

046

IN THE SUPREME COURT OF FLORIDA

CASE NO. 76,100

RANDY B. BROWN,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

FILED

SID J. WHITE

JUN 22 1990

CLERK, SUPREME COURT

By: Deputy Clerk

ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF RESPONDENT ON JURISDICTION

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INTRODUCTION

The Petitioner, RANDY B. BROWN, was the appellant in the court below and the defendant in the trial court. The Respondent, THE STATE OF FLORIDA, was the appellee in the district court and the prosecution in the trial court.

The Appendix to the Petitioner's Brief on Jurisdiction will be referred to by the symbol "1A" and the page number assigned by the Petitioner. The Appendix to this brief will be designated by the symbol "2A" and the page number assigned.

All emphasis is supplied unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

The Petitioner's Statement of the Case and Facts relies upon documents not properly before this court and contains a number of material omissions. Therefore, it must be rejected by the Respondent whose Statement of the Case and Facts follows:

The opinion of the district court upon which conflict is asserted states, in its entirety;

We affirm the judgments of conviction on the authority of Clark v. State, Nos. 88-1576 & 88-1274 (Fla. 3d DCA Nov. 21, 1989). However, because

the trial court failed to give written reasons for departing from the sentencing guidelines, we remand this cause for resentencing. Padgett v. State, 534 So.2d 1246 (Fla. 3d DCA 1988).

Affirmed in part; remanded in part.

(1A.; pg. 1)

The order on the Petitioner's Motion for Rehearing states, in its entirety;

On remand the trial court is to correct the judgment to reflect that the conviction is for attempted armed robbery without a firearm--a third-degree felony.

Otherwise the motion for rehearing is denied.

(1A.; pg. 10).

The Respondent reserves the right to set forth additional facts in the argument portion of this brief, as appropriate.

ISSUE PRESENTED BY REVIEW

WHETHER THE DECISION OF THE THIRD DISTRICT COURT OF APPEALS IS NOT IN EXPRESS AND DIRECT CONFLICT WITH POPE V. STATE, 15 F.L.W. 243 (FLA. APRIL 26, 1990). (RESTATED)

SUMMARY OF THE ARGUMENT

The Petitioner has failed to even allege that there is express and direct conflict, as the rule concerned requires, and cannot do so, because the district court's opinion does not either expressly or directly conflict with Pope v. State, 15 F.L.W. 243 (Fla. April 26, 1990).

However, not only has the Petitioner had to extensively refer to and analyze constitutionally irrelevant material to allege even a bare conflict, but he has omitted the fact that he never properly raised the issue concerned herein before the district court, at all. The first time the Pope argument was ever made in the district court was on rehearing, a time when no new argument or issue could properly even be considered by the court.

The Petitioner has failed to properly establish jurisdiction in this court and, therefore, such jurisdiction should be denied.

ARGUMENT

THE DECISION OF THE THIRD DISTRICT COURT
OF APPEALS IS NOT IN EXPRESS AND DIRECT
CONFLICT WITH POPE V. STATE, 15 F.L.W.
243 (FLA. APRIL 26, 1990). (RESTATED)

The Petitioner cannot properly assert jurisdiction in this case. His first problem is that Rule 9.030(a)(A)(iv), Fla.R.App.P. requires him to demonstrate that the decisions concerned, "expressly and directly conflict with a decision of another district court of appeal or of the Supreme Court on the same question of law" (emphasis added). The Petitioner has not even alleged that he can meet the required burden, nor can he, given that there is not one word in the decision of the third district that expressly or directly conflicts with Pope v. State, 15 F.L.W. 243 (Fla. April 26, 1990). Indeed, the Petitioner has been required to go far beyond the four corners of the decision to even allege that a bare conflict exists, improperly alleging facts totally irrelevant to the jurisdictional issue, as this court has held. Reaves v. State, 485 So.2d 829 (Fla. 1986).

However, even if this were not the case, the Petitioner has failed to mention that he never properly raised the issue concerned herein before the third district, at all.

Petitioner, in his initial brief, asked that the cause be remanded for resentencing pursuant to Padgett v. State, 534 So.2d 1246 (Fla. 3d DCA 1989). [without maintaining that the resentencing should be within the guidelines] (2A., pg. 1). The State conceded and, in his reply brief, the Petitioner pointed this out and, again, requested that the action be remanded for resentencing without requesting that the resentencing be within the guidelines. (2A., pg. 2).

The Third District gave the Petitioner precisely what he asked for on this issue, virtually tracking the language of his initial brief. (1A., pg. 1; 2A., pg. 1).

Then, in his Motion for Rehearing, the Petitioner, for the first time, requested that the resentencing be within the guidelines. (1A., pg. 5). Although he had previously filed a notice of supplemental authority citing Ree v. State, 14 F.L.W. 565 (Fla. Nov. 16, 1989) (1A., pg. 5), he had not amended or supplemented his brief or asked for any additional remedy. Thus, the Petitioner chose to present a new argument and a request for a new remedy for the first time on rehearing.

However, it is axiomatic that a party cannot present arguments in a motion for rehearing that it has not previously presented to the court. Sag Harbour Marine, Inc. v. Fickett, 484 So.2d 1250 (Fla. 1st DCA 1986), rev. denied, 494 So.2d 1150

(Fla. 1986). Issues raised for the first time on rehearing may not be considered by the court. Price Wise Buying Group v. Nuzum, 343 So.2d 115, 117 (Fla. 1st DCA 1977); See, Polyglycoat Corp. v. Hirsch Distributors, Inc., 442 So.2d 958, 960 (Fla. 4th DCA 1984); rev. dismissed, 451 So.2d 848 (Fla. 1984); Warren v. City of Leesburg, 203 So.2d 522, 526 (Fla. 2d DCA 1967).

The Petitioner has failed, therefore, to demonstrate any proper basis for conflict jurisdiction.

CONCLUSION

Based upon the foregoing reasons and authorities, this court should decline to accept jurisdiction in this action.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF RESPONDENT ON JURISDICTION was furnished by mail to ROBERT BURKE, Office of the Public Defender, 1351 N.W. 12th Street, Miami, Florida 33125 on this 20th day of June, 1990.

Charles M. Fahlbusch
CHARLES M. FAHLBUSCH

/bf