IN THE FLORIDA SUPREME COURT

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 77,122

BOBBY CHARLES OLIVER,

Respondent.

ON REVIEW FROM THE FIRST
DISTRICT COURT OF APPEAL

BRIEF OF RESPONDENT ON JURISDICTION

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BRIEF OF RESPONDENT ON JURISDICTION

I PRELIMINARY STATEMENT

Respondent was the defendant in the trial court and the appellant in the lower tribunal. Attached hereto as an appendix is the opinion of the lower tribunal. Petitioner's brief will be referred to as "PB", followed by the appropriate page number.

II STATEMENT OF THE CASE AND FACTS

Respondent accepts petitioner's recitation at PB 2, but objects to the insertion of facts in the argument section, PB at 5, because those facts do not appear within the four corners of the opinion below.

III SUMMARY OF THE ARGUMENT

Respondent will argue in this brief that petitioner not demonstrated any express and direct conflict on the same question of law, as required by art. V, sec. 3(b)(3), Fla. Const. and Fla.R.App.P. 9.030(a)(2)(A)(iv). The holding of the First District was that the trial court erred in convicting respondent for two counts of possession with intent to sell and two counts of sale of cocaine. None of the cases claimed to be in conflict appears in the lower tribunal's opinion. Since the conflict must appear within the four corners of the opinion over which review is sought, this Court has no jurisdiction to grant review.

IV ARGUMENT

PETITIONER HAS NOT DEMONSTRATED EXPRESS AND DIRECT CONFLICT ON THE SAME QUESTION OF LAW WITH ANY OTHER REPORTED CASE (Issue restated by respondent).

Petitioner's brief attempts to create conflict where none exists by attacking the lower tribunal's reliance on its prior decision in Wheeler v. State, 549 So.2d 687 (Fla. 1st DCA 1989), rev. dism. 560 So.2d 235 (Fla. 1990), and claiming that Wheeler and the instant case are in conflict with others. PB at 6.

Respondent notes that Wheeler was a rare en banc opinion of the First District, which certified three questions to this Court for review, 549 So.2d at 692. Respondent further notes that the state sought review of Wheeler in this Court, by filing a timely notice. After this Court issued its briefing schedule, and after this Court granted an extension of time for the state to file its brief on the merits, the state then took a voluntary dismissal of Wheeler.

If the state believed Wheeler was wrongly decided, it should have accepted the invitation for this Court to review the certified questions, instead of dismissing its action for discretionary review. Procedural default goes both ways.

This Court's review of a jurisdictional brief is limited by facts contained within the four corners of the opinion issued below to find conflict jurisdiction:

> Conflict between decisions must be express and direct, i.e., it must appear within the four corners of the majority decision. ...

> [T]he record itself can[not] be used to establish jurisdiction.

Reaves v. State, 485 So.2d 829, 830 (Fla. 1986). Since no conflict appears within that document, this Court is simply without jurisdiction to accept review.

In Mancini v. State, 312 So.2d 732 (Fla. 1975), this Court set forth the following test for conflict jurisdiction:

> Our jurisdiction cannot be invoked merely because we might disagree with the decision of the district court nor because we we might have made a factual determination if we had been the trier of fact. ... [O]ur jurisdiction to review decisions of courts of appeal because of alleged conflict is invoked by (1) the announcement of a rule of law which conflicts with a rule previously announced by this court or another district, or (2) the application of a rule of law to produce a different result in a case which involves substantially the same facts as a prior case. In this second situation, the facts of the case are of the utmost importance.

Id. at 733. None of the cases cited by petitioner is found in the opinion of the lower tribunal.

None of the facts referred to by petitioner (sans record cites) appears within the four corners of the opinion. This Court has declined to return to the days of yesteryear and allow the parties to cite to the record in a jurisdictional brief. Paddock v. Chacko, 553 So.2d 168 (Fla. 1989).

If petitioner's claim of conflict is accepted, any losing party will be able to invoke this Court's jurisdiction by claiming that the court's decision is not supported by the record. Such is not the function of this Court, since the appellate courts are intended to be the final forum for review.

Since there is no conflict, this Court has no power to accept review even if it wanted to do so.

V CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, respondent submits that this Court has no jurisdiction over this case, and so must decline to grant review.

Respectfully Submitted,

NANCY A. DANIELS
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by delivery to Gypsey Bailey, Assistant Attorney General, The Capitol, Tallahassee, Florida, and a copy has been mailed to respondent, #544081, P.O. Box 9, Quincy, Florida 32351, this 4th day of January, 1991.

P. DOUGLAS BRINKMEYER

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

BOBBY CHARLES OLIVER,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

* NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED.

* CASE NO. 89-3236

Opinion filed November 21, 1990.

An appeal from the Circuit Court of Hamilton County; L. Arthur Lawrence, Jr., Judge.

Barbara Linthicum, Public Defender; P. Douglas Brinkmeyer, Assistant Public Defender, Tallahassee, for appellant.

Robert A. Butterworth, Attorney General; Gypsy Bailey, Assistant Attorney General, Tallahassee, for appellee.

PER CURIAM.

Oliver appeals from his conviction and sentencing for two counts of possession with intent to sell cocaine and two counts of sale of cocaine. The charges arise out of two separate controlled buys of narcotics. For each occurrence, the appellant was charged with both possession with intent to sell and sale. In Wheeler v. State, 549 So.2d 687 (Fla. 1st DCA 1989), this

court held that separate convictions and punishments for both crimes arising out of a single transaction and involving the same controlled substance violated the principles of double jeopardy. We, therefore, reverse and remand to the trial court for vacation of one of the convictions as to each transaction and for appropriate resentencing.

The appellant also asserts that the trial court erred in imposing a departure sentence without providing contemporaneous written reasons for departing from the sentencing guidelines. In light of recent opinions of this court, including Brown v. State, 565 So.2d 369 (Fla. 1st DCA 1990), which holds that Ree v. State, 565 So.2d 1329 (Fla. 1990), shall only be applied prospectively, we find that the procedure utilized by the trial judge was not in error. Resentencing in this case, however, will be subject to the requirements of Ree, supra.

Reversed and remanded for proceedings consistent with this opinion.

JOANOS, BARFIELD and WOLF, JJ., concur.