IN THE SUPREME COURT OF FLORIDA

CASE NO. 81,676
(4th DCA No. 91-1580)

JAMES TISBY,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

****

ON PETITION FOR DISCRETIONARY REVIEW

****

RESPONDENT'S BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

Respondent, the State of Florida, was the Appellee in the Fourth District Court of Appeal and the prosecution in the trial court. The Petitioner was the appellant and the defendant, respectively, in the lower courts. In this brief, the parties will be referred to as they appear before this Honorable Court.

The symbol "PA" will be used to refer to Petitioner's Appendix, which is a conformed copy of the District Court's opinion.

STATEMENT OF THE CASE AND FACTS
(Limited to the issue of Jurisdiction)

The only facts relevant to a determination of this Court's conflict jurisdiction pursuant to Article V, Section 3(b)(3) of the Florida Constitution are those set out in the opinion sought to be reviewed. The State adopts the opinion as issued by the District Court in Tisby v. State, 18 Fla. L. Weekly D514 (Fla. 4th DCA Feb. 17, 1993) as its statement of the case and facts.

The State thus rejects Petitioner's statement of the case and facts, plus those passages in other portions of the jurisdictional brief containing factual assertions, inasmuch as these statements impermissibly stray from the face of this decision. Jenkins v. State, 385 So. 2d 1356, 1359 (Fla. 1980); Reaves v. State, 485 So. 2d 829, 830 n. 3 (Fla. 1986).

SUMMARY OF THE ARGUMENT

The State asserts that the District Court of Appeal did not expressly construe the State or Federal Constitutions, and thus no basis lies for this Court to exercise its discretionary jurisdiction. Further since this Court has not accepted jurisdiction to review Metcalf v. State, 18 Fla. L. Weekly D427 (Fla. 4th DCA Jan. 27, 1993), Metcalf is not currently pending before this Court for review, therefore Petitioner is not entitled to review pursuant to Jollie v. State, 405 So. 2d 418 (Fla. 1981).

REASONS FOR DENYING DISCRETIONARY REVIEW

THE DECISION BELOW DOES NOT EXPRESSLY CONSTRUE THE STATE OR FEDERAL CONSTITUTIONS AND THIS COURT SHOULD DENY PETITIONER'S REQUEST FOR REVIEW.

Petitioner maintains that the Fourth District's decision below involves an interpretation of the Due Process clauses of the Florida and United States Constitutions. Respondent acknowledges that the Metcalf decision relied upon by the Fourth District Court of Appeal to affirm the conviction sub judice makes reference to due process. However, the Fourth District did not in any manner construe the Constitution in the instant case. Thus, this Court should decline to exercise its discretionary jurisdiction.

It is axiomatic that in order to establish this Court's conflict jurisdiction, or to establish jurisdiction on the basis that a district court opinion affects a class of constitutional officers, the basis for the discretionary review must appear on the face of the district court opinion. See, School Board of Pinellas County v. District Court of Appeal, 467 So. 2d 985 (Fla. 1985). This requirement of expression on the face of the opinion extends to constitutional construction as well.

In order to expressly construe a provision of the federal or state constitutions for the purpose of invoking this Court's discretionary jurisdiction under Fla. R. App. P. 9.030(a)(2)(A)(ii), a district court's decision must explicitly "explain, define or otherwise eliminate existing doubts arising

from the language or terms of the constitutional provision." Ogle v. Pepin, 273 So. 2d 391, 393 (Fla. 1973) (quoting Armstrong v. City of Tampa, 106 So. 2d 407, 409 (Fla. 1958). In the case at bar, neither the Florida Constitution nor the United States Constitution was construed within the meaning of the above language. This is particularly true since the District Court's decision below merely relied upon another case in which due process was mentioned, but not construed. Thus, this Court's jurisdiction does not lie.

Petitioner's reliance upon Jollie v. State, 408 So. 2d 418 (Fla. 1981), to establish jurisdiction is misplaced. Pursuant to Jollie, a district court's decision which cites as controlling authority a decision which is **either pending review in or has been reversed by this Court** will constitute prima facie express conflict over which this Court may exercise its discretionary jurisdiction. Id. 405 So. 2d at 420. However, since this Court has not decided whether it will take jurisdiction to review the District Court's Metcalf opinion, Metcalf is only pending "jurisdiction" and is not currently pending "review" in this Court. Until this Court accepts jurisdiction to review Metcalf, the case is not actually "pending" review by this Court, and Jollie does not extend discretionary jurisdiction to the instant case.

Petitioner also alleges jurisdiction exists under Jollie due to the fact that Williams v. State, 593 So. 2d 1064 (Fla. 4th DCA 1992) is pending decision by this Court. However, Williams was not relied upon, or even cited, by the District

Court in the opinion issued in the case at bar. Kelly v. State, 593 So. 2d 1060 (Fla. 4th DCA 1992), does not confer Jollie jurisdiction, because this Court declined to accept jurisdiction to review that decision, see State v. Kelly, 599 So. 2d 1280 (Fla. 1992).[1]

Accordingly, this Court should decline to exercise its discretionary jurisdiction.

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[1] Contrary to Petitioner's allegations that "Kelly was not brought before this Court by the state for review" (Petitioner's brief at page 4) is erroneous. Although the State sought review, this Court declined to accept jurisdiction to review the decision.

CONCLUSION

WHEREFORE, based on the foregoing reasons and authorities cited therein, Respondent respectfully requests that this Honorable Court decline to accept discretionary jurisdiction in the instant case.

Respectfully submitted,

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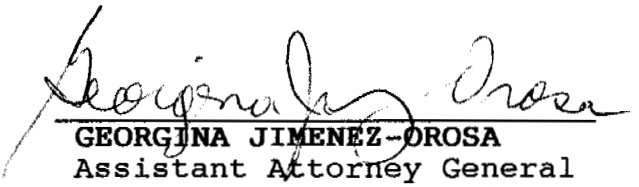

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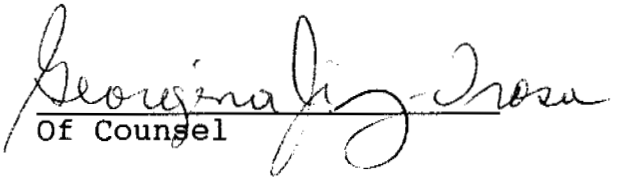
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing "Brief of Respondent on Jurisdiction" has been furnished by courier to: MARGARET GOOD, Assistant Public Defender, Counsel for Petitioner, 6th Floor/Criminal Justice Bldg., 421 Third Street, West Palm Beach, FL 33401 this 24th day of May, 1993.



Of Counsel

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APPENDIX TO

RESPONDENT'S BRIEF ON JURISDICTION

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A. Yes.
Q. Right?
A. Yes, because he'd probably kill me, too. I don't know. He wasn't going to let me—he tells me to leave and then he (inaudible). He says, I'll die. I will kill you before you get out of this door, you know.
Q. Is that why you pushed the knife?
A. Yes, I guess so.
Q. No, I'm having—
A. I don't really know. Yes. I don't know really why I did. You know, just to scare him a little bit I guess, you know. I guess.

The appellant's statements, albeit conflicting, when coupled with evidence of the victim's violent abuse of appellant and his efforts to keep her from leaving, support the requested instruction notwithstanding her acknowledgment that the victim was not pointing the knife at her.

The state argues that the requested defense instruction is inconsistent with the defense counsel's theory expressed in final argument, and appellant's statement to the court at the sentencing hearing, that the killing was accidental. Although these subsequent defense positions may be inconsistent with a self defense theory, they do not constitute a waiver of the erroneous ruling on the requested defense instruction. We note that once the court denied the requested instruction, counsel could not assert a self defense theory of the facts in the final argument, leaving counsel little alternative but to emphasize those other portions of defendant's statements to the police indicating that the killing was accidental.

The court in *Kilgore*, concluding that it was error to deny an instruction on justifiable use of force, said, with appropriate emphasis,

> It is not the *quantum* or the *quality* of the proof as to self-defense that determines the requirement for giving the charge. If *any* evidence of a substantial character is adduced, either upon cross-examination of State witnesses or upon direct examination of the defendant and/or his witnesses, the element of self-defense becomes an issue, and the jury, as the trier of the facts, should be duly charged as to the law thereon, because it is the jury's function to determine that issue.

271 So.2d 148, 152.

In *Mills*, the defendant, convicted of manslaughter by shooting her mother, made similar inconsistent statements. There, the defendant told a friend that she had taken the gun out to scare and stop her mother, who was "badgering" her. But she told the police that the gun went off accidentally when she slipped while practicing self defense techniques with the victim. The defendant later testified both that she had told her friend that her mother was "battering" not "badgering" her, and that the gun fired accidentally when her mother had grabbed her arm and hit her in the nose while she was showing her mother how to fire it. The court concluded:

> The state contends that an instruction on self defense would have been inappropriate because defendant's testimony was inconsistent with such a defense. *Pimentel v. State*, 442 So.2d 228 (Fla. 3d DCA 1983). However, " 'inconsistencies in defenses in criminal cases are allowable so long as the proof of one does not necessarily disprove the other.' " *Mellins v. State*, 395 So.2d 1207, 1210 (Fla. 4th DCA 1981) (quoting *Stripling v. State*, 349 So.2d 187, 191 (Fla. 3d DCA 1977), *cert. denied*, 359 So.2d 1220 (Fla. 1978)). In the present case, proof that the shooting was accidental, as Mills maintains, does not disprove that Mills was acting in her own self defense. Therefore, the trial court should have instructed the jury on self defense.

As for the other issue raised, concerning the sufficiency of the evidence to establish the corpus delicti, we find no error.

The judgment and sentence are reversed and the cause remanded for a new trial. (OWEN, WILLIAM C., JR., Senior Judge and BRESCHER, GEORGE A., Associate Judge, concur.)

* * *

Criminal law—Attempted purchase of cocaine within 1000 feet of school—In case of attempted purchase, fact that crack cocaine which defendant attempted to purchase in reverse sting operation had been manufactured by law enforcement agency is not relevant or material to issue of whether defendant's due process rights have been violated

JAMES TISBY, Appellant, v. STATE OF FLORIDA, Appellee. 4th District. Case No. 91-1580. L.T. Case No. 90-18156 CF10. Opinion filed February 17, 1993. Appeal from the Circuit Court for Broward County; Charles M. Greene, Judge. Richard L. Jorandby, Public Defender, and Margaret Good, Assistant Public Defender, West Palm Beach, for appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Michelle Smith, Assistant Attorney General, West Palm Beach, for appellee.

(HERSEY, J.) James Tisby appeals his conviction for attempted purchase of cocaine within 1000 feet of a school. The evidence indicates that the drugs used in the reverse sting operation which ensnared Tisby were a form of crack cocaine that had been converted from cocaine powder by the Broward County Sheriff's Department. Tisby seeks reversal on the authority of *Kelly v. State*, 593 So. 2d 1060 (Fla. 4th DCA), *rev. denied*, 599 So. 2d 1280 (Fla. 1992), and *Grissett v. State*, 594 So. 2d 321 (Fla. 4th DCA), *dismissed*, 599 So. 2d 1280 (Fla. 1992).

In *Kelly* we determined that law enforcement personnel were not statutorily authorized to "manufacture" drugs to be used in a reverse sting operation. 593 So. 2d at 1062. We characterized the process of doing so as "illegal." *Id.*

The subsequent case of *Metcalf v. State*, No. 92-0885, slip op. at 3 (Fla. 4th DCA Jan. 27, 1993) [18 F.L.W. D427], involved a conviction for solicitation to deliver cocaine. We distinguished *Kelly* and affirmed the conviction, explaining inter alia:

> It is irrelevant that the transaction ultimately resulted in an unlawful transfer of a drug. We note by analogy that the supreme court has recognized that outrageous police misconduct constituting a due process violation ensnaring one defendant, does not entitle a codefendant, who had no direct contact with the police informant involved, to a discharge as well. *State v. Hunter*, 586 So. 2d 319 (Fla. 1991). It has also been determined with respect to charges involving attempts, that where a substance is not itself an essential element of the crime, it does not matter whether the substance used is introduced, or is even real. *See Tibbetts v. State*, 583 So. 2d 809 (Fla. 4th DCA 1991). *See also Louissaint v. State*, 576 So. 2d 316 (Fla. 5th DCA 1990); *State v. Cohen*, 409 So. 2d 64 (Fla. 1st DCA 1982.)

As in *Metcalf* we conclude that the nature and source of the substance attempted to be purchased is not relevant or material to the issue of whether appellant's due process rights have been violated.

AFFIRMED. (DELL, J., concurs. LETTS, J., dissents without opinion.)

* * *

Torts—Negligence—Action against parents of teenage son who sexually abused plaintiffs' minor child while child was in defendants' care—Rule requiring that plaintiffs show that parents either knew or should have known of their son's propensity to commit act complained of does not apply when son is in position of a servant or agent of his parents—Plaintiffs' affidavit in opposition to summary judgment, stating that defendants' son was acting as agent or servant of defendants when he abused plaintiffs' child precluded summary judgment in favor of defendants on claim that they failed to protect plaintiffs' child from son's alleged propensities for sexual abuse of small children

ROBERT GRANT and KIM GRANT, Appellants, v. CHARLES WHITCHURCH and DALE WHITCHURCH, Appellees. 4th District. Case No. 92-3254. L.T. Case No. CL91-3144 AC. Opinion filed February 17, 1993. Appeal from the Circuit Court for Palm Beach County, James T. Carlisle, Judge. Jack Edward Orsley of Law Offices Orsley & Cripps, P.A., West Palm Beach, for appellants. Daniel M. Bachi and Bard Rockenbach of Sellars, Supran, Cole, Marion & Espy, P.A., West Palm Beach, for appellees.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing "Appendix to Respondent's Brief on Jurisdiction" has been furnished by courier to: MARGARET GOOD, Assistant Public Defender, Counsel for Petitioner, 6th Floor/Criminal Justice Bldg., 421 Third Street, West Palm Beach, FL 33401 this 24th day of May, 1993.

Georgina Jiménez-Orosa

Of Counsel