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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,)
)
 Petitioner,)
)
 vs.)
)
 MICHAEL ANTHONY RHODES,)
)
 Respondent.)
 _____)

Case No. 79910
(4th DCA No. ~~91~~-2482)

BRIEF OF RESPONDENT ON JURISDICTION

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PRELIMINARY STATEMENT

Respondent was the Appellant in the Fourth District Court of Appeal and the defendant in the trial court. Petitioner was the Appellee and the prosecution, respectively, in the lower courts.

In the brief, the parties will be referred to as they appear before this Honorable Court.

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's statement of the case and facts limited to the issue of jurisdiction, as contained in its second paragraph.

SUMMARY OF ARGUMENT

This Court has not accepted for review State v. Kelly, Case No. 79,280, which, incidentally, Petitioner chose not to move the district court for certification as it did in State v. Williams, Case No. 79,507. Williams was not cited by the district court in the instant case, therefore this Court does not have jurisdiction under Jollie v. State. Furthermore, this Court has no jurisdiction to review Kelly. The Kelly decision does not directly and expressly conflict with any other decisions. State v. Bass, cited by Petitioner, is factually and legally distinguishable. Second, the decision is merely an application of this Court's prior construction of the due process clause, not itself an express construction of that clause. Finally the decision does not directly and exclusively affect any class of constitutional officers as required to provide jurisdiction in this Court.

ARGUMENT

THIS COURT HAS NO JURISDICTION TO REVIEW A DECISION THAT CITES AS AUTHORITY A CASE THAT HAS NOT YET BEEN ACCEPTED FOR REVIEW BY THIS COURT, NOR DOES THIS COURT HAVE JURISDICTION TO REVIEW STATE v. KELLY.

For jurisdiction in the instant case, Petitioner relies on the district court's citation to Kelly v. State, 593 So.2d 1060 (Fla. 4th DCA 1992)¹ which is pending jurisdictional review in this Court, State v. Kelly, Case No. 79,280, in Williams v. State, 17 F.L.W. D406 (Fla. 4th DCA Feb. 5, 1992), a case in which this Court has postponed its decision on jurisdiction, State v. Williams, Case No. 79,507.

Williams was not cited by the district court in the instant case, therefore this Court does not have jurisdiction under Jollie v. State, 405 So.2d 418 (Fla. 1981). In Jollie, this Court held that it has jurisdiction over district court decisions that cite as controlling authority a decision that is pending review in this Court. In Harrison v. Hyster, 515 So.2d 1279 (Fla. 1987), this Court held that the phrase "pending review" means that this Court must have accepted the cited decision for review. The fact that the cited authority is pending on a petition to invoke discretionary jurisdiction, not yet acted on by this Court, does not give rise to jurisdiction. This Court stated:

Jollie's reference to the "controlling authority...that is...pending review" refers to a case in which the petition for jurisdictional review has been granted and the case is pending for disposition on the merits.

¹ In Kelly, Petitioner chose not to move the district court for certification.

515 So.2d at 1280. Because this Court has not granted the petition for jurisdictional review in State v. Kelly, this Court has no jurisdiction in the instant case.

Furthermore, this Court has no jurisdiction to review the Fourth District's Kelly decision. The decision does not directly and expressly conflict with the decision in State v. Bass, 451 So.2d 986 (Fla. 2d DCA 1984), as Petitioner alleges. In Jenkins v. State, 385 So.2d 1356, 1359 (Fla. 1980), this Court defined the limited parameters of conflict review as follows:

This Court may only review a decision of a district court of appeal that expressly and directly conflicts with a decision of another district court of appeal or the Supreme Court on the same question of law. The dictionary definition of the term "express" include: "to represent in words"; "to give expression to." "Expressly" is defined "in an express manner." Webster's Third New International Dictionary 1961 ed. unabr.

See generally Ansin v. Thurston, 101 So.2d 808 (Fla. 1958); Withlacoochee River Electric Coop v. Tampa Electric Company, 158 So.2d 136 (Fla. 1963), cert. denied 377 U.S. 952 (1964).

In order for two court decisions to be in express and direct conflict for the purpose of invoking this Court's discretionary jurisdiction under Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv), the decisions must speak to the same point of law, in a factual context of sufficient similarity to permit the inference that the result in each case would have been different had the deciding court employed the reasoning of the other court. "The facts of the case are of utmost importance." Mancini v. State, 312 So.2d 732, 733 (Fla. 1975). "Our jurisdiction cannot be invoked merely because we might disagree with the decision of

the district court...." Id. See also Mystan Marine, Inc. v. Harrington, 339 So.2d 200, 201 (Fla. 1976) (this Court's discretionary jurisdiction is directed to a concern with decisions as precedents, not adjudications of the rights of particular litigants). The factual contexts of the decisions involved here are not similar nor does the district court announce a rule inconsistent with rules of law previously announced.

The state's claim of conflict jurisdiction with State v. Bass, 451 So.2d 986 (Fla. 2d DCA 1984), is so weak as to be almost frivolous. Unlike Kelly, that case had absolutely nothing to do with the manufacturing of any illegal drug and did not rule on due process as it related to the scheme. The marijuana used in the reverse-sting in Bass already existed and had been in circulation in that form prior to its use by the police; the court in Bass merely approved the statutory authority of officers to use drugs in their possession for a reverse-sting operation.

Obviously that is a far different factual as well as legal scenario from the one before the Fourth District in Kelly. In Kelly, as well as in the instant case, the Broward County Sheriff's Office took powdered cocaine and, by definition², manufactured it into crack cocaine, an operation prohibited by Florida statute.

² Manufacture is defined in section 893.01(12)(a), Florida Statutes (1989), as:

The production, preparation, propagation, compounding, cultivating, growing, conversion, or processing of a controlled substance either directly or indirectly, by extraction from substances of natural origin, or independently by means of chemical synthesis, and includes any packaging of the substance or labeling or relabeling of its container....

See §§ 893.13(5) and 893.135, Fla. Stat. (1989); Kelly v. State, 593 So.2d 1060 (Fla. 4th DCA 1992). Contrary to Petitioner's assertion otherwise, the Broward County Sheriff's Office illegally manufactured and created the instrumentality of the crime with which Respondent was charged, tried, convicted, and imprisoned.

Further, the court in Kelly found that the lack of controls in this illegal scheme was resulting in crack cocaine "escap(ing)" into the communities where the sting operations were conducted, another factor not present in Bass. It was the combination of the statutory violation and the lack of controls resulting in actual distribution of the highly potent and addictive manufactured crack which caused the shock and outrage necessary to constitute a finding that due process was violated in Kelly. Because they are both factually and legally distinguishable, the decision in Bass and Kelly are not in express and direct conflict; there can be no inference that the result in each case would have been different had the deciding court employed the reasoning of the other court. There is no conflict jurisdiction.

Petitioner next argues that the district court's reliance on State v. Glosson, 462 So.2d 1082 (Fla. 1985) in support of its finding construes not only the Florida Constitution, but also the United States Constitution. In other words, according to Petitioner, this Court has jurisdiction of every district court case which merely cites prior controlling authority so long as the authority cited construes some constitutional provision. If that were true, this Court's jurisdiction would be nearly limitless and

include every application of the Fourth Amendment or Miranda.³ For better or worse however, this Court is limited to reviewing those cases which "expressly construe" constitutional provisions. Art. V, sec. 3(b)(3), Fla. Const. That means decisions which explain or define the language or terms of a constitutional provision, not those which merely apply a constitutional provision. Dykman v. State, 294 So.2d 633, 635 (Fla. 1973).

Nowhere in the Kelly decision does the Fourth District define or explain the due process clause; this is purely an application of the clause to the facts before the district court. See Dykman v. State, supra. As such the opinion in Kelly does not provide a basis for jurisdiction in this Court.

Finally, Petitioner alleges that the Kelly decision affects a class of constitutional officers, i.e., sheriffs and state attorneys. In Spradley v. State, 293 So.2d 697, 701 (Fla. 1974), this Court stated:

A decision which "affects a class of constitutional or state officers" must be one which does more than simply modify or construe or add to the case law which comprises much of the substantive and procedural law of this state.

To vest jurisdiction in this Court, the "decision must directly and, in some way, exclusively" affect the duties and powers of the particular class. Id. The district court's decision in Kelly v. State, in no way exclusively affects sheriffs and state attorneys. Rather, the district court held that the same laws bind us all, including the statutory prohibition against the manufacture of

³ Miranda v. Arizona, 384 U.S. 436 (1966).

illegal drugs; the Kelly decision only affects the constitutional officers "...in that the members of these classes are bound by the law the same as any other citizen." Spradley v. State, 293 So.2d at 701.


The state's proposal of jurisdiction in the instant case is again so broad as to include, for instance, any case where evidence is suppressed due to the illegal actions of the police. Acceptance of jurisdiction in this case would be contrary to the philosophy that the district courts are to be the courts of final appeal except in the most limited of cases. Id. This is not such a case. No jurisdiction exists for this Court to review Rhodes v. State.

CONCLUSION

Based on the foregoing arguments and the authorities cited therein, Respondent respectfully requests this Court not accept jurisdiction in the instant case.

Respectfully Submitted,

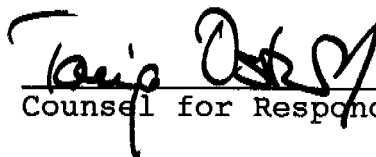
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier to Patricia G. Lampert, Assistant Attorney General, Elisha Newton Dimick Building, Room 240, 111 Georgia Avenue, West Palm Beach, Florida 33401 this 26th day of May, 1992.



Counsel for Respondent