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IN THE SUPREME COURT OF FLORIDA

CASE NO. 81,029

TERRY GLISPY,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

****

ON CERTIORARI FROM THE FOURTH DISTRICT COURT OF APPEAL

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RESPONDENT'S ANSWER BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

Petitioner, Terry Glispy, the criminal defendant and appellant below in the appended Glispy v. State, 17 F.L.W. D2699 (Fla. 4th DCA December 2, 1992), the decision over which review is sought, will be referred to as "petitioner." Respondent, the State of Florida, the prosecuting authority and appellee below, will be referred to as "the State."

No references to the record on appeal will be either necessary or appropriate. See e.g. Jenkins v. State, 385 So. 2d 1356, 1359 (Fla. 1980) and Reaves v. State, 485 So. 2d 829, 830 note 3 (Fla. 1986).

Any emphasis will be supplied by the State unless otherwise specified.

STATEMENT OF THE CASE AND FACTS

Those details relevant to a resolution of the threshold jurisdictional question are related in the unanimous opinion in Glispy v. State, 17 F.L.W. D2699, which the State, following the spirit of petitioner's implicit lead, adopts as its statement of the case and facts.

SUMMARY OF ARGUMENT

This Court cannot exercise its discretion conflict certiorari jurisdiction to review the decision below, since no legal "conflict" between the decisions of the Fourth and First District Courts of Appeal on the question of when restitution must be stricken as tardily ordered by a trial court exists.

ISSUE

THIS COURT DOES NOT HAVE JURISDICTION TO REVIEW THE DECISION BELOW

ARGUMENT

Petitioner essentially demands that this Honorable Court exercise its discretionary conflict certiorari jurisdiction to review the Fourth District's decision in Glispy v. State pursuant to Article V, Section 3(b)(3) of the Constitution of the State of Florida and Fla.R.App.P. 9.030(a)(2)(A)(iv & vi). The State firmly disagrees that this Court has jurisdiction to review this case.

The decision over which review is sought reads, in its entirety, as follows:

> Affirmed on the authority of Gladfelter v. State, 604 So. 2d 929 (Fla. 4th DCA 1992)[, review granted, Case No. 80,508 (Fla. January 5, 1993)].

Glispy v. State, 17 F.L.W. D2699. In Gladfelter v. State, 604 So. 2d 929, 930 (Fla. 4th DCA 1992), the Fourth District had held, in pertinent part, as follows:

> Appellant....contends it was error for the trial court to modify....[her] sentence by setting the amount of restitution more than sixty days after the sentence was imposed. Fla.R.Crim.P. 3.800(b). We have repeatedly held, however, that as long as the requirement to pay restitution in included in the sentence, setting the actual amount of restitution, even beyond sixty days from the sentence, is permissible. Savory v. State, 600 So. 2d 1 (Fla. 4th DCA 1992)....We affirm as to this point, and to the extent that we are in conflict with State v. Martin, 577 So. 2d 689 (Fla. 1st DCA), rev. denied, State v. Martin, 587 So. 2d 1329 (Fla. 1991), we note such conflict.

A prudent reading of State v. Martin, 577 So. 2d 689 (Fla. 1st DCA 1991), review denied, 587 So. 2d 1329 (Fla. 1991) and Gladfelter v. State, however, will disclose that these decisions do not legally "conflict" with one another. Consequently, Glispy v. State cannot legally conflict with State v. Martin.

In State v. Martin, 577 So. 2d 689, 690, the First District held that a trial court's imposition of a definite amount of restitution upon a convicted criminal defendant as a condition of a solely probationary sanction, after the 60-day period for the finalization of this sanction under Fla.R.Crim.P. 3.800(b) had passed, constituted an "illegal sentence" which could be thereafter corrected at any time by the trial court under Fla.R.Crim.P. 3.800(a). In Gladfelter v. State, 604 So. 2d 929, 930, in contrast, the Fourth District held that a trial court's order that a criminal defendant make restitution to his victim in an amount to be calculated as a condition of a probationary term which was to follow the defendant's sentence of imprisonment was proper under 3.800(b). The First District has itself recently implicitly accepted this distinction as dispositive. See Smith v. State, 17 F.L.W. D262 (Fla. 1st DCA December 31, 1992).

Since Gladfelter v. State cannot legally conflict with State v. Martin for purposes of establishing this Court's conflict certiorari jurisdiction, neither can Glispy v. State. It follows that this Court must not only deny certiorari in Glispy v. State, but must also deny certiorari in Gladfelter v. State as improvidently granted. Compare State v. Rhames, 494 So. 2d 205 (Fla. 1986).

CONCLUSION

WHEREFORE respondent, the State of Florida, respectfully submits that this Honorable Court must summarily DENY the petition for writ of certiorari.

Respectfully submitted,

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APPENDIX

Cir. 1969). However, based upon the trial court's earlier order denying appellees' motion to dismiss appellant's amended verified complaint, we hold the trial court abused its discretion when it dismissed appellee's second amended verified complaint with prejudice. Accordingly, we reverse the trial court's order of dismissal with prejudice and remand this cause to the trial court with instructions to allow appellant leave to amend his complaint.

AFFIRMED IN PART, REVERSED IN PART and REMANDED with instructions consistent herewith. (GLICKSTEIN, C.J., DELL and STONE, JJ., concur.)

* * *

Dissolution of marriage—Factors bearing upon whether to grant alimony pending dissolution are the needs of requesting spouse, financial ability of other spouse, and standard of living established during marriage

SHERYL LISA EVOLGA, Appellant, v. ALEX R. EVOLGA, Appellee. 4th District. Case No. 92-2555. L.T. Case No. 92-15338 16. Opinion filed December 2, 1992. Appeal of a nonfinal order from the Circuit Court for Broward County; Estella M. Moriarty, Judge. Roberta G. Stanley of Bruno L. Digiulian & Associates, P.A., Fort Lauderdale, for appellant. No appearance for appellee.

(PER CURIAM.) While numerous factors are considered in determining whether a former spouse is entitled to alimony after dissolution of marriage, the factors that bear upon whether alimony pending dissolution should be granted are few: the needs of the spouse seeking alimony, the financial ability of the other spouse, and the standard of living established during the marriage. *E.g., Belcher v. Belcher*, 271 So.2d 7, 11 (Fla. 1972); *Weasel v. Weasel*, 421 So.2d 749, 750 (Fla. 4th DCA 1982).

Reversed and remanded for entry of an order granting appellant alimony pendente lite in such amount as the trial court finds to be reasonable. Whether a further hearing is necessary before such determination is made is a matter for the trial court to decide. (DELL, GUNTHER and FARMER, JJ., concur.)

* * *

Appeals—Prohibition is inappropriate remedy to address erroneous exercise of jurisdiction where there is adequate remedy available by appeal—Circuit court has continuing jurisdiction over custody determinations, which includes visitation orders, until that jurisdiction is relinquished under provisions of Uniform Child Custody Jurisdiction Act

MATTHEW JOSEPH MALISKA, Petitioner, v. VIRGINIA GAY BROOME, Circuit Court Judge for the Fifteenth Judicial Circuit of and for Palm Beach County, Respondent. 4th District. Case No. 92-2787. L.T. Case No. CD-89-7750 FD. Opinion filed December 2, 1992. Petition for writ of prohibition. Patricia K. Allen, West Palm Beach, for petitioner. Rena J. Taylor of Legal Aid Society of Palm Beach County, Inc., West Palm Beach, for Respondent-Madeline Balestrieri.

(PER CURIAM.) The petition for writ of prohibition is denied. The circuit court has continuing jurisdiction over its "custody determinations" which by statutory definition includes visitation orders. *See* Fla. Stat. § 61.1306(2). Therefore, the court had continuing jurisdiction over the father and the minor child until that jurisdiction was relinquished under the provisions of the U.C.C.J.A. *See Yurgel v. Yurgel*, 572 So.2d 1327 (Fla. 1990); *Roby v. Nelson*, 562 So.2d 375 (Fla. 4th DCA 1990). Prohibition is not an appropriate remedy to address an erroneous exercise of jurisdiction where there is a complete and adequate remedy available by appeal. *Bondurant v. Geeker*, 499 So.2d 909 (Fla. 1st DCA 1986); *State ex rel. Dept. of Health and Rehabilitative Services v. Nourse*, 489 So.2d 1214 (Fla. 4th DCA 1986).[1] (DOWNEY, DELL and WARNER, JJ., concur.)

[1]Certiorari might have been available on the grounds that the order granting custody departed from the essential requirements of law, but this petition is untimely being treated as a petition for writ of certiorari. Furthermore, appeals have been filed from the orders of the trial court.

* * *

Criminal law—Jury instruction on flight harmless error

JOHN PRIMM, Appellant, v. STATE OF FLORIDA, Appellee. 4th District. Case No. 91-1964. L.T. Case No. 90-12073 CF10. Opinion filed December 2, 1992. Appeal from the Circuit Court for Broward County; Kathleen A. Kearney, Judge. Richard L. Rosenbaum of Law Offices of Richard L. Rosenbaum, Fort Lauderdale, for appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Douglas J. Glaid, Assistant Attorney General, West Palm Beach, for appellee.

(PER CURIAM.) AFFIRMED. Under the facts of this case, the trial court's instruction on flight constituted harmless error. *See State v. DiGuilio*, 491 So.2d 1129 (Fla. 1986). *See also Young v. State*, 601 So.2d 636 (Fla. 4th DCA 1992).

Affirmed. (GUNTHER, DELL and STONE, JJ., concur.)

* * *

GLISPY v. STATE. 4th District. #92-1241. December 2, 1992. Appeal from the Circuit Court for Indian River County. Affirmed on the authority of *Gladfelter v. State*, 604 So. 2d 929 (Fla. 4th DCA 1992).

STARCHER v. STATE. 4th District. #92-0694. December 2, 1992. Appeal from the Circuit Court for Broward County. Affirmed. *Hodge v. State*, 603 So.2d 1329 (Fla. 4th DCA 1992).

THOMPSON v. STATE. 4th District. #92-0483. December 2, 1992. Appeal from the Circuit Court for Broward County. AFFIRMED. *See Floyd v. State*, 569 So.2d 1227 (Fla. 1990), *cert. denied*, __ U.S. __, 111 S.Ct. 2912, 115 L.Ed.2d 1075 (1991).

STATE v. ROBERSON. 4th District. #91-2722. December 2, 1992. Appeal from the Circuit Court for Broward County. AFFIRMED. *See* rule 3.191(h)(2), Fla. R. Crim. P. (1991).

* * *

Criminal law—Search and seizure—Once defendant's vehicle was legally stopped because his temporary tag was not sufficiently visible for officer to determine whether it had expired, the use of a sniff dog was not an unconstitutional search under the Fourth Amendment—No showing that stop was made or prolonged in order to conduct search—Error to grant motion to suppress cannabis found in plastic bag underneath steering wheel of vehicle after dog alerted to presence of drugs

STATE OF FLORIDA, Appellant, v. TERRENCE BASS, Appellee. 5th District. Case No. 91-2684. Opinion filed December 4, 1992. Appeal from the Circuit Court for Seminole County, Newman D. Brock, Judge. Robert A. Butterworth, Attorney General, Tallahassee, and Myra J. Fried, Assistant Attorney General, Daytona Beach, for Appellant. James B. Gibson, Public Defender, and M. A. Lucas, Assistant Public Defender, Daytona Beach, for Appellee.

(HARRIS, J.) The State appeals the suppression of 24 packages of cannabis and a hundred dollars of United States currency found in a plastic bag underneath the steering wheel of a vehicle being driven by Terrence Bass. We reverse.

Bass was stopped for a traffic check because the temporary tag on his vehicle was not sufficiently visible for the officer to determine whether it had expired. Once Bass was stopped and the officer approached the vehicle, the officer could see that the temporary tag was valid. Nevertheless, he asked to see Bass's driver license and registration. While Bass was looking for his registration, a K-9 officer came to the scene. The dog alerted for the presence of drugs and the subsequent search revealed the cannabis and currency.

Once the defendant was legally stopped, the use of a sniff dog was not an unconstitutional search under the Fourth Amendment. *United States v. Place*, 462 U.S. 696, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983); *State v. Taswell*, 560 So.2d 257 (Fla. 3d DCA 1990). The trial judge suppressed the evidence because in this case there was no traffic violation. We find that immaterial. The trial judge found specifically "Certainly, Officer Fontana appropriately exercised his jurisdiction by stopping the vehicle with a temporary tag which he could not read." We find that once the vehicle was properly stopped, the officer could ask to see the driver's license and registration. There is no evidence that the stop was made or prolonged in order to conduct the search.

REVERSED and REMANDED. (DIAMANTIS, J., concurs. DAUKSCH, J., dissents, without opinion.)

* * *

CERTIFICATE OF SERVICE

I CERTIFY that a true and correct copy of the foregoing has been forwarded by courier to Ms. Marcy K. Allen, Esq., Assistant Public Defender, 421 3rd Street, West Palm Beach, FL 33401, this 26th day of January, 1993.

John Tiedemann

Of Counsel