IN THE SUPREME COURT OF FLORIDA

CEASAR H. ROBINSON,

Petitioner,

v.

FSC No. 93,210
(2d DCA no. 97-02619)

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 facts. The statement omits a number of facts set forth in the district court opinion, including facts adduced at trial which the district court determined were not taken into account by the trial court. Petitioner's statement also 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 sets forth the procedural history of the case and the following facts adduced at Petitioner's trial:

> At the 1982 trial, Ms. Francis testified that she, Mr. Francis, and her daughter, Shantel, went to bed together on the night of December 4, 1981. Shantel was sleeping at Ms. Francis's feet. During the early morning hours, Ms. Francis awoke with a numb feeling in her hand. She testified that she saw Robinson standing by the bed. Robinson said: "You thought you all have gotten away, but I got both of you all." Robinson then left the house. Ms. Francis then realized that she had been shot and her husband, Mr. Francis, had been killed.
>
> Shantel testified that she saw Robinson come into the room and shoot both her mother and her stepfather. She described what Robinson was wearing, although her testimony conflicted with her previous statement to the police.
>
> Ms. Francis's and Shantel's eye witness

> accounts were the only direct evidence presented against Robinson at the 1982 trial. However, the State presented an abundance of circumstantial evidence against Robinson, including: (1) Robinson's purchase of a .38 caliber gun and bullets one month prior to the shootings; which was the same caliber as that used in the shootings; (2) Robinson's fingerprint that was discovered on a light bulb that had been unscrewed from the porch light outside of the residence where the shootings took place; (3) a witness's testimony that, prior to the shootings, Robinson had told him that he caught Ms. Francis and Mr. Francis in bed together and could have killed them if he wanted to; (4) the fact that Robinson, at one time, had a key to the front door of the residence where the shootings took place, and the door showed no signed of forced entry on the night of the shootings, despite being locked; (5) the fact that the shootings took place five months after Robinson and Ms. Francis were divorced, two months after Mr. Francis and Ms. Francis were married, and a mere two days after Mr. Francis arrived in Florida and began residing with his newlywed wife in the former marital abode of Robinson and Ms. Francis; (6) the fact that nothing was stolen from the residence on the night of the shootings; and (7) the fact that the shooter did not harm Shantel, who was sleeping in the same bed with the victims.
>
> Robinson denied he was responsible for the shootings. He presented an alibi defense which indicated that he was 250 miles away, in Monticello, Florida, at the time of the shootings. However, the witnesses offered by the defense to corroborate Robinson's alibi, could not pinpoint Robinson's whereabouts between 6:00 p.m., Friday, December 4, 1981, and daybreak, Saturday, December 5, 1981.

(Respondent's Exhibit A, pgs. 3-4)

The district court's decision further provides the following facts adduced at the 1997 evidentiary hearing:

Wilbert Hollins (Hollins), a forty-four-year-old inmate at the Avon Park Correctional Institution, was the key witness for Robinson at the 1997 hearing on the motion for postconviction relief. Hollins was serving a life sentence at the time of the hearing.

Hollins testified to the following alleged facts. He met the victim, Avil Francis, in Winter Park, Florida in 1974 or 1975. He and Mr. Francis became friends and would visit one another at each other's homes. Hollins met Bernadette Francis, whom he knew as Bernadette James, through his relationship with Mr. Francis. Between 1977 and 1978, he saw Bernadette six or seven times at either his house or Avil's house.

In 1989, while Hollins was out of prison on bond, he had a chance encounter with Bernadette Francis in New York. Hollins was passing through Brooklyn, New York, looking for some relatives, when he encountered Ms. Francis sitting on the porch steps of a house in the Brownsville neighborhood. Although he had not seen Bernadette in over ten years, he immediately recognized her; and she recognized him.

According to Mr. Hollins, Ms. Francis informed him of Avil's death and shared some details. Ms. Francis allegedly told him that on the night of the shootings, she did not actually see or talk to Robinson, but knew that he was the person who shot them because she took his life savings and gave it to Avil. Ms. Francis also informed him that she told her daughter, Shantel, to lie and say she witnessed the shootings. That was the last time Hollins saw Ms. Francis prior to the 1997 court proceeding.

In another chance encounter, Hollins said he met Robinson at the Avon Park Correctional Institution in 1996 and inquired if Robinson knew Bernadette Francis. Hollins claimed that he remembered Ceasar Robinson's name from the discussion he had with Ms. Francis seven years earlier in New York.

Ms. Francis also testified. She denied knowing Hollins, and denied every having any conversations with him. She testified that

> she knew Avil Francis for only one year prior to their marriage on October 31, 1981. Further, while she did move to Brooklyn, New York, after the shootings, Ms. Francis testified that she did not live in or near the Brownsville area, and knew no one in that area. Ms. Francis said she never told her daughter to lie, and that they both told the truth at the 1982 trial.
>
> Robinson, who was seventy-nine years old at the 1997 hearing, testified briefly to meeting Hollins at the Avon Park Correctional Institution in 1996. According to Robinson, Hollins stated that he learned of Robinson's case from Ms. Francis. Robinson said that he never made any promises to Hollins.

(Exhibit A, pgs. 4-6)

The trial court granted post-conviction relief, finding that Hollins' testimony constituted newly discovered evidence and could have affected the outcome. On appeal, the district court stated that Hollins' testimony did constitute newly discovered evidence. As to the trial court ruling under the second prong of the test for evaluating newly discovered evidence, the district court reversed:

> .....[T]he trial court, in this case, was required to balance the weight of Hollins' impeachment testimony against all of the other evidence stacked against Robinson in making its determination.
>
> Upon review of the record, it initially appears that the trial court was within its discretion when it found that the impeachment evidence would counterbalance the testimony of Ms. Francis and Shantel on retrial. However, the trial court's order fails to account for the abundant circumstantial evidence that was presented against Robinson at the 1982 trial. In light of this strong circumstantial evidence we find it less likely that the jury would reject Ms. Francis's and Shantel's eyewitness accounts on retrial. Moreover, it

> is important to remember that Hollins' character, as a convicted felon, was itself susceptible to impeachment. See Perry v. State, 395 So. 2d 170, 173 (Fla. 1980).
>
> While we recognize that a motion for new trial based on newly discovered evidence is addressed to the sound discretion of the trial court, see Clark v. State, 379 So. 2d 97, 101 (Fla. 1979), we are compelled to hold that the trial court has abused its discretion in this case. The circumstantial evidence, coupled with the testimony of Ms. Francis and Shantel, so clearly outweighs the newly discovered, impeachment evidence that no reasonable person would have reached the conclusion that the trial court did. Therefore, the trial court abused its discretion in determining that Hollins' testimony would probably produce an acquittal on retrial.

(Exhibit A, pgs. 9-10)

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 did not reweigh witness credibility or substitute its judgment on weight assigned by the trial court. The district court's decision reflects a determination that the trial court failed to consider abundant circumstantial evidence at trial, thereby failing to balance the newly discovered evidence against all of the evidence stacked against Petitioner. 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 expressly and directly conflicts with decisions of this Court in Tibbs v. State, 397 So. 2d 1120 (Fla. 1981), Johnson v. State, 442 So. 2d 185 (Fla. 1983); and State v. Spaziano, 692 So. 2d 174 (Fla. 1997); the Fifth District in Evans v. State, 692 So. 2d 966 (Fla. 5th DCA 1997); and the First District in Borgess v. State, 455 So. 2d 488(Fla. 1st DCA 1984). 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. In reversing, the district court applied the settled principle recently set forth in this Court's decision in Jones v. State, 23 Fla. Law Weekly S137, 140 (Fla. March 17, 1998), that the trial

court is required to "consider all newly discovered evidence which would be admissible" at trial and then evaluate the "weight of both the newly discovered evidence and the evidence which was introduced at the trial." Id., citing Jones v. State, 591 So. 2d 911, 916 (Fla. 1991).[1] The district court decision reflects a determination that the trial court in granting relief failed to take into account the abundant circumstantial evidence presented at Petitioner's trial.

Petitioner asserts conflict based on this Court's decision in Tibbs v. State, 397 So. 2d 1120 (Fla.1981), approved, 457 U.S. 31, 102 S.Ct. 2211, 72 L.Ed. 2d 652 (1982). Therein, this Court instructed that legal sufficiency is the appropriate concern of an appellate tribunal and the weight is within the province of the trier of fact. Evans v. State, 692 So. 2d 966 (Fla. 5th DCA 1997), also cited by Petitioner, follows this principle.

The district court decision does not expressly conflict with Tibbs or Evans. The trial court failed to properly apply the law when it overlooked abundant circumstantial evidence of Petitioner's guilt in granting relief. Since this trial evidence was not weighed in the first instance, the district court's application of

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[1]It is apparent from this Court's recent decision in Jones that all the evidence adduced at trial must be considered, as evidenced by this Court's statement, "Because all of the evidence presented in Jones' original trial is important to our analysis of the issues Jones raises in the present 3.850 appeal, we set forth the following additional, pertinent facts from the record of the original trial." Id., 23 Fla. L. Weekly at S138.

the proper law to all of the evidence cannot be viewed as reweighing evidence.

Petitioner promotes conflict with Johnson v. State, 442 So. 2d 185, 188 (Fla. 1983), wherein this Court held that the credibility of a witness is for the finder of fact, not an appellate court, to determine. Here, the district court did not substitute its judgment on credibility determinations below.

The district court decision does not conflict with Borgess v. State, 455 So. 2d 488, 491 (Fla. 1st DCA 1984). In Borgess, the district court held that the trial judge was in the best position to evaluate credibility of conflicting stories, and the motion for new trial was properly denied since the trial court was not satisfied that recanting testimony was true. Here, the district court did not base its reversal on reevaluation of the factual or credibility determinations made by the trial court.

Review of the lower court's factual determinations for support does not end the appellate court's inquiry, as this Court's decision in State v. Spaziano, 692 So. 2d 174, 177 (Fla. 1997), cited by Petitioner, teaches. Therein, this Court held, inter alia, that "the trial court utilized the appropriate law." Id. at 177. The district court decision comports with Spaziono by review of whether the law was properly applied by the trial court. Resolution of this question of law, upon review of all 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.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing jurisdictional brief has been furnished by U.S. regular mail to Kevin Briggs, Assistant Public Defender, P.O. Box 9000 - Drawer PD, Bartow, Fl 33831 on this 24th day of June, 1998.

COUNSEL FOR RESPONDENT