IN THE SUPREME COURT OF FLORIDA

JAMES L. COTTLE,

Petitioner,

v. Case No. 91,822

STATE OF FLORIDA,

Respondent.
_____/

RESPONDENT'S JURISDICTIONAL BRIEF

On Review from the District Court of Appeal
of the State of Florida
Fifth District

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

REBECCA ROARK WALL
ASSISTANT ATTORNEY GENERAL
Fla. Bar #618586
444 Seabreeze Blvd.
5th Floor
Daytona Beach, FL 32118
(904) 238-4990

COUNSEL FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

OTHER AUTHORITIES:

SUMMARY OF ARGUMENT

This court should not exercise its discretionary jurisdiction in this case. There is no express and direct conflict contained in the Fifth District Court's opinion. There is nothing more than a factual difference between this case and other factually distinguishable cases. Both of the other two districts which Petitioner cites are in conflict have followed the Fifth District's analysis on this very issue. There is no conflict among the districts, and therefore, this Court should deny review.

ARGUMENT

THIS COURT SHOULD NOT EXERCISE DISCRETIONARY JURISDICTION IN THIS CASE BECAUSE NO GROUNDS EXIST FOR SUCH JURISDICTION.

This court's jurisdiction is defined by Article V of the Florida Constitution (1991). Article V, §3(b) expressly sets out this court's jurisdiction, describing every situation in which this court has or may take jurisdiction. Art. V, §3(b), Fla. Const. (1991). That jurisdiction is also set out in Rule 9.030(a) of the Florida Rules of Appellate Procedure.

While Petitioner has attempted to invoke this court's jurisdiction based on "express and direct conflict", this case fails to qualify on that ground. In 1980, Article V was amended to limit the Florida Supreme Court's discretionary jurisdiction in cases involving conflict. Rule 9.030 was likewise revised to incorporate the constitutional amendment. The Committee Notes to Rule 9.030, in discussing the 1980 amendment make it clear that the amendment was intended to reduce the "burgeoning caseload" that the Court handles.

The Committee Note, referring to conflict cases, states that "[t]hese cases comprised the overwhelming bulk of the court's caseload and gave rise to an intricate body of case law

interpreting the requirements for discretionary conflict review." For this reason, Article V and Rule 9.030 were amended to require a showing of an "express" as well as a "direct" conflict in order to invoke jurisdiction.

In the instant case, Petitioner does not even allege that there is "express" conflict. He only claims "direct" conflict between the instant opinion and three other district court opinions. Without alleging or attempting to show "express" conflict, Petitioner fails to invoke this Court's discretionary jurisdiction as delineated by the statute and the rule.

Furthermore, the written opinion of the Fifth District Court of Appeal filed September 5, 1997 shows no express and direct conflict with any other court. (See attached opinion). Clearly, nowhere in the opinion does the District Court **express** that there is conflict between its decision and any other court. Nor does the opinion cite to any case which is in **direct** conflict with either the DCA's ruling or the issue presented.

Petitioner cites to three cases which he claims conflict with the opinion in the instant case. However, each of the cited cases contains nothing more than factual distinctions, which create neither conflict nor confusion.

The issue discussed in the Fifth District's *Cottle* opinion

revolves around Petitioner's claim of ineffective assistance of trial counsel for failing to disclose a plea offer before trial. The Fifth District's opinion correctly discusses the law regarding the burden of proof necessary to establish a cause for relief for ineffective assistance. The court states that the defendant must be able to **prove** prejudice -- a correct statement of the requirements of *Strickland v. Washington*, 466 U.S. 668 (1984). The Fifth District then points out that in order to prove prejudice for failure to disclose a plea offer, a defendant must be able to prove that his sentence **would have been lesser** than the one he got. Again, that is a correct statement of the *Strickland* requirement.

The factual difference which sets the instant case apart from the three cases cited by Petitioner is that, in the instant case, Petitioner failed to allege anything that would have proven prejudice -- i.e. that the judge would have accepted the plea offer. The Fifth District's analysis in the instant case is **case specific** with regard to the requirement of proving that the trial judge would have accepted the offer.

In each of the cases cited by Petitioner, the facts were such as to satisfy the proof requirement. In *Lee v. State*, 677 So.2d 312 (Fla. 1st DCA 1996), the plea offer included a plea to **reduced charges**, which would have resulted in a lesser sentence by virtue

of the reduced charges. The allegation was sufficient on its face to require the trial court to conduct an evidentiary hearing.

Likewise, in *Seymore v. State*, 693 So.2d 647 (Fla. 1st DCA 1997), the plea offer would have allowed the defendant to get a prison term ranging from 30 months to 3 ½ years as opposed to the 20-year habitual sentence that he got. It is clear that the claim in that case included an allegation "that acceptance of the offer would have resulted in a shorter prison term than the [] sentence he ultimately received." *Id.* That allegation was sufficient to require the trial court to conduct an evidentiary hearing.

In *Hilligenn v. State*, 660 So.2d 361 (Fla. 2d DCA 1995), it is extremely difficult to determine what the actual and full allegations were -- the opinion is very brief. It is hard to see how this opinion can be in direct conflict with the instant case, with so little discussion of either facts or law. However, what is very clear in that opinion is the district court's instruction to the trial court that it may again deny the claim summarily if the court attaches portions of the record to support the summary denial. *Id.* So, even sufficient pleading does not preclude summary denial of the claim.

When this court examines the three cases which Petitioner cites, it is clear that there is no conflict. The Fifth District

Court of Appeal has clearly applied the correct legal standard in requiring a defendant to make sufficient allegations to show that he was prejudiced by his trial attorney's actions. When it involves the attorney's failure to disclose a plea offer, the legal test requires that the defendant allege, and ultimately prove, that if he was told the offer he would have accepted it, **and that would have resulted in a lesser sentence.**

In this case, the offer which the prosecutor made prior to trial involved a plea to the charges. In return, the prosecutor would agree to **not** seek habitual sentencing. Petitioner alleged that he would have taken that offer. However, he does not allege, nor can he prove, that he necessarily would have received a lesser sentence. The Fifth District, then, correctly held that "[b]ecause Cottle did not allege that the trial court would have accepted the terms of the allege plea offer, specifically the promise not to seek habitualization, **and failed to establish that his sentence under the plea would in fact have been for a lesser term of years,** his claim is legally insufficient." (emphasis added) *Cottle v. State*, 22 Fla.L.Weekly D2126 at D2127 (Fla. 5th DCA September 5, 1997).

The Fifth District's *Cottle* opinion is a clear and accurate application of the standards and requirements of the law relating

disclose a plea offer. The allegations as raised and presented by Petitioner to the courts below were insufficient to warrant relief, and did not require an evidentiary hearing. There is no conflict with any other court -- either express or direct.

This court, long ago, very clearly delineated the limitation on its jurisdiction which was narrowed by the 1980 constitutional amendment. In *Jenkins v. State*, 385 So.2d 1356 (Fla. 1980), this Court stated

> The pertinent language of section 3(b)(3), as amended April 1, 1980, leaves no room for doubt. This Court may only review a decision of a district court of appeal that **expressly** and directly conflicts with a decision of another district court of appeal or the Supreme Court on the same question of law. The dictionary definitions of the term "express" include: "to represent in words"; "to give expression to." "Expressly" is defined; "in an express manner." *Webster's Third New International Dictionary*, (1961 ed. unabr.).

(emphasis in original) *Id.* at 1359 This court further added that "[i]t is conflict of **decisions**, not conflict of **opinions** or **reasons** that supplies jurisdiction for review by certiorari." (emphasis in original) *Id.*

It is evident on the face of the published opinion that there

is no "express" conflict. Similarly, there is no "direct" conflict created by the court's explanation of the legal standard and burden of proof. Both the constitution and Rule 9.030 require that the "express and direct" conflict be obvious. Since neither is present here, this court should decline to take jurisdiction.

CONCLUSION

Based on the arguments and authorities presented herein, Respondent respectfully asks this honorable court to deny jurisdiction in this matter.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

REBECCA ROARK WALL
ASSISTANT ATTORNEY GENERAL
Fla. Bar #618586
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 and foregoing Jurisdictional Brief of Respondent has been furnished by U.S. mail to **James T. Miller**, attorney for Petitioner, at 920 Blackstone Building, 233 E. Bay Street, Jacksonville, FL 32202, this 1st day of December, 1997.

Rebecca Roark Wall
Of Counsel

expert testimony and related travel. Thus, he considered Mard's fees exorbitant." Ronda Weinstock's attorney testified that he considered Mard's fees "very high" and that Mard's hourly rate is "higher than what at that time was basically the going rate." In addition, the attorney testified that Mard's valuation reports were rendered useless when, prior to trial of the Weinstocks' case, this court disapproved Mard's method for valuing business good will. *See Young v. Young*, 600 So. 2d 1140 (Fla. 5th DCA), *rev. denied*, 613 So. 2d 13 (Fla. 1992). The attorney hired another expert to reevaluate Michael Weinstock's dentistry practice.

At the close of the hearing, the trial court announced that Mard reasonably expended 71 hours, $75 per hour was a reasonable rate, and Mard was entitled to $5,757.71 in fees and costs. Before entry of the final order, Mard moved to disqualify the trial judge, alleging bias against Mard's attorney. The judge denied the motion and simultaneously entered its order on Mard's motion for fees. Mard then petitioned this court for a writ of prohibition. We granted the petition and issued the writ, finding Mard's motion to disqualify legally sufficient and therefore improperly denied. *See Mard v. Freeman*, 688 So. 2d 455 (Fla. 5th DCA 1997).

Mard urges reversal of the fee award based on the erroneous denial of his motion to disqualify. However, the judge orally ruled on Mard's motion for fees before the motion to disqualify was filed, and he retained the authority to reduce the prior ruling to writing. *Fischer v. Knuck*, 497 So. 2d 240 (Fla. 1986). *Cf. Dream Inn, Inc. v. Hester*, 691 So. 2d 555 (Fla. 5th DCA 1997) (order granting new trial entered simultaneously with order of recusal void where trial judge reserved ruling after hearing on motion for new trial).

Mard also asserts the trial court lacked authority to determine a reasonable fee because the Weinstocks, through their attorneys, agreed to his quoted fee. This argument is without merit. The trial court appointed Mard to perform the valuations and expressly referred to Mard's "reasonable fee" in the order. Mard did not question or contest the reference. His motion for fees sought "a reasonable fee pursuant to [the court's] Order for Business Valuations...." Moreover, at the motion hearing, Mard acknowledged that the court was to determine whether or not his fee was reasonable. He cannot now argue that the court had no such authority.

However, we agree with Mard that the lower court erred in considering nonexpert testimony regarding the reasonableness of his fee. Neither Michael Weinstock nor Ronda Weinstock's attorney was competent to testify on that issue. One who is not shown to have expertise in the particular field is not qualified to testify about the necessity and reasonableness of the expert's fee. *Powell v. Barnes*, 629 So. 2d 185 (Fla. 5th DCA 1993). The court did properly consider the usefulness of Mard's reports in light of our holding in *Young*. *See Bystrom v. Florida Rock Industries, Inc.*, 513 So. 2d 742 (Fla. 3d DCA 1987) (quality of expert's testimony is proper factor for court's consideration in determining reasonable fee). Nonetheless, the court based its determination in part on incompetent testimony that Mard's fee was "exorbitant" and higher than the "going rate." Accordingly, we reverse the order and remand solely for reconsideration of the amount of Mard's fee. Because Judge Freeman has been disqualified and the hearing on fees is more than a ministerial act, the hearing shall be conducted before the successor judge. *Dream Inn, Inc.*, 691 So. 2d at 556.

REVERSED and REMANDED. (DAUKSCH and HARRIS, JJ., concur.)

* * *

Criminal law—Post conviction relief—Denial of motion for post conviction relief affirmed where defendant's motion was not timely, and issues raised in motion were successive

FARLEY GILBERT, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 97-2155. Opinion filed September 5, 1997. 3.850 Appeal from the Circuit Court for Orange County, Dorothy J. Russell, Judge. Counsel: Farley Gilbert, Okeechobee, *pro se*. No Appearance for Appellee.

(PER CURIAM.) The defendant appeals the trial court's order denying his petition for postconviction relief which was filed pursuant to rule 3.850 of the Florida Rules of Criminal Procedure. We affirm the trial court's order because the defendant's motion was not timely filed and because the issues raised therein are successive. *See Penn v. State*, 688 So. 2d 450 (Fla. 5th DCA 1997); *Davis v. State*, 654 So. 2d 667 (Fla. 5th DCA 1995).

AFFIRMED. (GRIFFIN, C.J., COBB and ANTOON, JJ., concur.)

* * *

Criminal law—Post conviction relief—Ineffective assistance of counsel—Trial court properly denied defendant's ineffective assistance of counsel claim based on counsel's alleged failure to relay a plea offer whereby in exchange for guilty pleas to charged offenses, state would not have sought sentencing under habitual offender statute, where defendant failed to allege that trial court would have accepted plea agreement, and, at time defendant was sentenced, trial court as well as prosecutor could initiate habitual offender proceedings—If a defendant is required to prove a fact at an evidentiary hearing, it must be alleged in motion for post conviction relief—Claim legally insufficient where defendant did not allege that trial court would have accepted plea offer, and failed to establish that sentence under plea would have been for a lesser term of years

JAMES L. COTTLE, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 97-1798. Opinion filed September 5, 1997. 3.850 Appeal from the Circuit Court for St. Johns County, Robert K. Mathis, Judge. Counsel: James T. Miller of James T. Miller, P.A., Jacksonville, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Jennifer Meek, Assistant Attorney General, Daytona Beach, for Appellee.

(COBB, J.) James L. Cottle appeals the summary denial of his motion for post conviction relief filed pursuant to Rule 3.850, Florida Rules of Criminal Procedure. On July 6, 1995, Cottle was sentenced to concurrent ten-year terms as a habitual felony offender for the third degree felonies of burglary of a motor vehicle and felony petit theft. In his 3.850 motion, Cottle raised four grounds of ineffective assistance of counsel, only one of which merits discussion. Cottle claimed that trial counsel failed to relay a plea offer, to-wit: in exchange for guilty pleas to the charged offenses, the state would not seek sentencing under the habitual offender statute. Cottle alleges that he would have accepted this plea offer.

At sentencing, the prosecutor noted that Cottle was offered a plea. Cottle at that point asserted that his attorney had not presented any plea offer. Defense counsel represented to the court that he had a note in his file which indicated that on May 2, 1995, he informed Cottle that the state would not habitualize him if he entered a plea as charged. That note also indicated that Cottle denied breaking into the car and stated that he wanted a trial.

In *Young v. State*, 608 So. 2d 111 (Fla. 5th DCA 1992), Young was convicted of capital sexual battery after trial. Young claimed in his 3.850 motion that defense counsel did not present to him a plea offer by the state to a reduced charge and specific sentence, and further alleged that he would have accepted the plea offer and would have received a lesser sentence. This claim was deemed legally sufficient to require further proceedings. However, two of the three judges on the panel concurred specially, emphasizing that defendant must specifically prove that the trial court would have accepted the plea to the lesser charge, including the recommended sentence.

If a defendant is required to prove a fact at an evidentiary hearing, it must be alleged in the 3.850 motion. Cottle did not allege that the trial court would have accepted the plea agreement. At the time Cottle was sentenced, the court as well as the prosecutor could initiate habitual offender proceedings. *See generally Young v. State*, 22 Fla. L. Weekly S384 (Fla. July 3, 1997) (only prosecutor can initiate habitual offender proceed-

ings, but this holding is not to be applied to cases which are final, or in pending cases where issue was not preserved). The judge could have rejected any decision by the state not to initiate habitual offender proceedings, and served the notice of intent himself.

Our court has noted that there is a strict standard of pleading and proof in these types of cases because a defendant who elects to go to trial and receives a sentence greater than the plea offer by the state has nothing to lose by alleging that he was not properly advised. *Young*, 608 So. 2d at 112-113. If a defendant was not aware of a plea offer, in many cases it would not have been brought to the court's attention either. In those cases, whether or not the court would have accepted such a plea offer, had it been tendered, would be a matter of pure speculation. Substantial prejudice resulting from ineffective assistance of counsel would be difficult to establish. *See generally, Knight v. State*, 394 So. 2d 997 (Fla. 1981).

In *Young*, this court noted that the initial brief on direct appeal contained an assertion, not disputed by the state, that the trial judge had tentatively approved the proposed plea offer. *Young*, 608 So. 2d at 113. *Young* is therefore distinguishable, because Cottle has not alleged that the judge approved of the plea offer before trial, or was even aware of it. *Young* is also distinguishable, because it was alleged that the proposed plea offer was to a reduced charge and specific sentence, which did not carry a mandatory term. In the instant case, the plea offer did not involve a lesser charge, or a specific term of years regarding the sentence. As Cottle was convicted of two third degree felonies, the court could not have imposed concurrent ten-year terms, absent the habitual offender classification. However, the court could have imposed consecutive five-year terms, also totaling ten years. Cottle did not allege that his guideline scoresheet would have required a lesser sentence.

Because Cottle did not allege that the trial court would have accepted the terms of the alleged plea offer, specifically the promise not to seek habitualization, and failed to establish that his sentence under the plea would in fact have been for a lesser term of years, his claim is legally insufficient. The order denying relief is affirmed.

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

* * *

Criminal law—Tampering with witness—No merit to defendant's contention that, since he had already pled no contest to burglary charge when he went to victim's house and threatened to kill victim if he did not call the state and drop the burglary charges, there was no "official proceeding" pending—Since defendant had not yet been sentenced, proceedings were not over, and defendant might have been permitted to withdraw plea if complaining witness recanted testimony—Since proceedings remained open for purpose of sentencing, and because victim might have testified at sentencing hearing, defendant's threats might have been found to have intended to induce victim to withhold testimony from official proceeding

JAMES W. HAGER, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 96-2581. Opinion filed September 5, 1997. Appeal from the Circuit Court for Brevard County, Edward J. Richardson, Judge. Counsel: James B. Gibson, Public Defender, and Rebecca M. Becker, Assistant Public Defender, Daytona Beach, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Anthony J. Golden, Assistant Attorney General, Daytona Beach, for Appellee.

(HARRIS, J.) On the complaint of John Bookstein, James W. Hager was charged with burglary of Bookstein's dwelling. Sometime later, Hager went to Bookstein's dwelling and threatened to kill him if he did not call the state and drop the burglary charges. Fearful of Hager and in his presence, Bookstein called the assigned assistant state attorney and asked that the burglary charges be dismissed. After Hager left, Bookstein called the assistant state attorney back and advised him what had occurred. Hager was then charged with tampering with a witness in violation of section 914.22, Florida Statutes.

Hager moved for judgment of acquittal in this tampering case on the basis that he had pled no contest to the burglary charge two days before this incident occurred and was awaiting sentence. His position is that there was no "official proceeding" pending when he confronted Bookstein. The trial court rejected this argument and so do we.

First, since Hager had not yet been sentenced, the proceedings were not finally over. There is a strong policy in favor of permitting the defendant to withdraw a plea prior to sentencing if good reasons can be shown. *State v. Braverman,* 348 So. 2d 1183 (Fla. 3d DCA 1977). If the complaining witness, in effect, recants his testimony, that might be sufficient to permit the withdrawal of the previous plea.

Second, because the proceedings remained open for the purpose of sentencing, and because Bookstein, as the victim, might have been called to testify at the sentencing hearing, Hager's threats might well have been found to have been intended to "cause or induce any person to ... withhold testimony . . . from an . . . official proceeding." See section 914.22(1)(a), Florida Statutes.

AFFIRMED. (GRIFFIN, C.J., and THOMPSON, J., concur.)

* * *

Criminal law—Appeal from conviction for burglary of a dwelling, where defendant cut through screen on window, and victim retrieved knife and stabbed defendant's wrist when he stuck his hand through screen to open door—No error in trial court's response to jury question as to ownership of knife, that jury would have to rely on own memories—Despite defendant's contention that jury must have relied on theft of knife to find necessary intent to prove crime of burglary, jury may have found necessary intent based on fact that entering was done stealthily and without consent of owner, and fact that items belonging to victim were found stacked near defendant's bicycle outside victim's house

LEE ANDERSON, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 96-3127. Opinion filed September 5, 1997. Appeal from the Circuit Court for Seminole County, Thomas G. Freeman, Judge. Counsel: James B. Gibson, Public Defender, and Noel A. Pelella, Assistant Public Defender, Daytona Beach, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Robin A. Compton, Assistant Attorney General, Daytona Beach, for Appellee.

(HARRIS, J.) James Stolzenberg was awakened by the sound of scratching noises at his back door. When he investigated, he saw someone using a sharp object to cut through the screen on a window next to the door. Stolzenberg retrieved a knife from the kitchen, and when the intruder stuck his hand through the screen to open the door, Stolzenberg stabbed the man's wrist. The intruder fled but was apprehended in a wooded area, bleeding profusely with a utility knife lying next to him. The intruder was identified as Lee Anderson. He was charged with and convicted of burglary of a dwelling.

Anderson appeals, contending that the court erred in its response to a jury question. We disagree and affirm.

During deliberations, the jury sent out a note asking the following question: "Ownership of the utility knife—we can't recall—was Stolzenberg owner of the knife?" The judge conferred with counsel:

> COURT: And—but I don't—how do you want to handle it? What do you say, the State?
>
> STATE: I think we should tell them to rely on their own memory.
>
> COURT: Tell them we can't supplement, we can't provide additional evidence at this time?
>
> STATE: Right. I think that's appropriate.
>
> DEFENSE: Judge, the only option I would have if they feel like he stole the knife, obviously that would support the burglary conviction. I think the evidence—there's no evidence as to ownership. I think that's what they should be told . . . one way or the other, whether it belonged to him.