IN THE SUPREME COURT OF THE STATE OF FLORIDA

LARRY THOMAS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

_____/

5th DCA Case No. 97-1691

Supreme Court Case No. 95,126

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

JURISDICTIONAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

CERTIFICATE OF FONT iii

STATEMENT OF THE CASE AND FACTS 1

SUMMARY OF ARGUMENT 3

ARGUMENT

ON THE FACE OF THE DECISION IN BRYANT 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. 4

CONCLUSION 7

CERTIFICATE OF SERVICE 7

TABLE OF AUTHORITIES

CASES:

DHRS v. National Adoption Counseling Service, Inc., 498 So. 2d 888 (Fla. 1986) 5

Guzman v. State, 644 So. 2d 996 (Fla. 1994) 5

Reaves v. State, 485 So. 2d 829 (Fla. 1986) 1, 4

Thomas v. State, 24 Fla. L. Weekly D66 (Fla. 5th DCA December 18, 1998) 2, 5, 6

Williams v. State, 622 So. 2d 490 (Fla. 4th DCA 1993) . . . 5, 6

OTHER AUTHORITIES:

Art. V, § 3(b)(3), Fla. Const. 4

Fla. R. App. P. 9.030(a)(2)(A)(iv) 4

CERTIFICATE OF FONT

Respondent certifies that this brief was typed in 12 point Courier New, a font that is not proportionately spaced.

STATEMENT OF THE CASE AND FACTS

The only facts relevant to this Court in determining whether to accept jurisdiction are those contained within the opinion of the District Court.[1] Respondent, therefore, offers the following as a substitute for Petitioner's statement of the case and facts.

The facts set out in the opinion of the Fifth District Court provide:

> Thomas was charged with unlawful possession of a firearm by a violent career criminal, armed burglary of a dwelling, three counts of robbery with a firearm and attempted robbery with a firearm. These charges arose from a night-time break in, and robbery of a condominium occupied by the Garner family and a family friend, Jodie Molnar. Two men, at least one wearing a mask and gloves, wakened the occupants, told them to keep their heads down on their beds and rifled through their belongings. Less than an hour later, Thomas and his co-defendant were stopped for having a stolen vehicle. The police searched their vehicle and found a ski mask, gloves, numerous weapons and possessions belonging to the victims.
>
> On March 4, 1997, James Sweeting was appointed by the court as defense counsel for Thomas. (Footnote omitted) Sweeting filed motions for discovery and received the state's witness list which included Jodie's name. Sweeting did not move to withdraw as Thomas' counsel until more than two months later, on May 27, 1997, at the beginning of Thomas' trial.
>
> In his written motion to withdraw, Sweeting stated that Jodie's mother had worked for his law firm and that after she left, the Molnar family had retained his law firm to represent them in a lawsuit in which they were the defendants. Sweeting alleged that as the result of his contacts and relationship with the Molnar family, his loyalty to Thomas was

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[1] Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986).

impaired.

> At the trial, Sweeting reaffirmed to the court that he was concerned because two of the victims, including Jodie, had not appeared for their depositions scheduled for the prior week. Sweeting stated that Jodie was the daughter of a former secretary at his office. Also, he told the court that his firm had represented Jodie's family in a construction case which had since been resolved. However, Sweeting did not reassert his allegation that he was in possession of any confidential information concerning the victim and/or her family which would impair his ability to represent Thomas or that he could not properly cross-examine the victim. The trial court denied the motion. (Footnote omitted)

Thomas v. State, 24 Fla. L. Weekly D66 (Fla. 5th DCA December 18, 1998).

The district court found that the trial court had not abused its discretion in denying counsel's motion to withdraw since the conflict alleged did not involve representation of clients or former clients with competing interests. Instead, the conflict arose from a personal relationship not shown to involve substantial emotional ties. The district court found that Thomas had not demonstrated prejudice establishing reversible error. Id.

Thomas filed a motion for rehearing or rehearing en *banc*. The district court denied the motion. Thomas filed a timely notice to invoke discretionary jurisdiction.

SUMMARY OF ARGUMENT

This Court should decline to accept jurisdiction in the instant case. The 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 THOMAS 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. Additionally, 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).

Petitioner has failed to demonstrate express and direct conflict between the decision in the instant case, Thomas v. State, 24 Fla. L. Weekly D66 (Fla. 5th DCA December 18, 1998), and Guzman v. State, 644 So. 2d 996 (Fla. 1994) ox Williams v. State, 622 So. 2d 490 (Fla. 4th DCA 1993). Respondent contends that no such conflict exists.

In Guzman, this Court found that, where the public defender had information that he could have given to impeach the State's chief witness, whom the public defender had represented and the public defender's office was still representing, counsel's motion to withdraw should have been granted. This Court stated it could "think of few instances where a conflict is more prejudicial" than the one in Guzman, where one client is being called to testify against another client. Guzman, 644 So. 2d at 999.

The instant case did not involve a situation where one client was being called to testify against another client. Here, the conflict arose from a personal relationship. Not only did the Fifth District find that Thomas' case did not involve the representation of clients or former clients, they also found the relationship that existed between defense counsel and the victim did not involve substantial emotional ties. Thomas, 24 Fla. L. Weekly at D66.

Williams, the other case cited by Petitioner, did involve

substantial personal ties. In Williams, the public defender moved to withdraw from the case asserting conflict because he would have to cross-examine an investigator from his office. Defense counsel argued he owed the investigator a duty of loyalty and would therefore be precluded from effectively cross-examining him. The trial court denied counsel's motion to withdraw. During trial, Williams' defense counsel did not cross-examine the investigator at all despite the fact he told the court he had several grounds upon which to impeach the investigator's testimony. Williams, 622 So. 2d at 491. The Fourth District held that it was error for the trial court to deny counsel's motion to withdraw where counsel asserted he could not adequately represent his client because of counsel's loyalty to his investigator, and the denial of the motion to withdraw resulted in counsel's lack of a cross-examination prejudicing the client. Id. at 491-492.

The instant case is distinguishable from Williams in that, unlike Williams, Thomas involved a personal relationship which was shown *not to involve substantial emotional ties.* Thomas, 24 Fla. L. Weekly at D66. In Williams, the public defender's loyalty to his investigator ran so deep that he did not cross-examine the investigator to the detriment of his client. In the instant case, the Fifth District found defense counsel's cross-examination of the victim at trial as vigorous as his cross-examination of another victim. Thomas, 24 Fla. L. Weekly at D66. Thomas failed to demonstrate that any perceived conflict between his counsel and the victim, Molnar, prejudiced him in any way. Id.

Petitioner has failed to establish that the Fifth District's opinion in Thomas 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,

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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 U.S. mail to Larry Thomas, DC#100471, Avon Park Correctional Institution, Post Office Box 1100/MB#530, Avon Park, Florida 33826-1100, this 30th of March, 1999.

Ann M. Phillips
Of Counsel

the motion based upon its earlier order granting the State a continuance on June 5, 1997. Wright was tried by Jury on June 18-24, 1997. Wright correctly contends that striking his February 21, 1997 speedy trial demand was erroneous because the State failed to establish that he was unprepared for trial. He is entitled to a discharge because he was not brought to trial within the speedy trial period invoked by his demand.

Filing a supplemental witness list prior to the court's calendar call does not evince an unwillingness or unpreparedness for trial. ***Obanion*** v. ***Stare,*** 496 So. 2d 977 (Fla. 3d DCA 1986), ***review denied, 504 So.*** 2d ***768*** (Fla. 1987). In ***Obanion,*** the Third District Court of Appeal found that the defendant's filing of an amended witness list on the same day as the scheduled trial date did not indicate an unpreparedness for trial under the speedy trial rule:

> The addition of one witness to a previously filed defense list, supplied to the state under the defendant's continuing duty to disclose under Fla.R.Crim.P. 3.220(f), meant only that the defendant had discovered an additional witness to call at trial, not that he was unprepared for trial without that witness. True, the defendant may have been ***better*** prepared to go to trial with this additional witness, but there is no showing in this record that the defendant was unprepared for trial without this witness.

Id. (emphasis in original). In this case, it appears that the defense had not gone so far as adding another witness as happened in ***Obanion,*** but rather was supplementing its earlier disclosure with the newly discovered name of the records custodian in Miami. It was error to strike the speedy trial demand based on the late specification of the name of the records custodian of the Department of Corrections.

Without the March 17th continuance, the speedy trial period, based on the February 21st demand, expired on April 12, 1997. Thus, the second continuance on May 2, 1997, was also invalid since under 3.19 1 (i) the court may only grant a continuance if the speedy trial period has not expired. See ***Brown v. State, 7*** 15 So. 2d (Fla. 1993).

Accordingly, the trial court's striking of the May 30th notice of expiration and the subsequent denial of Wright's motion for discharge based on the granting of the May 2nd continuance was error. The conviction must be reversed and Wright must be discharged from prosecution.

REVERSED and REMANDED. (COBB and ANTOON, JJ., concur.)

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[1]The notice of expiration incorrectly states that the demand was tiled on March 4. 1997. Wright contended that his speedy trial period expired on April 23, 1997.

[2]Wright incorrectly stated that the demand was filed on February 19, 1997, instead of the actual filing date of February 21, 1997. Additionally, he states that the period expired on April 10.1997, yet on appeal correctly argues that the period expired on April 12. 1997.

Wright states that the period expired on May 6, 1997, instead of May 7, 1997.

* * *

Criminal law-Counsel-No reversible error resulted from trial court's denial of defense counsel's motion to withdraw which was Wed on eve of trial two months after counsel had received state's witness list and realized that victim's mother had formerly worked for counsel's law firm and that the firm had represented the victim's family in a completed civil case-Prejudice is not presumed where alleged conflict arose from personal relationship not shown to involve substantial emotional ties, not from the representation of clients or former clients with competing interests—Defendant failed to show any acts or omissions by counsel which suggest that counsel was ineffective at trial

LARRY J. THOMAS, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No, 97-1691. Opinion filed December 18. 1998. Appeal from the Circuit Court for Seminole County, O.H. Eaton, Jr., Judge. Counsel: James B. Gibson, Public Defender, and Brynn Newton, 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.

(SHARP, W., J.) Thomas appeals after being convicted of unlawful possession of a firearm by a violent career criminal, armed burglary of a dwelling, three counts of robbery with a firearm and attempted robbery with a firearm. [1] He argues the trial court erred by denying his motion for judgment of acquittal on the charge of attempted robbery, and that remarks by a state witness that Thomas was being chased by the police when he was arrested were so prejudicial hc is entitled to a new trial. We find no merit to those arguments. However, the additional ground that the trial court erred in not allowing Thomas' trial counsel to withdraw based on a conflict is troubling.

Thomas was charged with unlawful possession of a firearm by a violent career criminal, armed burglary of a dwelling, three counts of robbery with a firearm and attempted robbery with a firearm. These charges arose from a night-time break in, and robbery of a condominium occupied by the Gardner family and a family friend, Jodie Molnar. Two men, at least one wearing a mask and gloves, wakened the occupants, told them to keep their heads down on their beds and rifled through their belongings. Less than an hour later, Thomas and his co-defendant were stopped for having a stolen vehicle. The police searched their vehicle and found a ski mask, gloves, numerous weapons and possessions belonging to the victims.

On March 4, 1997, James Sweeting was appointed by the court as defense counsel for Thomas.* Sweeting filed motions for discovery and received the state's witness list which included Jodie's name. Sweeting did not move to withdraw as Thomas' counsel until more than two months later, on May 27, 1997, at the beginning of Thomas' trial.

In his written motion to withdraw, Sweeting stated that Jodie's mother had worked for his law firm and that after she left, the Molnar family had retained his law firm to represent them in a lawsuit in which they were the defendants. Sweeting alleged that as the result of his contacts and relationship with the Molnar family, his loyalty to Thomas was impaired.

At the trial, Sweeting reaffirmed to the court that hc was concerned because two of the victims, including Jodie, had not appeared for their depositions scheduled for the prior week. Sweeting stated that Jodie was the daughter of a former secretary at his office. Also, he told the court that his firm had represented Jodie's family in a construction case which had since been resolved. However, Sweeting did not reassert his allegation that he was in possession of any confidential information concerning the victim and/or her family which would impair his ability to represent Thomas or that he could not properly cross-examine the victim. The trial court denied the motion.[3]

Absent a clear abuse of discretion, a trial court's denial of a motion to withdraw by counsel should not be disturbed. ***Weems v. State,*** 645 So.2d 1098 (Fla. 4th DCA), ***rev. denied, 654*** So.2d 920 (Fla. 1995); *Sanborn* v. Stare, 474 So.2d 309 (Fla. 3d DCA 1985). Here the motion was made on the eve of trial long after Sweeting could have and should have asserted a conflict, if one truly existed. Sweeting was appointed to represent Thomas on March 4th, filed motions for discovery in March, and had received the state's witness list, but he did not move to withdraw until two months later.

As argued to the trial court, the conflict consisted solely of Sweeting's employment relationship with the victim's mother, at a time prior to the commission of the crime and trial and his firm's representation of the victim's family in a completed civil case. This is sufficiently attenuated as to make this case distinguishable from ***Guzman*** v. ***State,*** 644 So.2d 996 (Fla. 1994) where the public defender had information that he could have given to impeach the state's chief witness, whom he had represented and his office was still representing and ***Crow v. Srate,*** 701 So.2d 431 (Fla. 5th DCA 1997) where the public defender had asserted that she had earlier represented the victim of the crime, that hostile interests existed between the defendant and the victim, and that she was privy to confidential information told to her by the victim. Sweeting's cross-examination of the victim at trial was as vigorous as his cross-examination of another victim.

The conflict in this case did not involve representation of clients or former clients with competing interests. Rather the conflict arose from a personal relationship not shown to involve substantial emotional ties. In these circumstances, prejudice is not presumed and the defendant must demonstrate that he has been prejudiced in some way to establish reversible error. See ***People v. Lewis, 430 N.E.*** 2d ***994*** (Ill. 1981), *cert.* ***denied, 460*** U.S. 1053 (1983); *Ex parre* Bell, 511 So.2d 519 (Ala. Crim. Ct. 1997).

Thomas has failed to show any acts or omissions by Sweeting which even remotely suggest that Sweeting was ineffective.

Therefore we affirm.

AFFIRMED. (ANTOON, J., concurs specially with opinion. DAUKSCH, J., dissents with opinion.)

[1]§§ 790.235, 810.02, 812.13, 777.04(1), Fla. Stat.

Since Sweeting was appointed as a Special Public Defender. he is subject to the same "conflict" rules as govern Public Defenders.

Mr. Sweeting also emphasized he wanted his client, Thomas (who was present in the courtroom) to know those facts before he proceeded in the case. The trial judge thought his ruling was one of law and thus he did not ask for Mr. Thomas' opinion. Had he done so, that might have avoided this appeal

(ANTOON, J., concurring.) I concur in the result reached by Judge Sharp, but write separately toemphasize that, in filing the motion to withdraw, defense counsel never asserted that an "actual conflict of interest" resulted from his representation of Mr. Thomas.

At the pretrial conference, after raising several other issues, defense counsel addressed his motion to withdraw, stating:

> Finally, one last thing, Your Honor, to get on the record here. I've also indicated to Mr. Thomas, and I have prepared a Motion to Withdraw, the Court is aware of it, I've given a copy to everyone, that Jodie M[o]lnar., which is one of the victims in the case, as a matter of fact, one of the victims that didn't show up for the depositions last week, is, in fact, the daughter of the former secretary of our office. And we are concerned and wanted to make sure Mr. Thomas knows, before he goes forward, that there is a relationship betweenthe mother of Jodie M[o]lnar, who is a victim in this case, and that relationship came as a result of her working with my office for about two and a quarter years. She separated from us, I believe, in '95. We have also had a case involving-a construction case involving [Ms. M[o]lnar's] father's law firm which has been resolved, it's not active at this time. I think Mr. Thomas needs to be aware of that and that that forms the basis of a motion to withdraw. We're concerned because I don't want to have to visit these issues in the future.

Nothing in either this statement or the motion to withdraw suggested that defense counsel had ever acted as the victim's attorney. Of course, defense counsel would have had an actual conflict if the interest of Mr. Thomas had been so adverse or hostile to the interest of another client that he could not represent both clients. See *Guzman v. State, 644 So.* 2d 996,997 (Fla. 1994). However, the transcript of the hearing on defense counsel's motion to withdraw does not reveal any such a conflict.

I agree with Judge Dauksch that grounds, other than an "actual conflict," may exist which may require withdrawal, but no such grounds were asserted here. *See Roberts v. State, 670 So.* 2d 1042 (Fla. 4th DCA 1996). Instead, it appears to me that, by filing the motion to withdraw: defense counsel was merely disclosing to the defendant his relationship with the victim's parents in order to discharge what he considered to be his ethical duty, and to avoid the issue from arising during postconviction proceedings. Given the argument ofdefense counsel, the trial court's denial of the motion to withdraw was not reversible error.

(DAUKSCH, J., dissenting.) I respectfully dissent.

Appellant should be given a new trial with a new lawyer. When Mr. Sweeting, a lawyer known to me to be a good, trustworthy, aggressive andcompetent lawyer, says he feels the need to withdraw because of a conflict of interest in representing a client, then that declaration should be honored virtually without question. It was error for the trial judge to have refused to do so; compounded by the majority's willingness to overlook the serious sixth amendment violation.

* * *

Elections-Municipal corporations-Recall election- Injunctious-Trial court could properly find that certain grounds for recall were legally insufficient because those grounds did not refer to specific misdeeds relating to official duties--Whether urging council member not to atteud council meeting so that **a quorum would be unavailable is legally sufficient ground for recall is not certain-slalfeasancc-Trial court could properly find legally sufficient** allegations **that vice mayor/city council member who was subject of recall violated city manager form of government and provision of city charter by giving direct work instructions to city employees without going through city manager-Recall petition not rendered invalid by fact that four of five grounds alleged were legally insufficient-Supervisor of Elections properly certified 15 percent petition for recall by referring to number of qualified electors at last municipal election although statute does not specifically define the voter pool to which the 15 percent calculation is to be applied-No merit to contention that recall process should have been stayed automatically when official filed appeal from lower court's refusal to enter injunction**

PHYLLIS T. GARVIN, Appellant, v. JOANNE JEROME, etc., et al., Appellees. 5th District. Case No. 98-2975. Opinion filed December 18, 1998. Appeal from the Circuit Court for Volusia County, Richard B. Orfinger, Judge. Counsel: C. Michael Barnette, Daytona Beach, for Appellant. Mary D. Hansen of Storch, Hansen & Morris, P.A., for Appellee Joanne Jerome, Chairman of the Phyllis T. Garvin Recall Committee. Franz Eric Dorn. City Attorney, Daytona Beach Shores, for Appellee City of Daytona Beach Shores.Frank B. Gummey, III, Assistant County Attorney, DeLand, for Appellee Deanie Lowe, Supervisor of Elections.

(SHARP, W., J.) Phyllis T. Garvin appeals from the rrial court's order which denied her request for an injunction to halt the conduct ofarecall election scheduled to be held shortly after the order was rendered. At issue in the recall election is her right to continue to hold the offices of Vice Mayor and City Council Member of the City of Daytona Beach Shores, Florida. The trial court ruled that the recall election should proceed as scheduled on November 3, 1998, but that the results oft he election should be sealed and not released for a sufficient time to allow Garvin to seek a stay from the appellate court. This court extended the stay which sealed the election results, pending ourdetermination of the cause, and expedited the conduct of this appeal. We affirm, and lift the stay.

Garvin first argues on appeal that the petition for recall was legally insufficient. It contained five separate grounds for Garvin's removal :

1. Malfeasance due to persistent repeated violations of City Manager form of government and section 3.06 of the Charter by:
   a. Giving direct workinstructions to city employees William Lazarus, Cathy Benson and Joe Blankenship, without first going through city manager.
   b. Without Council discussion or approval,, taking unlawful unilateral action to advertise for a part-time interim City Manager.
2. Malfeasance, as without lawful grounds she makes every effort to deprive applicants of their rights of due process of law.
3. Violation of her oath of office (Sec. 2.08) by subverting the City Manager form of government.
4. Misfeasance, in that shecontinually intimidates and harasses city employees to effectuate her personal desires.
5. Malfeasance of office in that she urged council member Marion Kyser not to attend a council meeting so that a quorum would not be available.

The trial court ruled that grounds 2, 3 and 4 were legally insufficient , but that grounds 1 and 5 were sufficient to premise a recall election pursuant to section 100.361, Florida Statutes (1997). All of the parties agree that this statute controls this cause and that Daytona Beach Shores is a municipality governed by these statutory provisions concerning recall elections. The statute provides that the following conduct justifies the holding of a recall election:

> The grounds for removalofelected municipal officials shall, for the purposes of this act, be limited to the following and must be contained in the petition:
> 1. Malfeasance;
> 2. Misfeasance;
> 3. Neglect of duty;
> 4. Drunkenness;
> 5. Incompetence;
> 6. Permanent inability to perform official duties; and
> 7. Conviction of a felony involving moral turpitude.

§ 100.361(1)(b), Fla. Stat. (1997).

Wc agree with the trial court that grounds 2, 3, and 4 were too vague to constitute valid bases for recall under the statute. See *Bent v. Ballantyne, 368* So.2d 351 (Fla. *1979); Taines v. Galvin, 279* So.2d 9 (Fla. *1973): Moultrie v. Davis, 498* So.2d *993* (Fla. 4th