

IN THE SUPREME COURT OF FLORIDA

FILED

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APR 12 1989

CLERK, SUPREME COURT

By

Deputy Clerk

ALVIN WILLIAMS,

Petitioner.

v.

CASE NO. : 73,948

STATE OF FLORIDA,

Respondent.

PETITIONER'S BRIEF ON JURISDICTION

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STATEMENT OF FACTS AND OF THE CASE

This action is before this Honorable Court, upon Notice To Invoke Discretionary Jurisdiction, to review the district court decision in Williams v. State 14 F.L.W. 756 (Fla. 5th DCA, March 23, 1989). The factual background of this case is as follows:

Oscar Nunez Services was a subcontractor with the state of Florida, Department Of Transportation, for constructing concrete sidewalks in DeLand. On the date of this incident, Tarmac Florida Concrete Company (hereafter "Tarmac") was in the business of delivering concrete. Alvin Williams was employed as a driver for Tarmac, for the purposes of delivering concrete to the Oscar Nunez job site.

A concrete delivery truck must be washed off after a delivery, to prevent concrete and rocks from flying off the truck while it is being driven away from the job site. The agreement between Tarmac and Oscar Nunez Services provided that Oscar Nunez Services would provide a place for Tarmac drivers to wash off the truck, and Oscar Nunez Services would later clean up any discarded concrete.

On June 5, 1987, Alvin Williams delivered a load of concrete to Oscar Nunez Services, at their job site in DeLand. After pouring the concrete for the sidewalk, Mr. Williams was instructed by the employees of Oscar Nunez Services where to wash off his concrete truck on the shoulder of the road. Mr. Williams washed down his concrete truck on the right-of-way, and left a little pile of sand and rock for the Oscar Nunez Services'

employees to clean up.

Officer Margaret Lefavor, of the DeLand Police Department drove by where Mr. Williams had cleaned his truck, stopped, and ordered him to remove the small pile of discarded concrete from the shoulder of the road. Mr. Williams explained to Officer Lefavor that the Oscar Nunez Services' employees were responsible for cleaning up the concrete; and that he had no tools or means of doing so. Nevertheless, Officer Lefavor continued to insist that Mr. Williams clean up the job site, Mr. Williams insisted that he had no tools or means to clean up the concrete, that it was not his responsibility to do so, and that in any event, the concrete would be cleaned up by the Oscar Nunez Services' employees as their contract required. The situation reached an impasse, whereupon Officer Lefavor arrested Mr. Williams for littering, and began handcuffing him. At that point, Officer Helmer drove by on his motorcycle, saw Officer Lefavor arresting Mr. Williams, and came to her assistance by driving up, drawing his .357 magnum pistol and pointing it at Mr. William's head, and threatening to blow his head off if he did not do as instructed.

On or about June 19, 1987, an Information was filed charging the Defendant with littering and with resisting an officer without violence (A. 1).

The Defendant filed a Motion To Dismiss (Unconstitutional Statute), and a Motion To Dismiss (pursuant to Rule 3.190(c)(4)), alleging that the uncontroverted facts did not present a prima facie case of guilt. The motion to dismiss challenging the

constitutionality of the littering statute argued that the statute, as worded and as applied to the facts herein, was unconstitutionally vague and overbroad. The c-4 motion to dismiss argued that the undisputed facts in this case show that Mr. Williams merely placed rubbish on the shoulder of the road for a later scheduled rubbish pick up, and that those facts do not constitute the crime of "littering".

A hearing was held in the county court on the Defendant's two motions to dismiss. On November 4, 1987, the trial court entered its Order finding that the statute was unconstitutionally overbroad. Accordingly, the trial court dismissed the littering charges against Mr. Williams. The Court also held that the c-4 Motion To Dismiss was thereby rendered moot (A. 2-5).

The State appealed that Order to the circuit court. On January 27, 1989, the circuit court entered its order, reversing the decision of the county court. Although the circuit court suggested that the trial court should not have reached the constitutional issue, it nevertheless specifically found Florida Statute 403.413 to be constitutional (A. 6-7).

The Defendant then petitioned the Fifth District Court Of Appeal for a writ of certiorari, to review the order of the circuit court, claiming that the circuit court order departed from the essential requirements of law. On March 23, 1989, the district court issued its opinion, and declined to issue the writ on the grounds that it would be premature to review the decision of the circuit court prior to a final criminal conviction in the

trial court, and prior to the conclusion of any subsequent appeal to the circuit court therefrom. The court in effect held it improper to issue a writ of certiorari to review a non-final appellate decision of the circuit court. The district court thereby allowed the appellate opinion of the circuit court, finding the litter statute to be constitutional, to remain undisturbed. The court specifically noted, however, that with regard to the propriety of issuing the writ, "we are aware our sister courts disagree with our position, so we express direct conflict with Fieselman v. State 537 So.2d 603 (Fla. 3d DCA 1988) and Mitchell v. State 14 F.L.W. 390 (Fla. 4th DCA February 8, 1989)." Williams v. State 14 F.L.W. 756 (Fla. 5th DCA March 23, 1989), *supra* (A.8-9).

On March 27, 1989, the petitioner, ALVIN WILLIAMS, filed his Notice To Invoke Discretionary Jurisdiction of this Court.

SUMMARY OF THE ARGUMENT

1. The Defendant was charged by Information with the crime of littering. The trial court (county court) declared the littering statute unconstitutional, and dismissed the criminal charge. The State appealed, and the circuit court reversed, specifically holding the littering statute to be constitutional. The Defendant petitioned the Fifth District Court Of Appeal for a writ of certiorari, claiming that the action of the circuit court departed from the essential requirements of law. The district

court declined to issue its writ, holding that certiorari is not available to review non-final orders in criminal cases. However, the district court specifically acknowledged that its opinion expressly and directly conflicted with decisions of the Third District Court Of Appeal and the Fourth District Court Of Appeal. This Court therefore has jurisdiction to review and resolve that express, direct conflict between this district court and the other district courts.

Additionally, it should be noted that the third district court case, which the court herein expressed direct conflict, is presently pending before this court on this same issue.

2. Since this Court has jurisdiction to resolve the express conflict, it has the discretion to proceed to consider the remaining issue in this cause, i.e., the constitutionality of the litter statute.

This Honorable Court should exercise its discretion to review the constitutionality of the littering statute, because its literal enforcement would have significant statewide ramifications. Specifically, municipalities in Florida have refuse pick-up services, whereby they encourage citizens to place refuse and other bulky items alongside the road for later scheduled refuse pick-up. The language of the litter law clearly prohibits the very conduct that the municipalities now promote and encourage. Either placing refuse alongside the road is legal (as the county court held), or it is not legal (as the circuit court decision suggests) -- but the issue should be resolved before any more citizens are prosecuted for what is commonly perceived as a non-criminal act.

ARGUMENT

I. THE DISTRICT COURT OF APPEAL DECISION HEREIN DIRECTLY AND EXPRESSLY CONFLICTS WITH THE DECISIONS IN FIESELMAN v. STATE 537 So.2d 603 (Fla. 3d DCA 1988) and MITCHELL v. STATE 14 F.L.W. 390 (Fla. 4th DCA February 8, 1989).

In the present case, the Fifth District Court Of Appeal declined to issue a writ of certiorari to review the appellate decision of the Volusia County circuit court, which decision reversed the Order of the county court dismissing the criminal prosecution herein. The district court herein relied upon its own earlier decision in Baker v. State 518 So.2d 457 (Fla. 5th DCA 1988). In Baker, the Fifth district stated that "this Court will not issue certiorari jurisdiction to review an Order denying a motion to dismiss or a circuit court opinion reversing an Order granting a motion to dismiss, both of which amount to the same thing. An adequate remedy by appeal, if conviction insues, is available".

In Fieselman v. State 537 So.2d 603 (Fla. 3d DCA 1988). the Third District Court Of Appeal expressly and directly certified conflict with Baker supra, and held that a circuit court's appellate decision may be reviewed by certiorari when it departs from the essential requirements of law.

In Mitchell v. State 14 F.L.W. 390 (Fla. 4th DCA February 8, 1989), the Fourth District Court Of Appeal likewise had before it a petition for writ of certiorari from a decision of the circuit court, acting in its appellate capacity, which reversed a county court decision granting the defendant's motion to dismiss. In

Mitchell, the Fourth district acknowledged the conflict between Baker and Fieselman, and further stated "we agree with the reasoning of the Third District and determine that this court has jurisdiction". Further that court certified conflict with Baker.

In the instant case, Williams v. State 14 F.L.W. 756 (Fla. 5th DCA March 23, 1989), the Fifth district court specifically reaffirmed its opinion in Baker, and further stated "we are aware our sister courts disagree with our position, so we express direct conflict with Fieselman v. State [citation omitted] and Mitchell v. State [citation omitted]".

This Court has jurisdiction to review the decision of the Fifth district court herein, which expressly and directly conflicts with the decisions of the Third District Court Of Appeal and the Fourth District Court Of Appeal on the same question of law, Fla.R.App.P. 9.030(a)(2)(IV). Additionally, it should be noted that Fieselman v. State supra, is presently pending jurisdictional review before this Court, case number 73,636.

It is therefore respectfully urged that this Court accept jurisdiction in this case, to resolve the conflict between the Fifth District Court and the other district courts on the issue presented herein.

11. THIS COURT SHOULD EXERCISE ITS DISCRETION TO CONSIDER AND RESOLVE THE REMAINING ISSUE HEREIN, i.e., THE CONSTITUTIONALITY OF THE FLORIDA LITTER LAW.

Once this Court assumes jurisdiction to resolve conflicts between the district courts of appeal, it has the discretion to consider and resolve the other issues raised in the appeal. Savoie v. State 422 So.2d 308 (Fla. 1982); Bould v. Touchette 349 So.2d 1181 (Fla. 1977). It is respectfully submitted that this Court should exercise its discretion to resolve the remaining issue presented herein to the district court, i.e., the constitutionality of the Florida Litter Law. The constitutionality of that statute has not been addressed in a published court opinion, and appears to be a matter of first impression.

Section 403.413(2)(a) Fla.Stat. (1985) provides:

"Litter" means any garbage, rubbish, trash, refuse, can, bottle, container, paper, lighted or unlighted cigarette or cigar, or flaming or glowing material.

Section 403.413(4)(a) provides:

It is unlawful for any person to throw, discard, place, or deposit litter in any manner of amount: In or on any public highway, road, street, alley, or thoroughfare, including any portion of the right-of-way thereof, or any other public lands, except in containers or areas lawfully provided therefore; when any litter is thrown or discarded from a motor vehicle the operator owner of the motor vehicle, or both shall be deemed in violation of this section.

Florida Statute 403.413 has been amended by Chapter 88-130, §56, Laws of Florida. The amendment, inter alia, adds a felony provision for commercial littering. However, the language rele-

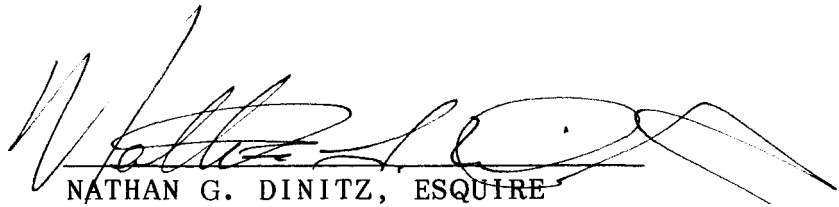
vant hereto has remained substantially unaffected by that Amendment.

It is respectfully submitted that the statute, facially and as it was applied to Mr. Williams, is unconstitutional as overbroad. It is void for overbreadth because it defines "littering", in a way contrary to the normally accepted meaning, without putting reasonably intelligent persons on notice as to that definition; and because it punishes common, non-criminal conduct, and provides the police with unfettered discretion to arrest. This issue of its constitutionality should be resolved now, to end the obvious conflict between the plain language of the statute, and the refuse collection policies of the local municipalities. As the trial court noted, cities in Volusia County specifically require that persons placing construction rubbish on the shoulder of the road for later trash pickup, or else that trash will not be picked up at all. If Mr. Williams is guilty of a crime, then any homeowner who remodels his home and places old window frames, old carpet, etc., on the side of the road for municipal rubbish pickup would likewise be criminally liable under the language of this statute. It is respectfully suggested that either the cities of the state of Florida, which provide for municipal trash pickup, are inviting persons to commit acts which violate the penal code of this state, or alternatively, the statute is void for overbreadth.

CONCLUSION

Accordingly, it is respectfully urged that this Court review this matter; resolve the conflict between the decision of the lower courts; and thereafter declare the Florida Litter Law to be unconstitutional.

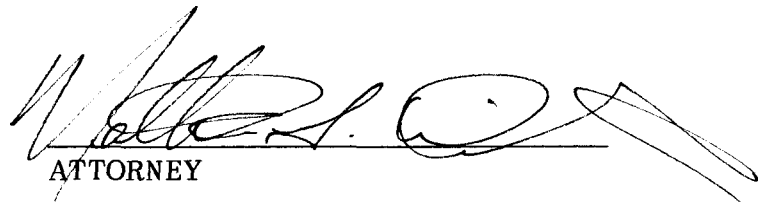
Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail delivery this 10th day of April, 1989, to the Honorable Robert P. Butterworth, Esquire, Attorney General, 125 North Ridgewood Avenue, 4th Floor, Daytona Beach, Florida 32014; to Larry Sikes, Esquire, Assistant State Attorney, 101 N. Woodland Blvd., Suite 4, DeLand, Florida 32720; and to the Honorable William C. Johnson, Jr., Circuit Court Judge, 125 East Orange Avenue, Suite 307, Daytona Beach, Florida 32014.



ATTORNEY