# ORIGINAL



IN THE SUPREME COURT OF FLORIDA

MICHAEL ASBELL,

Petitioner,

versus

CASE NO. 91,078

STATE OF FLORIDA,

Respondent.

APPEAL FROM THE CIRCUIT COURT
IN AND FOR PUTNAM COUNTY
AND THE FIFTH DISTRICT COURT OF APPEAL

PETITIONER'S BRIEF ON JURISDICTION

JAMES B. GIBSON, PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

BRYNN NEWTON
ASSISTANT PUBLIC DEFENDER
Florida Bar Number 175150
112-A Orange Avenue
Daytona Beach, Florida 32114-4310
904-252-3367

ATTORNEY FOR PETITIONER

TABLE OF CONTENTS

## TABLE OF CITATIONS

## STATEMENT OF THE CASE AND FACTS

Petitioner was charged by informations filed in the Circuit Court of Putnam County, Florida, with aggravated battery; two counts of attempted first-degree murder with a firearm; armed carjacking with a firearm; armed kidnapping; and possession of a firearm by a convicted felon. (R 7, 16-17) On August 15, 1996, he waived his defense of insanity and entered pleas of nolo contendere to simple battery, one count of attempted first-degree (premeditated) murder with a firearm; and possession of a firearm by a convicted felon. (R 55, 169-178) On September 19, 1996, he was sentenced to spend 17 years in prison for attempted first-degree murder and one year in the county jail for battery, and to spend 15 years on probation for possession of a firearm by a convicted felon. (R 163-165, 103-1 11)

Petitioner appealed and his convictions and sentences were affirmed by the Fifth District Court of Appeal on April 29, 1997. Rehearing was granted and on June 27, 1997, the District Court affirmed on the basis of Smith v. State, 683 So. 2d 577 (Fla. 5th DCA 1996). Asbell v. State, 22 Fla. L. Weekly D1542 (Fla. 5th DCA June 27, 1997). (APPENDIX). His notice of seeking this Honorable Court's review was filed on July 15, 1997.

## SUMMARY OF ARGUMENT

The Fifth District Court of Appeal's decision in this cause cites as controlling authority a decision which directly and expressly conflicts with the decision in Gallowav v. State, 680 So. 2d 616 (Fla. 4th DCA 1996), and notes that the authority upon which this decision is based "conflict[s]" with White v. State, 689 So. 2d 371 (Fla. 2d DCA 1997), which is pending review in Supreme Court Case Number 89,998.

## ARGUMENT

THE DISTRICT COURT OF APPEAL'S DECISION CITES AS CONTROLLING AUTHORITY ITS DECISION IN SMITH v. STATE, 683 So. 2d 577 (Fla. 5th DCA 1996), WHICH EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISIONS IN GALLOWAY v. STATE, 680 So. 2d 616 (Fla. 4th DCA 1996), AND NOTES CONFLICT WITH WHITE v. STATE, 689 So. 2d 371 (Fla. 2d DCA 1997), WHICH IS PENDING REVIEW BY THIS HONORABLE COURT.

Petitioner was charged with aggravated battery; two counts of attempted first-degree murder with a firearm; armed carjacking with a firearm; armed kidnapping; and possession of a firearm by a convicted felon. (R 7, 16-17) He was sentenced pursuant to a sentencing guidelines scoresheet which included 18 points for possessing a firearm in the commission of possession of a firearm by a convicted felon. (R 128, 98)

In its per curiam decision affirming Petitioner's convictions and sentences, the Fifth District Court of Appeal wrote:

> PER CURIAM
>
> We grant the motion for rehearing and affirm based on ***Smith v. State, 683 So.*** 2d 577 (Fla. 5th DCA 1996), although we note ***Smith*** conflicts [sic] with ***White v. State,*** [689 ***So.*** 2d 371 (Fla. 2d DCA 1997)].
>
> AFFIRMED.

See Asbell v. State, 22 Fla. L. Weekly D1542 (Fla. 5th DCA June 27, 1997). (APPENDIX).

In Smith v, State, 683 So. 2d 577 (Fla. 5th DCA 1996), the Fifth District Court of Appeal approved the assessment of 18 additional points for possession of a firearm by a convicted felon because it was not a felony enumerated in Section 775.087(2), adding:

> . . . *contra Galloway v. State,* [680 So. 2d 616 (Fla. 4th DCA 1996)] (holding that rule 3.702(d)(12) is inapplicable to convictions for possession of a firearm by a convicted felon when unrelated to the commission of any additional substantive offense).

In White v. State, 689 So. 2d 371 (Fla. 2d DCA 1997), the Second District Court of Appeal affirmed a sentence imposed pursuant to a scoresheet which included 18 points applied pursuant to Rule 3.702(d)(12) and noted:

> . . . In affirming the trial court on this point, we certify that our decision in this case is in direct conflict with the decision of the Fourth District Court of Appeal in *Galloway v. State, 680 So.* 2d 616 (Fla. 4th DCA 1996). . . .

White v. State is pending this Honorable Court's review in Supreme Court Case Number 89,998. The Fifth District Court of Appeal's decision in the instant case notes that Smith, supra, "conflicts" with White v. State, although Smith and White are actually in accord with each other. White and Smith, however, share the same conflict with the Fourth District Court of Appeal's decision in Gallowav v. State, 680 So. 2d 616 (Fla. 4th DCA 1996).

Because the decision in this case cites a decision, White, which is pending review by the Florida Supreme Court, this Honorable Court has jurisdiction of this appeal and should grant review in this cause. See Jollie v. State, 405 So. 2d 418 (Fla.

1981), wherein this Honorable Court held that a District Court of Appeal per curiam opinion which cites as controlling authority a decision that is either pending review in or has been reversed by the Supreme Court constitutes prima facie conflict and allows the Supreme Court to exercise its jurisdiction.

## CONCLUSION

For the reasons expressed herein, Petitioner respectfully requests that this Honorable Court exercise its discretionary jurisdiction and grant review of the Fifth District Court of Appeal's decision in this cause.

Respectfully submitted,

JAMES B. GIBSON, PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

BRYNN NEWTON
ASSISTANT PUBLIC DEFENDER
Florida Bar Number 175150
112-A Orange Avenue
Daytona Beach, Florida 32114-4310
904-252-3367

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 321 18, by delivery to his basket at the Fifth District Court of Appeal; and by mail to the Petitioner, Mr. Michael Asbell, P. 0. Box 510, Vernon, Florida 32462-0510, this 16th day of July, 1997.

ATTORNEY

IN THE SUPREME COURT OF FLORIDA

MICHAEL ASBELL,

Petitioner,

versus CASE NO. _____

STATE OF FLORIDA,

Respondent.

PETITIONER'S BRIEF ON JURISDICTION

**APPENDIX**

subsection (e), the legislature *intended* to also amend the definition of "domestic violence," it is not our place to amend clear unambiguous statutory language.[3]

It appears, therefore, that in order for Ms. Sharpe to qualify for a domestic violence injunction, she must be a relative by marriage of appellant and must have resided with him in a single dwelling unit. Since there is "living issue" of Ms. Sharpe's marriage to her deceased husband, she continues to be related by marriage to appellant. See *Crosby* v. *State*, 90 Fla. 381, 106 So. 741 (Fla. 1925). However, there is nothing in Ms. Sharpe's petition which claims that she and the appellant ever resided in the same household. Under the current law, statutory domestic violence between the pair has not occurred and cannot occur.

In order to be entitled to a domestic violence injunction, it seems axiomatic that one must both plead and prove one's entitlement to the protection of the statute. Ms. Sharpe simply failed todoso.

REVERSED and REMANDED. (PETERSON, C.J., and GRIFFIN, J., concur.)

[1]We recognize that this language is inconsistent with the provisions of the form authorized by section 741.30(3)(b), but it appears that legislative intent is better reflected in its statutory language than in its forms.

[2]But see the alternative basis for possible relief contained in section 901.01 Florida Statutes as discussed in *Oliver v. Haspil*, 152 So. 2d 758 (Fla. 3d DCA 1963); and *Drake v. Henson*, 448 So. 2d 1205 (Fla. 3d DCA 1984).

[3]*State v. Jett*, 626 So. 2d 691 (Fla. 1993); it is a settled rule of statutory construction that unambiguous language is not subject to judicial construction, however wise it may seem to alter the plain language.

* * *

MICHAEL ASBELL, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 96-2926. Opinion filed June 27, 1997. Appeal from the Circuit Court for Putnam County, Stephen L. Boyles, Judge. Counsel: James B. Gibson, Public Defender, and Brynn Newton, Assistant Public Defender, Daytona Beach, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Kristen L. Davenport, Assistant Attorney General, Daytona Beach, for Appellee.

ON MOTION FOR REHEARING

(PER CURIAM.) We grant the motion for rehearing and affirm based on *Smith* v. *State, 683 So.* 2d 577 (Fla. 5th DCA 1996), *although we* note *Smith* conflicts with *White* v. *State*, 22 F.L.W. D485 (Fla. Feb. 21, 1997).

AFFIRMED. (COBB, SHARP, W., and GRIFFIN, JJ., concur.)

* * *

**Criminal law-Appeals-Defense counsel's objection sufficient to preserve for appellate review error in admitting expert testimony that child's behavior was consistent with child who had been sexually abused-Evidence-Polygraph**

RICHARD BEAULIEU, Appellant/Cross-Appellee. v. STATE OF FLORIDA. Appellee/Cross-Appellant. 5th District. Case No. 95-605. Opinion filed June 27, 1997. Appeal from the Circuit Court for Orange County, John H. Adams, Sr., Judge. Counsel: William F. Jung, of Black & Jung, P.A., Tampa, for Appellant/Cross-Appellee. Robert A. Butterworth, Attorney General, Tallahassee, and Steven J. Guardiano, Sr. Assistant Attorney General, Daytona Beach, for Appellee/Cross-Appellant.

ON REMAND
MOTION FOR REHEARING
[Original Opinion at 22 Fla. L. Weekly D1240d]

(HARRIS, J.) We grant rehearing solely to address the cross appeal filed by the State. The trial court admitted evidence of a polygraph on the basis of *United States v. F'iccinonna, 885* F. 2d [illegible] (11th Cir. 1989). We decline to adopt *Piccinonna* which conflicts with our more recent decision in *Cassamassima v. State,* 657 So. 2d 906 (Fla. 5th DCA 1995), and direct the court to follow *Cassamassima* on remand. We do not change our position on the sufficiency of Defendant's objection below.

The supreme court has remanded this case to us to determine testimony on the basis that it was not reliable" in order to preserve the issue for appeal.

We cannot help but compare the dilemma facing defense counsel below with the dilemma faced by Orr in Joseph Heller's *Catch-22:*

> There was only one catch and that was Catch-22, which Specified that a concern for one's own safety in the face of dangers that were real and immediate was the process of a rational mind. Orr was crazy and could be grounded. All he had to do was ask; and as soon as he did, he would no longer be crazy and would have to fly more missions . . . If he flew them he was crazy and didn't have to; but if he didn't want to he was sane and had to . . . "That's some catch, that Catch-22," he [Yossarian] observed. "It's the best there is," Doc Daneeka agreed.

At the time of the trial below, we had issued our opinion in *Toro* v. *State.* 642 So. 2d 78, 82 (Fla. 5th DCA 1994), citing that portion of *State v. Townsend,* 635 So. 2d 949,958 (Fla. 1994), which held:

> If relevant, a medical expert witness may testify as to whether, in the expert's opinion, the behavior of a child is consistent with the behavior of a child who has been sexually abused.

Defense counsel's dilemma, therefore, was whether to object to this type testimony in face of *Toro* and *Townsend* and have his competency questioned or to not object only to see the supreme court recede from *Townsend*[1] and have all doubt removed. The defense counsel took a middle ground.

Defense counsel objected as follows:

> MR. GOODMAN [Defense Counsel]: I think he is about to elicit an answer which would be an improper answer. She [the psychologist] can't-she can give a diagnosis, if she can. She can't testify what she believes as to whether the child has been molested. . . She can give a diagnosis, for example, stress syndrome or whatever, or any other recognized psychological diagnosis, but she can't testify about whether in her opinion the child has been molested.
>
> MR. SAVITZ: She can testify and I think the case law backs us up-she did testify that he shows signs consistent with being sexually abused.
>
> MR. GOODMAN: I don't think it says that.

We find that the admission of the profile testimony was not harmless, and under the facts of this case and under the law as it existed at the time of the trial below, we hold that the objection was sufficient to preserve the issue for appeal and reverse Beaulieu's conviction and remand to the trial court for further action consistent with the opinion of the supreme *court* in *Hadden* v. *State,* 22 Fla. L. Weekly S55 (Fla. February 6, 1997).

REVERSED and REMANDED. (SHARP, W., and ANTOON, JJ., concur.)

'The supreme court has now held: "That expert testimony offered to prove the alleged victim of sexual abuse exhibits symptoms consistent with one who has been sexually abused should not be admitted." *Hadden v. State,* 22 Fla. L. Weekly S55.56 (Fla. February 6.1997).

* * *

**Criminal law-Probation revocation-Sentencing-Guidelines-Departure-Increase in sentence more than one cell-Belated appeal**

ROBERT WILSON, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 96-2691. Opinion filed June 27. 1997. Appeal from the Circuit Court for Volusia County, Gaylc Graziano, Judge. Counsel: Robert Wilson, Blountstown, pro se. Robert A. Butterworth, Attorney General, Tallahassee. and Roberta J. Tyke. Assistant Attorney General, Daytona Beach, for Appellee.

(THOMPSON, J.) Robert Wilson files this belated appeal to correct an improper departure sentence.' The trial court sentenced Wilson for violation of probation in two separate cases in 1991 and ordered him to serve concurrent five year departure sentences in each case Because none of the reasons given by the