ORIGINAL

FILED
SID J. WHITE
FEB 19 1999
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

IN THE SUPREME COURT OF THE STATE OF FLORIDA

DEREK ADSIDE,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

_____/

5th DCA Case No. 97-0672

Supreme Court Case No. 94,752

ON DISCRETIONARY REVIEW OF THE
DISTRICT COURT OF APPEAL,
FIFTH DISTRICT

JURISDICTIONAL BRIEF OF RESPONDENT

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

ANN M. PHILLIPS
ASSISTANT ATTORNEY GENERAL
Fla. Bar #978698
444 Seabreeze Boulevard
5th Floor
Daytona Beach, FL 32118
(904) 238-4990

COUNSEL FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

OTHER AUTHORITIES:

CERTIFICATE OF FONT

Respondent certifies that this brief was typed in Courier 12 point font.

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's statement of the case and facts.

SUMMARY OF ARGUMENT

This Court should decline to accept jurisdiction in the instant case. This court is limited to the facts contained within the four corners of the decision in determining whether an express and direct conflict exists. On the face of the decision under review, there is no express and direct conflict with any decision of this Court or any district court.

ARGUMENT

ON THE FACE OF THE DECISION IN ADSIDE v. STATE, INFRA, THERE IS NO EXPRESS AND DIRECT CONFLICT WITH A DECISION OF THIS COURT OR OF ANOTHER DISTRICT COURT. THIS COURT SHOULD THEREFORE DECLINE TO ACCEPT JURISDICTION.

Petitioner seeks discretionary review with this honorable Court under Article V, Section 3(b)(3) of the Florida Constitution. See also Fla. R. App. P. 9.030(a)(2)(A)(iv). Article V, Section 3(b)(3) provides that the Florida Supreme Court may review a district court of appeal decision only if it "expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law." In Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986), this Court explained:

> Conflict between decisions must be express and direct, i.e., it must appear within the four corners of the majority decision. Neither a dissenting opinion nor the record itself can be used to establish jurisdiction.

This Court further stated:

> This case illustrates a common error made in preparing jurisdictional briefs based on alleged decisional conflict. The only facts relevant to our decision to accept or reject such petitions are those facts contained within the four corners of the decisions allegedly in conflict. As we explained in the text above, we are not permitted to base our conflict jurisdiction on a review of the record or on facts recited only in dissenting opinions. Thus, it is pointless and misleading to include a comprehensive recitation of facts not appearing in the decision below, with citations to the record, as petitioner provided here. Similarly, voluminous appendices are normally not relevant.

Reaves, 485 So. 2d at 830, n.3. Finally, this Court has held that

inherent or so-called "implied" conflict may not serve as a basis for this Court's jurisdiction. DHRS v. National Adoption Counseling Service, Inc., 498 So. 2d 888, 889 (Fla. 1986).

In the instant case, Petitioner has failed to demonstrate express and direct conflict between the decision in the instant case, Adside v. State, 23 Fla. L. Weekly D2470 (Fla. 5th DCA November 6, 1998), and any of Petitioner's cited cases. Respondent contends that no such conflict exists.

Petitioner claims the district court's decision in Adside conflicts with Nelson v. State, 23 Fla. L. Weekly D2241 (Fla. 1st DCA October 1, 1998), Denson v. State, 711 So. 2d 1225 (Fla. 2d DCA 1998),[1] and Dodson v. State, 710 So. 2d 159 (Fla. 1st DCA 1998). In Adside, supra, the district court found that the sentencing issues of the trial court's imposition of court costs in each of Adside's six cases and the imposition of a public defender lien had not been preserved for appellate review based upon Florida Statute section 924.051(1)(b). Petitioner asserts that this holding of the district court in the instant case conflicts with the aforementioned cases.

Nelson, supra, and Denson, supra, are both distinguishable from the instant case in that those cases involve the issue of whether an illegal sentence constitutes fundamental error which may be addressed for the first time on appellate review. The sentencing errors involved in Adside, ordering Adside to pay court

---

[1]Bain v. State, 24 Fla. L. Weekly D314 (Fla. 2d DCA Jan. 29, 1999) receded in part from Denson, supra.

costs and imposing a public defender's lien without notice and opportunity to object, were not fundamental; nor did the errors cause Adside's sentence to be illegal. Additionally, Nelson and Denson dealt with section 924.051(3), Florida Statutes (1997). Adside cited to section 924.051(1)(b), Florida Statues (1997). Adside was based upon the interpretation of a different statutory subsection than that in Nelson and Denson. No conflict exists between these cases.

Neither does conflict exist between Dodson, supra, and the instant case. The First District Court of Appeal in Dodson did not address the issue of whether the wrongful imposition of discretionary costs, standing alone, constituted fundamental error. The court reversed Dodson's sentence on other grounds, and, in *dicta* stated that the court was uncertain whether the imposition of a public defender's lien without proper notice would rise to the level of fundamental error. In light of its confusion, the First District Court of Appeal certified a question to this court seeking a determination of that issue. While this court has granted review in Dodson, no conflict between Adside and Dodson exists since Dodson never addressed the issue of what type of sentencing error could be addressed on appellate review if it had not been preserved. Moreover, Dodson also dealt with section 924.051(3) instead of subsection (1)(b) as cited in Adside.

Petitioner has failed to establish that the Fifth District's opinion in Adside expressly and directly conflicts with any case of this Court or of a district court. Jurisdiction should be denied.

CONCLUSION

Based on the arguments and authorities presented herein, Respondent respectfully prays this honorable Court decline to accept jurisdiction in this case.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

Belle B. Turner

BELLE B. TURNER
ASSISTANT ATTORNEY GENERAL
Fla. Bar #397024
444 Seabreeze Boulevard
5th Floor
Daytona Beach, FL 32118
(904) 238-4990

COUNSEL FOR RESPONDENT

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

Ann M. Phillips

ANN M. PHILLIPS
ASSISTANT ATTORNEY GENERAL
Fla. Bar #978698
444 Seabreeze Boulevard
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 delivery to Susan A. Fagan, Assistant Public Defender, 112-A Orange Avenue, Daytona Beach, Florida 32114-4310, this 18th day of February, 1999.

Ann M. Phillips
Of Counsel

"using illegal drugs now." This statement was allegedly made in the presence of an HRS employee, David Silverstein. Count III of the complaint alleges that on or about October 19, 1995, Huffstetler told Judge Tombrink, while in the hallway of the courthouse, that Stucchio was "using illegal drugs now and would use illegal drugs in the future."

The trial court entered an order dismissing the complaint for failure to state a claim against Huffstetler, but this court reversed the order on appeal in its opinion dated April 4, 1997. We held that the court improperly considered matters outside the complaint in granting the dismissal. Inherent in this decision is that the complaint stated a cause of action. *See Stucchio v. Huffstetler,* 690 So. 2d 753 (Fla. 5th DCA 1997). Promptly on remand, Huffstetler moved for summary judgment on Counts I and III of the complaint. There is no answer to the third amended complaint by Huffstetler. The motion, which was not verified, asserted that Huffstetler was entitled to judgment as a matter of law because the statements alleged in the complaint were privileged. Huffstetler filed no affidavit in support of his motion. Stucchio likewise failed to file any affidavit in opposition to Huffstetler's motion.

The trial court held a hearing on Huffstetler's motion and entered final summary judgment in favor of Huffstetler. The stated basis for entry of judgment in favor of Huffstetler was that Stucchio failed to file any affidavits in opposition to the motion, and there was no issue of material fact raised by the complaint.

Thus, the question appears to be whether, as a matter of law, Huffstetler was entitled to judgment on both of Stucchio's claims on the basis of judicial privilege. The privilege is not absolute, but applies only where: (1) the statements involved were made during the course of judicial proceedings; and (2) they were relevant to the subject of inquiry. *See Levin, Middlebrooks, Mabie, Thomas, Mayes, & Mitchell, P.A. v. United States Fire Ins. Co.,* 639 So. 2d 606 (Fla. 1994). Statements made during the course of judicial proceedings which are irrelevant to the proceedings are entitled to only a "qualified privilege." *See Sussman v. Damian,* 355 So. 2d 809, 811 (Fla. 3d DCA 1977).

Here, the pleadings fail to conclusively demonstrate that Huffstetler was entitled to the protection of the privilege with respect to either count. In Count I, Stucchio alleges that on October 17, 1995, Huffstetler was before Judge Tombrink on an "unrelated" case and that he told Judge Tombrink while in chambers that Stucchio was "using illegal drugs now." The statement was alleged to be irrelevant to the proceedings. This court has already found that this count states a claim for slander. Given that the pleadings (and record) fail to demonstrate without dispute that the statement was relevant to the issues before the court, Huffstetler was not entitled to judgment on this claim.

Count III of the complaint similarly alleges that on or about October 19, 1995, Huffstetler told Judge Tombrink, while in the hallway of the courthouse, that Stucchio was "using illegal drugs now and would use illegal drugs in the future." The complaint further alleges that these statements were irrelevant to the issues before the court. Like the statements made in count I, the pleadings (and record) fail to demonstrate the context of the statement or establish the privilege as a matter of law. Thus, the trial court erred in granting final summary judgment in favor of Huffstetler.

REVERSED and REMANDED. (DAUKSCH, J., concurs specially, with opinion. SHARP, W., J., concurs specially, with opinion.)

(DAUKSCH, J., concurring specially.) I concur in the result and write only to emphasize this was a summary judgment which is being reversed.

(SHARP, W., J., concurring specially.) I agree with the result in this case but on slightly different grounds. As discussed more fully in my dissenting opinion in *Malone v. City of Satellite Beach,* 23 Fla. L. Weekly D1921 (Fla. 5th DCA August 14, 1998), it is almost never appropriate to grant a motion for judgment on the pleadings based on the complaint alone or the complaint and an answer, where the cause of action is one for defamation, and the defendant's asserted defense is privilege. Generally, the existence *vel non* of an absolute privilege or a qualified privilege to publish a defamatory statement is a defense, which the defendant must plead and carry the burden of proving at trial.[1] When pled as a defense, it is then the task of the plaintiff to respond that the privilege was abused, or for some reason should not be applicable to the situation in that case.[2]

In most cases, the existence of a privilege or its abuse are issues of fact which cannot be resolved at the pleadings stage. In this case, an absolute privilege may apply. But there are unresolved issues of fact which make it problematic: was the defamatory statement made during the course of a judicial proceeding? And was it relevant to the subject of inquiry? Further, if a qualified privilege is being asserted, unresolved fact issues are still present in this case: was the statement made in good faith? Did it exceed the bounds of the scope of the qualified privilege asserted?

These are all questions which cannot be resolved as a matter of law on the basis of pleadings.

---

[1]*Schreidell v. Shoter,* 500 So.2d 228 (Fla. 3d DCA 1986); *Miami Herald Pub. Co. v. Ane,* 423 So.2d 376 (Fla. 3d DCA 1982), *approved,* 458 So.2d 239 (Fla. 1984); *Riggs v. Cain,* 406 So.2d 1202 (Fla. 4th DCA 1981); *Glynn v. City of Kissimmee,* 383 So.2d 774 (Fla. 5th DCA 1980).

[2]*See Randolph v. Beer,* 695 So.2d 401 (Fla. 5th DCA 1997); *Axelrod v. Califano,* 357 So.2d 1048 (Fla. 1st DCA 1978).

* * *

Criminal law—Loitering and prowling—Possession of burglary tools—Evidence—Similar fact—Error in permitting state to introduce similar fact evidence where state had not notified defendant of its intent to offer such evidence was harmless given overwhelming evidence of guilt, including defendant's taped confessions and eye witness testimony

DEREK ADSIDE, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 97-672. Opinion filed November 6, 1998. Appeal from the Circuit Court for Orange County, Michael F. Cycmanick, Judge. Counsel: James B. Gibson, Public Defender, and Susan A. Fagan, Assistant Public Defender, Daytona Beach, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Steven J. Guardiano, Senior Assistant Attorney General, Daytona Beach, for Appellee.

(ANTOON, J.) Derek Adside appeals his convictions and sentences which were entered by the trial court after a jury found him guilty on five counts of burglary of a dwelling[1], one count of possession of burglary tools[2], and one count of loitering or prowling[3]. He raises six claims of error, two of which merit discussion: (1) the claim that the trial court improperly permitted the state to submit similar fact evidence, and (2) the claim that the trial court improperly imposed a public defender lien and duplicative court costs as part of his sentence. However, we affirm Mr. Adside's convictions and sentences because there has been no showing of reversible error in this case.

On July 20, 1996, at approximately 1:30 in the morning, a police officer observed Mr. Adside riding his bicycle into a condominium complex. After circling the area three times, Mr. Adside got off his bicycle and pushed it into shrubbery located in the center of the common area. He then walked into the carport of one of the living units, bent down, and looked into the driver's window of a parked automobile. He looked over the fence and into the courtyard area and pushed on the gate. The officer saw Mr. Adside move along the wall of the condominium unit in such a way as to avoid activating the light sensors. The officer lost sight of Mr. Adside for approximately forty-five seconds but, when he reappeared, he again pushed at the gate and jiggled the handle. This conduct formed the basis for the loitering or prowling charge.

During trial, the state called the owner of the condominium unit to testify regarding other uncharged events which had occurred during the two-week period of time prior to Mr. Adside's arrest in this case. The owner testified that the gate to her condominium had been opened during the night, her car had been broken into, and litter had been strewn around her condominium. Defense counsel objected to the admission of this testimony, arguing that the

evidence was inadmissible because (1) the evidence was not offered to prove a relevant fact at issue, and (2) the state had failed to file written notice of its intent to use similar fact evidence as required by section 90.404(2)(b)1, of the Florida Statutes (1995).[4] The trial court overruled the objection and permitted the state to submit this testimony to the jury.

Mr. Adside maintains that the trial court erred in admitting the similar fact evidence. The state responds by arguing that the testimony was relevant and thus admissible; however, the state fails to respond to the claim that the evidence was inadmissible because the state had failed to comply with the statutory notice requirement. *See* § 90.404(2)(b)1., Fla. Stat. (1995). Since the state failed to provide timely notice of its intent to offer similar fact evidence, the trial court should have sustained defense counsel's timely objection. Nevertheless, the error in admitting this testimony was harmless in light of the overwhelming evidence of Mr. Adside's guilt. The evidence of guilt included Mr. Adside's two audio taped confessions in which he admitted in detail to committing all of the crimes charged. Furthermore, eye witnesses testified as to Mr. Adside's actions which gave rise to the loitering or prowling charge. Under these circumstances there is no reasonable possibility that the improper admission of the similar fact evidence contributed to Mr. Adside's convictions. *See Barbee v. State*, 630 So. 2d 655 (Fla. 5th DCA 1994); *see also* §§ 59.041, 924.33, Fla. Stat. (1995). Accordingly, we affirm Mr. Adside's convictions.

Mr. Adside next maintains the trial court erred in ordering him to pay court costs in each of the six cases and in imposing a public defender lien. He argues that he was only obligated to pay court costs on one case since the six cases had been consolidated for trial, and that the trial court erred in failing to give him notice and an opportunity to object before entering the public defender lien. These claims of error have been waived for purposes of appellate review because Mr. Adside failed to raise any objection to the imposition of these assessments during the sentencing hearing, and he failed to file a timely motion to correct his sentence pursuant to rule 3.800(b) of the Florida Rules of Criminal Procedure. Accordingly, we reject these claims of sentencing error as waived. *See* §924.051(1)(b), Fla. Stat. (Supp. 1996).

Having found no merit to any of the claims of reversible error raised by Mr. Adside in this appeal, we affirm his convictions and sentences.

AFFIRMED. (DAUKSCH and HARRIS, JJ., concur.)

---

[1]§810.02, Fla. Stat. (1995).
[2]§810.06, Fla. Stat. (1995).
[3]§856.021, Fla. Stat. (1995).
[4]Section 90.404(2) of the Florida Evidence Code provides:
90.404 Character evidence; when admissible.—
* * *
(2) OTHER CRIMES, WRONGS, OR ACTS.—
(a) Similar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity.
(b)1. When the state in a criminal action intends to offer evidence of other criminal offenses under paragraph (a), no fewer than 10 days before trial, the state shall furnish to the accused a written statement of the acts or offenses it intends to offer, describing them with the particularity required of an indictment or information. No notice is required for evidence of offenses used for impeachment or on rebuttal.
§ 90.404(2), Fla. Stat. (1995).

* * *

Injunctions—Motor Fuel Marketing Practices Act—Action for damages and injunctive relief, alleging defendant engaged in predatory pricing and selling motor fuel below nonrefiner cost—Trial court correctly determined that proof of injury to one competitor constituted injury to "competition" within meaning of statute—No merit to claim that trial court erred in determining that no hardship would be sustained by defendant or public if temporary injunction was issued because defendant would lose profits and public would be required to pay additional cost for motor fuel—"Hardship" such as that asserted by defendant appears to be result contemplated by legislature since statute prohibits sale of motor fuel below nonrefiner cost in order to curb predatory pricing which adversely affects motor fuel competition

RACETRAC PETROLEUM, INC., Appellant, v. DELCO OIL, INC., Appellee. 5th District. Case No. 97-3535. Opinion filed November 6, 1998. Nonfinal appeal from the Circuit Court for Volusia County, John V. Doyle, Judge. Counsel: Henry M. Coxe, III, John A. DeVault, III, and Allan F. Brooke II of Bedell, Dittmar, DeVault, Pillans & Coxe, P.A., Jacksonville, for Appellant. J. Michael Huey, Geoffrey B. Schwartz, and George W. Hatch of Huey, Guilday & Tucker, P.A., Tallahassee, and Darren J. Elkind of James, Zimmerman, Paul & Huddleston, Deltona, for Appellee.

(PER CURIAM.) Delco Oil, Inc., filed a complaint against Racetrac Petroleum, Inc., (Racetrac) seeking damages and injunctive relief, alleging that Racetrac was violating Florida's Motor Fuel Marketing Practices Act (the Act)[1] by engaging in predatory pricing and selling motor fuel below nonrefiner cost. After conducting an evidentiary hearing, the trial court entered a nonfinal temporary injunction prohibiting Racetrac from selling motor fuel below the nonrefiner cost and setting a minimum price for which Racetrac may sell its fuel. Racetrac appeals, arguing the trial court erred in interpreting the meaning of the term "competition" in the Act and in weighing the hardship imposed on the parties by the issuance of a temporary injunction. We disagree and affirm the trial court's temporary injunction.

Racetrac's claims of error focus on the trial court's interpretation of two provisions contained in the Act. In reviewing this appeal we recognize first that judicial interpretation of Florida statutes is a purely legal matter and therefore subject to *de novo* review. *See Operation Rescue v. Women's Health Center, Inc.*, 626 So. 2d 664, 670 (Fla. 1993), *aff'd in part, rev'd in part on other grounds*, 512 U.S. 753 (1994). We recognize further that " 'the primary and overriding consideration in statutory interpretation is that a statute should be construed and applied so as to give effect to the evident intent of the legislature.' " *Deason v. Florida Dep't of Corrections*, 705 So. 2d 1374, 1375 (Fla. 1998)(quoting *State v. Nunez*, 368 So. 2d 422, 423-24 (Fla. 3d DCA 1979)).

The first provision at issue is subsection 526.304(1)(b), Florida Statutes (1995), which provides: "It is unlawful for any nonrefiner engaged in commerce in this state to sell any grade or quality of motor fuel at a retail outlet below nonrefiner cost, where the effect is to injure competition." Racetrac contends the trial court erred in concluding that proof of injury to Delco alone constituted injury to "competition" within the meaning of this subsection, arguing that our legislature intended to enforce the prohibition against below-cost motor fuel pricing only when it affects "competition as a whole." However, "competition" is defined in subsection 526.303(2), Florida Statutes (1995), as "the vying for motor fuel sales between any two sellers in the same relevant geographic market." As a result, the trial court correctly determined that proof of injury to Delco alone constituted injury to "competition" within the meaning of subsection 526.304(1)(b), since the definition of "competition" specifically pertains to sales between "any two sellers." § 526.303(2), Fla. Stat. (1995). Where the legislature has used particular words to define a term, we do not have the authority to redefine it. *See Baker v. State*, 636 So. 2d 1342, 1343-44 (Fla. 1994).

The second relevant provision is subsection 526.312(2)(b), Florida Statutes (1995), which authorizes the circuit court to issue a temporary injunction to enforce the Act if "the court determines, on balance, the hardships imposed on the defendant and the public interest by the issuance of such preliminary injunctive relief will be less than the hardship which would be imposed on the plaintiff if such preliminary injunctive relief were not granted." Racetrac maintains that the trial court erred when it balanced the competing hardships in this case because the court determined that no hardship would be sustained by Racetrac or the public if a temporary injunction was issued. Racetrac contends the trial court failed to consider that if Racetrac were enjoined and thereby required to raise its prices, it would lose approximately $113,000 worth of profits