IN THE SUPREME COURT OF FLORIDA

DERRICK ACKERS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 80,037
5th DCA CASE NO. 91-735

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL,

FIFTH DISTRICT

RESPONDENT'S JURISDICTIONAL BRIEF

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TABLE OF CONTENTS

PAGES:

TABLE OF AUTHORITIES

SUMMARY OF ARGUMENT

The petitioner argues that the decision of the Fifth District Court of Appeal in this case expressly and directly conflicts with this court's decision in McPhadder v. State, 475 So.2d 1215 (Fla. 1985). The decisions neither expressly nor directly conflict. Moreover, this court has expressly resolved the issue raised in the petitioner's jurisdictional brief in decisions issued since McPhadder. This court need not, and should not, exercise its discretionary power to review the district court's decision in this case.

ARGUMENT

THE PETITIONER HAS SHOWN NEITHER EXPRESS NOR DIRECT CONFLICT BETWEEN DECISIONS.

The petitioner, Derrick Ackers, asserts that the decision of the Fifth District Court of Appeal in this case expressly and directly conflicts with this court's decision in McPhadder v. State, 475 So.2d 1215 (Fla. 1985). The decisions neither expressly nor directly conflict. Moreover, this court resolved the issue raised in the petitioner's jurisdictional brief in its decisions in Brea v. State, 530 So.3d 924 (Fla. 1988) and Palmore v. State, 495 So.2d 1170 (Fla. 1986). This court need not, and should not, exercise its discretionary power to review the district court's decision in this case.

The district court's decision does not mention McPhadder, and does not discuss the appellate courts' jurisdiction to hear state appeals. The district court did consider the issue of its jurisdiction in this case, and resolved that issue by an order denying Mr. Ackers' motion to dismiss the appeal.[1] However, since the district court's decision does not expressly address the matter as to which conflict is asserted, this court should decline to accept jurisdiction in this case. See Department of Health and Rehabilitative Services v. National Adoption Counseling Service, Inc., 498 So.2d 888 (Fla. 1986) (implied or inherent conflict insufficient); Reaves v. State, 485 So.2d 829

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[1] The petitioner's jurisdictional brief includes, as its Exhibits D and E, his Motion to Dismiss filed in the district court and the order denying that motion. Exhibit A to this brief is the state's response, filed in the district court, to that motion to dismiss.

(Fla. 1986) (disagreement must appear within four corners of majority opinion of case in which review sought); Jenkins v. State, 385 So.2d 1356, 1359 (Fla. 1980) ("express" means "represent[ed] in words").

Nor is there direct conflict between the decision in this case and the decision in McPhadder, since the facts of the two cases are distinguishable. See Department of Revenue v. Johnston, 442 So.2d 950 (Fla. 1983). In this case, the trial court excluded "all evidence pertaining to the robbery...charged in CR90-9660A." (See Exhibit C to petitioner's jurisdictional brief) The evidence introduced in the trial of case no. 90-9660, which Judge Formet presided over before he entered the order in limine in this case, included admissions made by the petitioner, admissions made by his co-defendant, and evidence seized by the police. (Exhibit A to this brief at paragraph 4; Exhibit B to this brief) In McPhadder, the disputed order in limine excluded taped statements made by a police informant. Those statements are not party admissions or confessions, and were not evidence seized by the police. McPhadder at 1216. *See* Brea v. State, 530 So.2d 924, 926 (Fla. 1988); State v. Palmore, 495 So.2d 1170 (Fla. 1986).

The petitioner argues that McPhadder stands for a rule that the state, pursuant to Rule 9.140(c)(1)(B),[2] can appeal only orders which suppress on fourth amendment grounds confessions, admissions or other evidence. That rule provides that

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[2] Florida Rules of Appellate Procedure.

> [t]he State may appeal an order suppressing before trial confessions, admissions or evidence obtained by search and seizure.

This court, in Palmore, supra, expressly held that the language "obtained by search and seizure" modifies only "evidence," and not "confessions" or "admissions." 495 So.2d at 1171. ~~See also~~ Brea, supra. The district court's decision in this case, in short, is consistent with McPhadder and with this court's other decisions on this point.

CONCLUSION

The Respondent requests this court to decline to exercise its discretionary power to review this matter.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A true and correct copy of the foregoing Jurisdictional Brief has been delivered by hand to Assistant Public Defender Paolo G. Annino at 112-A Orange Avenue, Daytona Beach, Florida 32114, this 1st day of ~~June~~ July, 1992.

NANCY RYAN
Assistant Attorney General

IN THE SUPREME COURT OF FLORIDA

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STATE OF FLORIDA,

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APPENDIX TO RESPONDENT'S JURISDICTIONAL BRIEF

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INDEX TO APPENDIX

IN THE DISTRICT COURT OF APPEAL, OF THE STATE OF FLORIDA

FIFTH DISTRICT

STATE OF FLORIDA,

Appellant,

v. CASE NO. 91-735

DERRICK ACKERS,

Appellee.

_____ /

RESPONSE TO MOTION TO DISMISS

Comes now the Appellant, the State of Florida, and responds to the Motion to Dismiss filed by the appellee in this action, as follows:

1. The appellee correctly states that the right of appeal from final judgments and orders is prescribed by statute, and that the review of nanfinal orders is governed by court rule. State v. Pettis, 520 So.2d 250, 252 (Fla. 1988); State v. Creighton, 469 So.2d 735 (Fla. 1985); State v. Smith, 260 So.2d 489 (Fla. 1972); Art. V, §4(b)(1), Fla. Const.

2. The state submits that this appeal is authorized by Rule 9.140(c)(1)(B), Florida Rules of Appellate Procedure, as that rule has been construed by the courts. Rule 9.140(c)(1)(B) provides that the state may appeal nonfinal orders

> [s]uppressing before trial confessions, admissions or evidence obtained by search and seizure.

3. The order appealed from excludes "all evidence pertaining to the robbery of the Kentucky Fried Chicken charged in CR90-9660/A." (R 455)[1]

4. During the trial of case no. 90-9660, the state introduced admissions made by the defendant and his co-defendant, Darrick Studstill, as well as physical evidence which was obtained by search and seizure, (R 227-30, 235-6, 271, 161-2, 202-4, 217-20) The order appealed from has the effect of excluding all of that evidence from the trial in this case.

5. The Florida courts have treated orders on motions in limine as "suppression orders" within the meaning of Rule 9.140(c)(1)(B) in cases similar to the instant case. State v. Palmore, 495 So.2d 1170 (Fla. 1986); State v. Ono, 552 So.2d 234 (Fla. 5th DCA 1989); State v. Katiba, 502 So.2d 1274 (Fla. 5th DCA 1987); State v. Andres, 552 So.2d 1151 (Fla. 3rd DCA 1989); State v. Everette, 532 So.2d 1124 (Fla. 3rd DCA 1988); State v. Sequra, 378 So.2d 1242 (Fla. 2d DCA 1979) (approved in Palmore, supra). See also State v Brea, 530 So.2d 924 (Fla. 1988) ("admissions" referred to in Rule 9.140(b)(1)(C) include co-conspirators' admissions).

6. Should this court hold that this appeal is not authorized by Rule 9.140(b)(1)(C), the state requests this court to treat

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[1] In the instant case, Mr. Ackers was charged with the robbery of a Popeye's Fried Chicken restaurant. In case no. 90-9660, he was convicted of having robbed a nearby Kentucky Fried Chicken restaurant.

this appeal as a petition for common-law certiorari. *See* Rules 9.030(b)(2)(A), 9.040(c), Fla.R.App.P.; State v Pettis, supra.

7. The order appealed from represents a departure from the essential requirements of law. Judge Formet, granting the motion in limine below, stated that he did so for two reasons: first, because the Kentucky Fried Chicken robbery had not been shown to be sufficiently similar to the Popeye's robbery, and second, because

> I just don't know that I'm satisfied with the presentation I've got up to this point as to ... the fact that [the KFC robbery] wouldn't become the major focal point of the trial.

(R 406-7) As the state argues in its initial brief, the record does not support a finding that the earlier robbery would become "the major focal point" of the trial of the later robbery. (Initial Brief at 8-9) That ruling was so speculative and premature as to depart from the law's essential requirements, Moreover, as the state also argues in its initial brief, the trial court's ruling on the relevancy issue is altogether erroneous; the state submits that that ruling, as well, departs from the essential requirements of the law.

8. The defense, in its motion to dismiss this appeal, argues in effect that the state should take its chances at trial without the contested Williams rule evidence. (Motion at paragraph *8)* The assistant state attorney, at the hearing held below on the motion in limine, announced that the state is not willing to proceed to trial without that evidence. (R 406) The state, of course, has the burden of proving its case beyond a

reasonable doubt; where, as here, the state is not willing to proceed to trial without excluded evidence, a certiorari petition should be entertained so as to avoid irreparable injury to the state's interests. State v. Pettis, supra, 520 So.2d at 253.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Response to Motion to Dismiss has been furnished by hand delivery to Paolo G. Annino at the Public Defender's in-basket at the Fifth District Court of Appeal, this 19th day of December, 1991.

NANCY RYAN
Assistant Attorney General