IN THE SUPREME COURT OF FLORIDA

CASE NO. 77,602

KEVIN NELMS,

Petitioner.

vs.

STATE OF FLORIDA,

Respondent.

****

ON APPEAL FROM THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA, FOURTH DISTRICT

****

RESPONDENT'S BRIEF ON JURISDICTION

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TABLE OF CONTENTS

TABLE OF CITATIONS

CASES **PAGE**

FLORIDA RULES:

OTHER AUTHORITY:

PRELIMINARY STATEMENT

Respondent was the prosecution in the Criminal Division of the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida, and the Appellee in the District Court of Appeal, Fourth District. Petitioner was the defendant and Appellant in the lower courts. In this brief, the parties will be referred to as they appear before this Court.

STATEMENT OF THE CASE

Appellant was convicted of first degree murder. His direct appeal was per curiam affirmed on December 18, 1985.

Several 3.850 motions were filed. The last alleged his jury was not drawn from a countywide jury pool. The trial judge denied the 3.850 Motion, finding the issue had not been raised before trial and finding Spencer v. State, 545 So.2d 1352 (Fla. 1989) not to be retroactive.

The District Court, which had considered a related issue based on dramatically different facts in State v. Moreland, 564 So.2d 1164 (Fla. 4DCA 1990), affirmed the denial of relief and cited that decision as authority. Rehearing was sought and was denied February 14, 1991.

By notice filed March 13, 1991, Petitioner seeks discretionary review of the decision in this case.

SUMMARY OF ARGUMENT

Petitioner has failed to show conflict with the decision of other courts from the four corners of the Fourth District's opinion. Even if this court reversed Moreland, due to dramatic differences in the procedural posture of the two cases Nelms would not require reversal. A decision to accept jurisdiction should be held in abeyance until this court decides Moreland.

ARGUMENT

ISSUE

THE DECISION OF THE DISTRICT COURT DOES NOT CONFLICT WITH SPENCER V. STATE AS PETITIONER DID NOT RAISE THE ISSUE ADDRESSED IN SPENCER ON DIRECT APPEAL AND MANDATE IN PETITIONER'S DIRECT APPEAL ISSUED ON DECEMBER 18, 1985.

To properly invoke the "conflict certiorari" jurisdiction of this Court, Petitioner must demonstrate that there is "express and direct conflict" between the decision challenged herein, and those holdings of other Florida appellate courts or this Honorable Court on the same rule of law to produce a different result than other state appellate courts faced with the substantially same facts. Article V, §3 (b)(3), Fla.Const. (1980); Fla.R.App.P. 9.030(a)(2)(iv). This court has stated that "conflict between decisions must be expressed and direct, i.e., it must appear within the four corners of the majority opinion." Reaves v. State, 485 So.2d 829, 830 (Fla. 1986). At bar, the decision of the Fourth District Court of Appeals does not conflict with decisions of other courts. Therefore, this Honorable Court should decline to exercise jurisdiction in the case.

Respondent acknowledges that what appears below does not arise from the four corners of the Fourth District opinion. However, in order to explain to the court why Jollie v. State, 405 So.2d 418 (Fla. 1981) does not require this Court to accept jurisdiction, the following explanation is required.

Petitioner suggests the decision of the District Court of Appeal is in direct conflict with this court's decision in Spencer v. State, 545 So.2d 1352 (Fla. 1989). This is incorrect!

In Spencer the defendant raised the jury district issue on numerous times prior to trial, including the date of trial. "At the time the jury was accepted, counsel for Spencer did so with the understanding that he was not waiving Spencer's claim to be entitled to a jury selected from the entire county." Spencer, 545 So.2d at 1354. Indeed, the jury district issue was a predominant issue during Spencer's prosecution and direct appeal.

The jury district issue was a very minor issue during the prosecution of petitioner. The only indication the issue was even raised is the pleading titled "Challenge to Grand Jury Panel and Motion to Dismiss Indictment." (see petitioner's appendix at A 14, A 15). The record of petitioner's prosecution is void of any indication that the pleading was even argued to the court or if the pleading was ever set for a hearing. The issue was not raised on direct appeal.

A close look at the pleadings shows the issue presented is not the issue addressed in Spencer. Petitioner's pleading requests that both juries (grand and petit) be drawn from the same jury districts. Spencer requested that both juries be drawn from the county at large.

This court issued the Spencer decision on June 15, 1988. Petitioner's direct appeal was affirmed via a per curiam decision on December 18, 1985. Nelms v. State, 480 So.2d 1320 (Fla. 4th DCA 1985).

This time difference and the preservation of the issue at the trial court and appellate court level also provides a dramatic distinction to State v. Moreland, 564 So.2d 1164 (Fla. 4th DCA 1990). In Moreland, the issue was raised in the trial court while Spencer was pending before this court and also raised as an issue on direct appeal. Moreland, 564 So.2d at 1165. Based on the above it is very clear that even if this court reverses Moreland, the reversal may have no effect on petitioner.

Therefore, Respondent requests that this court refuse to exercise jurisdiction in this case. Alternatively, Respondent requests that this Court not rule on jurisdiction until Moreland is decided as it is quite evident that an affirmance will be fatal to Petitioner's position.

CONCLUSION

Based upon the above Respondent requests that this Court refuse to accept jurisdiction in this cause.

Respectfully submitted,

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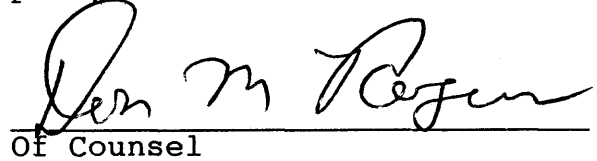
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing "Respondent's Brief on Jurisdiction" has been furnished by United States Mail to: CHARLES W. MUSGROVE, ESQUIRE, 2328 South Congress Avenue, Congress Park, Suite 1D, West Palm Beach, Florida 33406, this 5th day of April, 1991.



Of Counsel

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CASE NO. 77,602

KEVIN NELMS,

Petitioner.

vs.

STATE OF FLORIDA,

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ON APPEAL FROM THE DISTRICT COURT OF APPEAL
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APPENDIX TO

RESPONDENT'S BRIEF ON JURISDICTION

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IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT JULY TERM 1990

KEVIN NELMS,

Appellant,

v. CASE NO. 90-1312.

STATE OF FLORIDA,

Appellee.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DISPOSED OF.

Opinion filed January 4, 1991

Appeal of order denying rule 3.850 motion from the Circuit Court for Palm Beach County; Marvin U. Mounts, Judge.

Charles W. Musgrove, West Palm Beach, for appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Don M. Rogers, Assistant Attorney General, West Palm Beach, for appellee.

PER CURIAM.

This cause is affirmed on the authority of State v. Moreland, 564 So.2d 1164 (Fla. 4th DCA 1990).

ANSTEAD, LETTS and POLEN, JJ., concur.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing "Appendix" has been forwarded by United States Mail to: CHARLES W. MUSGROVE, ESQUIRE, 2328 South Congress Avenue, Congress Park, Suite 1D, West Palm Beach, Florida 33406, this 5th day of April, 1991.

Of Counsel

/pas