IN THE SUPREME COURT OF THE STATE OF FLORIDA

GEORGE TAPLIS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 89,721
5TH DCA Nd: 96-2467

ON DISCRETIONARY REVIEW OF THE
DISTRICT COURT OF APPEAL,
FIFTH DISTRICT

JURISDICTIONAL BRIEF OF RESPONDENT

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SUMMARY OF ARGUMENT

This Court should decline to accept jurisdiction in the instant case. Petitioner's appropriate remedy is to raise this issue, if he is eventually convicted, on direct appeal. Additionally, on the face of the decision under review, there is no express and direct conflict with any decision of this Court or any other district court of appeal. This court is limited to the facts contained within the four corners of the decision in determining whether an express and direct conflict exists.

ARGUMENT

PETITIONER HAS A REMEDY ON DIRECT APPEAL. ON THE FACE OF THE DECISION IN STATE V. TAPLIS, INFRA, THERE IS NO EXPRESS AND DIRECT CONFLICT AND THIS COURT SHOULD DECLINE TO ACCEPT JURISDICTION.

This Court lacks jurisdiction to entertain the instant appeal. The decision of the Fifth District Court of Appeal in State v. Taplis, 21 Fla. L. Weekly D2450 (Fla. 5th DCA November 15, 1996), is a decision which grants the state's petition for certiorari and quashes the non-final order of the trial court barring the admission of certain evidence at trial. This Court has held that certiorari review of a trial court's non-final order may not ordinarily be had because the party has available to it an eventual plenary appeal of the final judgment. Fieselman v. State, 566 So. 2d 768, 770 (Fla. 1990).

In the instant case, Petitioner can challenge his conviction, and the issue of the degree of level of probable tampering needed to exclude the admission of evidence, on direct appeal of the final judgment. Moreover, this appeal would become moot if Petitioner is acquitted at trial. Martin-Johnson v. Savage, 509 So. 2d 1097, 1100 (Fla. 1987).

Petitioner, however, seeks discretionary review with this

honorable Court under Article V, Section 3(b)(3) of the Florida Constitution. See also Fla. R. App. P. 9.030(a)(2)(A)(iv). Article V, Section 3(b)(3) provides that the Florida Supreme Court may review a district court of appeal decision only if it "expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law." In Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986) this Court explained:

> Conflict between decisions must be express and direct, i.e., it must appear within the four corners of the majority decision. Neither a dissenting opinion nor the record itself can be used to establish jurisdiction.

In the same opinion this Court further stated:

> This case illustrates a common error made in preparing jurisdictional briefs based on alleged decisional conflict. The only facts relevant to our decision to accept or reject such petitions are those facts contained within the four corners of the decisions allegedly in conflict. As we explained in the text above, we are not permitted to base our conflict jurisdiction on a review of the record or on facts recited only in dissenting opinions. Thus, it is pointless and misleading to include a comprehensive recitation of facts not appearing in the decision below, with citations to the record, as

> petitioner provided here. Similarly, voluminous appendices are normally not relevant.

Reaves, 485 So. 2d at 830, n.3. Finally, this Court has held that inherent or so-called "implied" conflict may not serve as a basis for this Court's jurisdiction. DHRS v. National Adoption Counselins Service, Inc., 498 So. 2d 888, 889 (Fla. 1986).

Petitioner asserts that the decision of the Fifth District Court of Appeal in the instant case conflicts with several cases. It is the Respondent's position that each of the cases cited by Petitioner utilizes the same legal standard. This is the **same** standard that was used by the Fifth District Court of Appeal in deciding this case below; namely, that relevant physical evidence can be admitted unless there is some indication of probable tampering. Peek v. State, 395 so. 2d 492, 495 (Fla. 1980); Dodd v. State, 537 So. 2d 626, 627 (Fla. 3d DCA 1988); Beck v. State, 405 so. 2d 1365, 1367 (Fla. 4th DCA 1981).

Petitioner may not go behind the reasoning of the courts and cite what he believes the cases "suggest" in order to establish conflict. (Petitioner's Jurisdictional Brief p. 6, 8). Although each of the cases is factually distinct, all of the decisions, including the Fifth District's, use the same legal standard. This does not constitute a conflict.

Based on the decision in Taplis, supra, there is no express and direct conflict with the cases relied upon by petitioner. There is nothing on the face of the Fifth District's decision to demonstrate a conflict with any other decision. This Court therefore lacks jurisdiction to review this case.

CONCLUSION

Based on the arguments and authorities presented herein, respondent respectfully requests this honorable Court decline to accept jurisdiction in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Jurisdictional Brief of Respondent has been furnished by U.S. mail to Michael W. Woodward, Keyser & Woodward, Post Office Box 92, Interlachen, Florida, 32148, 6th day of February, 1997.

Ann M. Childs
Of Counsel

statement of general applicability interpreting or prescribing law or policy, which the Division is required under section 120.535 to establish through proper rulemaking procedures. See *Christo v. Florida Dep't of Banking and Finance, 649 So.* 2d 3 18 (Fla. 1st DCA), *review dismissed mem., 660 So.* 2d 712 (Fla. 1995).

Appellants assert that FMHA did not have standing to raise this issue because the alleged non-rule policies have yet to bc applied to anyone, But one may have standing whose 'substantial interests are affected' by the lack of a rule. See *Cortese v. School Bd. of Palm Beach County, 425 So.* 2d 554, 556 n.4 (Fla. 4th DCA 1982). *review denied mem., 436 So.* 2d 98 (Fla. 1983). We conclude that the uncertainty engendered by the Division's non-rule policy substantially affects the interests of mobile home park owners such that they have standing. See *Ward v. Bd. of Trustees of the Internal Improvement Trust Fund,* 651 So. 2d 1236 (Fla. 4th DCA 1995). FMHA has standing to raise this challenge because the prospectus is such a fundamental element of the mobile home park business that the absence of a procedure to obtain approval of amendments to the prospectus, and the confusion regarding the effective term of the prospectus, has direct impact on the business decisions and affects the substantial interests of FMHA's members. *See Televisual Communications, Inc. v. Florida Dep't of Labor & Employment Sec.,* 667 *So.* 2d 372 (Fla. 1 st DCA *1995); Florida Dep 't of Professional Regulation v. Sherman College of Straight Chiropractic,* 20 Fla. L. Weekly D2534 (Fla. 1st DCA November 16, 1995). As this court explained in *Village Park,* 506 So. 2d at 429, the Division is charged with the responsibility of approving the prospectus. The mobile home park owner is statutorily obligated to provide tenants with an "approved" prospectus, and cannot enter into a binding rental agreement until after providing the prospective tenant with an "approved" prospectus. See §§ 723.011(1)(a), 723.014(1). Therefore, the mobile home park owners have demonstrated the requisite injury-in-fact attributable to the elimination of the process for approval of amended prospectuses. The record contains support for the conclusion that the abrogation of such review procedures without substituting alternative procedures implements non-rule policy that there will no longer be any process for review and approval of amendments, in violation of section 120.535.

The repeal of this rule also has the effect of instituting a second non-rule policy that a prospectus is valid for some undetermined period of time longer than the rental agreement. Although the Division argues that there is no such policy, there is ample record evidence to support the hearing officer's finding that such a policy exists. For example, Bureau Chief Norred testified that the statute and the case law did not establish the longevity of the prospectus, that the rule did, and that the reason the agency wanted to repeal the rule was because the definition of "tenancy" in *Herrick* had given a meaning to the rule contrary to *the policy of the agency.*

The Division failed to prove that rulemaking is impractical, and the hearing officer expressly held that there was "no credible evidence" of a good faith attempt to expeditiously use the rulemaking procedure to address these policies. The Division failed to carry its burden of establishing a valid defense under section 120.535. *See Christo v. Florida Dep 't of Banking & Finance, 649 So.* 2d 318 (Fla. 1st DCA), *review dismissed mem., 660 So.* 2d 712 (Fla. 1995).

Accordingly, we hold that the present rule repeal is invalid because the elimination of an amendment process has the effect of vesting unbridled discretion in the Division over the manner of performance of a statutorily mandated obligation to approve prospectuses, in violation of section 120.54(4). The repeal also has the effect of implementing non-rule policy governing the term Of a prospectus and concerning the lack of responsibility of the Division to approve amendments to prospcctuscs, in contravention of section 120.535. We therefore AFFIRM the order invalidating the repeal of Rule 61B-31.001(5), Florida Administrative Code. (BARFIELD, C.J., and KAHN, J., CONCUR.)

'There is no merit to the claim that this rule repeal is invalid under section 120.56 on the theory that the non-rule policy of the agency enlarges. modifies, or contravenes the specific provisions of law the rule was intended to implement. *In Christo v. Florida Dep't of Banking and Finance. 649 So.* 2d 318 (Fla. 1st DCA), *review dismissed mem.,* 660 So, 2d 712 (Fla. 1995). the appellant bad asserted that unpromulgated agency rules were invalid under both sections 120.535 and 120.56. The hearing officer held that there was no violation of section 120.56 "because the manuals did not enlarge. modify or contravene the specific provisions of law they were intended to implement." *Id.* at *319. However,* this court held that "the Legislature, in enacting section 120.535. intended section 120.535 to be used as the exclusive method to challenge an agency's failure to adopt agency statements of general applicability as rules." *Id.* at 321. Thus, the decision affirmed the ruling that the appellant had stated no claim under section 120.56, but rejected the reasoning of the hearing officer in that case.

* * *

Administrative law-Hearing officer's determination that Orlando-orange County Expressway Authority was agency subject to Administrative Procedure Act at time it notified construction company of intent to consider disqualification of company on bidding on contracts is affirmed

ORLANDO-ORANGE COUNTY EXPRESSWAY AUTHORITY. Appellant. v. HUBBARD CONSTRUCTION CO., Appellee. 5th District. Case No. 95-3081. Opinion filed November 15, 1996. An Administrative Appeal from the Division of Administrative Hearings, Counsel: Michael P. McMahon and William C. Turner. of Akerman, Senterfitt & Eidson, P.A.. Orlando, for Appellant. F. Alan Cummings, W. Robert Vezina, III and Mary M. Piccard of Cummings, Lawrence & Vezina. P.A., Tallahassee, for Appellee.

ON MOTION FOR REHEARING, CLARIFICATION OR CORRECTION
[Original Opinion at 21 Fla. L. Weekly D1942c]

(SHARP, W., J.) We grant Orlando-Orange County Expressway's motion for rehearing, clarification and correction, and correct the opinion to the following extent: On pages 2-3, the underlined portions are subsituted, and the opinion shall now state:

> Since then, the statute was amended effective October 1, 1996, to define "agency" as excluding "an expressway authority pursuant to chapter *348,* or any legal or administrative entity created by an interlocal agreement pursuant to section 163.01(7) unless any party to such agreement is otherwise an agency as defined in this subsection or an expressway authority pursuant to chapter *348.*

Hubbard's request for attorneys' fees under section 57.105 is denied because there was not a complete absence of justiciable issues raised. *T.I.E. Communications, Inc. v. Toyota Motors Center, Inc.,* 391 So. 2d 697, 698, n. 3 (Fla. 3d DCA 1981). (GRIFFIN and THOMPSON, JJ., concur.)

* * *

Criminal law-Burning to defraud insurer-Evidence-Party seeking to exclude physical evidence because of gap in chain of custody must show probability, as opposed to mere possibility, tbat tampering occurred-Evidcncc that vehicle which was almost completely destroyed by fire was left at scene of fire for three days, towed along highway to secure lot, and then towed again to another secure lot where insurer's fire investigators examined vehicle, took samples of fire debris, and sent samples to private lab for analysis did not establish probability of tampering sufficient to support exclusion of samples taken from burned vehicle

STATE OF FLORIDA, Petitioner, v. GEORGE TAPLIS. Respondent. 5th District. Case No. 96-2467. Opinion filed November 15, 1996. Petition for Certiorari Review of Order From the Circuit Court for Putnam County, Stephen L. Boyles, Judge. Counsel: Steve Alexander, State Attorney. and Gary L. Wood, Assistant State Attorney, Palatka, Petitioner. Michael W. Woodward of Keyser & Woodward. P.A., Interlachen, for Respondent.

(HARRIS, J.) The primary issue in this case is whether one must show a probability (as opposed to a mere possibility) of

tampering in order to exclude relevant physical evidence when there is a gap in the chain of custody. If so, a subsidiary issue remains as to whether the facts of this case reveal evidence of a probability of tampering. We hold that the burden of one attempting to bar otherwise relevant evidence is to show a likelihood of tampering (probability) and that the evidence in this case does not meet that test. We therefore grant certiorari and quash the trial court's order that bars the introduction of samples taken from the burned vehicle.

George Taplis had been driving his wife's vehicle when it was reported that the vehicle was on fire. When the Putnam County officials responded to the scene, the vehicle was almost completely destroyed by fire. A member of the Fire Service pried open the trunk to extinguish the fire. When the owner had failed to have the car removed from the street within three days, the County had the vehicle towed to the Palatka Auto Body lot, After paying the insurance claim and after obtaining the consent of the owner (Taplis' wife), the insurance company had the vehicle towed to a secure lot in Orlando. Fire investigators from Tampa were then employed to examine the vehicle in order to determine the cause of the fire. Photographs were taken and samples of fire debris were taken from inside the passenger compartment. These samples were sent to a private lab for analysis. As a result of these tests, Taplis was charged with burning to defraud an insurer.

Taplis moved to prevent the introduction of the evidence taken from the examination of the vehicle on the basis that the vehicle had not been properly preserved and therefore the results of the examination "may well be" the product of contamination or tampering; further, that by failing to properly preserve the vehicle, exculpatory evidence important to the defense may have been lost. The trial court, after taking testimony, granted the motion, stating:

> Based on these findings, this Court concludes that there was an insufficient (if any) chain of custody to preserve the condition and integrity of the swath and belt for evidentiary purposes. The risk of contamination/tampering (intentional or unintentional) renders the admission an intolerable risk of prejudice.

It is evident from the above, and from other statements in the record, that the trial court was of the opinion that the mere possibility of contamination or tampering was sufficient to bar the introduction of the evidence. This belief may have been based on dictum in ***Dodd v. State, 537 So.*** 2d 626, 627-628 (Fla. 3d DCA 1988), in which the court stated: "Notwithstanding the testimony on redirect, a mere reasonable possibility of tampering is sufficient to require proof of the chain of custody." We believe that this statement is dictum because under the facts of ***Dodd,*** there was a ***probability*** of either mistake or tampering. In ***Dodd,*** the issue was the quantity of cocaine. A container and its contents weighing a combined 3 17.5 grams went to the lab where a contraband scale registered a combined weight of only 249.5 grams. ***The Dodd*** court observed that the "gross discrepancies" in the weight indicated "probable tampering." ***Id,*** at 628. We do not have that situation before us.

It is true that the vehicle was left unattended at the scene of the fire for three days. It was then towed to a secure lot and later towed to another secure lot. It is also true, even in these secure lots, that the public had access to the vehicle at least during business hours. But there is no indication in the record that tampering "probably" happened. The Fire Service officer who assisted in putting out the fire, two deputy sheriffs, employees of the secure lots, and the fire investigator all testified at the hearing on the motion and their testimony suggests that no material changes occurred to the vehicle prior to obtaining the samples.

Taplis urges that the fact that water was sprayed on the vehicle, that the vehicle had been twice towed along the highway, and that the interior had been exposed to the weather for some time are themselves sufficient to create a probability of contamination. Under the facts of this case, we think not. The fire investigator testified that the heat of the ignited gasoline in the passenger compartment caused the top of the carpet to melt which scaled unburned gasoline in the padding underneath. It is difficult to conceive how the movement of the vehicle or the vehicle's exposure to the elements could affect the analysis of the padding. And even if gasoline were somehow brought into the passenger compartment by the water used to extinguish the fire, how it got under the sealed carpet is unexplained.

While the weight that the jury should give this evidence because of the matters raised by defense is certainly subject to argument, the evidence should not be ruled inadmissable merely because there is a possibility that tampering might have occurred, *See* ***Peek*** *v. State,* 395 So. 2d 492 (Fla. 1980), *cert.* ***denied, 451*** U.S. 964, 101 S.Ct. 2036, 68 L.Ed.2d 342 (1931).

Certiorari granted and order granting the second motion in limine is quashed. (COBB and GRIFFIN, JJ., concur.)

* * *

Criminal law-Sentencing--Probation revocation-where defendant received sentence of imprisonment on one offense followed by term of probation on second offense, defendant is entitled to credit for time served on first offense on sentence imposed following revocation of probation-Issue is cognizable as rule 3.800(a) motion to correct illegal sentence

ROBERT J. WHITFIELD, JR., Appellant. v. STATE OF FLORIDA, Appellee. 5th District. Case No. 96-1998. Opinion filed November 15, 1996. Appeal from the Circuit Court for St. Johns County, Robert K. Mathis, Judge. Counsel: Robert J. Whitfield, Jr., Crestview. pro se. Robert A. Butterworth. Attorney General, Tallahassee, and Wesley Heidt, Assistant Attomcy General, Daytona Beach, for Appellee.

(DAUKSCH, J.) Appellant, Robert Whitfield, timely appeals the trial court's order denying his petition for writ of ***habeas corpus.***

Appellant was sentenced to a twelve-year term of imprisonment for the offenses of principal to sexual battery, uttering a false or forged instrument and two counts of forgery. The sentence was to be followed by ten years probation for the separate offense of dealing in stolen property. Following appellant's violation of probation, the trial court adjudicated him guilty of the underlying offense and sentenced him to serve five years imprisonment with credit for 166 days. Appellant filed a petition for writ of ***habeas corpus*** in which he alleged that he was entitled to immediate release based upon the trial court's failure to credit him with the twelve years previously served for the offenses of principal to sexual battery, uttering a false or forged instrument and two counts of forgery. The trial court denied appellant's petition.

Relying upon ***Tripp v. State, 622 So.*** 2d 941 (Fla. 1993), appellant correctly contends on appeal that upon his violation of probation he was entitled to credit for the twelve years previously served on the first case for which he was sentenced. ***In Tripp,*** the supreme court held that the trial court's imposition of a term of probation on one offense, consecutive to a sentence of incarceration on another offense, entitles a defendant to credit for time served on the first offense on the sentence imposed following a revocation of probation on the second offense. See *also* Cook *v. State*, 645 So. 2d 436 (Fla. 1994). Appellant also correctly contends that his argument is cognizable as a 3.800(a) motion to correct illegal sentence because an illegal sentence can be corrected at any time, See ***Dock*** v. State, 671 So. 2d 297 (Fla. 5th DCA 1996). Accordingly, the order appealed is reversed and the cause remanded to the trial court with directions to credit appellant for all time previously served in the first case. ***See Tripp; Dock.*** If he is entitled to release then that should be done.

REVERSED and REMANDED. (COBB and HARRIS, JJ., concur.)

* * *