

IN THE SECOND DISTRICT COURT OF APPEAL
LAKELAND, FLORIDA

STATE OF FLORIDA, .

Petitioner, .

vs . : Case No. 87-2669

BOBBY JOE BURTON .

Respondent. .

_____ :



ON APPEAL FROM THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, STATE OF FLORIDA

BRIEF OF THE RESPONDENT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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TABLE OF CONTENTS

	<u>PAGE NO.</u>
STATEMENT OF THE CASE AND FACTS.....	1
SUMMARY OF ARGUMENT.....	1
<u>ARGUMENT</u>	
WHETHER THE DECISION BELOW IS IN CONFLICT WITH <u>SMITH v. STATE</u> , 430 So.2d 448 (Fla. 1983), AND WHETHER THE COURT SHOULD EXERCISE ITS DISCRETION TO REVIEW THE DECISION.....	2
CONCLUSION.....	3
CERTIFICATE OF SERVICE.....	3

TABLE OF CITATIONS

PAGE NO.

<u>Carawan v. State</u> 515 So.2d 161 (Fla. 1987).....	2
<u>Fuentes v. State,</u> (Fla. 2d DCA November 9, 1988) 13 F.L.W. 2485].....	2
<u>Smith v. State,</u> 430 So.2d 448 (Fla. 1983).....	1,2

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Petitioner,

vs .

Case No. 87-2669

BOBBY JOE BURTON,
Respondent.

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's Statement of the Case and Facts.

SUMMARY OF ARGUMENT

In view of the case law issued since Smith v. State, 430 So.2d 448 (Fla. 1983), which impliedly overrules its holding, the instant case is not in conflict. Secondly, Smith dealt with possession and sale. The instant case dealt with possession and delivery and is distinguishable on the facts.

ARGUMENT

WHETHER THE DECISION BELOW IS
IN CONFLICT WITH SMITH V. STATE,
430 So.2d 448 (Fla, 1983), AND
WHETHER THE COURT SHOULD EXERCISE
ITS DISCRETION TO REVIEW THE DECISION,

Respondent does not dispute the fact that Smith v. State, 430 So.2d 448 (Fla. 1983) holds that the crime of possession of a proscribed substance is not included in the crime of sale of a proscribed substance. However, since Smith was issued, this Court has issued another opinion, Carawan v. State, 515 So.2d 161 (Fla. 1987) which if not directly, impliedly overrules Smith, supra. Although Smith, supra, conflicts with the holding in the instant case, in light of Carawan, supra, and subsequent decisions of the Second District Court, Gordon v. State, 515 So.2d 161 (Fla. 2d DCA 1988) and Fuentes v. State, (Fla. 2d DCA November 9, 1988) [13 FLW. 24851, there is no conflict with current case law.

Petitioner would also note that Smith, supra, dealt with possession and sale of proscribed substances. The instant case dealt with possession and delivery of proscribed substances and can be distinguished factually on that basis.

Petitioner's request for discretionary review in the instant case should be denied.

CONCLUSION

In light of the foregoing reasons, arguments and authorities, the Respondent respectfully asks this Honorable Court to deny its discretionary jurisdiction in this case.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Katherine V. Blanco, Assistant Attorney General, Park Trammell Bldg., 8th Floor, 1313 Tampa Street, Tampa, Florida 33602, this 6th day of March, 1989.

Respectfully submitted,

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