

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

CASE NO.: SC19-912

BRIAN K. MCKENZIE,

Respondent.

**ON NOTICE TO INVOKE DISCRETIONARY
JURISDICTION TO REVIEW A DECISION OF THE
FIFTH DISTRICT COURT OF APPEAL**

MR. MCKENZIE'S BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

In this brief the Petitioner, **STATE OF FLORIDA**, will be referred to as “the state.” The Respondent, **BRIAN K. MCKENZIE**, will be referred to as “Mr. McKenzie.” The state’s brief on jurisdiction will be referred to as “SBJ.”

STATEMENT OF THE CASE AND FACTS

The state’s brief skips the facts that give this case some context (SBJ 1). The pertinent facts are that in 2009, as part of a plea agreement, Mr. McKenzie entered a plea of no contest to one count of engaging in sexual activity with a child while in a position of familial or custodial authority. McKenzie v. State, ___ So.3d ___ (Fla. 5th DCA 5/10/19)[44 Fla. L. Weekly D1252; 2019 WL 2062785 *1]. He was designated a sexual offender, and sentenced to six months in jail, followed by two years of sex offender community control, followed by three years of sex offender probation^{1/}. Mr. McKenzie served his jail time and successfully completed his community control and probation. The sentence was fully completed in April 2015, and Mr. McKenzie was notified by the Department of Corrections that he was no longer under supervision. Id. In 2018, the state filed a notice in the circuit court and requested Mr. McKenzie be designated a sexual predator. Over Mr. McKenzie’s

^{1/} The opinion says two years of sex offender probation, id., but that is incorrect (R/35-42, 53).

objection, after a hearing the circuit court entered a written order designating Mr. McKenzie a sexual predator. The appeal to the Fifth District ensued. Id. The Fifth District held that the circuit court lacked subject matter jurisdiction over the case in 2018, and thus its order was vacated. Id.

SUMMARY OF THE ARGUMENT

THIS COURT MUST DECLINE JURISDICTION BECAUSE THE FIFTH DISTRICT'S DECISION DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH ANY OTHER DECISION ON THE SAME QUESTION OF LAW

It is important to note that in the state's summary of the argument (SBJ 3) and in its argument (SBJ 4-6) it simply argues that the Fifth District's decision conflicts with Cuevas v. State, 31 So.3d 290 (Fla. 3d DCA 2010). But it neglects to discuss, much less argue, whether the decision conflicts "on the same question of law," as required by Article V, §3(b)(3), Florida Constitution. That is because it cannot show conflict "on the same question of law" as Cuevas did not discuss - much less decide - the issue on which the Fifth District decided McKenzie - that of jurisdiction.

The Fifth District correctly cited and analyzed the law concerning jurisdiction. It did not create any new law. It simply applied the unique facts of this case to correct

and well-established Florida law and determined that the facts showed that the circuit court lacked jurisdiction. This decision is squarely in line with other Florida appellate decisions on the same question of law, and does not directly and expressly conflict with any decision.

ARGUMENT

THIS COURT MUST DECLINE JURISDICTION BECAUSE THE FIFTH DISTRICT'S DECISION DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH ANY OTHER DECISION ON THE SAME QUESTION OF LAW

The holding of the Fifth District in McKenzie v. State, ___ So.3d ___ (Fla. 5th DCA 5/10/19)[44 Fla. L. Weekly D1252, 2019 WL 2062785], is stated at the beginning of its opinion: “We conclude that the trial court lacked jurisdiction to enter the order and, accordingly, reverse.” 2019 WL 2062785 at *1. In its brief on jurisdiction, the state correctly says “The Fifth District held that the court did not have jurisdiction to enter the order designating Respondent as a sexual predator after his sentence expired, . . .” (SBJ 1), and “The Fifth District held that the order was improperly entered because the trial court lacked jurisdiction, . . .” (SBJ 3). This is important because the case that was certified to be in express and direct conflict with McKenzie - that of Cuevas v. State, 31 So.3d 290 (Fla. 3d DCA 2010) - did not even

mention the issue of jurisdiction.

The jurisdiction of this Court is limited to a narrow class of cases enumerated in the Florida Constitution. Among the classes of cases that may, in the Court's discretion, be reviewed are those where it is alleged that a district court's opinion "expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law." Article V, §3(b)(3), Florida Constitution.

The cases from this Court make clear that the express and direct conflict "on the same question of law" must appear on the face of the opinion which the Court is being requested to review. Reaves v. State, 485 So.2d 829, 830 (Fla. 1986).

The Fifth District's decision in McKenzie is in accord with Florida law on the issue of jurisdiction in a criminal case. It is axiomatic that a circuit court cannot proceed if it lacks subject matter jurisdiction over a case or personal jurisdiction over a defendant. In Mr. McKenzie's case, the circuit court lacked both. "Lack of jurisdiction constitutes fundamental error because a trial court cannot act in excess of its authority, and failure to correct that error " "would undermine the integrity of our system of justice." State v. Williams, 260 So.3d 472, 475 (Fla. 1st DCA 2018).

The trial court lacked subject matter and personal jurisdiction because Mr. McKenzie completed his probation and thus his entire sentence in April, 2015. At

that point, the trial court lost all subject matter and personal jurisdiction as his criminal case was closed and Mr. McKenzie was no longer under the control of the criminal court for that case. The Fifth District's decision on this point is in full accord with well-established decisions of this court and other Florida appellate courts on that point of law. See Francois v. State, 695 So.2d 695, 697 (Fla. 1997)(upon expiration of the probationary term, circuit court is divested of subject matter jurisdiction over criminal case, and this jurisdiction could not be extended even by stipulation of the parties). See also Coppinger v. State, 246 So.3d 398, 400 (Fla. 4th DCA 2018)(where defendant had completed sentence, court lacked jurisdiction over the case); Kilbourn v. State, 127 So.3d 723, 724 (Fla. 2d DCA 2013)(order that terminated probation also terminated trial court's jurisdiction over defendant); Gonzalez-Ramos v. State, 46 So.3d 67 (Fla. 5th DCA 2010)(where defendant's term of probation ended before state filed paper alleging violation of probation, circuit court lacked subject matter jurisdiction to do anything in case); Driscoll v. State, 538 So.2d 1283 (Fla. 2d DCA 1989)(order that discharged defendant from community control was a final order that terminated the state's jurisdiction over defendant).

This rule also applies to a case that involves a defendant whose criminal sentence has expired and who has been discharged from state custody for a sex offense and the state then files a petition for civil commitment as a sexually violent

offender. The criminal court lacks subject matter jurisdiction to consider that petition. See State v. Phillips, 119 So.3d 1233, 1242-44 (Fla. 2013); Morel v. State, 138 So.3d 1122, 1125-26 (Fla. 4th DCA 2014)(accord).

So there is nothing new or novel about the law of jurisdiction that the Fifth District applied, or any of the decisions it cited or relied upon.

The Fifth District's certification or express and direct conflict with Cuevas v. State, 31 So.3d 290 (Fla. 3d DCA 2010), was incorrect. In Cuevas, the Third District affirmed, in a 2-1 decision, a circuit court order that designated Cuevas a sexual predator even though his prison sentence was fully served and he had been released^{2/}. The majority found no evidence that the state waived its right to seek that designation. The court ruled this was a regulatory designation which could be imposed at any time. In a lengthy dissent, Judge Sheppard argued the trial court erred as §775.21 did not confer any authority on the trial court to add the designation at that time. Id. at 292-95. What is important to this court is that the issue of jurisdiction - that issue of law that was decided by the Fifth District in McKenzie below - was not ever explicitly addressed in either the majority or dissent in Cuevas. Instead, Cuevas was decided on a waiver issue, and the Third District did not decide the specific issue

^{2/} In Almond v. State, 89 So.3d 1056, 1058 (Fla. 2d DCA 2012), the Second District said that it appeared that the circuit court in Cuevas “. . . ceased to have jurisdiction over the criminal case and the defendant.”

raised by Mr. McKenzie.

The bottom line is that the state cannot show that the Fifth District's decision in McKenzie expressly and directly conflicts with Cuevas on the same question of law as is necessary to invoke this court's jurisdiction. The Court must therefore decline to accept jurisdiction in this case.

CONCLUSION

Based on the arguments and authorities set forth in this brief, this Court must decline to accept jurisdiction over this case.

Respectfully submitted this 24th day of June, 2019.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that this brief was efiled and that system sent a true copy by email addresses `crimappdab@myfloridalegal.com` and `andrea.totten@myfloridalegal.com` to counsel for the Appellee: Andrea K. Totten, Assistant Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, FL 32118, on June 24, 2019.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief is typed in 14 point TIMES NEW ROMAN proportional space font.

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