

IN THE SUPREME COURT OF FLORIDA

RICHARD DIAL THORP,)
)
 Petitioner,)
)
 vs.)
)
 STATE OF FLORIDA,)
)
 Respondent.)

CASE NO. 73,767

FILED
SUPREME COURT

MAR 23 1989

CLERK, SUPREME COURT

By _____
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RESPONDENT'S BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

Petitioner was the Appellant in the Fourth District Court of Appeal and the Defendant in the trial court. The Respondent was the Appellee and the Prosecution, respectively, in those lower courts. In this brief, the parties will be referred to as they appear before this Honorable Court.

STATEMENT OF THE CASE AND FACTS

Respondent, the State of Florida, will accept the Statement of the Case and Facts set out in Petitioner's brief except as follows:

1. At oral argument the state only conceded that there was a conflict, the state did not concede that this conflict was direct and express. The state respectfully submits that there is no such express and direct conflict.

SUMMARY OF THE ARGUMENT

The opinions that form the present conflict are not in express and direct conflict with each other. At best they are only in implied conflict and such a conflict cannot properly vest jurisdiction in this Court.

ARGUMENT

I

THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL DOES NOT PRESENT DIRECT AND EXPRESS CONFLICT WITH THE OPINIONS HIGHLIGHTED BY PETITIONER (Restated).

Petitioner seeks to establish this Court's conflict jurisdiction by arguing that the decision at issue directly and expressly conflicts with certain decisions of this Court pursuant to Art. V, §3 (b) (3), Fla. Const., and Fla. R. App. P.9,030 (a) (2) (A) (iv).

In fact, Petitioner has failed to demonstrate direct and express conflict with the cited decisions hence the jurisdiction of this Court can not be invoked.

While it is not necessary that a district court explicitly identify conflicting district court or supreme court decisions in its opinion in order to create an "express" conflict under section 3(b)(3), this Court may only review a decision of a district court of appeal that expressly and directly conflicts with a decision of another district court of appeal or the Supreme Court on the same question of law. Ford Motor Co. v. Kikis, 401 So.2d 1341 (Fla. 1981); Jenkins v. State, 385 So. 2d 1356 (Fla. 1980). "Expressly" is defined as follows: "in an express manner." Jenkins, at 1359.

There is no "express" conflict present in this case. The implied conflict arises from the opinions of Hunt v. State, 468 So.2d 1100 (Fla. 1st DCA 1985) and Falzone v. State, 500

So.2d 1337 (Fla. 2d DCA 1986). In Hunt, the First District stated as follows:

"Florida Rule of Criminal Procedure 3.701d.5.a prohibits consideration of past criminal conduct for which convictions were not obtained prior to the commission of the primary offense for purposes of scoring under the prior record category."

Id. at 1101.

While in Falzone, the Second District stated that:

"Aside from the placing of the commas relied upon in Frank, [v. State, 490 So.2d 190 (Fla. 2d DCA 1986)] we see no reason why the rule would seek to exclude from guidelines computation those convictions which occur between the commission of the subject offense and the sentencing for that offense."

Id. at 896.

Respondent submits that while this language shows a disagreement, this disagreement does not rise to the level of being an "express" conflict under Jenkins. At most, it would be an implied conflict which would not confer jurisdiction on this Court. It thus becomes apparent that Petitioner seeks to invoke the jurisdiction of this Court in an attempt to pursue a second appeal. Such a tactic is not permitted. Sanchez v. Wimpey, 409 So.2d 20 (Fla. 1982).

CONCLUSION

WHEREFORE based on the arguments and authorities cited therein, the State of Florida respectfully requests that this Honorable Court decline to accept jurisdiction in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing brief has been furnished by mail to: MARY CATHERINE BONNER, Counsel for Petitioner, 207 S.W. 12th Court, Ft. Lauderdale, Florida, 33315 this 22d day of March, 1989.

Alfonso M. Saldana
Of Counsel