

FILED

SID J. WHITE

MAY 26 1992

CLERK, SUPREME COURT.

By _____
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

JOSEPH INNES :

RESPONDENT :

v. :

DCA No. 91-02666

FSC No. _____

STATE OF FLORIDA :

RESPONDENT :

_____ :

PETITIONER'S BRIEF ON JURISDICTION

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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IN THE SUPREME COURT OF FLORIDA

JOSEPH INNES,

Petitioner,

v.

DCA No. 91-02666

FSC No. _____

STATE OF FLORIDA,

Respondent.

_____ /

STATEMENT OF THE CASE AND FACTS

Appellant, Petitioner, Joseph Innes, seeks to have reviewed a decision of the District Court of Appeal, Second District, dated and filed on May 6, 1992. The petitioner was the original defendant in the trial court, and the appellant before the District Court of Appeal. The respondent, State of Florida, was the appellee before the District Court of Appeal. This was an appeal by petitioner from his conviction and sentence entered by the Circuit Court In and For Pinellas County.

The State Attorney for Pinellas County, Florida, direct filed an information charging petitioner, Joseph Innes, with burglary of a dwelling and grand theft, [Case No. 91-7561] failure to appear, [Case No. 91-5368] burglary of a dwelling, [Case No. 91-6380] fraudulent use of a credit card [Case No. 91-2626], and dealing in stolen property and grand theft [Case No. 91-523] (R92,58,81,39,1) Subsequently, petitioner entered a plea of nolo contendere on the understanding he would receive no more than four years incarceration followed by two year's probation,

and he would pay restitution, the amount to be determined later.
(R36-38;53-57;76-80;87-91;111-116) On July 30, 1991, petitioner
was adjudicated guilty and sentenced as previously agreed upon.

(R19-31) At the time of sentencing petitioner was a juvenile.

(R5) Although the court was aware that petitioner was a juvenile
and attempted to comply with Florida Statute 39.111, (R152-153)
the court failed to comply with all the requirements. On August
16, 1991, petitioner timely filed a notice of appeal. (R117)

The District Court of Appeal, Second District, affirmed
petitioner's convictions and sentence in an a written opinion
attached hereto. Petitioner now seeks the discretionary review of
this court on the jurisdictional grounds that the instant opinion
is expressly and directly in conflict with the decisions of other
district courts of appeal.

SUMMARY OF THE ARGUMENT

The decision of the District Court of Appeal, Second District, expressly and directly conflicts with the decisions of other District Courts of Appeal, specifically, Toussaint v. State, 17 FLW D311 (Fla. 5th DCA January 24, 1991); Keith v. State, 542 So.2d 440 (Fla. 5th DCA 1989); Taylor v. State, 534 So.2d 1181 (Fla. 4th DCA 1988) and Lang v. State, 566 So.2d 1354 (Fla. 5th DCA 1990).

QUESTION PRESENTED

WHETHER THE DECISION IN THE INSTANT CASE
DIRECTLY AND EXPRESSLY CONFLICTS WITH THOSE
CASES HOLDING THAT FAILING TO FOLLOW THE
REQUIREMENTS OF 39.111 WITHOUT THE EXPRESS
WAIVER OF A JUVENILE DEFENDANT CONSTITUTES
REVERSIBLE ERROR ?

In the instant case the District Court affirmed petitioner's conviction and sentence citing one of its earlier opinions, Davis v. State, 528 So.2d 521 (Fla. 2d DCA 1988). But the court also recognized that its opinion was in express and direct conflict with Lang v. State, 566 So.2d 1354 (Fla. 5th DCA 1990).

Other District Courts have also held that absent a waiver by the juvenile, the trial court must strictly comply with the requirements of Chapter 39 and that it is fundamental error for the trial court to impose adult sanctions without the required findings, regardless of whether it was after trial or upon a plea. see Toussaint v. State, 17 FLW D311 (Fla. 5th DCA January 24, 1991); Keith v. State, 542 So.2d 440 (Fla. 5th DCA 1989); Taylor v. State, 534 So.2d 1181 (Fla. 4th DCA 1988).

CONCLUSION

The decision of the District Court of Appeal, Second District, that the petitioner, Joseph Innes, seeks to have reviewed is in direct and express conflict with the decision of the District Court of Appeal, Fifth District, in the case of Toussaint v. State, 17 FLW. D311 (Fla. 5th DCA January 24, 1991), as well as, Keith v. State, 542 So.2d 440 (Fla. 5th DCA 1989), Taylor v. State, 534 So.2d 1181 (Fla. 4th DCA 1988) and Lang v. State, 566 So.2d 1354 (Fla. 5th DCA 1990). Because of the reasons and authorities set forth in this brief, it is submitted that the decision in the present case is erroneous and that the conflicting decision of the District Court of Appeal for the Fourth and Fifth Districts is correct and should be approved by this court as the controlling law of this state.

Petitioner, Joseph Innes, therefore, requests this court to extend its discretionary jurisdiction to this cause, and to enter its order quashing the decision sought to be reviewed, and approving the conflicting decision of the District Courts of Appeal, Fourth and Fifth Districts, as the correct decision, and granting such other relief as shall seem right and proper to the court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been sent to Stephen Baker, Assistant Attorney General, Westwood Center, 2002 North Lois, Tampa, Florida 33607, and to Joseph Innes, 122631, Lancaster Correctional, P.O. Drawer 158, Florida 32693 this 21st day of May, 1992.

Allyn Giambalvo

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1. Copy of Second District Court's Opinion filed on May 6, 1992.

ALTENBERND, A.C.J., and BLUE, J., Concur.
PARKER, J., Concur Specially.

PARKER, Judge, Concurring specially.

I concur with the majority. But for this court's opinion in Davis, I would reverse this case because the record fails to show that Innes waived the trial court's required findings under Chapter 39, Florida Statutes. See Evans v. State, 17 F.L.W. D592 (Fla. 2d DCA Feb. 26, 1992).