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IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
APR 18 1997
CLERK, SUPREME COURT
By
Chief Deputy Clerk

KENNETH HAROLD MOODY

Petitioner,

v.

FSC NO. 90,014
2D DCA No. 96-03375

STATE OF FLORIDA,

Respondent.

BRIEF OF RESPONDENT ON JURISDICTION

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Fla. Stat. § *775.084 (4) (b) (1)* *4*

SUMMARY OF THE ARGUMENT

The state submits that the Court should not entertain jurisdiction because *Burdick v. State*, infra, is not in direct and express conflict with the decision of the Second District below. As explained in *Ansin v. Thurston,* infra, for decisions to be in direct conflict the decisions must be based practically on the same state of facts with the respective courts reaching opposing holdings.

In the instant case there is no direct conflict due to insufficient factual and legal identity in the case relied on by the petitioner. However, the decision of the Second District does acknowledge conflict with other district courts of appeal on a question different than that addressed by the petitioner and this court may choose to exercise jurisdiction.

ARGUMENT

THE COURT SHOULD DECLINE TO ENTERTAIN JURISDICTION IN THE INSTANT CASE BECAUSE THERE IS NO DIRECT AND EXPRESS CONFLICT BETWEEN THE DECISION OF THE SECOND DISTRICT BELOW AND THE DECISION THE PETITIONER CITES BECAUSE THE FACTS IN THE INSTANT CASE DO NOT CORRESPOND TO THE FACTS IN THE CASE WHICH THE PETITIONER CITES AND THE CASES ADDRESS DIFFERENT LEGAL QUESTIONS.

The petitioner seeks to invoke the discretionary jurisdiction of the Court, arguing that the Second District's decision expressly and directly conflicts with *Burdick* v. *State*, 594 So. 2d 267 (Fla. 1992). The state responds that the Court should not entertain jurisdiction in the instant case on the basis of the alleged conflict with *Burdick*, but may choose to exercise jurisdiction based upon the alleged conflict acknowledged in the opinion of the Second District below.

The Florida Constitution, art. V, § 3(b) (3), enables 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 or of the supreme court on the same question of law. See *also* Fla. R. App. P. 9.030(a) (2)(A)(iv). "Express" means "to represent in words" and "to give expression

to." "Expressly" means "in an express manner." Jenkins v. *State*, 385 So. 2d **1356, 1359** (Fla. **1980)**.

A limitation of review to decisions in "direct conflict" evinces a concern with decisions as precedents as opposed to adjudications of the rights of particular litigants:

> A conflict of decisions ... must be on a question of law involved and determined, and such that one decision would overrule the other if both were rendered by the same court; in other words, the decisions must be based practically on the same state of **facts** and announce antagonistic conclusions. 21 C.J.S. Courts **462.**

Ansin v. *Thurston*, **101 So. 2d 808**, 811 (Fla. 1958). Thus, for there to be direct conflict the factual scenarios in each case must be identical with the respective courts reaching opposing holdings.

A review of the Second District's decision below indicates a lack of direct and express conflict with *Burdick*. The state finds that ***Burdick*** did not reach the question in the instant case, which is whether the minimum mandatory sentence under section **775.084 (4) (b) (1) (2)** and (3), Florida Statutes (1995) is mandatory or permissive.

In *White* v. ***State***, **618 So. 2d 354** (Fla. 1st **DCA** 1993) the First District contrasted the *Burdick* issue with the question

presented at bar. It first recognized that *Burdick* held that sentencing under sections 775.084(4)(a)(1) and 775.084(4)(b)(1) is permissive, not mandatory. The *White* Court went on to distinguish *Burdick*:

> The state correctly points out that the question certified in *Burdick* was expressly limited to whether the **maximum** sentence of life for a non-violent felon is mandatory or permissive. It does not necessarily follow from *Burdick* that the **minimum** sentence for a defendant sentenced pursuant to the habitual violent felony offender statute is permissive, and we have not so held. See ***Knickerbocker***, 604 So. 2d at 878; see *also King,* 597 So. 2d at 316. In ***Knickerbocker***, the charges against the defendant, a habitual violent felony offender, included two felonies of the first degree (kidnapping and armed burglary). The applicable provision of section 775.084 stated:
>
> (b) The court, in conformity with the procedure established in subsection (3), may sentence the habitual violent felony offender as follows:
>
> 1. In the case of a felony of the first degree, for life, and such offender shall not be eligible for release for 15 years.
>
> In our directions for Knickerbocker's resentencing, we held as follows:
>
> [S]hould the trial court again decide to sentence appellant as an habitual violent felony offender for the burglary and kidnapping convictions, **it is obliged to impose 35-year mandatory minimum sentences,**

> 604 So. 2d at 878. (emphasis added.) The Second District's decision in *King* is consistent with our interpretation that the trial court, having determined to sentence Appellant as a habitual violent felony offender, has the discretion to impose a sentence of "any terms of years **not less that the minimum mandatory nor more than the maximum sentence provided in subsections 775.084 (4)(b)(1), (2) and (3).**" 597 So. 2d at 315. (Emphasis added.) See *Sims* v. *State*, 605 so. 2d 997 (Fla. 2d DCA 1992) (where trial court decided to sentence defendant as habitual violent felony offender, minimum mandatory sentence must be included in sentence); *Lowe*, 605 So. 2d at 507 (relying on *King* in holding that habitual violent felony offender's sentence must include minimum mandatory term); Brousseau v. *State*, 590 So. 2d 997 (Fla. 5th DCA 1991). *Contra Green v. State*, 615 So. 2d 823 (Fla. 4th DCA 1993) (finding habitual violent felony offender sentencing is discretionary, so that imposition of minimum mandatory term is not required). ...Noting the lack of minimum mandatory provisions in the habitual felony offender provisions in section 775.084 (4) (a)(1)-(3), we believe our interpretation of the minimum mandatory provisions in the habitual **violent** felony offender statute, section 775.084(4)(b)(1) through (4)(b)(3), as being, in fact, mandatory, is consistent with the legislative intent to distinguish habitual offenders from habitual violent offenders and enhance the latter's sentences. (emphasis in original)

618 So. 2d at 359. Accordingly, the **white** court determined that, on remand, if sentencing the appellant as a habitual violent

felony offender, the trial court was required to include a minimum mandatory term of years. Id.

The state respectfully requests that the Court decline to exercise its discretionary jurisdiction in the instant case as the petitioner has failed to demonstrate direct and express con-fict with *Burdick*. However, the Court may choose to exercise jurisdiction based upon the conflict acknowledged in the decision below.

CONCLUSION

In light of the foregoing facts, arguments, and authorities, this Honorable Court should decline to exercise discretionary jurisdiction because the petitioner has failed to show direct and express conflict with *Burdick.* However, the Court may choose to entertain jurisdiction based upon the acknowledged conflict in the Second District's opinion.

Respectfully submitted,

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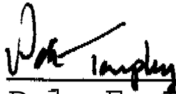

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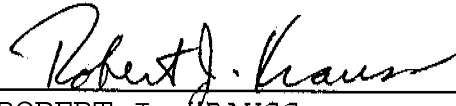

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