IN THE SUPREME COURT OF FLORIDA

CASE NO. 80,666

ELISAMES HARRIS,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

****

ON PETITION FOR DISCRETIONARY REVIEW

****

BRIEF OF RESPONDENT

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INTRODUCTION

The Petitioner, **ELISAMES** HARRIS was the defendant in the trial court and the appellant in the Third District Court of Appeal. The Respondent, the **STATE** OF **FLORIDA,** was the prosecution in the trial court and the appellee in the Third District Court of Appeal. The parties will be referred to as Petitioner and Respondent in this brief.

STATEMENT OF THE CASE AND FACTS

The Petitioner was charged with armed robbery, robbery with force and grand theft to which he pled no contest, in the Circuit Court of the Eleventh Judicial Circuit, Dade County, Florida.

The Petitioner was convicted and sentenced pursuant to the Habitual Felony Offender Statute upon the trial court's finding that he qualified for the enhanced status.

The Petitioner filed a motion for post conviction relief pursuant to Fla.R.Crim.P. Rule 3.850 alleging that the Habitual Felony Offender Statute, Section 775.084, violated the single-subject rule of the constitution of Florida, Article 111, section 6, and as a result thereof, his petition for relief should be granted. The trial court denied the Petitioner's Rule 3.850 motion and Petitioner timely filed a notice of appeal in the Third District Court of Appeals.

The Third District Court of Appeal, Chief Judge Alan Schwartz, issued it's opinion affirming the decision of the trial court based upon Beaubrum v. State, 595 So.2d 254 (Fla. 3d DCA 1992); Ingram v. State, 599 So.2d 785 (Fla. 4th DCA 1992); Tims v. State, 592 So.2d 741, 742 (Fla. 1st DCA 1992), holding that section 775.084 was not in violation of the single subject rule of Article 111, section 6, Florida Constitution.

This petition for Discretionary Review followed.

QUESTION PRESENTED

WHETHER THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL, CITING AS CONTROLLING AUTHORITY A CASE PENDING BEFORE THIS COURT, CONSTITUTES EXPRESS CONFLICT, ALLOWING THIS COURT TO EXERCISE ITS JURISDICTION? (Restated).

SUMMARY OF THE ARGUMENT

Because the Third District Court of Appeal relied on Beaubrum v. State, 595 So.2d 254 (Fla. 3d DCA 1992) in support of its opinion in the instant case and Beaubrum is currently pending before this Honorable Court, Respondent agrees that there is express conflict authorizing jurisdiction in this Honorable Court.

ARGUMENT

THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL, CITING AS CONTROLLING AUTHORITY A CASE PENDING BEFORE THIS COURT, CONSTITUTES EXPRESS CONFLICT, ALLOWING THIS COURT TO EXERCISE ITS JURISDICTION.

This Court has discretionary jurisdiction to review decisions of district courts of appeal that expressly and directly conflict with a decision of another district court of appeal on the same question of law. Art. V, § 3 (b)(3), Fla. Const.; Fla.R.App.P. 9.030 (a)(2)(A)(iv). A district court's per curiam decision without opinion citing as controlling authority a decision that is pending in this Court constitutes express conflict. State v. Lofton, 534 So.2d 148 (Fla. 1988); Jollie v. State, 405 So.2d 418 (Fla. 1981).

The opinion of the Third District in the instant case cited Beaubrum v. State, 595 So.2d 254 (Fla. 3d DCA 1992) in a per curiam decision affirming Petitioner's conviction below. (App. 1-2). Beaubrum is presently pending review in this Court in Case Number 79,669 on the same issue of law. This being so, the State concedes that this Court has jurisdiction to review the instant case. Art. V, § 3 (b)(3), Fla. Const.; Jollie, 405 So.2d 418.

CONCLUSION

WHEREFORE, based upon the foregoing reasons and authorities cited herein, Respondent agrees that conflict jurisdiction is vested in this Honorable Court.

Respectfully submitted,

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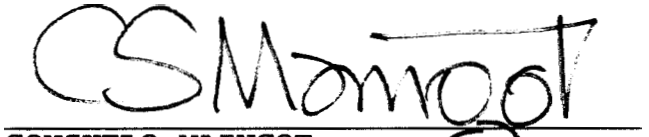
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **BRIEF** OF RESPONDENT as furnished by mail to **ELISAMES HARRIS,** pro se, DC# 076491 MN: 393, P.O. Drawer 1072, Desoto Correctional Institution, Arcadia, Florida 33281 on this 19 day of November 1992.



CONSUELO MAINGOT
Assistant Attorney General

/gdp

IN THE SUPREME COURT OF FLORIDA

CASE NO. 80,666

ELISAMES HARRIS,

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vs.

STATE OF FLORIDA

Respondent.

APPENDIX TO BRIEF

Harris v. State,
17 FLW D2303 (Fla. 3d DCA October 6, 1992)

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PROFESSIONAL REGULATION, BOARD OF DENTISTRY, Appellee. 3rd District. Case No. 92-889. Opinion filed October 6, 1992. An Appeal from the Department of Professional Regulation, Board of Dentistry. Norman W. Edwards, for appellant. Kathryn L. Kasprzak, Staff Attorney, and Lisa S. Nelson, Assistant General Counsel, and Larry MacPherson, for appellee.

(Before SCHWARTZ, C.J., and FERGUSON, and GERSTEN, JJ.)

(PER CURIAM.) We affirm, in all respects, the final order of the Department of Regulation, except that we reverse that portion of the order which finds that appellant made "deceptive, untrue, or fraudulent representations in the practice of dentistry." *See Elmariah v. Department of Professional Regulation, Board of Medicine*, 574 So.2d 164 (Fla. 1st DCA 1990); *Britt v. Department of Professional Regulation*, 492 So.2d 697 (Fla. 1st DCA 1986); *Gershanik v. Department of Professional Regulation, Board of Medical Examiners*, 458 So.2d 302 (Fla. 3d DCA 1984), *review denied*, 462 So.2d 1106 (Fla. 1985).

* * *

Torts—Trial court properly determined that plaintiff did not and could not state claim for abuse of process and that action, if at all, could be maintained only as malicious prosecution action after favorable determination of underlying lawsuit

GONZALO R. DORTA, ESQ., Appellant, vs. JONATHAN GAINES, ESQ., VALDES-FAULI, COBB, PETREY & BISCHOFF, P.A., Appellees. 3rd District. Case No. 92-808. Opinion filed October 6, 1992. An Appeal from the Circuit Court for Dade County, Phillip W. Knight. Gonzalo R. Dorta, Esq., appellant. Valdes-Fauli, Cobbs, Bischoff & Kriss and Jonathan L. Gaines and John J. Hearn, for appellees.

(Before SCHWARTZ, C.J., and FERGUSON and GERSTEN, JJ.)

(PER CURIAM.) The trial court correctly determined that the appellant's complaint did not and could not state a claim for abuse of process and therefore could be maintained, if at all, only as a malicious prosecution action after a favorable determination of the underlying action. *Marty v. Gresh*, 501 So.2d 87 (Fla. 1st DCA 1987); *McMurray v. U-Haul Co., Inc.*, 425 So.2d 1208 (Fla. 4th DCA 1983); *Blue v. Weinstein*, 381 So.2d 308 (Fla. 3d DCA 1980); *see Yoder v. Adriatico*, 459 So.2d 449 (Fla. 5th DCA 1984).

Affirmed.

* * *

GERALD vs. STATE. 3rd District. #91-1859. October 6, 1992. Appeal from the Circuit Court for Dade County. Affirmed. *Magill v. State*, 386 So.2d 1188 (Fla. 1980), *cert. denied*, 450 U.S. 927, 101 S.Ct. 1384, 67 L.Ed.2d 359 (1981); *Irvin v. State*, 66 So.2d 288 (Fla. 1953), *cert. denied*, 346 U.S. 927, 74 S.Ct. 316, 98 L.Ed.2d 419 (1954); *White v. State*, 375 So.2d 622 (Fla. 4th DCA 1979).

DIXON vs. STATE. 3rd District. #91-1155. October 6, 1992. Appeal conducted pursuant to Anders v. California, 386 U.S. 738 (1967), from the Circuit Court for Dade County. Affirmed. § 924.33, Fla. Stat. (1991).

JOHNSON vs. STATE. 3rd District. #91-315. October 6, 1992. Appeal from the Circuit Court for Dade County. Affirmed. *See Correll v. State*, 523 So.2d 562 (Fla.), *cert. denied*, 488 U.S. 871, 109 S.Ct. 183, 102 L.Ed.2d 152 (1988); *Bertolotti v. Dugger*, 514 So.2d 1095 (Fla. 1987). *Compare State v. James*, 404 So.2d 1181, 1182 (Fla. 2d DCA 1981) (upon complete destruction of evidence by the state, "defendant generally must show that the destruction of evidence resulted in some demonstrable prejudice to him.").

GUZMAN vs. STATE. 3rd District. #92-2069. October 6, 1992. Appeal under Fla. R. App. P. 9.140(g) from the Circuit Court for Dade County. Affirmed. *Medina v. State*, 573 So. 2d 293 (Fla. 1990); *Guzman v. State*, 558 So. 2d 501 (Fla. 3d DCA 1990).

ZORRILLA vs. ROBBINS. 3rd District. #92-961. October 6, 1992. Appeal from the Circuit Court for Dade County. Affirmed. §§ 194.171(3), (6), Fla. Stat. (1991). *See Millstream Corp. v. Dade County*, 340 So.2d 1276 (Fla. 3d DCA 1977). *Cf. Bystrom v. Diaz*, 514 So.2d 1072 (Fla. 1987).

NICKERSON vs. NICKERSON. 3rd District. #92-950. October 6, 1992. An Appeal from the Circuit Court for Dade County. Affirmed. *Cowie v. Cowie*, 564 So.2d 533 (Fla. 2d DCA 1990); *Canakaris v. Canakaris*, 382 So.2d 1197 (Fla. 1980); *Applegate v. Barnett Bank*, 377 So.2d 1150 (Fla. 1979).

JACOBS-CARPENTER vs. DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES. 3rd District. #91-2686. October 6, 1992. Appeal from the Circuit Court for Monroe County. Affirmed. *See Yurgel v. Yurgel*, 572 So.2d 1337 (Fla. 1990); *Lamon v. Rewis*, 592 So.2d 1223 (Fla. 1st DCA 1992); *Steward v. Steward*, 588 So.2d 692 (Fla. 5th DCA 1991); § 61.133, Fla. Stat. (1991).

FROW vs. STATE. 3rd District. #92-509. October 6, 1992. Appeal from a non-final order from the Circuit Court for Dade County. Affirmed. *See Turner v. Pellerin*, 272 So.2d 129 (Fla. 1973); *Hanks v. Goodman*, 253 So.2d 129 (Fla. 1971); *State v. Kaufman*, 421 So.2d 776 (Fla. 5th DCA 1982).

HARRIS vs. STATE. 3rd District. #92-653. October 6, 1992. Appeal under Fla.R.App.P. 9.140(g) from the Circuit Court for Dade County. Affirmed. *Beaubrun v. State*, 595 So.2d 254 (Fla. 3d DCA 1992); *Ingram v. State*, 599 So.2d 785 (Fla. 4th DCA 1992); *Tims v. State*, 592 So.2d 741, 742 (Fla. 1st DCA 1992).

* * *

Contracts—Leases—Declaratory judgment determining that landlords could re-configure parking lot of commercial building complex and require tenants to pay newly imposed parking charges reversed where leases were silent with respect to landlord's authority to impose parking charges and prior to re-configuration no parking charges had ever been levied against tenants, their employees or business invitees—Parking charges do not constitute operating expenses under lease—Attorney's fees—Action for declaratory relief is not action for enforcement of lease so as to justify fee award—Where both parties filed for declaratory relief, neither party entitled to attorney's fees

MARTIN L. ROBBINS, M.D., P.A., et al., Appellants, vs. I.R.E. REAL ESTATE FUND, LTD., et al., Appellees. 3rd District. Case No. 92-75. Opinion filed October 6, 1992. An Appeal from the Circuit Court for Dade County, Henry G. Ferro, Judge. Maland & Ross and Lauri Waldman Ross; Irwin M. Frost, for appellants. Jeffrey C. Roth, for appellees.

(Before NESBITT, FERGUSON, and GODERICH, JJ.)

(NESBITT, J.) Tenants of a commercial building complex appeal an adverse declaratory judgment which determined that their landlords could re-configure the complex parking lot and require the tenants to pay newly imposed parking charges. For the following reasons, the judgment of declaratory relief is reversed with directions to enter judgment favorable to the tenants.

This dispute began after the landlords restructured and re-configured the building parking area so as to prohibit ingress and egress of all users of the lot without payment of parking charges or the display of a decal showing the required monthly fees had been paid. The landlords demonstrated the purpose of the re-configuration was, at least in part, to promote greater parking availability to the tenants and to afford them greater security. It seems that due to the shortage of parking space at nearby Baptist Hospital, employees of the hospital had started using previously free parking space at the building complex. The landlords further demonstrated that the open parking area had been used by motorists to avoid a corner traffic signal and unrestrained access to the lot had permitted criminal activity. Automobile tires had been slashed; car windows had been smashed with attendant theft; and tenants and their visitors had reported vandalism to their cars while parked in the open lot.

The landlords point to the provisions in the tenant leases which "reserve the right at any time to make alterations to the building; [and] construct other buildings or improvements in the buildings or common areas . . . ." Further, the landlords claimed authorization for the restructuring charges came from lease clauses which authorized the landlords to adopt "reasonable rules and regulations . . . governing the use of the parking areas, walks and driveways . . . ." Presently, tenants do not deny the landlords' right to re-configure the parking lot. Instead, their claim is that the landlords had no authority to commence charging for parking in the newly configured lot. The landlords claim that because the leases are otherwise silent as to the authority to impose parking charges, section 4.2 of the leases authorize levy for these charges. That provision provides:

Section 4.2 Definition Of Operating Expenses

The term "Operating Expenses" shall mean (1) all costs of management, operation and maintenance of the Office Complex, including, without limitation, wages, salaries and payroll burden

92-130745-W

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

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 1992

ELISAMES HARRIS, **

Appellant, **

vs. ** CASE NO. 92-653

THE STATE OF FLORIDA, ** #90-39359

Appellee. ** 90-41212
90-42332

Opinion filed October 6, 1992.

An appeal under Fla.R.App.P. 9.140(g) from the Circuit Court for Dade County, Gerald D. Hubbart, Judge.

Elisames Harris, in proper person.

Robert A. Butterworth, Attorney General, and Consuelo Maingot, Assistant Attorney General, for appellee.

Before SCHWARTZ, C.J., and FERGUSON and COPE, JJ.

PER CURIAM.

Affirmed. Beaubrum v. State, 595 So.2d 254 (Fla. 3d DCA 1992); Ingram v. State, 599 So.2d 785 (Fla. 4th DCA 1992); Tims v. State, 592 So.2d 741, 742 (Fla. 1st DCA 1992).