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MAY 6 1992
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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

CASE NO. 79,630

VS.

JAMES VON DECK,

Respondent.
_____/

RESPONDENT'S BRIEF ON JURISDICTION

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AUTHORITIES CITED

STATEMENT OF THE CASE

At the jury charge conference in the instant case the state requested the lesser included offense of aggravated assault and its enhancements. The defendant objected to this lesser included offense. (Pet. Appendix 111, R. 928-929, 931).

On February 20, 1992, the state moved for rehearing and also asked the fifth district court of appeal to certify direct conflict between it's decision in the instant case and Kimbrough v. State, 356 So.2d 1294 (Fla. 4th DCA 1978). (Pet. Appendix IV). The fifth district court refused to certify conflict between the two decisions.

STATEMENT OF THE FACTS

The following are facts omitted in petitioner's statement of the facts.

On October 24, 1990, at approximately 4:00 p.m. the defendant phoned his wife at the Jiffy Food Mart where she worked. (R. 515). The defendant and his wife got into an argument and the defendant told her he was going to come up and "get her butt." (R. 693).

The defendant's brother, Ronald Von Deck, later told the police officers that he was unsure whether the defendant knew his wife had been cheating on him. (R. 713-714).

On the way to the Jiffy Food Store the defendant fired a shot in the air over the police cruiser. (R. 696). The defendant was a good shot, shooting at a local target range on a weekly basis. (R. 698). The defendant could have hit the police car or the officer had he wanted to. (R. 697-699). The defendant only wanted to get the police officers out of his way. (R. 700).

SUMMARY OF ARGUMENT

I. There is no "express and direct" conflict between the instant case and Kimbrough v. State, 356 So.2d 1294 (Fla. 4th DCA 1978), because the two cases do not have "substantially the same controlling facts."

II. Both the instant case and Kimbrough v. State, 356 So.2d 1294 (Fla. 4th DCA 1978), originated in Brevard County in the eighteenth judicial circuit. At the time Kimbrough was decided the fifth district court had not yet been created and Brevard County was in the fourth district. Therefore, there is no conflict with the decision of another district court of appeal.

III. Petitioner's argument that the fifth district court's opinion in the instant case is "absurd" is not a valid reason to invoke the discretionary conflict jurisdiction of this court.

ARGUMENT #1

THERE IS NO EXPRESS AND DIRECT CONFLICT BETWEEN THE FIFTH DISTRICT COURT'S OPINION IN THE INSTANT CASE AND KIMBROUGH V. STATE, 356 SO.2D 1294 (FLA. 4TH DCA 1978).

Petitioner asks this court to accept jurisdiction in the instant case due to an alleged conflict with the fourth district court of appeal's decision in Kimbrough v. State, 356 So.2d 1294 (Fla. 4th DCA 1978). Article V, section 3(b)(3) of the Florida Constitution states that the Supreme Court may review the decision of a district court of appeal if that decision "expressly and directly conflicts with a decision of another court of appeal . . . on the same question of law." [emphasis added]. This "express and direct" conflict can exist in one of two ways. Either an announced rule of law conflicts with other appellate court's expressions of the law, or a rule of law is applied to produce a different result in a case which involves "substantially the same controlling facts as a prior case." City of Jacksonville v. Florida First National Bank of Jacksonville, 339 So.2d 632 (Fla. 1976), Nielson v. City of Sarasota, 117 So.2d 731 (Fla. 1960).

The first situation is not applicable to the instant case. There is no conflict between the rules of law applied in Kimbrough and Von Deck. The law as applied in both cases is the same law that has existed for decades: the charging document must allege all the elements of a lesser included offense before that offense can be read to the jury as a lesser included charge.

The second situation under which a conflict can arise is also not applicable to the instant case and Kimbrough. For

there to be conflict under this second "test" the two cases would be required to have "substantially the same controlling facts." However, the facts of Von Deck and Kimbrough are clearly, obviously and easily distinguishable.

First, in Kimbrough it was the defendant who reuuested the lesser included offense and the state who objected to it being given. Contrarily, in Von Deck the state requested the lesser and the defendant objected to it. The fifth district court of appeals emphasized this obvious factual distinction in its opinion by stating "Kimbrough is probably erroneous but then a reading in a criminal case in favor of the defendant, or made at the defendant's special informal request, cannot be said to violate his constitutional right as to notice and due process.!! Von Deck v. State, 593 So.2d 1129, 1130 (Fla. 5th DCA 1992). (Pet. Appendix III). Thus, although the fifth district court criticized the fourth district court's decision in Kimbrough, it specifically recognizes a key factual distinction between the cases: when a defendant requests a lesser included offense and the state objects, the giving of the lesser does not infringe upon the state's constitutional right to due process and notice because the state does not have a constitutional right to due process and notice, however, when a defendant objects to the state's request for a lesser included offense which is not fully alleged in the charging document, the defendant's constitutional rights of due process and notice are infringed upon.

The second reason the two cases are not in conflict is because the exact language of the charging document in

Kimbrough is never recounted. The fourth district court merely concludes, in two sentences, that the charging document before it was sufficient to allege the elements of an aggravated assault. There is no recounting of the exact words contained in the information and therefore this court does not know whether the information specifically did state the victim was placed in fear or whether the information alleged that the victim actually observed or heard any of the five shots being fired at him. (If the information specifically alleged that the victim was placed in fear, then that element of aggravated assault would obviously be alleged. Furthermore, if the charging document alleged that five shots were fired at the victim, or that he actually observed or heard any of the five shots, then it could be reasonably inferred that fear of the victim was sufficiently alleged.) Without knowledge of the exact allegations in the charging document of both cases it is impossible for this court to determine whether the language of the charging documents in Kimbrough and Von Deck are in fact the same and whether a lesser included offense under the same language of an information was allowed in one case while not allowed in the other.

Given the fourth district court's brief discussion of this first prong of the Florida Supreme Court's two prong test for determining whether a permissive lesser included offense should be presented to the jury, it appears that the sufficiency of the charging document was never an important issue, if an issue at all, in the Kimbrough appeal. Rather, Kimbrough focuses on the facts presented at trial and whether

these facts supported the requested lesser included offense. Whether the facts of the instant case supported the lesser included offense was never an issue in this appeal because the first prong of this court's test on permissive lesser included offenses was never met: the charging document in the instant case did not allege all of the elements of aggravated assault.

Therefore, petitioner's request to invoke this court's discretionary conflict jurisdiction should be denied.

ARGUMENT #2

BECAUSE THE FIFTH DISTRICT HAD NOT BEEN CREATED AT THE TIME OF THE KIMBROUGH DECISION THE TWO CASES ARE NOT FROM DIFFERENT DISTRICT COURTS OF APPEAL

The discretionary jurisdiction of this court is not applicable to the instant case because Rule 9.030(a)(2)(A)(iv), F.R.Cr.P. allows discretionary jurisdiction to be sought only when a decision of a district court "expressly and directly conflicts with a decision of another district court of appeal . . . on the same question of law." [emphasis added].

The instant case originated in Brevard County of the eighteenth judicial circuit which is now in the fifth appellate district. The decision in Kimbrough v. State, 356 So.2d 1294 (Fla. 4th DCA 1978), also originated in Brevard County of the eighteenth judicial circuit, however, at that time the fifth district had not yet been created and the district court of appeal for Brevard County was the fourth district. Thus, the fifth district court's decision in Von Deck is not in conflict with another district court

because at the time the Kimbrough opinion was issued there was no fifth district and the area of the fifth district from which Von Deck originated was then part of the fourth district. Although respondent has been unable to find any Florida decision which even discusses this issue it seems logical that when the fifth district was created the eighteenth judicial circuit was bound by the decisions of the fourth district court which originated in the area of the fourth district which is now the fifth district. Furthermore, the fifth district would be bound by the previous decisions of the fourth district which originated in the area which was now the fifth district. Therefore, even if there was a conflict between the two decisions (which there is not) the fifth district court of appeals decision in Von Deck would be a change in the law within that district. Such a situation is not one in which the discretionary jurisdiction of this Court can be invoked.

ARGUMENT #3

PETITIONER'S ARGUMENT THAT THE FIFTH DISTRICT COURT'S DECISION IN THE INSTANT CASE IS ABSURD IS NOT SUFFICIENT TO INVOKE THIS COURT'S JURISDICTION

In his closing paragraph petitioner claims that it is "absurd" for the state to have to allege in an information charging attempted murder of a police officer that the victim was placed in fear before the state would be allowed the lesser included offense of aggravated assault to be read to the jury. However, this criticism is nothing more than a criticism of the law which has existed in this state since this court's decision in Brown v. State, 206 So.2d 377 (Fla.

1968). The firmly established law in Brown is that a lesser included offense may be read to the jury only if both the accusatory pleading and the evidence at trial support the lesser. The policy behind this requirement is that the defendant is entitled to be apprised by the accusatory pleading of all offenses of which he may be convicted. Brown at 383.

What petitioner fails to recognize is that the state has great discretion in determining which charges will ultimately be presented to the jury. The state can file a strong case so that few lesser included offenses will be presented, or they can file a weak case so that many lesser included options will be presented to the jury. The state's tactical decision in the instant case was to file a single charge which carried a minimum mandatory prison sentence of twenty-five years before eligibility for parole. Section 775.825 Fla. Stat. (1988). Had the state wished to give the jury the option of the lesser included offense of aggravated assault on a law enforcement officer with a firearm, they could have either alleged the element of fear of the victim in the charging document or added count II to the information charging aggravated assault and its enhancements. However, the state opted for a charging document which would allow only an all or nothing verdict. Because this tactic failed, the state is now asking this court to accept jurisdiction and rescue the state from its error. Such is not a valid ground for requesting this court to invoke its conflict jurisdiction.

CONCLUSION

Respondent respectfully asks this Honorable Court to deny petitioner's request that this court accept jurisdiction based on a conflict that does not exist.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy has been furnished to Robert Butterworth, Attorney General, 210 North Palmetto Avenue, Suite 447, Daytona Beach, Florida, 32014, by mail delivery, this 4th day of May, 1992.

By: _____

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