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IN THE SUPREME COURT OF THE STATE OF FLORIDA

TOMMIE V. JOHNSON,

Petitioner,

v.

Case No. 90,494

STATE OF FLORIDA,

Respondent.

ON DISCRETIONARY REVIEW FROM THE
DISTRICT COURT OF APPEAL, FOURTH DISTRICT
AND THE NINETEENTH JUDICIAL CIRCUIT IN AND FOR
MARTIN COUNTY, FLORIDA

RESPONDENT'S BRIEF ON JURISDICTION

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Counsel for Respondent

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STATEMENT OF THE CASE AND FACTS

Respondent generally agrees with the Petitioner's version of the case and facts with the following additional finding from the decision entered below in this case:

"Defendant concedes that affirmance on this point is required based on Gibbs v. State, 676 So. 2d 1001 (Fla. 4th DCA), review granted, . 88,409 (Fla. Nov. 4, 1996)....This case is a stronger case than Gibbs for rejecting a double jeopardy challenge because the second offense here is not simple possession as in Gibbs but possession with intent to sell/deliver. There are several ways to analyze the differences between these crimes...." Johnson v. State, 689 So. 2d 3.124, 1125 (Fla. 4th DCA 1997).(See also, Appendix)

SUMMARY OF ARGUMENT

The decision in this case does not expressly or directly conflict with any other decision and so this Court should not exercise jurisdiction in this case.

POINT ONE

THERE IS NO EXPRESS OR DIRECT CONFLICT BETWEEN THE DECISION IN THIS CASE AND ANY OTHER DECISION SUCH THAT THIS COURT SHOULD EXERCISE JURISDICTION

Under Article V, Section 3(b)(3) of the Florida Constitution, and Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv), this Court may review any decision of a district court of appeal that expressly and directly conflicts with a decision of another district court or of the Supreme Court on the same question of law. In Reaves v. State, 485 So. 2d 829 (Fla. 1986), this Court held that the only facts relevant to the decision to accept or reject petitions for review are those facts contained within the four corners of the majority decision; neither the dissenting opinion nor the record may be used to establish jurisdiction. Moreover, jurisdiction depends upon whether the conflict between decisions is express and direct and not whether the conflict is inherent or implied. Dept. Of HRS v. Nat'l Adoption Counseling Service, , 498 So. 2d 888 (Fla. 1986). The district courts are ordinarily the court of final appellate jurisdiction, and this Court's review on the basis of conflict of decisions is limited.

Viewed in this light, there is no basis to exercise

jurisdiction in this case. Petitioner requests this Court to exercise its discretionary jurisdiction on two bases: that by citing to Gibbs v. State, supra, currently pending before this Court, the decision below is subject to review pursuant to Jollie v. State, 405 So. 2d 418 (Fla. 1981), and second, that the decision below conflicts with Ricks v. State, 686 So. 2d 798 (Fla. 1st DCA 1997).[1]

Although it is true that of this writing, Gibbs remains pending before this Court, Respondent predicts that by the time these words are read, the decision will have issued. Regardless, the Gibbs decision was not cited as controlling the result in this case. 'This case is a stronger case than Gibbs for rejecting a double jeopardy challenge because the second offense here is not simple possession as in Gibbs but possession with intent to sell/deliver. There are several ways to analyze the differences between these crimes." Johnson v. State, 689 So. 2d 1124, 1125 (Fla. 4th DCA 1997). The decision then explained the differences between these two offenses, amply demonstrating that they were different for double jeopardy purposes. Therefore, despite the

[1]An apparently incorrect citation for the Ricks decision was included in Petitioner's brief; based on the context of the argument, Respondent has concluded that this is the correct citation for the decision relied upon by Petitioner.

fact that Gibbs is pending, since it was not cited as controlling the result in this case, this Court need not exercise jurisdiction in this case pursuant to Jollie, supra. Whatever the outcome of the Gibbs case, this decision would be distinguishable given the different crimes involved. Trafficking in a controlled substance and possession with the intent to sell or deliver the controlled substance are substantially different offenses from two possession offenses. The fact that Gibbs is distinguishable demonstrates that this Court need not exercise jurisdiction on the ground that Gibbs is pending.

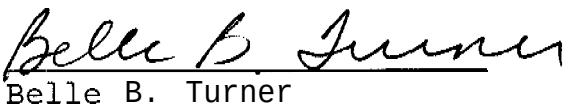
Nor does this case conflict with Ricks v. State, supra. Ricks, like Gibbs, involved dual convictions for two possessory offenses: "simple" possession of marijuana and possession with the intent to sell/deliver the same marijuana. These two decisions may conflict with each other, but they do not conflict with this case. This Court should decline to accept jurisdiction in this case.

CONCLUSION

Based upon the foregoing argument and authority, the State respectfully requests this Honorable Court to decline to accept jurisdiction in this case.

Respectfully submitted,

Robert A. Butterworth
Attorney General



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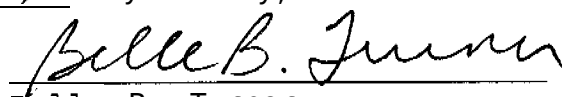
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing motion has been furnished by United States Mail to Susan D. Cline, counsel for Petitioner, at 421 Third Street, 6th Floor, West Palm Beach, FL 33401, this 19th day of May, 1997.



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IN THE SUPREME COURT OF THE STATE OF FLORIDA

TOMMIE V. JOHNSON,

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STATE OF FLORIDA,

Respondent.

ON DISCRETIONARY REVIEW FROM THE
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APPENDIX TO RESPONDENT'S BRIEF ON JURISDICTION

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IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT JANUARY TERM 1997

TOMMIE V. JOHNSON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 96-0469

Opinion filed February 19, 1997

Appeal from the Circuit Court for the Nineteenth Judicial Circuit, Martin County; Joe Wild, Acting Circuit Judge; L.T. Case No. 95-890-CFA.

Richard L. Jorandby, Public Defender, and Susan D. Cline, Assistant Public Defender, West Palm Beach for appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Belle B. Turner, Assistant Attorney General, Daytona Beach, for appellee.

PARIENTE, J.

Defendant appeals from his convictions and sentences for trafficking in cocaine more than 28 grams and possession of cocaine with intent to sell/deliver. Defendant received concurrent sentences of 64.37 months in prison with credit for 128 days time served and was ordered to pay a 950,000 fine for trafficking in cocaine together with a surcharge of $2,500. We affirm both the convictions and sentences.

The issue of defendant's constructive possession was properly submitted to the jury. The jury could have found, based on the facts of this case, that defendant was the driver/owner of the vehicle and in sole possession of the key to the trunk where the cocaine was found under the spare tire. See Jordan v. State, 548 So. 2d 737,739 (Fla. 4th DCA 1989).

Defendant also attacks his convictions for trafficking in cocaine and possession with intent to sell/deliver because both charges arose from one underlying core offense of possession of cocaine. Defendant concedes that affirmance on this point is required baaed on Gibbs v. State, 676 So. 2d 1001 (Fla. 4th DCA), review- No. 88,409 (Fla. Nov. 4, 1996). In Gibbs, our court held that there is no double jeopardy violation based on convictions far trafficking in cocaine in excess of 28 grams and simple possession

Our court in Gibbs relied on State v. McCloud, 577 So. 2d 939 (Fla. 1991), which rejected a double jeopardy attack on dual convictions for sale of cocaine and possession of the same quantum of cocaine. Our supreme court in McCloud concluded that because sale of cocaine can occur without possession, possession is not an essential element of sale and is therefore not a necessarily included lesser offense. Id. at 940-41.

This case is a stronger case than Gibbs for rejecting a double jeopardy challenge because the second offense here is not simple possession as in Gibbs but possession with intent to sell/deliver. There are several ways to analyze the differences between these crimes.

Pursuant to section 893.135(1)(b), Florida Statutes (1995), a person traffics in cocaine either by knowingly selling, delivering or bringing into this state 28 grams or more of cocaine or by being in actual or constructive possession of 28 grams or more of cocaine. It is thus possible to commit the offense of trafficking in cocaine without having actual or constructive possession of the cocaine, or, alternatively, without actually intending to sell the cocaine. See Gibbs, 676 So. 2d at 1008 (Cross, J., concurring). Trafficking in cocaine also requires proof that the quantity of cocaine was at least 28 grams.

For the crime of possession with intent to sell/deliver cocaine, section 893.13(1)(a), an essential element is proof of specific scienter; i.e., intent to sell or deliver the cocaine. Tbis element is not an essential element of trafficking. Possession with intent to sell/deliver thus requires an essential element that is not an essential clement of trafficking.

In this case, the trial court instructed only on simple possession as a lesser included offense of both charges. Possession with intent to sell/deliver cocaine is neither a necessarily included lesser offense nor a permissive lesser included offense of trafficking. See § 775.021(4)(b)(3).

As to defendant's third point on appeal, that the five percent surcharge was not orally pronounced, *section 960.25* establishes a five percent surcharge which shah be imposed for any criminal offense. Because the surcharge is mandatory, the trial court was not obligated to announce it orally to include it *in the* written sentence. See Reyes *v.* State, *655 So.* 2d 111, 116-17 (Fla. 2d DCA 1995).

POLEN and SHAHOOD, JJ., concur.