IN THE SUPREME COURT OF THE STATE OF FLORIDA

FILED
SID J. WHITE
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CASE NO. 86,956

STATE OF FLORIDA,

Petitioner,

vs.

ROBERT LEE DOZIER,

Respondent.

PETITIONER'S BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

Respondent was the defendant and Petitioner was the prosecution in the Criminal Division of the Circuit Court of the Nineteenth Judicial Circuit, in and for Indian River County, Florida. Respondent was the appellant, and Petitioner was the appellee in the Fourth District Court of Appeal. In this brief, the parties will be referred to as the Respondent or the Defendant and the Petitioner or the State. The symbol "A" denotes the appendix hereto attached.

STATEMENT OF THE CASE AND FACTS

The State relies on the facts set out in the opinion of the Fourth District Court of Appeal (A. 1-4).

SUMMARY OF THE ARGUMENT

This Court should accept jurisdiction to review the instant case because the opinion of the Fourth District Court of Appeal cites as controlling authority a decision that is pending review in this court.

ARGUMENT

THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL IN THE INSTANT CASE CITES AS CONTROLLING AUTHORITY A CASE THAT IS PENDING REVIEW IN THIS COURT.

In Jollie v. State, 405 So. 2d 418, 420 (Fla. 1981), this court held that a district court opinion which cites as controlling authority a decision that is pending review constitutes "prima facie express conflict and allows this Court to exercise its jurisdiction." In the instant opinion by the Fourth District Court of Appeal, the district court referenced its decision in Dozier v. Wild, 659 So. 2d 1103 (Fla. 4th DCA 1995), stating that it had concluded therein that it was unconstitutional for a county court judge to be repeatedly assigned to hear criminal cases over which a circuit judge has jurisdiction (A. 1). The Fourth District expressly stated that the earlier Dozier case "is indistinguishable on the constitutional issue" from the conviction in this case (A. 1). Accordingly, it reversed the convictions in this case (A. 1).

However, the Fourth District said that it was "mindful" that this court might disagree with its holding on the constitutional issue, so it proceeded to consider the other claims raised on appeal by Respondent. In so doing, the Fourth District obviously recognized that this court is presently considering the

constitutional issue, and that this court's decision might bear on the instant case. Indeed, this court accepted jurisdiction in the case on which the Fourth District relied, The Honorable Joe A. Wild v. Dozier, Case No. 85, 050 (OA held April 3, 1995).

The State submits that this court's ultimate decision in that case **should** bear on this case, for it is the controlling issue in this case.[1] Thus, this court should accept jurisdiction in this case so to afford consistent rulings in the two Dozier cases. After all, the Fourth District, and apparently this court, thought that the issue in the Dozier case presently pending before this court is one of great public importance (A. 1). In keeping with the Jollie reasoning, then, the Fourth District's reliance on that Dozier opinion in this case amounts to "prima facie" great public importance.

[1] The Fourth District did not believe that any of Respondent's other issues on appeal warranted reversal (A. 2-4).

CONCLUSION

Based on the foregoing argument and citation of authority, the State respectfully requests that this court accept jurisdiction in this case, as it has in The Honorable Joe A. Wild v. Dozier, Case No. 85,050, and rule on the merits in accordance with that Dozier case.

Respectfully submitted,

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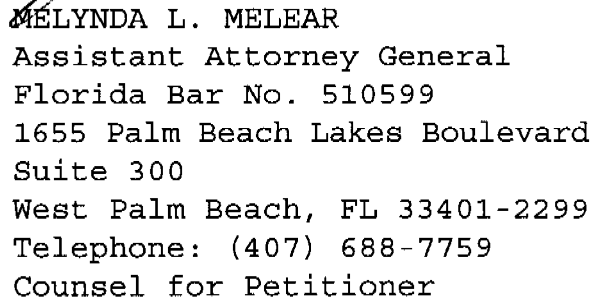

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Brief on Jurisdiction has been furnished by courier to ELLEN MORRIS, Assistant Public Defender, Criminal Justice Building/6th Floor, 421 3rd Street, West Palm Beach, Florida 33401, on this 27th day of November, 1995.

Of Counsel

4-141166

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT JULY TERM 1995

ROBERT LEE DOZIER, Appellant,	
v.	CASE NO. 94-2178
STATE OF FLORIDA, Appellee.	L.T. CASE NO. 94-234-CF

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

Opinion filed November 1, 1995

Appeal from the Circuit Court for Indian River County; Joe A. Wild, Judge.

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Richard L. Jorandby, Public Defender, and Ellen Morris, Assistant Public Defender, West Palm Beach, for appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Melynda L. Melear, Assistant Attorney General, West Palm Beach, for appellee.

KLEIN, J.

In another appeal involving a different conviction of this very same defendant, we reversed his conviction on the ground that it was unconstitutional for a county judge to be repeatedly assigned to hear criminal cases over which only a circuit judge has jurisdiction, and we certified the issue as one of great public importance. Dozier v. Wild, 659 So. 2d 1103 (Fla. 4th DCA 1995). Because Dozier's conviction in this case is indistinguishable on the constitutional issue, his motion to disqualify Judge Wild should have been granted. We therefore reverse his conviction, but

since we are mindful that our supreme court may disagree, we address Dozier's other arguments.

Dozier was convicted of burglary of a structure and petit theft for stealing a weedeater from a trailer. He argues that his conviction for burglary of a structure should be reversed because the trailer from which he took the weedeater was not a "structure" within the meaning of the burglary statute, but rather a trailer. He thus argues that since the information charged him with burglary of a structure, and the proof was for a different offense, burglary of a trailer, the conviction cannot stand.

Chapter 810, involving burglary, provides in 810.011, Florida Statutes (1993):

> (1) "Structure" means a building of any kind, either temporary or permanent, which has a roof over it, together with the curtilage thereof....
>
> ***
>
> (3) "Conveyance" means any motor vehicle, ship, vessel, railroad car, <u>trailer</u>, aircraft, or sleeping car. (Emphasis added.)

The victim in this case was the owner of a landscaping business who kept his equipment in a large, fully-enclosed trailer with swinging doors on the back, which was attached to a truck. The burglary occurred when the truck and trailer were parked in front of a residence where the victim's employee was doing yard maintenance.

During deliberations the jury sent out the question, "Is a mobile shed a structure?" The trial judge indicated he would

give the standard instruction again and add that the jurors should apply the common every day definition of a building. The defense then objected. The state then asked the court to re-read the standard instruction defining burglary of a structure. Thereafter the foreperson asked, "Is there a definition that is more encompassing than what Your Honor gave?" The court then gave the following instruction:

> Structure means any building of any kind, either temporary of permanent, that has a roof over it, and the enclosed space of ground and outbuildings immediately surrounding that structure. The other words in that definition, such as building which it says, structure means any building, should be taken in the normal every day common sense meaning of that term. In other words, there's no special legal definition for building, so you should take building to mean what is normally associated with the term in your every day life.

In regard to a variance between the charge and the proof, the court stated in Grissom v. State, 405 So. 2d 291, 292 (Fla. 1st DCA 1981):

> Of course, the proof at trial must substantially conform to the allegations of the charging document, in order that the defendant not be misled and thereby prejudiced, and to insure against reprosecution for the same offense. However, where a variance between the allegations and proof is not such as to have misled the defendant or subject him to a substantial possibility of reprosecution for the same offense, the variance is immaterial and does not preclude conviction. (Citations omitted.)

We conclude that there was not such a variance here as could have misled defendant or subjected him to reprosecution. *See also* *Barber v. State*, 243 So. 2d 2 (Fla. 2d DCA 1971) (Information charged breaking and entering a building in the 600 block of 10th Street when the building was actually in the 700 block.)

As to the additional instruction which the court gave about the structure, we are unpersuaded by defendant that it is reversible error. While it may have been better for the trial court to have adhered to the standard instructions under these circumstances, it was no more prejudicial to defendant than the discrepancy between the information and the proof.

Reversed.

STONE, J., and OWEN, WILLIAM C., JR., Senior Judge, concur.