IN THE SUPREME COURT OF FLORIDA

SOLOMON WISE,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.
_____/

CASE NO. 96,760

DCA case no.: 98-3123

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

JURISDICTIONAL BRIEF OF RESPONDENT

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STATEMENT OF CASE AND FACTS

The Fifth District Court of Appeal affirmed the Petitioner's judgment and sentence citing the case Maddox v. State, 708 So. 2d 617 (Fla. 5th DCA), rev. granted, 718 So. 2d 169 (Fla. 1998). This led the Petitioner to seek review in this Court.

CERTIFICATE OF FONT AND TYPE SIZE

The undersigned counsel certifies that this brief was typed using 12 point Courier New, a font that is not proportionately spaced.

SUMMARY OF ARGUMENT

This Court does have the discretion to accept jurisdiction of this case. As a practical matter, however, it may be more prudent to hold this petition for review in abeyance until this same issue is resolved in other pending cases.

ARGUMENT

THIS COURT DOES HAVE THE DISCRETION TO ACCEPT JURISDICTION OF THIS CASE.

This Court has jurisdiction under article V, section (3)(b)(3) of the Florida Constitution where a decision of a district court "expressly and directly conflicts" with a decision of this Court or another district court. Where the district court's decision is a per curiam opinion which cites as controlling law a decision that is either pending review in or has been reversed by this Court, this Court has the discretion to accept jurisdiction. Jollie v. State, 405 so. 2d 418, 420 (Fla. 1981).

The State acknowledges that this Court has the authority to accept jurisdiction of this case in light of the district court's citation to Maddox v. State, 708 So. 2d 617 (Fla. 5th DCA), rev. granted, 718 So. 2d 169 (Fla. 1998). However, the State notes that this same issue -- whether sentencing errors have to be preserved -- is presently pending review in numerous other cases in this Court. Accordingly, the State submits that the interests of judicial economy, as well as fairness to this Petitioner, can best be served by holding this petition for review in abeyance pending resolution of this issue in the other cases. Numerous cases involving this issue will be ripe for review by this Court in the

near future, and little purpose would be served by full briefing in all of them. Once this Court decides the Maddox case, the details of the holding will have to be applied to other pending cases. This would be best done after the Maddox decision is made.

CONCLUSION

Based on the arguments and authorities presented herein, the Respondent respectfully acknowledges that this Court does have the discretion to accept jurisdiction of this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above Jurisdictional Brief has been furnished by delivery via the basket of the Office of the Public Defender at the Fifth District Court of Appeal to Susan A. Fagan, counsel for the Petitioner, 112 Orange Ave. Ste. A., Daytona Beach, FL 32114, this 5th day of November 1999.

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shelves evidencing a struggle; a bruise and bite mark on the victim mother; the distraught appearance of both mother and daughter; and the belligerent attitude of the defendant at the scene.

In the instant case the hearsay. testimony was supported by the officer's description of the distraught appearance of the victim when the officer responded to a 911 call; the officer described the physical appearance of the victim's wounds to her arm and mouth; and photographs of the victim's wounds were introduced into evidence. Morris is directly on poinr and is disposirive.

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

'The state also argues that the officer's testimony as to what White had told her constituted an exception to the hearsay rule as an "excited utterance" pursuant to section 90.803(2), Florida Statutes (1997). The trial court made no such finding. however, and WC therefore reject this argument by the state.

* * *

Criminal law—Where in initial trial jury acquitted defendant of charge of burglary with assault or battery while armed with a firearm and could not reach a verdict on charge of first degree. murder, and subsequent information charged defendant with second degree murder and carrying concealed firearm, court should have dismissed charge of carrying concealed firearm because of defendant's prior acquittal of related offense of burglary while armed with a firearm

ROBERT FIELDS, Appellant. v. STATE OF FLORIDA, Appellee. 5th District. Case No. 98-2762. Opinion filed September 10, 1999. Appeal from the Circuit Court for Seminole County, Kenneth R. Lester, Judge. *Counsel:* James B. Gibson, Public Defender. and A. S. Rogers, Assistant Public Defender, Daytona Beach, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Carmen F. Corrente, Assistant Attorney General, Daytona Beach. for Appellee.

(COBB, J.) Fields was charged with first degree murder and burglary with an assault or battery while armed with a firearm. A jury acquitted Fields of the latter count but could not reach a verdict in respect to the murder count.

After the first trial rhe state filed an information charging Fields wirh second degree murder and added a second count: carrying a concealed firearm. Fields moved to dismiss the second count. His motion was denied, and at a second trial he was convicted of both counts. The issue on appeal is whether the concealment charge should have been dismissed because of Fields' prior acquittal of the related offense of burglary while armed with a firearm.

Florida Rule of Criminal Procedure 3.15 l(c) provides:

> When a defendant has been tried on a charge of 1 of 2 or more related offenses, the charge of every other related offense shall be dismissed on the defendant's motion unless a motion by the defendant for consolidation of the charges has been previously denied, or unless the defendanthas waived the right to consolidation, or unless the prosecution has been unable, by due diligence, to obtain sufficient evidence to warrant charging the other offense or offenses.

Fields relies on the opinion in *Franklin* v. *State,* 719 So. 2d 938 (Fla. 1st DCA 1998). In rhat case tbe defendant was originally charged with DUI manslaughter and leaving the scene of an accident resulting in death. At his first trial, he was acquitted of the leaving-the-scene charge and the jury was unable to reach a verdict on the DUI manslaughter charge. The state subsequently filed an information charging the defendant with the reiterated charge DUI manslaughter and with the new charge of leaving the scene of an accident with injuries (in addition to a person being killed in the accident, another person was injured). The First District held that the trial court erred in failing to dismiss the charge of leaving the scene of an accident with injuries based on the authority of Florida Rule Of Criminal Procedure 3.151(c). The court held:

> This case fits squarely under rule 3.15 1 (c). The arrest and booking reports and informations clearly show that appellant was unaware of the charges of leaving the scene of an accident involving injury until after the first trial when he was acquitted of leaving the Scene of an accident resulting in death. There can be no argument that the charges are not "related offenses," because they arise from the same automobile accident and could be tried in the same Court. *See* Fla. R. Crim. P. 3.151(a). Moreover, it is undisputed that appe did not file a previous motion for consolidation: nor did he waiv right to consolidation, and there is no showing that the prosecu was unable, by due diligence, to obtain sufficient evident warrant charging the other offense, See Fla. R. Crim. P. 3.15

Id. at 940. The *Franklin* courtnotedthe Fourth District's discus of Rule 3.151 in *State v. Harris. 357 So.* 2d 758 (Fla. 4th I 1978): including the fact that the purpose of the Rule is to pr defendants fromsuccessive prosecutioix based upon essentiall same conduct. *Franklin* at 940; See *Harris* at 759.

We agree with Fields that this case fits squarely within the Clearly, the concealment charge and the burglary while armed a firearm are related offenses; no motion for consolidation or w is present here; and there has been no showing that the prosecu by due diligence, was unable to obtain sufficient evidence tot the concealment charge against Fields prior to the first trial. Ind there was testimony at that trial by a state witness in regard to concealment.

We reverse the judgment and sentence in regard to the con ment count and remand for resentencing with a revised scores

REVERSED AND REMANDED. (DAUKSCH GOSHORN, JJ., concur.)

* * *

HARDY v. STATE. 5th Disuict. #99-2317. September 10, 1999. 3.800 from the Circuit Court for St Johns County. See *Stevens* v. *State,* 65 1 So. 2 (Fla. 5th DCA 1995).

AFFIRMED.

BIRKHEAD v. BOARD OF ADJUSTMENT OF CITY OF COCOA BEAC District. #99-1569. September 10, 1999. Petition for Certiorari Rcvi Decision from the Circuit Court for Brevard County. DENIED. *Ann Okeechobee County,* 710 So. 2d 641 (Fla. 4th DCA 1998).

JONES v. STATE. 5th District. #99-1158. September 10, 1999. Appeal fr Circuit Coun for Seminole County. AFFIRMED. See *Smith v. State,* 683 577 (Fla. 5th DCA 1996). *rev. dismissed,* 691 So. 2d 1081 (Fla. 1997).

TONEY v. STATE. 5th District. #98-3234. September 10. 1999. Appeal fr Circuit Court for Brevard County. AFFIRMED. See *Holmes v. State,* 374 944 (Fla. 1979); *Blackshear v. State, 480* So.2d 207 (Fla. 1st DCA 1985)

WISE v. STATE. 5th District. #98-3123. September 10, 1999. Appeal fr Circuit Court for Brevard County, AFFIRMED. *Maddox v. State, 708 So.* (Fla. *5th* DCA), review *granted,* 718 So. 2d 169 (Fla. 1998).

GREENE v. STATE. 5th District. #98-2843. Septcmbe 10, 1999. Appeal fr Circuit Court for Volusia County. AFFIRMED. See *State v. Law, 559 So.* (Fla. 1989).

HILLYER v. STATE. 5th District. #98-2249. September 10, 1999. Appe. the Circuit Court for Volusia County. AFFIRMED. *See Speed v. Srare. 73:* 17 (Fla. 5th DCA 1999).

BURNSIDE v. STATE. 5th District. #97-2884. September 10, 1999. Appe the Circuit Court for Citrus County. AFFIRMED. See *Lovette v. State,* 636 1304 (Fla. 1994).

* * *

JERRAME HOESTEINE. Petitioner. v. STATE OF FLORIDA. Respond District. Case No. 99-1664. Opinion filed September 3. 1999. Petition for Prohibition, William T. Swigert, Respondent Judge. Counsel: Tania Z. Alavi & Bird, P.A.. Ocala for Petitioner. Robert A. Butterworth, A General. Tallahassee, and Wesley Heidt, Assistant Anomey General, I Beach, for Respondent.

CORRECTED OPINION

[Original Opinion at 24 Fla. L. Weekly D2059b]

[Editor's note: The first name of the Petitioner has bee rected.]

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IMBEAU v. STATE. 4th District. #99-2087. September 8, 1999. Appeal denying rule 3.800(a) motion from the Circuit Court for the Seventeenth Circuit. Broward County. Affirmed. See § 921.001(5), Fla. Stat. (1997

LAKES v. STATE. 4th District. #s 98-2321, 98-2322 & 98-2323. Sspt 1999. Consolidated appeals from the Circuit Court for the Seventeenth Circuit, Broward County. Affirmed. *Nix v. Williams, 467 U.S.* 431 *Maulden v. State,* 617 So. 2d 298,301 (Fla. 1993).