IN THE SUPREME COURT OF FLORIDA

TERRY McMILLON,

Petitioner/Appellant,

v. CASE NO. SC99-201

STATE OF FLORIDA,

Respondent/Appellee.
_____/

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

RESPONDENT'S BRIEF ON JURISDICTION

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SUMMARY OF ARGUMENT

The District Court did not enter a "citation PCA" but instead issued a written and signed opinion. Moreover, the lower court did not cite a case as "controlling authority." This case was merely decided in a manner similar to that of another case under review, based upon a harmless error analysis. Thus, there is no *prima facie* express conflict and this Court should not accept jurisdiction.

ARGUMENT

POINT ON APPEAL

THE DISTRICT COURT DID NOT "RELY UPON" OR CITE AS "CONTROLLING AUTHORITY" ANY DECISION UNDER REVIEW BY THIS COURT.

Petitioner alleges that this Court has jurisdiction based upon the decision in Jollie v. State, 405 So.2d 418 (Fla. 1981). However, in Jollie, this Court held that a *per curiam* decision ***without opinion*** which cites as controlling authority a decision that is pending review in this Court constitutes *prima facie* express conflict for purposes of jurisdiction. Thus, a "citation PCA" is required to invoke this Court's jurisdiction under Jollie. Here, we have neither a citation PCA nor a citation which can be construed as "controlling authority."

Normally, a *per curiam* decision by a District Court is not reviewable. The Jollie decision carved out a necessary exception to allow review where the *per curiam* decision utilized only a case currently under review as controlling authority. Thus, if the case cited as "controlling" authority were currently pending review, this Court could also accept jurisdiction of the newer case.

In this case we have a signed, written opinion which does not cite Scott v. State, 722 So.2d 256 (Fla. 5th DCA 1998) as "controlling authority." In fact, the exact wording in the decision below is: "[a]s we did in Scott...we hold that...it was harmless." The District Court opinion cites Chicone v. State, 684 So.2d 736 (Fla. 1996) as controlling authority, when viewed from

the perspective of State v. Medlin, 273 So.2d 394 (Fla. 1973). The lower court decision merely found that error, if any, was entirely harmless. Scott is not the "controlling authority" for harmless error.

Moreover, the Scott case involved a possession charge, with the contraband found in Scott's eyeglass container inside his locker. Here, the charge was sale of cocaine and Petitioner claimed only that someone else sold the cocaine. There was no evidence adduced to support the defense that Petitioner sold the substance, but did not know it was cocaine. Petitioner simply denied selling the substance. Because Scott and this case are dissimilar, the District Court did not "rely upon" the Scott case. This case is not a "citation PCA" and the Scott case is not cited as controlling authority. The Court should therefore refuse to accept jurisdiction.

CONCLUSION

Based on the argument and authorities presented herein, Respondent requests this Honorable Court to decline to accept jurisdiction in this cause

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Respondent's brief on the merits in case number SC99-201 has been furnished by delivery to Noel A. Pelella, Assistant Appellate Public Defender, Seventh Judicial Circuit, this 24th day of January, 2000.

CARMEN F. CORRENTE
ASSISTANT ATTORNEY GENERAL

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IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT JULY TERM 1999

TERRY McMILLON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

_____/

NOT FINAL UNTIL THE TIME EXPIRES TO FILE REHEARING MOTION, AND, IF FILED, DISPOSED OF.

CASE NO. 99-1139

L.CT. 97-36759

Opinion filed December 10, 1999

Appeal from the Circuit Court for Volusia County, Richard B. Orfinger, Judge.

James B. Gibson, Public Defender, and Noel A. Pelella, Assistant Public Defender, Daytona Beach, for Appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Robin A. Compton, Assistant Attorney General, Daytona Beach, for Appellee.

HARRIS, J.

An undercover agent drove into an area to purchase drugs. McMillon and Corey Pride rushed to his vehicle and, according to the officer, Pride delivered counterfeit rock cocaine while McMillon delivered the real thing. At trial, McMillon's defense was that Pride had delivered both rocks. The jury accepted the officer's version of the facts and convicted McMillon of sale of cocaine.

McMillon argues on appeal that the court erred in not giving his requested instruction that the State had the burden of proving that McMillon was aware the substance delivered

was cocaine at the time of the sale. We acknowledge that the supreme court in *Chicone v. State,* 684 So. 2d 736 (Fla. 1996), has made such knowledge an element of possession, and presumably, sale of controlled substances. But the *Chicone* court also held that because guilty knowledge is implicit in "possession," it need not be specifically alleged in the information. A jury instruction must, however, if requested, advise the jury of the State's burden of showing defendant's knowledge of the illicit nature of the substance. But even in *Chicone*, by footnote [footnote 14], the court recognizes a connection between a more specific instruction and the issue raised by the defendant.

Here, the *Medlin* inference that one who sells controlled substances knows the illicit nature of the substance sold, unrebutted, is sufficient to carry the day for the State as far as proving its case is concerned. *State v. Medlin*, 273 So. 2d 394 (Fla. 1973). It is up to the jury to determine whether to accept the State's proof as sufficient evidence that defendant knowingly sold a substance later proved to be crack cocaine and, if the issue is presented, whether defendant knew the substance was cocaine that he was selling. McMillon's defense was that he did not sell either the counterfeit or the real rock. He put on a defense witness who testified that he, the witness, had sold both rocks.

Hence, the issue raised by defendant for the jury's consideration was whether he sold the crack cocaine, not whether he knew what he sold was cocaine. As we did in *Scott v. State,* 722 So. 2d 256 (Fla. 5th DCA 1998), *rev. granted*, 729 So. 2d 394 (Fla. 1999), we hold that even if the failure to give the instruction was error, it was harmless. We believe that a jury confronted with an argument that "although I did not sell the rock, if I did sell the rock as crack, I didn't know what it was" would certainly convict.

AFFIRMED.

SHARP, W., and PETERSON, JJ., concur.