IN THE SUPREME COURT OF FLORIDA

ALBERT J. HLAD, JR.,

Petitioner,

v. CASE NO. 76,623

STATE OF FLORIDA,

Respondent.

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ANSWER BRIEF ON JURISDICTION

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SUMMARY OF ARGUMENT

Petitioner's notice of appeal was not timely filed. Therefore, this proceeding should be dismissed. Further, Petitioner has failed to carry his burden to demonstrate that the instant decision directly and expressly conflicts with the decisions he cites. Jurisdiction of this matter should not be accepted.

ARGUMENT

THE INSTANT DECISION DOES NOT DIRECTLY AND EXPRESSLY CONFLICT WITH DECISIONS OF THE OTHER DISTRICT COURTS OF APPEAL OR OF THIS COURT ON THE SAME QUESTION OF LAW.

Petitioner, Albert J. Hlad, Jr. [hereinafter "Hlad"], petitions this Honorable Court for review of a decision of the Fifth District Court of Appeal [hereinafter "Fifth DCA"]. Respondent, the State of Florida [hereinafter "the state"], contends that this Honorable Court does not have jurisdiction to entertain this appeal because Hlad's notice of appeal was untimely. Therefore, this matter must be dismissed.

The order from which Hlad appeals is the opinion of Fifth DCA rendered on July 19, 1990. (A 1). On July 24, 1990, the state filed a Motion for Certification and Clarification, pertaining solely to the costs issue. (A 2). By Order dated August 13, 1990, that motion was denied. (A 3). Hlad's jurisdictional notice was filed on September 12, 1990. (A 4).

Florida Rules of Appellate Procedure 9.120(b) provides that to invoke the jurisdiction of this Court, a notice of appeal must be filed within thirty (30) days "of rendition of the order to be reviewed." The time schedule of any proceeding may be tolled upon the filing of a motion until disposition of the motion. Fla. R. App. P. 9.300(b). Accordingly, the filing of a motion for certification and clarification in a district court of appeal tolls the time for the filing of a jurisdictional notice of appeal. Fla. R. App. P. 9.300(d).

Four days of the thirty provided by Rule 9.120(b) expired before the state's motion was filed. Pursuant to Rule 9.300(b), after the motion was ruled on, the time for the filing of the jurisdictional notice began to run again. Thirty days passed from the date of the denial of the motion until the filing of the jurisdictional notice. Accordingly, Hlad's notice of appeal was untimely, and therefore, his instant appeal should be dismissed for lack of jurisdiction.

Assuming arguendo that Hlad had timely filed his notice of appeal, the state contends that this matter should be dismissed because there is no valid basis for exercise of jurisdiction by this Honorable Court. Hlad bases his petition on the ground that the decision of the Fifth DCA in the instant case directly and expressly conflicts with decisions of other district courts of appeal and of this Court on the same question of law. See Fla. R. App. P. 9.030(a)(2)(A)(iv). He alleges that the instant decision directly and expressly conflicts with McKenney v. State, 388 So.2d 1232 (Fla. 1980); State v. Troehler, 546 So.2d 109 (Fla. 4th DCA 1989); Pilla v. State, 477 So.2d 1088 (Fla. 4th DCA 1985); and Harrell v. State, 469 So.2d 169 (Fla. 1st DCA 1985).

In the instant case, the court held that a prior uncounseled conviction could be used for enhancement purposes because (1) the crime to which Hlad pled guilty was not punishable by more than six months imprisonment, and (2) Hlad was not actually imprisoned for the misdemeanor conviction. (A 6). In so holding, the Fifth DCA analyzed the case in light of the holding in Baldasar v. Illinois, 446 U.S. 222, 100 S.Ct. 1585, 64 L.Ed.2d 169, reh.

denied, 447 U.S. 930, 100 S.Ct. 3030, 65 L.Ed.2d 1125 (1980), which Hlad argued supported his position. (A 5-10). The court determined that Baldasar applied to situations where the prior offense was punishable by more than six months' imprisonment, entitling the defendant to legal representation. If the defendant did not get that representation, the conviction was constitutionally invalid, and therefore, could not be used in an enhancement situation. (A 5-10). As Hlad conceded, he was not imprisoned for the prior offense, and the offense was not potentially punishable for a term of incarceration exceeding six months. Accordingly, the court concluded that Hlad's prior uncounseled conviction was valid and could be used for enhancement. (A 5-10).

Hlad's claim regarding express and direct conflict is without merit. In McKenney v. State, supra, this Court stated that Baldasar "did not hold that all uncounseled convictions were per se invalid for purposes of imposing a sentence of imprisonment, only those which could not themselves have supported incarceration." 388 So.2d at 1234-1235. Accordingly, McKenney does not conflict with the instant decision because the prior conviction in the instant case could have supported incarceration for a period up to six months. The state submits that the instant holding is an example of an uncounseled conviction valid for the purpose of imposing imprisonment, enhanced or otherwise, as contemplated by McKenney. Rather than expressly and directly conflicting with the instant decision, McKenney supports it.

Hlad claims that the Fourth District Court of Appeal's opinion in Pilla v. State, supra, is in conflict with the instant decision in holding that a prior uncounseled conviction cannot be used to enhance punishment of a later crime "even if the former offense was not punishable by imprisonment exceeding six months." (Petitioner's brief at 6). The state submits that Pilla does not stand for that proposition. Indeed, there is no mention of any term of imprisonment, much less the specific holding Hlad represents to this Court.

Further, in the Fourth District Court of Appeal's recent decision in Cooper v. State, 538 So.2d 105 (Fla. 4th DCA 1989), the court held that a prior uncounseled conviction "may be used to enhance the defendant's sentence on this conviction if the defendant did not have a right to counsel in the prior proceedings." 538 So.2d at 106. An accused has a right to counsel in misdemeanor cases only where he is actually imprisoned for the misdemeanor.[1] Scott v. Illinois, 440 U.S. 367, 99 S.Ct. 1158, 59 L.Ed.2d 383 (1970). Accordingly, the position of the Fourth District Court of Appeal on the instant issue does not expressly and directly conflict with that of the Fifth DCA in the instant case.

Hlad also cites State v. Troehler, 546 So.2d 109 (Fla. 4th DCA 1989), claiming that it "invoked Baldasar v. Illinois, supra," to hold that a prior uncounseled misdemeanor cannot be used to enhance a subsequent misdemeanor to a felony with a

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[1] Hlad conceded that he was not imprisoned for the prior misdemeanor. (A 6).

prison term. (Petitioner's brief at 6). Again, Hlad misinforms this Court. Troehler does not "invoke" or even cite Baldasar in its opinion.

In Troehler, the court quoted from Allen v. State, 463 So.2d 351, 357 (Fla. 1st DCA 1985), that a prior conviction "obtained in violation of the defendant's constitutional right to counsel is void" and cannot be used for enhancement. 546 So.2d at 111. As the Fifth DCA pointed out in the instant decision, "[t]here is no indication in Troehler as to whether or not the 1976 conviction resulted in incarceration." (A 9). If it did, then the prior uncounseled conviction was void because it violated the accused's constitutional right to counsel and is not in conflict with the Fifth DCA's instant decision.[2] Accordingly, Troehler cannot be said to be in direct and express conflict with the subject decision.

Finally, Hlad also claims that the instant case conflicts with Harrell v. State, supra. In Harrell, the state sought to use a conviction which stated on the face of the judgment that it was uncounseled as the sole basis for a revocation of probation. 469 So.2d at 171. The First District Court of Appeal decided that such action was improper even though the uncounseled conviction was valid.[3] Id. However, in so holding, the court

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[2] The Fifth DCA stated that "[i]f there was no incarceration imposed for that conviction, then we would disagree with the Troehler result." (A 9). However, since that most crucial information was omitted from the opinion, the decision cannot be said to directly and expressly conflict with the instant case.

[3] The conviction was valid because the defendant did not have a right to counsel for that offense.

stated, "[o]ur opinion here is directed only to those cases where the state seeks to revoke probation solely on the basis of a valid conviction, and offers no other ground for revocation." Id.

Florida Rules of Appellate Procedure 9.030(a)(2)(A)(iv) provides that conflict sufficient to confer jurisdiction on this Honorable Court must be "on the same question of law." Since the holding in Harrell was specifically limited to probation violation cases and the instant case does not concern probation, the instant case is not in express and direct conflict with Harrell. Further, even if it is in conflict with Harrell, the First District Court of Appeal has indicated that it has reconsidered its position on this issue and receded from Harrell sub silentio.[4] (A 9); See Kearse v. State, 501 So.2d 90 (Fla. 1st DCA 1987).

The Fifth DCA's instant decision is not in express and direct conflict with any of the decisions cited by Hlad. Accordingly, even if he had timely filed his notice of appeal, this Court would not have jurisdiction to review the instant case. Hlad has failed to carry his burden to demonstrate otherwise.

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[4] It is interesting to note that the Harrell decision appears to be in conflict with another decision of the same court, Allen v. State, supra. See A 9. In Leffew v. State, 518 So.2d 1376, 1378 (Fla. 2d DCA 1988), the Second District Court of Appeal relied on Allen in reaching the same decision as the Fifth DCA reached in the instant case.

CONCLUSION

Based on the arguments and authorities cited herein, the respondent respectfully requests this Honorable Court decline to accept jurisdiction of the instant case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Answer Brief on Jurisdiction has been furnished by hand delivery to the box of the Public Defender at the Fifth District Court of Appeal to James R. Wulchak, Attorney for Petitioner, on this 11th day of October, 1990.

Judy Taylor Rush
Of Counsel