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IN THE SUPREME COURT OF THE STATE OF FLORIDA

PAUL T. NEWELL,

Petitioner,

v.

Case No. 91,135

STATE OF FLORIDA,

Respondent.

FILED

STJ J. WHITE

SEP 4 1997

CLERK, SUPREME COURT

Deputy Clerk

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

RESPONDENT'S BRIEF ON JURISDICTION

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TABLE OF AUTHORITIES

CASES:

Johnson v. State,
689 So. 2d 1124 (Fla. 4th DCA 1997) , 6

Jo le v. ate,
405 So. 2d 815 (Fla. 1980) 3,4

Lowe v. State,
605 So. 2d 505 (Fla. 5th DCA 1992) 1,3

Moody v. State,
22 Fla. L. Weekly D488 (Fla. 2d DCA Feb. 19, 1997) 1

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii
STATEMENT OF THE CASE AND FACTS 1
SUMMARY OF ARGUMENT 2

ARGUMENT

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 3

CONCLUSION
CERTIFICATE OF SERVICE 6

STATEMENT OF THE CASE AND FACTS

This case was before the Fifth District Court of Appeal on review of a summary denial of a motion for postconviction relief. Petitioner's complaint on 3.850 was that his habitual offender sentence was illegal because he alleged that the oral pronouncement of sentence did not impose a mandatory minimum. The trial court denied relief on the ground that the fifth district had decided the issue adversely to Mr. Newell in Lowe v. State, 605 So. 2d 505 (Fla. 5th DCA 1992).

On appellate review, without requesting a response from the State, the district court entered an order which read as follows:

AFFIRMED. Lowe v. State, 605 So. 2d 505 (Fla. 5th DCA 1992), rev. denied, 613 So. 2d 6 (Fla. 1992). Accord, Moody v. State, 22 Fla. L. Weekly D488 (Fla. 2d DCA Feb. 19, 1997), rev. granted, Case No. 90,014 (Fla. May 2, 1997)....

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 Jollie v. State, 405 So. 2d 815, (Fla. 1980), this Court held that when a district court PCA opinion cites as controlling a case currently pending before this Court, the decision below is subject to review. In this case, the district court cited as controlling authority a case which was final over five years ago, namely, Lowe v. State, 605 So. 2d 505 (Fla. 5th DCA 1992), rev. denied, 613 So. 2d 6 (Fla. 1992). Since Lowe is not currently pending, this Court need not exercise jurisdiction in this case.

Respondent recognizes that the decision also cited a case pending in this Court, with the introductory signal "Accord". The Respondent suggests that by using this signal after citing Lowe without any limitation, the district court merely intended to

indicate that other cases also supported the same proposition. Since Moody was not cited as controlling the result in this case, but merely offered as additional support, this Court need not exercise jurisdiction in this case pursuant to Jollie, supra.

Even if this Court exercises its discretion to accept review of this case, then the Respondent respectfully suggests that the Jollie decision suggests the appropriate resolution, namely, consolidation of this **case** with the Moody case presently pending.

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,

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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 Paul T. Newell, DC# 122589, at Florida State Prison Workcamp, P.O. BOX 181, Starke, FL 32091 this 2d day of September, 1997.

Belle B. Turner

Belle B. Turner
Assistant Attorney General

IN THE SUPREME COURT OF THE STATE OF FLORIDA

PAUL T. NEWELL,

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v.

Case No. 91,135

STATE OF FLORIDA,

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ON DISCRETIONARY REVIEW FROM THE
DISTRICT COURT OF APPEAL, FIFTH DISTRICT
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APPENDIX TO RESPONDENT'S BRIEF ON JURISDICTION

Newell v. State,

Case No. 97-1023 (Fla. 5th DCA June 20, 1997).....A

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IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

JANUARY TERM 1997

PAUL T. NEWELL,
Appellant,

NOT FINAL UNTIL THE TIME EXPIRES
TO FILE REHEARING MOTION, AND,
IF FILED, DISPOSED OF.

v.

Case No. 97-1023

L.C. # 93-4540

STATE OF FLORIDA,
Appellee.

Opinion filed June 20, 1997

3.850 Appeal from the Circuit Court
for Orange County,
Cynthia Z. Mackinnon, Judge.

Paul T. Newell, Starke,
pro se.

No Appearance for Appellee.

PER CURIAM.

AFFIRMED. Lowe v State, 605 So. 2d 505 (Fla. 5th DCA 1992), rev. denied, 613
So. 2d 6 (Fla. 1992). Accord, Moodv v. State, 22 Fla. L. Weekly D488 (Fla. 2d DCA Feb.
19, 1997), rev. granted, Case No. 90.014 (Fla. May 2, 1997); White v. State, 618 So. 2d
354 (Fla. 1st DCA 1993). Contra; State v. Morales: 678 So. 2d 510 (Fla. 3d DCA 1996);
Hill v. State, 652 So. 2d 904 (Fla. 4th DCA 1995).

PETERSON, C.J., GOSHORN and ANTOON, JJ.. concur.

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J. A. DEACON, FLORIDA