

IN THE SUPREME COURT OF FLORIDA

CASE NO. 82,220

DCA NO. 92-1242

THE STATE OF FLORIDA,

Petitioner,

-vs-

CALVIN LEE,

Respondent.

FILED

SID J. WHITE

SEP. 18 1993

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

ON APPLICATION FOR DISCRETIONARY REVIEW

RESPONDENT'S BRIEF ON JURISDICTION

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CASE NO. 82,220

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THE STATE OF FLORIDA,

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-vs-

CALVIN LEE,

Respondent.

ON APPLICATION FOR DISCRETIONARY REVIEW

INTRODUCTION

Petitioner, the State of Florida, was the prosecution in the trial court and the appellee in the Third District Court of Appeal; the Respondent, Calvin Lee, was the defendant in the trial court and the appellant in the Third District Court of Appeal. The parties are referred to in this brief as Petitioner and Respondent. References to the appendix to this brief are marked "A."

STATEMENT OF THE CASE AND FACTS

For the limited purposes of this jurisdictional brief, Respondent accepts Petitioner's statement of the case and facts as set forth in its brief as a substantially accurate account of the proceedings in the Third District Court of Appeal.

QUESTION PRESENTED

WHETHER THE DECISION OF THE DISTRICT COURT OF APPEAL BELOW, ON ITS FACE, DIRECTLY AND EXPRESSLY CONFLICTS WITH *STATE V. NIEMCOW*, 505 So. 2d 670 (Fla. 5th DCA 1987) AND *STATE V. MAILLIS*, 495 So. 2d 817 (Fla. 2d DCA 1986)?

SUMMARY OF ARGUMENT

The decision of the district court below, on its face, directly and expressly conflicts with the decisions of the Second and Fifth District Courts of Appeal cited by the Petitioner.

ARGUMENT

THE DECISION OF THE DISTRICT COURT OF APPEAL BELOW APPEARS ON ITS FACE TO BE IN DIRECT CONFLICT WITH *STATE V. NIEMCOW*, 505 So. 2d 670 (Fla. 5th DCA 1987) AND *STATE V. MAILLIS*, 495 So. 2d 817 (Fla. 2d DCA 1986).


Respondent acknowledges that, on the face of the opinion below, there is express and direct conflict with the decisions of the Fifth and Second District Courts of Appeal in *State v. Niemcow*, 505 So. 2d 670 (Fla. 5th DCA 1987), and *State v. Maillis*, 495 So. 2d 817 (Fla. 2d DCA 1986), respectively.

CONCLUSION

Respondent admits that, on the face of the decision of the Third District Court of Appeal below, there is express and direct conflict with the decisions cited by Petitioner in its Brief on Jurisdiction.


Respectfully submitted,

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BY: 
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail to Assistant Attorney General Mark Rosenblatt, Office of the Attorney General, Criminal Division, Post Office Box 013241, Miami, Florida 33128, this 8th day of September, 1993.



JULIE M. LEVITT
Special Assistant Public Defender

IN THE SUPREME COURT OF FLORIDA

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THE STATE OF FLORIDA,

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

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT
JANUARY TERM, 1993

CALVIN LEE,	**
Appellant,	**
vs.	** CASE NO. 92-1242
THE STATE OF FLORIDA,	**
Appellee.	**

Opinion filed May 25, 1993.

An Appeal from the Circuit Court of Monroe County, Richard Payne, Judge.

Bennett H. Brummer, Public Defender and Julie M. Levitt, Special Assistant Public Defender, for appellant.

Robert A. Butterworth, Attorney General and Mark Rosenblatt, Assistant Attorney General, for appellee.

Before BARKDULL, NESBITT and GODERICH, JJ.

PER CURIAM.

The defendant, Calvin Lee, appeals his conviction and sentence for conspiracy to traffic in cocaine and trafficking in cocaine. We affirm, in part, and reverse and remand, in part.

We must agree with the defendant and the state that the judgment incorrectly reflects the conviction for conspiracy to traffic as a first degree felony. A conspiracy to traffic in cocaine is a second degree felony because the underlying offense, trafficking in cocaine in an amount between 28 and 200 grams, is a first degree felony. §§777.04(4)(b), 893.135(1)(b)1a, Fla. Stats. (1991). Accordingly, we reverse the conviction and remand the judgment to the trial court, to be corrected to reflect the conviction for conspiracy to traffic as a second degree felony. See Watson v. State, 426 So. 2d 1300 (Fla. 2d DCA 1983).

As for the remaining points raised by the defendant in this appeal, we find that they lack merit.