

IN THE SUPREME COURT OF FLORIDA

045
FILED

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AUG 12 1998

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

STATE OF FLORIDA,

Petitioner,

v.

Case No. 93,499

JEREMIAH BUTLER,

Respondent.
_____ /

JURISDICTIONAL BRIEF OF RESPONDENT

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PRELIMINARY STATEMENT

Petitioner, the State of Florida, was the appellee in the district court, and the prosecution in the trial court. The state will be referred to herein as petitioner. Respondent, Jeremiah Butler, was the appellant in the district court, and the defendant in the trial court. He will be referred to in this brief as respondent, or by his proper name.

STATEMENT OF THE CASE AND FACTS

Respondent concurs with petitioner's statement of the case and facts.

SUMMARY OF ARGUMENT

Any conflict between the instant case and Garvin v. State, 685 So.2d 17 (Fla. 3d DCA 1996), was resolved by this Court in Miller v. State, 23 Fla. L. Weekly S389 (Fla. July 16, 1998). Since the holding in the instant case is in complete harmony with the ruling in Miller, supra, the Court should decline to accept jurisdiction of this case. Kyle v. Kyle, 139 So.2d 885 (Fla. 1962).

Additionally, the state asserts that the opinion of the lower court is in direct and express conflict with the holding in Brown v. State, 430 So.2d 446 (Fla. 1983). Respondent respectfully disagrees. Brown, supra, is factually distinguishable in that there, a man entered a store and relieved two different cashiers of their money at gunpoint. Here, respondent entered a convenience store where one only person was working. He relieved that person of his wallet, and the proceeds from the cash register. While Brown's dual convictions for robbery were properly upheld, here, one of respondent's dual convictions for robbery was properly reversed.

Because of the factual difference between Brown, supra, and the instant case, this Court should decline to accept conflict jurisdiction. Kyle v. Kyle, supra.

ARGUMENT

ISSUE I

ANY POSSIBLE CONFLICT THAT MAY HAVE EXISTED BETWEEN THE INSTANT CASE AND GARVIN V. STATE, 685 So.2d 17 (FLA. 3D DCA 1996), HAS BEEN RESOLVED BY THIS COURT IN MILLER V. STATE, 23 FLA. L. WEEKLY S389 (FLA. JULY 16, 1998).

The state asserts that the instant case is in direct and express conflict with Garvin v. State, supra. Respondent agrees. That direct and express conflict, however, has already been resolved by this Court. See, Miller v. State, supra. Consequently, the Court should decline to accept jurisdiction of this case.

Eleven days before petitioner filed the instant jurisdictional brief, this Court issued its opinion in Miller v. State, 23 Fla. L. Weekly S389 (Fla. July 16, 1998). The issue in Miller, as well as in Garvin, and the instant case, was whether a defendant could properly be convicted of burglary when he entered an open business establishment with the intention of committing a crime therein.

The state's theory was that consent to enter the business was implicitly revoked when the person who entered evinced an intent to commit a crime therein.

The Miller Court unanimously rejected that reasoning, and held

[Once] consensual entry is complete, a consensual 'remaining in' begins, and any

burglary conviction must be bottomed on proof that consent to 'remaining in' has been withdrawn. Miller entered the grocery store when it was open, and on this record we can find no evidence that consent was withdrawn.

Id.

Respondent asserts the Miller opinion is in complete harmony with the instant case. Although the case cited by the state, Garvin v. State, 685 So.2d 17 (Fla. 3d DCA 1996), is in conflict with the case at bar, this Court's decision in Miller, supra, has resolved that conflict. Consequently, this Court should decline to accept jurisdiction of the instant case.

Next, the state argues that the instant case is in direct and express conflict with Brown v. State, 430 So.2d 446 (Fla. 1983). Respondent respectfully disagrees because the cases are factually distinguishable.

In Brown, supra, the defendant entered a Family Dollar Store, produced a firearm and confronted a cashier. After taking money from her cash register he proceeded to a second cash register. There, he relieved a second cashier of more money. This Court upheld two convictions for robbery because Brown took money from two different cashiers by force, violence, assault, or putting in fear.

In the case at bar, appellant entered a convenience store, confronted the only employee working at the time, took that man's wallet as well as the store's money, and fled.

Thus, the case at bar is factually distinguishable from Brown v. State, supra, because, unlike Brown where two separate individuals were relieved of property at gunpoint, here only one person was relieved of property at gunpoint. Consequently, this Court should not accept jurisdiction because the instant case and Brown are factually distinguishable.

CONCLUSION

Any conflict between the case at bar and Garvin v. State, supra, has already been resolved by this Court. See, Miller v. State, supra. Second, the instant case and Brown v. State, supra, are factually distinguishable. Therefore, there is no conflict for this Court to resolve.

Based on the foregoing argument, reasoning, and citations to authority, this Court should decline to accept conflict jurisdiction of this case.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to L. Michael Billmeier, Assistant Attorney General, by delivery to The Capitol, Plaza Level, Tallahassee, FL; and a copy has been mailed to appellant on this date, August 11, 1998.

Respectfully submitted,

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