ORIGINAL

IN THE SUPREME COURT OF FLORIDA

JAMES E. STEPHENS,

Petitioner,

v.

FSC No. 92,639
(2d DCA no. 97-00569)

STATE OF FLORIDA,

Respondent.

_____/

DISCRETIONARY REVIEW OF DECISION OF THE SECOND DISTRICT COURT OF APPEAL STATE OF FLORIDA

RESPONDENT'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

Respondent does not accept the Petitioner's statement of the case and facts. It contains material that goes beyond the content of the decision below. This Court, however, considers only the facts that appear on the face of the district court decision in making its jurisdictional determination. Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986). The content of the opinion under review determines whether there is conflict. Jenkins v. State, 385 So. 2d 1356 (Fla. 1980).

The district court decision reflects the following procedural history. (Respondent's Exhibit A)

Petitioner was charged with one count of battery of a law enforcement officer, one count of resisting an officer with violence, one count of possession of cocaine and one count of unauthorized possession of a driver's license or identification card. The battery and resisting charges were severed and tried by a jury, and Petitioner was convicted of battery as charged and of the lesser offense of resisting an officer without violence. He then pled to the remaining offenses and was sentenced on all offenses..

Petitioner's charges arose after police stopped a car in which he was a passenger. For reasons of officer safety, one of the policemen asked Petitioner to exit the car. He began to flail his arms and yell obscenities, refusing to leave the vehicle. As an officer reached over to unbuckle Petitioner's seat belt and pull

him out of the car, Petitioner punched the officer. This precipitated his arrest for battery of a law enforcement officer. He allegedly struggled violently and continued to yell obscenities and eventually required hobble restraints to prevent injury to the officers or to himself.

After the altercation, he complained only of scrapes on his nose and elbow. He stated that an unobserved bruise on his leg and cut on his arm were old injuries. Nevertheless, he was taken to the hospital as standard police procedure. The officers testified that they used the least amount of force necessary to arrest him; no one struck, punched or kicked him at any time. The third passenger testified he did not see the officers beat Petitioner.

The primary thrust of his defense was that he was the victim of police brutality and that which the police denominated resisting arrest was in actuality self-defense. To this end, Petitioner produced at trial photographs of a bruise on his thigh that he contended was the product of an officer's wielding a flashlight or night stick. On rebuttal, the state called Dr. Wilks, the emergency room physician, who examined Petitioner immediately after arrest. Testifying from both his notes and from the photographs, Wilks stated that the leg bruise was more than a day old and would not have been evident immediately after infliction.

Petitioner filed a motion for post-conviction relief, contending that Petitioner's trial counsel was ineffective in

failing to clarify that photographs of Petitioner's leg bruise were taken two days after his arrest and not immediately afterward. The defense contended that had counsel properly elicited this information, the jury could have concluded that the bruise was in fact inflicted by an officer during the incident, and that the effect of the evidence on the jury would have been to create doubt in their minds as to the veracity of the officers' testimony. An evidentiary hearing was held and relief granted on this claim.

On appeal, the district court reversed, holding as follows:

> A review of the attachments to the trial court's ruling on the 3.850 motion, together with the record of the evidentiary hearing, reveals that there was indeed confusion concerning when Stephens received the bruises depicted in the photographs. Stephens' counsel probably was less than effective in presenting this evidence or in cross-examining Dr. Wilks. Nevertheless, to prevail on a 3.850 motion, the defendant must prove not only that his attorney made errors so serious that he could not be said to have been acting truly as his "counsel," the defendant must also establish that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Rose v. State, 675 So. 2d 567, 569 (Fla. 1996)(citing Strickland v. Washington, 466 U.S. 688 (1984)). Our assessment of the evidence leads us to the conclusion that any alleged deficiency on the part of Stephens' counsel did not affect the fairness and reliability of the trial so as to undermine confidence in the outcome. See Kennedy v. State, 547 So. 2d 912 (Fla. 1989). Our conclusion is only bolstered by the extremely weak nature of Stephens' questionable police brutality defense, which was uncorroborated by any other evidence.

SUMMARY OF THE ARGUMENT

This Court should decline to exercise jurisdiction to hear the instant case because the district court opinion does not expressly and directly conflict with the opinions cited by Petitioner. The district court's decision does not reflect that it reweighed witness credibility or redetermined facts or weight of the evidence assigned by the trial court. Rather, the district court's decision reflects an assessment of the evidence under the two part Strickland standard for ineffective assistance of counsel. The district court's decision comports, rather than conflicts, with the decisions cited by Petitioner.

ARGUMENT

THIS COURT SHOULD DECLINE TO EXERCISE DISCRETIONARY JURISDICTION TO CONSIDER THIS APPEAL BECAUSE THE OPINION OF THE SECOND DISTRICT COURT OF APPEAL DOES NOT "EXPRESSLY AND DIRECTLY" CONFLICT WITH THE PRIOR DECISIONS OF ANOTHER DISTRICT COURT OF APPEAL OR THE SUPREME COURT ON THE SAME QUESTION OF LAW.

Petitioner seeks to invoke the discretionary jurisdiction of the Court, arguing that the Second District's decision below expressly and directly conflicts with decisions emanating from this Court in Grossman v. Dugger, 23 Fla. L. Weekly S16 (Fla. Dec. 18, 1997); Blanco v. State, 702 So. 2d 1250 (Fla. 1997); Rose v. State, 675 So. 2d 567 (Fla. 1996); Demps v. State, 462 So. 2d 1074, 1075 (Fla. 1984); and the Fourth District's decision in Thomas v. State, 616 So. 2d 1150 (Fla. 4th DCA 1993). The state responds that the cases cited by Petitioner are not in direct and express conflict with the subject decision of the Second District.

To establish jurisdictional conflict under Art. V, §3(b)(3), Fla. Const., a petitioner must show that there is an express and direct conflict of decisions. Jenkins v. State, 385 So.2d 1356 (Fla. 1980). The alleged conflict between decisions "must be express and direct" and "must appear within the four corners of the majority decision." Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986).

The question is not whether this Court might or would rule

differently, but whether the district court's ruling as it stands can only create vital conflict. Nielsen v. City of Sarasota, 117 So.2d 731, 734-735 (Fla. 1960). As this Court pointed out in Kyle v. Kyle, 139 So. 2d 885, 887 (Fla. 1962), "if the points of law settled by the two cases are not the same, then no conflict can arise." See also Dep't of Health and Rehabilitative Serv. v. Nat'l Adoption Counseling Serv., Inc., 498 So. 2d 888 (Fla. 1986)("implied" conflict may not serve as a basis for jurisdiction).

The Court typically finds jurisdictional conflict in two types of situations. One involves the announcement of a rule of law in conflict with a rule this Court has previously announced. The other jurisdictional conflict arises out of the application of a rule of law, in a case involving substantially the same controlling facts, resulting in a decision contrary to that reached in a prior case. Nielsen v. City of Sarasota, 117 So.2d at 743. Sub judice, review of the district court's decision reveals that the district court did not announce a rule of law in conflict with a previously announced rule. Nor did it apply a settled rule of law in such a way as to reach a result contrary to an earlier decision involving or turning on the same controlling facts.

Here, in reversing the order granting post-conviction relief, the Second District disposed of Petitioner's claim on the prejudice prong of the Strickland v. Washington, 466 U.S. 668 (1984),

standard for ineffective assistance of counsel. (Exhibit A) Respondent asserts that in doing so, the district court applied the settled principle set forth in Rose v. State, 675 So.2d 567, 571(Fla. 1996), and in Thomas v. State, 616 So. 2d 1150 (Fla. 4th DCA 1993), that an ineffective assistance of counsel claim is a mixed question of law and fact subject to plenary review under the test set forth in Strickland. The district court's decision comports, rather than conflicts, with Rose and Thomas because the district court properly reviewed Petitioner's claim under the standard enunciated in Strickland.

Petitioner asserts conflict based on Blanco v. State, 702 So.2d 1250, 1252(Fla. 1997), wherein this Court, quoting Demps v. State, 462 So. 2d 1074, 1075(Fla. 1984) stated:

> In reviewing a trial court's application of the above law to a rule 3.850 motion following an evidentiary hearing, this Court applies the following standard of review: As long as the trial court's findings are supported by competent substantial evidence, "this Court will not 'substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of the witnesses as well as the weight to be given to the evidence by the trial court.'"

Similarly, Petitioner promotes conflict with this Court's decision in Grossman v. Dugger, 23 Fla.L.Weekly S16 (Fla. Dec. 18, 1997), wherein this Court quoted the above passage from the Blanco and Demps decisions.

Contrary to Petitioner's assertions, the district court

decision does not conflict with Blanco, Demps, or Grossman. The Second District's "assessment of the evidence" and assessment of Petitioner's police brutality defense as "extremely weak," "questionable," and "uncorroborated by any other evidence," in analyzing Petitioner's claim under the prejudice prong, does not reflect any redetermination of facts found by the trial court. Nor does the decision reflect a substitution of judgment for that of the trial court on witness credibility or weight of the evidence.

Rather, the Second District's decision reflects its proper resolution of a question of law, namely, whether Petitioner satisfied the prejudice prong of Strickland. Respondent asserts an assessment of the evidence, including the promoted defense at trial, was an integral aspect of the district court's review of Petitioner's claim for the required showing of prejudice under Strickland. And, the decision, which reflects an assessment of the evidence under Strickland, does not, as Petitioner suggests, show that the district court substituted its judgment for that of the trial court of facts, witness credibility, or weight of the evidence.[1]

Petitioner mistakenly asserts that based on Blanco and Grossman, the only assessment a reviewing court is now permitted to make is to review the record to determine whether competent,

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[1]Petitioner also seeks to show conflict by reference to the trial record and the trial court's order. The record cannot be used to establish jurisdiction. Reaves, supra.

substantial evidence supports the trial court's factual findings. (Petitioner's amended brief at p. 6) If such were true, then an affirmance would be required in every case where a trial court, upon making a factual determination supported by evidence, then proceeded to ignore or misapply the Strickland standard or, for that matter, other proper law. Neither Blanco nor Grossman so hold. Review of factual determinations for support does not end the appellate court's inquiry on collateral review, as Blanco and Grossman teach through reasoned analysis therein.

In Blanco, this Court addressed the trial court's findings in denying Blanco's second Rule 3.850 motion in which he sought to present newly discovered evidence. This Court held that the record showed the trial court properly applied the law and its findings were supported by competent substantial evidence. Id. at 1252. In Grossman, this Court found that the trial court applied the right rule of law governing ineffective assistance of counsel under Strickland and competent substantial evidence supported the trial court's finding. Id., 23 Fla.L.Weekly at S16. Neither Blanco nor Grossman excuse de novo review of questions of law resolved below.

Here, the district court decision reflects proper review of whether Petitioner satisfied the prejudice prong of Strickland. Resolution of this question of law, upon review of the evidence, did not result in direct and express conflict of the district court opinion with the above-mentioned decisions.

CONCLUSION

Based upon the foregoing reasons, arguments, and citations to authority, this Honorable Court should decline to exercise jurisdiction to consider the instant appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing amended jurisdictional brief has been furnished by U.S. regular mail to David R. Gemmer, Esquire, P.O. Box 390, St. Petersburg, Florida 33731 on this 13th day of April, 1998.

Patricia A McCarthy

COUNSEL FOR RESPONDENT