

IN THE FLORIDA SUPREME COURT

FILED
SID J. WHITE
MAY 1 1989
CLERK, SUPREME COURT
By _____ Deputy Clerk

STATE OF FLORIDA,

Petitioner,

v.

Case No.

ARDEN M. MERCKLE,

Second District Court #89-233

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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PRELIMINARY 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, Arden M. Merckle, 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 April 12, 1989. Merckle v. State, 14 F.L.W. 950 (Fla. 2d DCA 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:

Arden Merckle appeals the summary denial of his motion for postconviction relief. We reverse.

Merckle was convicted of bribery,¹ receiving unlawful compensation,² extortion by a state officer,³ and misbehavior in office.⁴ He was sentenced to five years in state prison for the first offense and placed on consecutive terms of probation for the remaining offenses. The convictions and sentences were affirmed on appeal. Merckle v. State, 512 So.2d 948 (Fla. 2d DCA 1987), approved, 529 So.2d 269 (Fla. 1988). Merckle now argues that the multiple punishments constitute a double jeopardy violation because all four of his convictions stem from a single act requiring the same proof.

The trial court determined that this issue could have been raised on direct appeal and denied the motion without addressing the merits of Merckle's double jeopardy claim. However, Merckle relies primarily upon Carawan v. State, 515 So.2d 161 (Fla. 1987), which had not been decided at the time of his appeal. This court had held that Carawan, which substantially modified the law regarding double jeopardy, may be applied retroactively in proceedings initiated under rule 3.850, Florida Rules of Criminal Procedure. Glenn v. State, 537 So.2d 611 (Fla. 2d DCA 1988).

¹ §838.015(1), Fla. Stat. 1981).

² §838.016(2), Fla. Stat.

§839.11, Fla. Stat. (1981).

⁴ A common law crime. See §775.01, Fla. Stat. (1981)

We find that Merckle's motion presents a prima facie showing of his entitlement to relief. Accordingly, the order of the trial court is reversed and this case remanded for further proceedings pursuant to rule 3.850.

Reversed .

14 F.L.W. 950

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, 537 So.2d 611 (Fla. 2d DCA 1988), a case which has been accepted for review by this Court.

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 MERCKLE V. STATE, No. 89-233 (Fla. 2d DCA, April 12, 1989) [14 F.L.W. 950] 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's decision in the instant case expressly and directly conflicts with Harris.

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 faced with an

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.

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 ARDEN M. MERCKLE, 1341 Eudora Street, Denver, Colorado 80220 this 28th day of April, 1989.

K Blanco
OF COUNSEL FOR PETITIONER