

IN THE SUPREME COURT OF FLORIDA

DIEGO TAMBRIZ-RAMIREZ,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC17-713
4th DCA Case No. 4D15-2957

RESPONDENT'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

A jury convicted Petitioner of the following offenses: Count 1, Burglary of a Dwelling with an Assault or Battery While Armed and Masked; Count 2, Aggravated Assault with a Deadly Weapon While Masked; and Count 3, Attempted Sexual Battery - Person 12 Years of Age or Older - Using Great Force of a Deadly Weapon. Tambriz-Ramirez v. State, 42 Fla. L. Weekly D508, D509 (Fla. 4th DCA Mar. 1, 2017). On May 15, 2013, the Fourth District Court of Appeal affirmed Petitioner's convictions on direct appeal in Tambriz-Ramirez v. State, 112 So. 3d 767 (Fla. 4th DCA 2013).

Thereafter, Petitioner filed a motion for postconviction relief alleging that trial counsel was ineffective for failing to raise a double jeopardy violation. Tambriz-Ramirez, 42 Fla. L. Weekly at D509. The trial court held an evidentiary hearing and denied the claim. Id. Petitioner raised the same claim on appeal. Id. The Fourth District Court of Appeal analyzed the issue and concluded that the claim was without merit because there was no double jeopardy violation. Id. at D509-10.

The Fourth District Court of Appeal recognized that Petitioner's decision conflicted with eight decisions from the First and Fifth District Courts of Appeal in which double jeopardy violations were found based on similar convictions.

Id. at D510. The Fourth District Court of Appeal certified conflict with those eight decisions. Id.

SUMMARY OF THE ARGUMENT

Jurisdiction exists because the decision of the Fourth District Court of Appeal conflicts with the eight decisions certified to be in conflict. This Court should accept review.

ARGUMENT

THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL CONFLICTS WITH FOUR DECISIONS OF THE FIRST DISTRICT COURT OF APPEAL AND FOUR DECISIONS OF THE FIFTH DISTRICT COURT OF APPEAL.

A. Jurisdictional Criteria

This Court has discretionary jurisdiction to review a decision of a district court of appeal that is certified to be in direct conflict with a decision of another district court of appeal. Art. V, §3(b)(4), Fla. Const.

B. Discussion

The State agrees with Petitioner that the decision of the Fourth District Court of Appeal conflicts with the eight decisions certified to be in conflict. The conclusion of the Fourth District Court of Appeal that there is no double jeopardy violation in Petitioner's case cannot be reconciled with the holdings of the eight conflict cases. See Dykes v. State, 200 So. 3d 162, 163 (Fla. 5th DCA 2016) (remanding postconviction

claim "to the trial court to determine if double jeopardy bars Dykes's convictions for aggravated battery with a firearm and aggravated assault with a firearm because they were subsumed into the greater offense of burglary of a dwelling with an assault or battery with a firearm"); Hankins v. State, 164 So. 3d 738 (Fla. 5th DCA 2015) (finding that "convictions for aggravated battery with a firearm and aggravated assault with a firearm violated double jeopardy because they were subsumed into the greater offense of burglary of a dwelling with an assault or battery with a firearm"); Smith v. State, 154 So. 3d 523, 524 (Fla. 1st DCA 2015) (finding that Smith's two aggravated assault convictions violated the prohibition against double jeopardy because those offenses are subsumed within his conviction for armed burglary with an assault); McGhee v. State, 133 So. 3d 1137, 1138 (Fla. 5th DCA 2014) (reversing "conviction for aggravated assault with a firearm because it is subsumed into the greater offense of burglary of a dwelling with an assault or battery while armed with a firearm"); Green v. State, 120 So. 3d 1276, 1278 (Fla. 1st DCA 2013) ("because all of the elements of the crime of aggravated assault with a firearm are contained within the crime of burglary with an assault while armed with a firearm, convictions for both the burglary and the aggravated assault violate the prohibition against double jeopardy");

Estremera v. State, 107 So. 3d 511, 512 (Fla. 5th DCA 2013)

("[A]ll of the elements of the crime of aggravated assault with a firearm are contained within the crime of burglary with assault while armed with a firearm"); White v. State, 753 So. 2d 668, 669 (Fla. 1st DCA 2000) (same); Baldwin v. State, 790 So. 2d 434, 435 (Fla. 1st DCA 2000) (same).

The State also agrees with Petitioner that this case presents a significant issue that warrants review by this Court.

CONCLUSION

This Court should exercise its discretion and accept review of this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing was served by email on Rocco Carbone, III, 135 Jenkins Street, St. Augustine, FL 32068 at rocco@rjc3law.com on May 15, 2017.

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CERTIFICATE OF TYPEFACE COMPLIANCE

I HEREBY CERTIFY that this brief has been prepared in Courier New font, 12 point, and double spaced.

/s/ MARK J. HAMEL
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