

IN THE FLORIDA SUPREME COURT

FILED
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JUN 10 1989

CLERK, SUPREME COURT
By _____
Deputy Clerk

STATE OF FLORIDA, ▪

 Petitioner, ▪

vs. ▪

CASE NO. 74,251

ROBERT L. JOHNSON, ▪

 Respondent. ▪

_____ :
:

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

RESPONDENT'S BRIEF ON JURISDICTION

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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IN THE FLORIDA SUPREME COURT

STATE OF FLORIDA,

Petitioner, :

vs .

Case No. 74,251

ROBERT L. JOHNSON,

Respondent.

_____ :

STATEMENT OF THE CASE AND FACTS

The Respondent, Robert L. Johnson, accepts the Petitioner's rendition of case and facts, except as may be noted in the argument portion of this jurisdictional brief.

SUMMARY OF ARGUMENT

There is no conflict between the Second District's opinion in Respondent's case and in this Court's decision in Smith v. State, 430 So.2d 488 (Fla. 1983). The two cases involve entirely different statutory directives (subsequent to amendment between 1979 and 1987) and, at any rate, Petitioner is raising a new issue for the first time in her brief on jurisdiction. Petitioner failed to raise the purported conflicting opinion so as to allow full and fair consideration by the appellate court below, and cannot be allowed to raise this entirely new ground for the first time before this Honorable Court.

ISSUE

WHETHER THE DECISION BELOW IS IN CONFLICT
WITH SMITH v. STATE, 430 So.2d 488
(Fla. 1983), AND WHETHER THE COURT SHOULD
EXERCISE ITS DISCRETION TO REVIEW THE
DECISION?

It is, without question, within this Court's jurisdiction to consider the Petitioner's requested relief. However, the dispositive question remains whether this Court should decline to exercise jurisdiction by "refusing to exercise our discretion where the opinion below establishes no point of law contrary to a **decision** of this Court or another district court." The Florida Star v. B.J.F., 530 So.2d 286 (Fla. 1988), emphasis added. Since the opinion of the Second District Court does not establish a point of law in express and direct conflict as asserted, this Honorable Court should decline to accept jurisdiction.

In Department of Revenue v. Johnston, 442 So.2d 950 (Fla. 1983), this Court ruled that where the cause was before the Court because of an apparent conflict, but that cause was distinguishable on its facts from those cited in conflict, this Court would discharge its jurisdiction. So it is here.

The Second District's opinion interpreted sections 893.13 (1)(a) and (e), Florida Statutes (1987), slip opinion, pages 1 and 2, while Smith involves the same sections, but as written and promulgated in 1979. Smith, supra, 430 So2d, at 449. Both the 1979 statutes on sale and possession, and this Court's Blockburser analysis in Smith, supra, were altered and superseded by this

Court's decision in Carawan v. State, 515 So.2d 161 (Fla. 1987).
Smith is distinguishable from the instant opinion

Smith is a stale case which the Petitioner now raises for the first time before this Honorable Court. Petitioner failed to mention Smith in any way before the Second District Court of Appeals so as to allow that Court the opportunity to determine its impact on Respondent's cause. "This Court should decline the review of questions which the trial court did not have a full and adequate opportunity to consider." In Re Beverly, 342 So.2d 481 (Fla. 1977), emphasis added. In the same way, Petitioner should not be allowed to raise for the first time on jurisdictional brief, a purportedly conflicting case of which Petitioner should have apprised the Second District.

Virtually the whole of Petitioner's argument before the Second District sought to validate the dual convictions at bar based on this Court's opinion in Carawan, supra. Since there is no conflict between Carawan and the instant opinion, since the instant opinion addresses a later statute and since, at any rate, Petitioner should be precluded from raising new arguments for the first time before this Court while seeking discretionary review, this Honorable Court should decline to accept jurisdiction.

CONCLUSION


In light of the foregoing reasons, arguments and authorities, Petitioner respectfully requests that this Honorable Court decline to accept jurisdiction.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Brenda S. Taylor, Assistant Attorney General, Park Trammell Bldg., 8th Floor, 1313 Tampa Street, Tampa, Florida 33602, this 16th day of June, 1989.

RESPECTFULLY SUBMITTED,

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