IN THE SUPREME COURT OF FLORIDA

Case No. 94,180

Joseph Hodge,

Petitioner,

v.

State of Florida,

Respondent.

****

ON APPEAL FROM THE FOURTH DISTRICT COURT OF APPEAL

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RESPONDENT'S ANSWER BRIEF ON JURISDICTION

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CERTIFICATE OF TYPE SIZE AND STYLE

Counsel for the State of Florida, Respondent, hereby certifies that the instant brief has been prepared with 12 point Courier New type font.

PRELIMINARY STATEMENT

Petitioner was the Appellant in the Fourth District Court of Appeal and the Defendant in the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County. Respondent, State of Florida, was the Appellee in the Fourth District Court of Appeal and the prosecution in the trial court. In this brief, the parties will be referred to as they appear before this Honorable Court.

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STATEMENT OF THE CASE AND FACTS

Petitioner accepts Respondent's Statement of the Case and Facts for purposes of this appeal in so far as it presents an accurate, objective and non-argumentative recital of the procedural history and facts in the record, and subject to the modifications set forth below and in the argument portion of this brief.

In the Fourth District, Petitioner raised one issue challenging his sentence: Whether the trial court erred in imposing an assessment of $1,089 for public defender's fees without advising Petitioner of the right to contest those fees. Petitioner did not raise this issue in the trial court at the sentencing hearing or via motion to correct sentence under Florida Rule Criminal Procedure 3.800(b).

SUMMARY OF THE ARGUMENT

Under well established precedent, this Court must decline to exercise its discretionary conflict jurisdiction. At this time, there are no conflicting decisions among the district courts of appeal on any point of law affecting Petitioner's sentence. The First District, subsequent to the filing of the Notice to Invoke Jurisdiction in this cause, receded from the very position on which the Fourth District had certified conflict. Thus, there is no basis for this Court to review this matter.

ARGUMENT

Issue

THIS COURT HAS NO JURISDICTION TO REVIEW THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL UNDER ARTICLE FIVE, SECTION 3, OF THE FLORIDA CONSTITUTION WHERE, SUBSEQUENT TO THE FILING OF THE NOTICE TO INVOKE JURISDICTION IN THIS CAUSE, THE FIRST DISTRICT COURT OF APPEAL RECEDED FROM THE POSITION ON WHICH THE CONFLICT JURISDICTION WAS PREMISED.

The issue presented is whether this Court has jurisdiction to review the decision of the Fourth District Court of Appeal where, subsequent to the filing of the notice to invoke jurisdiction in this cause, the First District Court of Appeal receded from the position on which the conflict jurisdiction was premised. This Court's jurisdiction is set forth in Article V, Section 3 of the Florida Constitution. Under subsection 4, the Constitution grants discretionary jurisdiction to this Court to review decisions of district courts of appeal that pass upon questions certified by the district courts to be in direct conflict with a decision of another district court of appeal. In light of Locke v. State, 719 So. 2d 1249 (Fla. 1st DCA 1998), which was issued subsequent to the issuance of the Fourth District's opinion in this case, no conflict exists, and therefore, this court lacks jurisdiction to review this matter.

This Court long ago recognized the narrow scope of its jurisdiction in South Florida Hospital Corp. v. McCrea, 118 So. 2d

25, 27 (Fla. 1960). In McCrea, this court explained:

> It is not amiss to again point out that the scope of review by the Supreme Court of a decision of a Court of Appeal is extremely limited when the ground of asserting jurisdiction is an alleged conflict of such decision with the decision of another appellate court on the same point of law. For this court to interfere with the judgment of a district court of appeal, on the ground mentioned, it must appear that the court of appeal has, in the decision challenged, made a pronouncement of a point of law which the bench and bar and future litigants may fairly regard as an authoritative precedent but which is in direct conflict with the pronouncement on the same point of law in a decision or decisions of the Supreme Court or another District Court of Appeal. (citation omitted).
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> ...
>
> At the risk of being tedious, we will again reiterate that unless we find a direct conflict in decisions of other appellate courts of this state on the point or points of law pronounced in the opinion of the District Court of Appeal in this case, we have no power or jurisdiction in any manner to disturb the judgment of the lower court. Courts of Appeal are meant to be courts of final appellate jurisdiction in the vast majority of cases, and in cases such as the one at bar it is only to harmonize and standardize decisions that this court may presume to interfere. (emphasis added).

This Court, relying on Lake v. Lake, 103 So. 2d 639, 643 (Fla. 1958), further clarified its limited powers in reviewing cases alleging conflict jurisdiction:

> Sustaining the dignity of the decisions

> of the district courts of appeal must depend largely on the determination of the Supreme Court not to venture beyond the limitations of its own powers by arrogating to itself the right to delve into a decision of a district court of appeal primarily to decide whether or not the Supreme Court agrees with the district court of appeal about the disposition of a given case. (emphasis added).

These concepts provide the foundation for Respondent's position that this Court lacks jurisdiction.

In Bailey v. Hough, 441 So. 2d 614 (Fla. 1983), this Court denied a petition for review because no conflict existed. In Hough v. Bailey, 421 So. 2d 708 (Fla. 1st DCA 1982), the First District acknowledged conflict with a decision of the Second District Court of Appeal, Kirk v. Beaumann, 336 So. 2d 125 (Fla. 2d DCA 1976). After this Court accepted jurisdiction in Bailey, the Second District expressly receded from its prior decision in Kirk, and adopted the view espoused by the First District in Hough. Thereafter, this Court held that no conflict existed and, therefore, it lacked jurisdiction to review the case.

The posture of the case *sub judice* is identical to that presented in Bailey. In this case, the Fourth District's opinion noted conflict[1] with the First District's decision in Neal v. State, 688 So. 2d 392 (Fla. 1st DCA 1997), rev. den., 698 So. 2d

[1] Conflict existed based on Jollie v. State, 405 So. 2d 418 (Fla. 1981).

543 (Fla. 1997). Subsequent to the issuance of the district court's opinion in this case, the First District receded from its position espoused in Neal, and adopted the position of the Fourth District. In Locke, the court agreed with the Hyden decision and held that the failure to give notice to an individual defendant of the potential imposition of statutorily authorized public defender's fees at the time of sentencing does not constitute fundamental error. 719 So. 2d at 1250. Both Hyden and Locke acknowledge that the amendments to the rules of criminal and appellate procedure have overruled Henriquez and Wood.[2] 715 So. 2d at 962; 719 So. 2d at 1250. Hence, it is clear that both district courts are in accord on the same point of law. Consequently, it is evident that there is no need to "harmonize and standardize" any points of law in the case *sub judice*. Under Bailey, this Court lacks jurisdiction to review this matter.

In Skinner v. State, 470 So. 2d 702 (Fla. 1985) this Court again refused to review a decision of a district court, Skinner v. State, 450 So. 2d 595 (Fla. 5th DCA 1984), which expressly stated that it conflicted with a decision of another district court, Golden v. State, 120 So. 2d 651 (Fla. 1st DCA 1960). After this Court accepted jurisdiction, the First District expressly adopted the reasoning of the Fifth District in Skinner in an en banc

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[2] Henriquez v. State, 545 So. 2d 1340 (Fla. 1989); Wood v. State, 544 So. 2d 1004 (Fla. 1989)

decision. Id. Based on the en banc decision, this Court dismissed the petition for review because of the lack of conflict.

Just as in Skinner, the First District has expressly receded from the conflicting decision in an en banc decision, Locke. Neal has no precedential effect. Hence, there cannot be any basis for conflict jurisdiction. See also, Wainwright v. Taylor, 476 So. 2d 669, 670 (Fla. 1985)(Our concern in cases based on conflict jurisdiction is the precedential effect of those decisions which are incorrect *and* in conflict with decisions reflecting the correct rule of law).

As stated earlier, the jurisdiction of this Court is extremely limited when the ground of asserting jurisdiction is an alleged conflict with a decision of another appellate court on the same point of law. McCrea, supra, 118 So. 2d at 27. The bench, the bar, and future litigants will not regard Neal as authoritative precedent. To the contrary, interested parties will regard Hyden, Locke, and Maddox v. State, 708 So. 2d 617 (Fla. 5th DCA 1998), as authoritative precedent on the issue of whether the failure to give notice to an individual defendant of the potential imposition of statutorily authorized public defender's fees at the time of sentencing constitutes fundamental error.

This Court has previously indicated in order for two decisions to be in "express" as well as "direct" conflict for the purpose of invoking this Court's discretionary jurisdiction under Art. V, §

3(b)(3), Fla. Const., and Fla. R. App. P. 9.030(a)(2)(A)(iv), the decisions should speak to the same point of law, in factual contexts of sufficient similarity to compel the conclusion that the result in each case would have been different had the deciding court employed the reasoning of the other court. See generally, Mancini v. State, 312 So. 2d 732 (Fla. 1975). Similarly, in Nielson v. City of Sarasota, 117 So. 2d 731, 734 (Fla. 1960) this Court stated that:

> When our jurisdiction is invoked pursuant to this provision of the Constitution we are not permitted the judicial luxury of upsetting a decision of a Court of Appeal merely because we might personally disagree with the so-called "justice of the case" as announced by the Court below. In order to assert our power to set aside the decision of the Court of Appeal on the conflict theory we must find in that decision a real, live and vital conflict within the limits above announced.

In light of First District's decision in Locke, no such "real," "live" or "vital" conflict exists at this time.

Given the lack of conflict between the district courts of appeal on this issue, this Court must not venture beyond the limitations of its own powers by arrogating to itself the right to delve into the decision of the Fourth District Court of Appeal where the purpose of doing so would be primarily to decide whether or not this Court agrees with the district court about the disposition of this case. Lake, supra, 103 So. 2d at 643. Since

there is no conflict, and this Court does not have jurisdiction to review this cause, the petition for review must be denied. See generally, Seachord v. English, 259 So. 2d 136 (Fla. 1972); Morrison v. C. J. Jones Lumber Co., 165 So. 2d 758 (Fla. 1964); and State v. Bateh, 110 So. 2d 7 (Fla. 1959)(Where Court's jurisdiction rested upon conflict between decision of district court and prior decision of the Supreme Court, and Supreme Court resolved the conflict prior to its decision on the merits, this Court could not disturb the judgment of the district court).

Respondent recognizes that this Court has postponed its decision on jurisdiction in Hyden v. State, Case No. 93,966.[3] Based on Harrison v. Hyster, 515 So. 2d 1279 (Fla. 1987), it would be improvident to accept jurisdiction in the case *sub judice*. The district court affirmed Petitioner's sentence upon the authority of Hyden v. State, 715 So. 2d 960 (Fla. 4th DCA 1998). The full extent of the district court's opinion reads, "Per Curiam. Affirmed. See Hyden v. State." [citation omitted]. Therefore, the only basis upon which it can be asserted that this Court has jurisdiction to review this matter is on the rationale of Jollie, supra. Therefore, since this Court has not agreed to review the merits of Hyden, it certainly should not accept jurisdiction of this petition.

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[3] No jurisdictional briefs were requested in that case.

CONCLUSION

WHEREFORE based on the foregoing arguments and authorities cited herein, Respondent respectfully requests that this Court decline to exercise its discretionary jurisdiction to review the decision of the district court of appeal.

Respectfully submitted,

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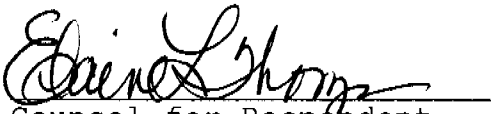
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the "Respondent's Brief on Jurisdiction" was sent by courier to Louis G. Carres, Assistant Public Defender, Criminal Justice Building, 421 Third Street, Sixth Floor, West Palm Beach, Florida 33401 on January 25, 1999.



Counsel for Respondent