

IN THE SUPREME COURT OF FLORIDA

JEFFREY MICHAEL FLYNN)
)
 Petitioner,)
)
 vs.)
)
 STATE OF FLORIDA,)
)
 Respondent.)
)
 _____)

CASE NO. SC17-1197
(L. T. No. 4D15-3792)

PETITIONER’S BRIEF ON JURISDICTION

On Petition for Discretionary Review
based on Certified Conflict of Decisions

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PRELIMINARY STATEMENT

Petitioner was the defendant in the trial court and appellant in the district court of appeal. He will be referred to by name and as petitioner in this brief.

The State of Florida is the respondent and was the appellee in the district court. The appellee will be referred to as the “state” herein.

An Appendix is filed herewith containing a conformed copy of the decision below on which the certification of conflict was based.

STATEMENT OF THE CASE AND FACTS

This case is before the Court on a decision certifying conflict of decisions on an issue of law of the correct construction of a criminal statute. The decision is reported as Flynn v. State, 42 Fla. L. Weekly D1010a (Fla. 4th DCA May 3, 2017), reh. denied May 24, 2017. Appendix - A.

Petitioner was convicted at jury trial of concealing a child contrary to court order in violation of section 787.04(1), Fla. Stat. (2014). At issue is whether this statutory section can be the basis for a felony conviction for violation of a domestic relations order for a shared child custody arrangement based on failure to return a child to the custodial parent as specified in a custody order.

The Fourth District affirmed conviction in Flynn despite there being no court order directing him to reveal the whereabouts of the child to the court. The Fourth District certified that its decision was contrary the Second District’s interpretation of

the same statute in Merkle v. State, 88 So. 3d 375 (Fla. 2d DCA 2012). The courts in Flynn and in Merkle construed in different ways the same statutory section, 787.04(1), Fla. Stat. (2014), which is titled “Removing minors from state or concealing minors contrary to state agency or court order.”

In rejecting the construction of the statute in Merkle the Fourth District adopted a contrary interpretation of statute by the Fifth District in Costlow v. State, 543 So. 2d 1259 (Fla. 5th DCA 1989). Costlow held that conviction of the third degree felony of concealing a child contrary to court order can be based on keeping a child from the other parent entitled to custody in absence of a court order directing the person to reveal the whereabouts of the child to the court. In Flynn and in Merkle there was no issue of removal of the child from the state, thus only the portion of the statute that the decisions were concerned with was concealing a child contrary to court order. This was the controlling statutory section in both cases. There is direct conflict, and the certification of conflict presents this Court with jurisdiction to resolve directly contrary applications of the same statutory provision.

SUMMARY OF THE ARGUMENT

The Fourth District’s certification of conflict vests the Court with jurisdiction. It should exercise its discretion to accept jurisdiction and 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. The issue concerns whether the statute is designed to criminalize failures to obey joint parenting agreements and orders or is to protect the courts' ability to exercise its jurisdiction to protect children.

As shown below, the state continues to attempt to prosecute under this statute in circumstances where there is no court order directing the person to reveal the whereabouts of a child to the court. The conflicting interpretations concerning the scope and application of this felony provision issue should be resolved by this Court.

ARGUMENT

THE FOURTH DISTRICT'S DECISION CERTIFIED TO BE IN DIRECT CONFLICT WITH A DECISION ON THE SAME QUESTION OF LAW BY ANOTHER DISTRICT COURT OF APPEAL VESTS JURISDICTION IN THIS COURT TO REVIEW AND RESOLVE THE LAW AT ISSUE.

The Court has jurisdiction pursuant to Article V, section 3(b)(3) and (4) of the Florida Constitution to review a decision of a district court of appeal that is certified by that court to be in express conflict, and which expressly and directly conflicts, with a decision of another district court of appeal on the same question of law. The certification of conflict vests this Court with jurisdiction to resolve the conflict under Article V, section 3(b)(4).

The Fourth District construed section 787.04(1) of the Florida Statutes which provides: "It is unlawful for any person, in violation of a court order, to lead, take, entice, or remove a minor beyond the limits of this state, or to conceal the location of

a minor, with personal knowledge of the order.” The Fourth District construed this section to apply where there is a refusal to return a child as required by a shared custody order in the absence of an order to reveal the whereabouts of the child to the court.

The Fifth District held in Costlow v. State, 543 So. 2d 1259, 1262 (Fla. 5th DCA 1989), *en banc*, that the statute prohibiting concealing a child contrary to a court order can be applied to a parent who violates a domestic time-sharing custody arrangement by failing to return the child to the custodial parent. The court said, *id.* at 1262, “With regard to the merits of section 787.04(1), the legislature made a decision that interference with a person’s custody rights is a serious matter which should be addressed by the criminal law.”

The Second District in Merkle v. State, *supra* at 377-378, per Judge Altenbernd, construed section 787.04(1) differently, holding it does not apply to custodial disputes in absence of a court order directing the person to reveal the whereabouts of the child to the court. The Second District reasoned that the statute applies to protect the jurisdiction of a court and its ability to carry out its duty to protect children, not to punish violators of custody orders. In reaching its conclusion the court in Merkle found the statute not ambiguous, but if it were the court stated it would be bound to interpret its scope favorably to the accused. Merkle at 377.

In Flynn the Fourth District stated, “We affirm the trial court’s ruling and in doing so, reject the holding set forth in Merkle, 88 So. 3d at 377.” Flynn at p 2 of slip opinion. In rejecting the construction given to the statute in Merkle the Fourth District recognized the differing constructions given to the same statutory provision, “In other words, the Merkle case ‘suggests that the statutory offense is actually concealing the location of the child from the court.’ Id. at 378 n. 4. This holding is at odds with the Fifth District’s decision in Costlow, where the court held that ‘[c]oncealment’ means ‘concealing a child from a person entitled to its custody.’” Flynn at p 2 of slip opinion.

Certification of conflict was appropriate in view of these express and directly conflicting constructions given to the same statutory provision.

This Court should exercise its jurisdiction to review the certified conflict to resolve the meaning and application of this statute. The Fourth District, additionally, has applied the statute in another case subsequent to its decision in Flynn through a citation decision that relied on Flynn and also certified conflict with Merkle. See Giordano v. State, 42 Fla. L. Weekly D1415a (Fla. 4th DCA June 21, 2017). The issue of the statute’s correct construction and application is an ongoing concern, and absent a resolution by this Court the statute will continue to be applied in an inconsistent manner among the districts. It is anticipated that exercise of the Court’s review jurisdiction will be sought in Giordano, and it may be appropriate for the cases

to be consolidated in this Court where both involve certified conflict on the same issue of law.

The issue of to be resolved on the merits will involve application of well-established rules of statutory construction and also whether use of the principle that statutory provisions should be read *in pari materia* helps to clarify the legislative intent. These issues may warrant the Court setting the case for oral argument.

CONCLUSION

WHEREFORE, it is respectfully requested that the Court will exercise its jurisdiction to grant review of the decision below that was certified to be in conflict on the same point of law with a decision of another appellate court in this state.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Brief of Petitioner on Jurisdiction has been furnished to counsel for appellee, Richard Valuntas, Esq., Assistant Attorney General, 1515 North Flagler Drive, Ninth Floor, West Palm Beach, Florida 33401-3432, by E-mail service at CrimAppWPB@MyFloridaLegal.com, and that a copy has been filed with the Court through the state efilings portal this 30th day of June 2017.

/s/ Louis G. Carres
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CERTIFICATE OF FONT COMPLIANCE

Counsel hereby certifies that the instant brief has been prepared with Times New Roman 14-point font.

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Attorney