IN THE SUPREME COURT OF FLORIDA

JEFFREY FLYNN,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

Case No. SC17-1197

L.T. No. 4D15-3792

ON DISCRETIONARY REVIEW FROM THE
THE FOURTH DISTRICT COURT OF APPEAL

JURISDICTIONAL BRIEF OF RESPONDENT

PAMELA JO BONDI
ATTORNEY GENERAL
Tallahassee, Florida

CELIA A. TERENZIO
BUREAU CHIEF, WEST PALM BEACH
Florida Bar No. 0656879
RICHARD VALUNTAS
Assistant Attorney General
Florida Bar No. 151084
1515 North Flagler Drive, #900
West Palm Beach, FL 33401
(561) 837-5016
CrimAppWPB@MyFloridaLegal.com

Counsel for Respondent

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES **PAGE#**

OTHER AUTHORITIES

PRELIMINARY STATEMENT

The respondent, State of Florida, was the prosecution in the trial court and the appellee before the Fourth District Court of Appeal. The respondent will be referred to herein as "the State." The petitioner, Jeffrey Flynn, was the defendant in the trial court and the appellant before the Fourth District Court of Appeal. The petitioner will be referred to as "petitioner."

STATEMENT OF THE CASE AND FACTS

Petitioner was convicted and sentenced for one count of parental kidnapping and one count of concealment of a child contrary to court order. Flynn v. State, 217 So. 3d 1055 (Fla. 4th DCA 2017). At trial, petitioner moved for a judgment of acquittal on the child concealment charge because there was no court order in place expressly directing him to disclose the child's location.[1] Id. at 1055. The trial court denied the motion for judgment of acquittal and ruled that petitioner's "act of concealing the child's location from his ex-wife was sufficient to support the charge." Id. The Fourth District affirmed petitioner's convictions and sentences and noted that "[m]ost time sharing orders, including the one at issue here, require

[1] Petitioner "absconded with his child for several months in violation of a court order providing that Appellant and his ex-wife had shared custody of the child." Id.

persons with joint custody to keep the other custodial person informed with respect to the whereabouts and activities of the child." Id.

The Fourth District's decision in Flynn rejected the Second District's holding in Merkle v. State, 88 So. 3d 375 (Fla. 2d DCA 2012) and adopted the Fifth District's holding in Costlow v. State, 543 So. 2d 1259 (Fla. 5th DCA 1989). Id. The Fourth District also certified conflict with the Second District's decision in Merkle. Id. Petitioner subsequently sought review in this Court.

SUMMARY OF ARGUMENT

The Fourth District's decision in this case certified conflict with the Second District's opinion in Merkle. The State contends there is no conflict because the instant case is factually distinguishable from Merkle. The law is clear that conflict jurisdiction does not exist over a case when it is factually distinguishable from the case it allegedly conflicts with. Accordingly, the Court should decline jurisdiction over the instant case because no express and direct conflict exists with Merkle.

ARGUMENT

THERE IS NO BASIS FOR DISCRETIONARY REVIEW OF THE FOURTH DISTRICT'S DECISION BECAUSE IT DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH THE SECOND DISTRICT'S OPINION IN MERKLE.

Petitioner seeks to invoke the discretionary jurisdiction of this Court pursuant to Article V, sections 3(b)(3) and (4) of the Constitution of the State of Florida.

Petitioner contends the holding in Flynn conflicts with the opinion in Merkle and that this Court should accept jurisdiction to "resolve whether the felony statute in this case is properly construed to apply to the failure of a parent to fail to return a child pursuant to a shared custody arrangement in absence of a court order to reveal the whereabouts of the child." (JB. 2-3). For the reasons set forth below, the Court should decline jurisdiction over this case because there is no express and direct conflict between Flynn and Merkle.

The law is clear that if the purportedly conflicting cases are distinguishable in their controlling factual elements, then no conflict jurisdiction exists. Kyle v. Kyle, 139 So. 2d 885, 887 (Fla. 1962); Department of Revenue v. Johnston, 442 So. 2d 950 (Fla. 1983)(where case was before this Court on apparent conflict, but case was distinguishable on its facts, this Court would discharge jurisdiction). Simply put, conflict jurisdiction does not exist over a case when it is factually distinguishable from the case it allegedly conflicts with. Ackers v. State, 614 So. 2d 494, 495 (Fla. 1993). The instant case is factually distinguishable from Merkle because it involves a situation where the pertinent time-sharing court order required petitioner to keep his ex-wife informed regarding the victim's (their minor child's) whereabouts. Flynn, 217 So. 3d at 155. Petitioner violated the terms of the time-sharing court order when he absconded with the victim for several months and he was convicted of concealment of a child contrary to court order. Id.

The Merkle case, in contrast, involved the mother of a child who left Florida with her child before any court order was entered regarding custody of the child. Merkle, 88 So. 3d at 376-377. The child's father, Mr. Merkle, subsequently obtained a court order that required the mother to return the child to him. Id. The order obtained by Mr. Merkle, however, did not require the mother to disclose the child's location. Id. Under these circumstances, the Second District held that the mother's motion for judgment of acquittal should have been granted because no court order required her to disclose the child's location. Id. at 378.

The Court should decline jurisdiction over this case because nothing within the "four corners" of the Fourth District's opinion expressly and directly conflicts with the Second District's decision in Merkle. Art. V, § 3(b)(3), Fla. Const. (the Court has discretionary jurisdiction to review a district court decision "that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law"). The court order at issue in this case required petitioner and his ex-wife to "keep the other custodial person informed with respect to the whereabouts and activities of the child." Flynn, 217 So. 3d at 155. No similar order existed in Merkle. In fact, the pertinent order in Merkle "authorized law enforcement officers to assist Mr. Merkle in taking physical possession of the child, it did not order Ms. Merkle to disclose the location of her son." Merkle, 88 So. 3d at 376.

The decisions in Flynn and Merkle are factually distinguishable because Flynn involved a court order requiring the defendant to keep the other parent informed with respect to the whereabouts of the child, while Merkle did not. Thus, no conflict jurisdiction exists because Flynn and Merkle are distinguishable in their controlling factual elements. Kyle, 139 So. 2d at 887. Petitioner correctly notes the Court technically has discretionary jurisdiction over this case simply because the Fourth District certified conflict with Merkle. (JB. 2). Nevertheless, the Court should decline jurisdiction under Article V, section 3(b)(4) because no direct conflict between Flynn and Merkle exists. These two cases are distinguishable in their controlling factual elements, so the Fourth District erroneously certified conflict between the instant case and Merkle. Accordingly, the Court should not accept jurisdiction over this case.

CONCLUSION

WHEREFORE based on the foregoing arguments and authorities cited herein, the State respectfully requests this Honorable Court decline to accept jurisdiction over this case.

Respectfully submitted,
PAMELA JO BONDI
ATTORNEY GENERAL
Tallahassee, Florida

/s/ Celia A. Terenzio
CELIA A. TERENZIO
Bureau Chief, West Palm Beach

Florida Bar No.: 0656879

/s/ Richard Valuntas
RICHARD VALUNTAS
Assistant Attorney General
Florida Bar No.: 0151084
1515 North Flagler Drive, #900
West Palm Beach, FL 33401
(561) 837-5000
CrimAppWPB@MyFloridaLegal.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this brief has been electronically furnished to this Court and by email (lcarres@gate.net) to Louis Carres, Special Assistant Conflict Counsel, 401 S. Dixie Hwy., Second Floor, West Palm Beach, FL 33401 on July 20, 2017.

/s/ Richard Valuntas
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief has been prepared with Times New Roman 14 point type and complies with the font requirements of Rule 9.210.

/s/ Richard Valuntas
RICHARD VALUNTAS
Assistant Attorney General