IN THE SUPREME COURT OF FLORIDA

HONORABLE WARREN BURK,
Circuit Court Judge,

Petitioner,

v.

SHALONDA WASHINGTON,

Respondent.

Case Number 89, 829

ON NOTICE TO INVOKE DISCRETIONARY REVIEW
OF A DECISION OF THE FIFTH DISTRICT COURT OF APPEAL

RESPONDENT'S BRIEF ON JURISDICTION

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SUMMARY OF ARGUMENT

The decision of the district court of appeal in the instant case does not conflict with Mann v. State, 476 So.2d 1369 (Fla. 2d DCA 1985). In Mann, the court concluded that the speedy trial rule does not apply to direct criminal contempt proceedings. The instant case, Washington v. Burk, 22 Fla. L. Weekly D 120 (Fla. 5th DCA, January 3, 1997), holds that speedy trial is applicable to indirect criminal contempt of court prosecutions. The court specifically noted that the decision does not address the applicability of the speedy trial rule to direct contempt proceedings.

The portion of Drost v. Drost, 519 So.2d 698 (Fla. 4th DCA 1988) that discusses speedy trial is not a "decision" within the meaning of Article V, section 3(b)(3) of the Florida Constitution. The one sentence in the opinion that discusses speedy trial is only obiter dictum. Conflict with the "dicta" of a district court of appeal decision should not serve as a basis for discretionary review in the supreme court.

The court should not accept jurisdiction because Drost v. Drost, supra, does not discuss the legal principles that the court applied in concluding that speedy trial does not apply in indirect criminal contempt prosecutions. In Ford Motor Company v. Kikis, 401 So.2d 1341 (Fla. 1981) the court determined that the decision before the court for review must discuss the legal principles which the court applied in reaching its decision. The logical extension of this rule

of law is that the decision that is alleged to conflict with the case before the court for review must also discuss the legal principles which the court applied in reaching its decision.

ARGUMENT

THE SUPREME COURT SHOULD NOT ACCEPT JURISDICTION BECAUSE MANN v. STATE, 476 So.2d 1369 (Fla. 2d DCA 1985) DOES NOT CONFLICT WITH THE DISTRICT COURT OF APPEAL'S DECISION IN THE INSTANT CASE AND DROST v. DROST, 519 So.2d 698 (Fla. 4th DCA 1988) DOES NOT DISCUSS THE LEGAL PRINCIPLES THAT THE COURT APPLIED IN CONCLUDING THAT SPEEDY TRIAL DOES NOT APPLY IN INDIRECT CRIMINAL CONTEMPT OF COURT PROSECUTIONS.

The petitioner erroneously asserts that Mann v. State, 476 So.2d 1369 (Fla. 2d DCA 1985) conflicts with the decision in the instant case. In Mann, the court concluded that Florida's speedy trial rule does not apply to direct criminal contempt of court proceedings. In the instant case, Washington v. Burk, 22 L. Fla. Weekly D 120 (Fla. 5th DCA, January 3, 1997), the court held that the speedy trial rule is applicable in indirect criminal contempt of court prosecutions. In fact, in the instant case the court specifically noted that the opinion does not address the applicability of the speedy trial rule to direct criminal contempt proceedings. At footnote 3 in the majority opinion the court made the following observation. "We do not concern ourselves in this opinion with the applicability of Rule 3.191 to

direct criminal contempt proceedings. We note, however, there are persuasive reasons why the procedural requirements of this rule cannot apply to such summary proceedings. See, e.g., Mann v. State, 476 So.2d 1369 (Fla. 2d DCA 1985)."

The court should not accept conflict jurisdiction because Drost v. Drost, 519 So.2d 698 (Fla. 4th DCA 1988) does not discuss the legal principles that the court applied in concluding that speedy

trial does not apply in indirect criminal contempt prosecutions. Article V, section 3(b)(3) of the Florida Constitution confers jurisdiction upon the Supreme Court to review a decision of a district court of appeal that expressly and directly conflicts with a decision of another district court of appeal. As the court observed in Ford Motor Company v. Kikis, 401 So.2d 1341 (Fla. 1981), the decision before the court for review must discuss the legal principles which the court applied in reaching its decision. The logical extension of this rule of law is that the decision that is alleged to conflict with the case before the court for review must also discuss the legal principles which the court applied in reaching its decision.

In Drost, supra, the opinion does not discuss any legal principles which the court applied in reaching the conclusion that speedy trial does not apply to indirect criminal contempt prosecutions. In Drost the court simply aligns itself with the Fifth District Court of Appeal's decision in Mauney v. State, 507 So.2d 746 (Fla. 5th DCA). The court in Drost purportedly "holds" that the speedy trial rule does not apply to direct or indirect criminal contempt proceedings; "Moreover, though not raised or discussed by the parties, and in order to avoid future misunderstanding in other cases, we hereby align ourselves with our sister court and hold that the speedy trial rule does not apply to direct or indirect contempt proceedings. Mauney v. State, 507 So.2d 746 (Fla. 5th DCA 1987)."

If the above sentence was intended to establish controlling law

it is contrary to the maxim of judicial review enunciated in State v. DuBose, 128 So.2d 4, 6 (Fla. 1930). In explaining this maxim, Justice Terre11 wrote that courts "consistently decline to settle questions beyond the necessities of the immediate case. This court is committed to the 'method of a gradual approach to the general, by a systematically guarded application and extension of constitutional principles to particular cases as they arise, rather than by out of hand attempts to establish general rules to which future cases must be filled."' The "holding" in Drost also contravenes the rule of subject matter appellate jurisdiction that appellate courts will refrain from issuing advisory opinions, or answer an abstract legal question. Sarasota-Fruitville Drainage Dist. v. Certain Lands, 80 So.2d 335 (Fla. 1955); Cottrel v. Amerkan, 35 So.2d 383 (Fla. 1948); Ready v. Safeway Rock Co., 24 So.2d 808 (Fla. 1946).

Respondent submits that, despite the court's characterization as the "holding" of the case, the sentence of the Drost opinion that petitioner alleges conflicts with the holding in the instant case is only obiter dictum, Black's Law Dictionary, 6th Ed. defines obiter dictum as follows:

> Obiter dictum. Words of an opinion entirely unnecessary for the decision of the case. Noel v. Olds, 78 U.S.App.D.C. 155, 138 F.2d 518, 586. A remark made, or opinion expressed, by a judge, in his decision upon a cause, "by the way," that is, incidentally or collaterally, and not directly upon the question before him, OK upon a point not necessarily involved in the determination of the cause, or introduced by way of illustration, or analogy or argument. such are not binding as precedent. See Dicta; Dictum.

Because the issue of the applicability of the speedy trial rule to direct and indirect contempt proceedings was not even before the court in Drost, the sentence upon which petitioner relies in asserting conflict jurisdiction can only be properly considered as obiter dictum. The supreme court has not resolved the issue of whether a conflict in the "dicta" of a district court of appeal decision can serve as a basis for discretionary review. State v. Speights, 417 So.2d 1168 (Fla. 1st DCA 1982). Respondent submits that Article V, section 3(b)(3) of the Florida Constitution confers jurisdiction on the basis of conflicting decisions. Obiter dictum is not a part of an appellate decision within the meaning of Article V, section 3(b)(3). Thus, in a literal sense, "dicta conflict" cannot exist. 2 P. Padovano, Florida Appellate Practice, section 2.10 at 26 (1988).

Petitioner argues in the jurisdictional brief that the court in the instant case did not follow the doctrine of stare decisis. It should be pointed out that only the dissenting opinion in the instant case makes this assertion. A dissent, however, is not a "decision" upon which discretionary review can be based. Reaves v. State, 485 So.2d 829 (Fla. 1986); Jenkins v. State, 385 So.2d 1356 (Fla. 1980). Furthermore, respondent submits that the district court of appeal receded from its previous holding in Mauney, supra, because an

overwhelming argument for the change was made. The majority opinion simply failed to mention that an overwhelming argument for the change had successfully been made.

Petitioner does not argue in the jurisdictional brief that the decision in the instant case conflicts with a decision of the supreme court that defines or interprets the doctrine of stare decisis. Petitioner's discussion of stare decisis is in the nature of a complaint and nothing more.

CONCLUSION

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing respondent brief on jurisdiction has been furnished by U.S. mail to Anthony J Hall, Assistant Attorney General, 444 Seabreeze Blvd. 5th Floor, Daytona Beach, Florida 32118.

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