

IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 96,588

STATE OF FLORIDA,

Petitioner,

vs.

CHARLES HOGAN,

Respondent.

PETITIONER'S REPLY BRIEF ON JURISDICTION AND THE MERITS

ROBERT A. BUTTERWORTH

Attorney General
Tallahassee, Florida

CELIA TERENCE

Bureau Chief
Assistant Attorney General
Florida Bar No. 656879

AUGUST A. BONAVIDA

Assistant Attorney General
Florida Bar No. 962295
1655 Palm Beach Lakes Boulevard
Suite 300
West Palm Beach, Florida 33401
Telephone: (407) 688-7759

Counsel for Petitioner

TABLE OF CONTENTS

CERTIFICATE ON INTERESTED PERSONS.....ii

TABLE OF CITATIONS.....iii

STATEMENT OF THE CASE AND FACTS1

SUMMARY OF THE ARGUMENT.....2

ARGUMENT.....3-6

THE PROSECUTOR IS PERMITTED TO COMMENT ON THE
DEFENDANT’S FAILURE TO PRODUCE EVIDENCE TO
REFUTE AN ELEMENT OF THE CRIME WHERE AN
EXCULPATORY DEFENSE HAS BEEN ASSERTED FOR THE
FIRST TIME AT TRIAL BY THE DEFENDANT.

CONCLUSION.....7

CERTIFICATE OF SERVICE.....8

CERTIFICATE OF INTERESTED PERSONS

Counsel for Petitioner certified that the following person, in addition to those set forth in its Initial Brief, may have an interest in the outcome of this case:

AUGUST A. BONAVIDA, Assistant Attorney General
Office of the Attorney General
State of Florida
(appellate counsel for Petitioner)

TABLE OF CITATIONS

CASES

Ford Motor Co. v. Kikis, 401 So.2d 1341 (Fla. 1981) 4

Highsmith v. State, 580 So.2d 234 (Fla. 1st DCA), rev. den., 589 So.2d 291 (Fla. 1991) 2-6

Jackson v. State, 575 So.2d 181 (Fla. 1991) 2, 4, 5

Lawyer v. State, 627 So.2d 564 (Fla. 4th DCA 1993) 2, 4-6

Mancini v. State, 312 So.2d 732 (Fla. 1975) 3, 4

McCoy v. State, 723 So.2d 869 (Fla. 1st DCA 1998) 5

McDonald v. State, 578 So.2d 371 (Fla 1st DCA 1991) 2-4, 6

State v. Hoqan, 24 Fla. L. Weekly D2027
(4th DCA September 1, 1999) 4, 5

Thomas v. State, 726 So.2d 369 (Fla. 4th DCA 1999) 2, 4-6

MISCELLANEOUS

Art V, § 3(b)(3), Fla. Const. 2, 3

STATEMENT OF THE CASE AND FACTS

Petitioner adopts and realleges the statement of the case and facts as set forth in its initial brief.

SUMMARY OF THE ARGUMENT

This Court has jurisdiction to review this case pursuant to Art V, § 3(b)(3), Fla. Const. The legal principle espoused in this case, which follows Lawyer v. State, 627 So.2d 564 (Fla. 4th DCA 1993) and Thomas v. State, 726 So.2d 369 (Fla. 4th DCA 1999), directly conflicts with that set forth in McDonald v. State, 578 So.2d 371 (Fla 1st DCA 1991) and Highsmith v. State, 580 So.2d 234 (Fla. 1st DCA), rev. den., 589 So.2d 291 (Fla. 1991).

The lower court incorrectly construed this Court's opinion in Jackson v. State, 575 So.2d 181, 188 (Fla. 1991) by imposing, *sub silentio*, an additional requirement that, prior to commenting upon a defendant's failure to call a witness who would give favorable testimony in support of a claim of an affirmative defense, it must be demonstrated that there exist a "special relationship" between the defendant and that witness which includes a familial or some other close relationship.

ARGUMENT

THE PROSECUTOR IS PERMITTED TO COMMENT ON THE DEFENDANT'S FAILURE TO PRODUCE EVIDENCE TO REFUTE AN ELEMENT OF THE CRIME WHERE AN EXCULPATORY DEFENSE HAS BEEN ASSERTED FOR THE FIRST TIME AT TRIAL BY THE DEFENDANT.

Respondant argues in his Answer Brief that McDonald and Highsmith are not in conflict with the lower court's opinion in the case *sub judice* (AB 5). Petitioner disagrees. Respondant argues that McDonald "bears little factual or legal resemblance to the instant case" (AB 6). Respondant reasons that in McDonald, since the defendant, and not the State, initially argued that the State failed to produce a witness who may very well have testified contrary to the State's theory, the facts are distinguishable from those at bar (AB 6). The position is a misapprehension of the well-settled principle of conflict jurisdiction.

When jurisdiction of this Court is sought to review conflicting decisions of two or more district courts of appeal pursuant to Art V, § 3(b)(3), Fla. Const., this Court has stated that such jurisdiction is appropriate where, "(1) the announcement of a rule of law conflicts with a rule previously announced by this court or another district, or (2) the application of a rule of law produces a different result in a case which involves substantially the same facts as a prior case. In this second situation, the

facts of the case are of the utmost importance." Mancini v. State, 312 So.2d 732, 733 (Fla. 1975)(citations omitted)(emphasis added). As Mancini makes clear, this Court may invoke conflict jurisdiction even where, as here, the facts of the conflicting cases are not identical, so long as one district court expressly discusses and applies a rule of law which is in conflict with that set forth by another district court of appeal. Ford Motor Co. v. Kikis, 401 So.2d 1341,1342 (Fla. 1981)(The discussion of the legal principles which the court applied supplies a sufficient basis for a petition for conflict review.).

In the case at bar, the lower court, construing this Court's opinion contained in Jackson espoused a rule of law which was in direct conflict with the rule set forth in the McDonald and Highsmith cases. State v. Hogan, 24 Fla. L. Weekly D2027 (4th DCA September 1, 1999). Specifically, relying on its previous decisions in Lawyer and Thomas, the lower court held that only when the absent witness and defendant occupy a "special relationship," can the State then comment upon a defendant's failure to call such witness to support the defendant's voluntarily asserted affirmative defense. Hogan.

McDonald and Highsmith do not expressly require that it be demonstrated that there be a "special relationship" between the

defendant and the absent witness as a prerequisite to permitting the State to comment upon the defendant's failure to call a witness who could corroborate the defendant's affirmative defense to the charge. McDonald; Highsmith. Indeed, in Highsmith, the court noted that one of the two extrajudicial witnesses was the defendant's "friend." Id. at 235. Thus, as correctly stated by the lower court, conflict exists and jurisdiction of this Court is proper.

Respondant argues that he and Ted Hanson did not have a "special relationship," because "it was not a relationship where Hanson would have been expected to testify favorably for Respondant" (AB 12). This argument is entirely specious. That Hanson would not have given testimony favorable to Petitioner is utterly belied by the record. Indeed, Petitioner's theory of his case is that Hanson gave him consent to be in the victim's house. This was injected throughout various stages of the trial, including Respondant's opening (T 143), and closing arguments (T 416-17), as well as through evidence introduced through Respondant's testimony (T 356-362). Consent is an affirmative defense to the charge of burglary. McCoy v. State, 723 So.2d 869 (Fla. 1st DCA 1998). Since Respondant represented to the jury that Hanson's testimony would have corroborated Petitioner's affirmative defense, it follows that such testimony would be entirely favorable to his case.

Further, the lower court *sub silentio*, and Respondant expressly, assert that the "special-relationship" between a defendant and the witness be limited to a familial or some special friendship (AB 13-4). Hogan; Lawyer; Thomas. However, Jackson does not impose this additional requirement in order to show that the witness is not "equally available." Id. This requirement was not imposed in Highsmith and McDonald. Thus, that Hanson was not related to, or even a close friend of Respondant is irrelevant to the inquiry. Indeed, a special relationship may exist with respect to any individual who would testify favorably to the defendant, but whose identity and location is solely within the defendant's knowledge. In this situation, after a defendant voluntarily assumes some burden of proving an affirmative defense by referring to a witness who would corroborate this defense, yet fails to call this witness to testify, this would invite the State to comment upon the defendant's failure to do so. This is consistent with the overall function of a trial, i.e., a search for the truth. Anything less would give the defense a "license to commit perjury and the search for the truth in the judicial process [would be] frustrated by default." Lawyer (Hersey, J., dissenting). Consequently, the lower court, following its decisions in Lawyer and Thomas, erred in ruling otherwise.

CONCLUSION

WHEREFORE, based on the foregoing arguments and the authorities cited therein, Respondent respectfully requests this Court to QUASH the decision of the Fourth District Court of Appeals in this case.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

CELIA TERENZIO
Bureau Chief
Assistant Attorney General
Florida Bar No. 656879

AUGUST A. BONAVIDA
Assistant Attorney General
Florida Bar No. 962295
1655 Palm Beach Lakes Boulevard
Suite 300
West Palm Beach, FL 33401-2299
(407) 688-7759

Counsel for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Petitioner's Brief on the Merits" has been furnished by Courier to: MAXINE WILLIAMS, Assistant Public Defender, Criminal Justice Building/6th Floor, 421 Third Street, West Palm Beach, FL 33401, this 11th day of April, 2000.

Of Counsel