0d5

FILED
SID J. WHITE
JUL 11 1997
CLERK, SUPREME COURT
By
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

ROBERT WILKINS,

Petitioner,

v. CASE NO. 90,864

STATE OF FLORIDA,

Respondent.

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL
AND THE NINTH JUDICIAL CIRCUIT IN AND FOR
ORANGE COUNTY, FLORIDA

J SDICTIONAL BRIEF OF RESPONDENT

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

JENNIFER MEEK
ASSISTANT ATTORNEY GENERAL
Fla. Bar #0046061
444 Seabreeze Blvd.
Fifth Floor
Daytona Beach, FL 32118
(904) 238-4990

COUNSEL FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

SECONDARY MATERIAL:

STATEMENT OF FACTS

The facts of this case were not set forth in the district court's decision. See Wilkins v. State, 22 Fla. L. Weekly D878 (Fla. 5th DCA Apr. 4, 1997)

SUMMARY OF ARGUMENT

If this Court accepts review of Green v. State, 691 So. 2d 502 (Fla. 5th DCA 1997)[1] this Court has discretion to exercise jurisdiction in the instant case. However, this Court has no jurisdiction over the instant case based upon the lower court's citation to Martinez v. State, 22 Fla. L. Weekly D305 (Fla. 3d DCA Jan. 29,1997) reh'g denied, 22 Fla. L. Weekly D1009 (Apr. 23, 1997).

[1]previously cited as 22 Fla. L. Weekly D614 (Fla. 5th DCA Mar. 7, 1997)

ARGUMENT

THIS COURT'S JURISDICTION IN THE INSTANT CASE IS DEPENDENT UPON ACCEPTANCE OF JURISDICTION IN GREEN v. STATE.

Where, as in the instant case, the district court's decision is a per curiam opinion that contains nothing but a citation to authority, this Court has no jurisdiction "unless one of the cases cited as controlling authority is pending before this Court, or has been reversed on appeal or review, or receded from by this Court, or unless the citation explicitly notes a contrary holding of another district court or of this Court." The Florida Star v. B.J.F., 530 So. 2d 286, 288 n.3 (Fla. 1988)(citing Jollie v. State, 405 So. 2d 418, 420 (Fla. 1981))

Green v. State, 691 So. 2d 502 (Fla. 5th DCA 1997), which is currently pending review before this Court in case number 90,696, is applicable under Jollie, and allows this Court to exercise its jurisdiction in the instant case. However, if this Court denies jurisdiction in Green, review must be denied in the instant case unless some other basis for jurisdiction exists.[2] This Court has no jurisdiction over the instant case based upon the lower court's

---

[2]Gerald Kogan, C.J. & Robert Craig Waters, The Jurisdiction of the Florida Supreme Court, Fla. B., J. Appellate Prac. & Advoc, Sec., May 1997 at 1, 8

citation to Martinez v. State, **22 Fla. L. Weekly D305 (Fla.** 3d DCA Jan. 29,1997) reh'g denied, 22 Fla. L. Weekly D1009 (Apr. 23, 1997)

Martinez is not applicable under Jollie for several **reasons.** First, it is not *controlling* upon the Fifth District Court of Appeal, nor is it a contrary holding of another district court. Second, it is not pending review before this Court. Although certified conflict cases do not require briefing and are routinely accepted,[3] this Court lacks jurisdiction of the case if the losing party does not petition for review. See Davis v. Mandau, **410 So.** 2d 915, **915 (Fla. 1981)** On June 24, 1997, Martinez filed his Notice of Voluntary Dismissal of his Notice to Invoke Discretionary Jurisdiction filed on May 23, 1997, divesting this Court of jurisdiction to review his case. See Appendix B

Finally, even if Martinez **was** controlling authority which was pending before this Court, Savoie v. State, 422 So. 2d 308 (Fla. 1982), does not give this Court discretion to consider the point at issue in the instant case. Savoie holds that once this Court *accepts jurisdiction* over a cause in order to resolve **a legal issue** in conflict, it may, in its discretion, consider other issues properly raised **and** argued before it. Id. at 309 This rule does

---

[3]Kogan, **C.J.** & Waters, supra at 10

not provide that the collateral issues may supply the means for invoking jurisdiction.*

In sum, this Court had discretion to exercise jurisdiction in the instant case only if this Court accepts review of Green v. State, 691 So. 2d 502 (Fla. 5th DCA 1997).

---

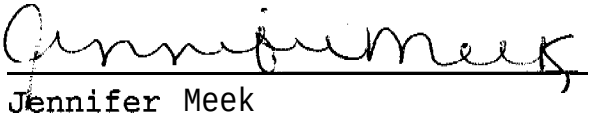
*This is consistent with the rule that no briefing on jurisdiction is permitted in certified conflict cases, inasmuch as the collateral issues could not be *raised and argued* prior to the Court accepting jurisdiction.

CONCLUSION

Based on the foregoing arguments and authorities, respondent respectfully requests this honorable Court decline to accept jurisdiction of this case, until and unless jurisdiction is accepted in Green v. State, 691 So. 2d 502 (Fla. 5th DCA 1997).

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

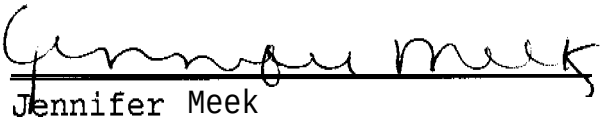


Jennifer Meek
ASSISTANT ATTORNEY GENERAL
Fla. Bar #0046061
444 Seabreeze Blvd., 5th Floor
Daytona Beach, FL 32118
(904) 238-4990

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above Jurisdictional Brief has been delivered to Susan A. Fagan, Assistant Public Defender, 112 Orange Avenue, Suite A, Daytona Beach, FL 32114, this 10th day of July, 1997.



Jennifer Meek
Assistant Attorney General

IN THE SUPREME COURT OF FLORIDA

ROBERT WILKINS,

Petitioner,

v. CASE NO. 90,864

STATE OF FLORIDA,

Respondent.
_____/

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL
AND THE NINTH JUDICIAL CIRCUIT IN AND FOR
ORANGE COUNTY, FLORIDA

APPENDICES TO JURISDICTIONAL BRIEF OF RESPONDENT

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

JENNIFER MEEK
ASSISTANT ATTORNEY GENERAL
Fla. Bar #0046061
444 Seabreeze Blvd.
Fifth Floor
Daytona Beach, FL 32118
(904) 238-4990

COUNSEL FOR RESPONDENT

APPENDIX A

ject to a search warrant can be detained to prevent flight in the event that incriminating evidence is found and also in order to minimize the risk of harm to the officers and the occupants. See *also State v. Thomas*, 603 So. 2d 1382 (Fla. 5th DCA 1992).

During the detention, the officer was advised by Ms. Freeman, one of the owners of the home subject to the search, that Boydell possessed cocaine. Since the affidavit supporting the search warrant indicated the presence of drugs on the premises owned by the informant, the officer's belief that the informant's statement gave him probable cause to search Boydell was, in our view, well-founded. The question is whether " 'the facts and circumstances. within their (the officers') knowledge and of which they had reasonably trustworthy information (are) sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed." *Brinegar v. United* Stares, 338 U.S. 160, 175-176, 69 S. Ct. 1302, 1310-11, 93 L. Ed. 1879 (1949). *citing Carroll v. United States, 267* U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925).

Even though Ms. Freeman's statement might have been hearsay had it been offered to prove the truth of the matter, the relevance for a probable cause analysis is that the statement was made to the police officer by a person he reasonably believed was in a position to know facts justifying the statement. Having heard the statement from one reasonably believed to be involved in the sale of cocaine (based on the affidavit and the search warrant) and finding Boydell on the premises where it was alleged that cocaine was being sold, a reasonable person would believe that Boydell was involved in criminal activity. Even though the court erred in excluding the statement based on a hearsay objection, it nevertheless made the correct ruling on the motion.

AFFIRMED. (PETERSON, C.J., and ANTOON, J., concur.)

* * *

Criminal law—Sentencing—Error to impose three-year mandatory minimum *sentence* for possession of firearm by convicted felon

DONNIE ANDERSON, Appellant, v, STATE OF FLORIDA, Appellee. 5th District. Case No. 96-1961. Opinion filed April 4. 1997. Appeal from the Circuit Court for Marion County, Jack Singbush, Judge. Counsel: James G. Gibson, **Public Defender, and Susan A. Fagan, Assistant Public Defender, Daytona** Beach, for **Appellant.** No Appearance for **Appellee.**.

(PER CURIAM.) In this *Anders* appeal' we strike the three year minimum mandatory provision in appellant's sentence for possession of a firearm by a' convicted felon. The convicted felon firearm offense is not one of the enumerated felonies in the statute which requires a minimum mandatory term for possession of a firearm. See § 775.087(2), Fla. Stat. (1995); *Simmons v. State*, 457 So. 2d 534 (Fla. 2d DCA 1984). In all other respects, the judgment and sentences in this appeal are affirmed.' ""

MINIMUM MANDATORY TERM STRICKEN; AFFIRMED AS MODIFIED. (DAUKSCH, SHARP, W., and THOMPSON, JJ., concur.)

---

[1]*Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967).

* * *

WILKINS v. STATE. 5th District. #96-1622. April 4. 1997. Appeal from the Circuit Court for Orange County. AFFIRMED. *See Green v. State*, 22 Fla. L. Weekly D614 (Fla. 5th DCA March 7, 1997); *Martinez v. State*, 22 Fla. L. Weekly D305 (Fla. 3d DCA January 29, 1997).

* * *

Venue-Change-Convenience of parties or witnesses or in the interest of justice-Interlocutory appeal from trial court's denial of defendant's motion to chnngc venue from Duval to Putnam County in action for negligence, strict liability, and civil conspitacy resulting from smoking tobacco products manufactured and retailed by defendants--Trial court did not abuse discretion in denying motion where venue would be proper in either county, and plaintiff asserted, without contradiction, that he intends to call corporate personnel located in Duval County, that many of the witnesses will be experts coming from various parts of United States and Canada, and that Duval County, with a major airport would be more convenient for these witness-Although defendants suggested that plaintiff's coworkers and friends in Putnam County will be witnesses, they failed to identify potential witnesses or set forth expected substance of testimony, record reflects that many tobacco products liability cases are now pending in Duval County and that Duval County Circuit Court has case management order in place dealing with tobacco litigation—Notice of supplemental authority-Abuse of rule to file, in the afternoon prior to oral argument, notice of supplemental authority attaching copies of opinions in five cases, the latest of which was decided in 1989

BROWN & WILLIAMSON TOBACCO CORPORATION. etc.. et al., Appellants, v. DAVID YOUNG, Appellee. 1st District. Case No. 96-3566. Opinion filed April 4. 1997. An appeal from the Circuit Court for Duval County. Alban E. Brooke, Judge. Counsel: James F. Moseley. Robert B. Parrish and Andrew J. Knight. II of Moseley, Warren, Prichard & Parrish, Jacksonville, for Appellant Brown & Williamson Tobacco Corporation. Michael L. Coulson of Saalfield. Catlin & Coulson, Jacksonville, for Appellant Winn-Dixie Stores, Inc. Charles C. Howell, III of Howell, O'Neal & Johnson, Jacksonville, for Appellant Liggett Group, Inc, Norwood S. Wilncr, Gregory H. Maxwell. Stephanie J. Hartley and Kenneth C. Steel. III of Spohrer, Wilncr, Maxwell, Macicjcwski & Stanford, P.A., Jacksonville, for Appellee.

(VAN NORTWICK, J.) In this interlocutory appeal in a products liability action, Brown & Williamson Tobacco Corporation, Liggett Group, Inc., and Winn-Dixie Stores, Inc., appeal an order denying their motion for change of venue from Duval County to Putnam County pursuant to section 47.122, Florida Statutes (1995).[1] Because appellants have failed to meet their burden of showing that the trial court abused its discretion in refusing to transfer venue from Duval County, we affirm.

Factual and Procedural Background

David Young, appellee, is currently a resident of Putnam County, moving there in 1993. He brought this action against appellants in 1995. alleging that he developed chronic obstructive pulmonary disease and other diseases from smoking tobacco products manufactured by Brown & Williamson and Liggett, foreign corporations doing business in Florida, and sold at retail by Winn-Dixie, a Florida corporation with its corporate headquarters in Duval County. He seeks damages on the theories of negligence, strict liability, and civil conspiracy.

Young selected venue in Duval County pursuant to section 47.051, Florida Statutes (1995).[2] The parties agree, however, that venue would be proper under-section 47.051 in either Duval County or Putnam County, presumably because Winn-Dixie owns and operates grocery stores in both those counties. Thus, as this suit could have been brought in Putnam County, section 47.122 would permit a change of venue to Putnam County for the convenience of the parties or witnesses or in the interest of justice.

After Young answered his first set of. interrogator&, 'the appellants moved for a transfer of venue pursuant to section 47.122. They allege that the cause of-action.did not-accrue in Duval County and that none of Young's family members or treating physicians reside in Duval. County. Appellants contend that it would be more convenient for Young's witnesses to testify in Putnam County rather than Duval County. Finally, they argue that the Duval County citizens should not be burdened with the trial of this case which has little or no nexus to Duval County.

In his answer to interrogatories, *Young had identified two treating physicians, one located in Putnam County and the other located in Alachua County. Although Young was asked to identify his living relatives, who are few in number, he was not asked, and therefore did not answer, whether any of these relatives had knowledge of his disease, its alleged cause, or any other circumstances pertinent to a resolution of this lawsuit. Young was not asked, and therefore did not answer, whether there were

APPENDIX B

L97-1-7916

SUPREME COURT
OF THE STATE OF FLORIDA

JAVIER E. MARTINEZ,

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

Case Nunber: 90,679

Appeal Case Number: 96-165

Lower Court: 94-32063
(Criminal Division)

NOTICE OF VOLUNTARY DISMISSAL

COMES NOW, Appellant, JAVIER E. MARTINEZ, by and through undersigned counsel, and pursuant to Rule 9.350(b), hereby enters his Notice of Voluntary Dismissal of the Notice to Invoke Discretionary Jurisdiction filed on May 23, 1997,

Respectfully submitted,

CARROLL & ASSOCIATES, P.A.
201 South Biscayne Building
2400 Miami Center
Miami, Florida 33131
(305) 372-2445

By: _____
LINDA L. CARROLL
Florida Bar No.: 150445

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document has been furnished by U.S. mail, this 19th day of June, 1997, to Sylvie Perez Posner, Assistant Attorney General, 110 S.E. 6th Street, 10th Floor, Fort Lauderdale, Florida 33301.

By: _____
LINDA L. CARROLL