

IN THE FLORIDA SUPREME COURT

FILED
SID J. WHITE

APR 24 1989

CLERK, SUPREME COURT
By _____
Deputy Clerk

STATE OF FLORIDA,

Petitioner,

v.

Case No.

JOSEPH CHARLES SPADARO,

Second District Court #88-3182

Respondent.

DISCRETIONARY REVIEW OF THE DECISION OF
THE DISTRICT COURT OF APPEAL
SECOND DISTRICT OF FLORIDA

BRIEF OF PETITIONER ON JURISDICTION

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 WHETHER THE DECISION IN SPADARO V. STATE, NO. 88-3182 (Fla. 2d DCA, March 10, 1989) [14 F.L.W. 657] IS IN EXPRESS AND DIRECT CONFLICT WITH HARRIS V. STATE, 520 So.2d 639 (Fla. 1st DCA), review denied, No. 71,999 (Fla. Oct. 12, 1988) AND CLARK V. STATE, 530 So.2d 519 (Fla. 5th DCA 1988)

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RELIMINARY STATEMENT

Petitioner, the State of Florida, was the Appellee in the Florida District Court of Appeal, Second District, and the prosecution in the trial court. Respondent, Joseph Charles Spadaro, was the Appellant in the Second District Court of Appeal and the Defendant in the trial court. The Appendix to this Brief contains a copy of the decision of the Second District Court of Appeal filed on March 10, 1989.

STATEMENT OF THE CASE AND FACTS

The following Statements of the Case and Facts is taken verbatim from the opinion of the Florida District Court of Appeal, Second District:

Joseph Charles Spadaro timely appeals the summary denial of his post-conviction relief motion filed pursuant to Florida Rule of Criminal Procedure 3.850. We previously reviewed the circuit court's summary denial of Spadaro's motion and affirmed in part and reversed in part. Spadaro v. State, No. 88-1083 (Fla. 2d DCA, Aug. 5, 1988). On remand, the court again summarily denied the motion and provided attachments from the record in support of a portion of the ruling. We again affirm in part and reverse in part.

We agree with the trial court that Spadaro's claim of an involuntary plea is adequately refuted by the record and transcript. That portion of the order is affirmed.

However, we reverse the denial of Spadaro's allegation that he was sentenced in violation of double jeopardy prohibitions for trafficking in cocaine and possession of cocaine. Carawan v. State, 515 So.2d 161 (Fla. 1987). Subsequent to the circuit court's determination to the contrary, this court held that Carawan is retroactively applicable to convictions which were obtained prior to the opinion's rendition. Glenn v. State, No. 88-1256 (Fla. 2d DCA Nov. 30, 1988) [13 F.L.W. 2622]; Gonzales-Osorio v. State, 535 So.2d 644 (Fla. 1st DCA 1988). Contra Harris v. State, 520 So.2d 639 (Fla. 1st DCA), review denied, No. 71,999 (Fla. Oct. 12, 1988) (reaching a contrary holding).

Accordingly, we find that the trial court erred in summarily denying Spadaro's double jeopardy contention. We reverse this part of the summary denial with directions that the trial judge examine the files and records in this case to determine whether they conclusively refute Spadaro's double jeopardy argument. If so, the

court should attach such documentation to its order. Otherwise, an evidentiary hearing may be necessary to resolve the question. If the record actually supports Spadaro's argument, the court should vacate the judgment and sentence for possession of cocaine. Any part aggrieved by the subsequent action of the trial court must file a notice of appeal within thirty days to obtain further appellate review.

14 F.L.W. 657-658.

Although Carawan v. State, 515 So.2d 161 (Fla. 1987) was decided after the judgment and sentence was entered in the defendant's case, the Second District followed the precedent of that court and held that Carawan is retroactively applicable to convictions which were obtained prior to the rendition of Carawan. In so doing, the Second District Court relied on its prior decisions in Glenn v. State, No. 88-1256 (Fla. 2d DCA Nov. 30, 1988) [13 F.L.W. 2622]; Gonzales Osorio v. State, 535 So.2d 644 (Fla. 2d DCA 1988) and acknowledged a contrary holding in Harris v. State, 520 So.2d 639 (Fla. 1st DCA), review denied, No. 71,999 (Fla. Oct. 12, 1988).

SUMMARY OF THE ARGUMENT

The decision in the instant case expressly and directly conflicts with the decision rendered by the First District Court of Appeal in Harris v. State, 520 So.2d 639 (Fla. 1st DCA), review denied, No. 71,999 (Fla. Oct., 12, 1988). The holding of the Second District case is consistent with the holding in Glenn v. State, 537 So.2d 611 (Fla. 2d DCA 1988), a case which has been accepted for review by this Honorable Court. State v. Glenn, Fla. S.Ct. Case No. 73,496.

ARGUMENT

ISSUE

WHETHER THE DECISION IN SPADARO V. STATE, NO. 88-3182 (Fla. 2d DCA, March 10, 1989) [14 F.L.W. 6571] IS AN EXPRESS AND DIRECT CONFLICT WITH HARRIS V. STATE, 520 So.2d 639 (Fla. 1st DCA), review denied, No. 71,999 (Fla. Oct 12, 1988) AND CLARK V. STATE, 530 So.2d 519 (Fla. 5th DCA 1988).

This Honorable Court has accepted jurisdiction of Glenn v. State, 537 So.2d 611 (Fla. 2d DCA 1988), a case which certified conflict with Harris v. State, 520 So.2d 639 (Fla. 1st DCA 1988) review denied, No. 71,999 (Fla. Oct. 12, 1988)¹. As in Glenn, the Second District in the instant case expressly and directly held that Harris v. State, supra, reached a contrary holding to that reached at bar. The Second District Court has now held that Carawan is to be retroactively applied to cases which occurred before the rendition of Carawan. In addition to the above cited cases, it must be observed that the Fifth District Court of Appeal in Clark v. State, 530 So.2d 519 (Fla. 5th DCA 1988), reached a decision directly in conflict with the position taken by the Second District Court of Appeal. In Clark, the court was

¹ Also pending this court's decision as to whether jurisdiction will be exercised is the Second District opinion rendered in Gonzalez-Osorio v. State, 535 So.2d 644 (Fla. 2d DCA 1988), F.S.Ct. Case No. 73,677 and Etlinger v. State, 2DCA Case No.88-3195 (Fla. 2d DCA, Feb. 22, 1989) [14 F.L.W. 5391,

faced with an analogous factual situation to that presented in the instant case. The Fifth District Court specifically held that Carawan was not the law at the time of Clark's conviction, nor is Carawan the law now because of the amendment to §775.021(4), Florida Statutes. Although the decision in Harris deals with the same subject matter we are concerned with sub judice, the decision in Clark is squarely on point and is, therefore, squarely in conflict with the decisions rendered by the Second District Court of Appeal, including that rendered in the instant case.

Inasmuch as the Second District Court of Appeal directly conflicts with both the Fifth District and the First District Courts of Appeal as to the retroactive applicability of Carawan, this Honorable Court should exercise its jurisdiction to review the instant case.

CONCLUSION

Based on the foregoing reasons, arguments and authorities, Petitioner respectfully requests this Court to exercise its jurisdiction based upon the clear conflict between the Second District Court Appeal in this case and the First and Fifth District Courts of Appeal with respect to retroactive application of Carawan.

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 U.S. Mail to JOSEPH C. SPADARO - #105825, Glades Correctional Institution, 500 Orange Avenue Circle, Belle Glade, Florida 33430 this 21st day of April, 1989.

K. Blanco

OF COUNSEL FOR PETITIONER