IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

DEONTAE PALINSKI JOHNSON,

Respondent.

_____/

CASE NO. FSC#SC21-20
DCA CASE 1D19-1474
LT NO. 37-2017-CF-1832

ON DISCRETIONARY REVIEW
FROM THE FIRST DISTRICT COURT OF APPEAL

JURISDICTIONAL BRIEF OF RESPONDENT

JESSICA J. YEARY
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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STATEMENT OF THE ISSUES

GIVEN THE REQUIREMENTS OF SECTION 316.062(1), FLORIDA STATUTES, DOES CONVICTION ON MULTIPLE COUNTS UNDER SECTION 316.027(2), FLORIDA STATUTES, STEMMING FROM A SINGLE CRASH INVOLVING MULTIPLE VICTIMS, EXPOSE A DEFENDANT TO MULTIPLE PUNSHMENTS FOR ONE OFFENSE IN VIOLATION OF THE DOUBLE JEOPARDY PROTECTIONS OF THE U.S. CONSTITUTION?

STATEMENT OF THE CASE AND THE FACTS

The relevant facts are limited to those contained in the four corners of the majority per curiam opinion of the First District Court of Appeal in Johnson v. State, 1D19-1474, issued on September 14, 2020. Those facts are as follows:

> Deontae Palinski Johnson appeals multiple convictions, arguing that under Double Jeopardy principles he cannot be convicted of multiple counts of leaving the scene of a crash stemming from a single crash. We agree and reverse.
>
> Johnson was driving and had a passenger with him, Christian Debique. Johnson hit another vehicle, killing the driver, Tryriq Roberts. The collision caused the second vehicle to collide with a third vehicle. There were two people in the third vehicle, Breanna Cotton and Kristal Haynes. Debique, Cotton, and Haynes were all injured. Johnson left the scene of the crash without attempting to assist any of the four victims.
>
> The State charged Johnson with one count of vehicular homicide, one count of leaving the scene of a crash involving death, three counts of leaving the scene of a crash involving injury, and one count of driving with a suspended or revoked license. Prior to trial, the State dropped the driving with a suspended or revoked license charge.
>
> The jury convicted Johnson of all five of the remaining counts. At sentencing, the trial court dismissed one conviction of leaving the scene involving injury, reasoning that the unit of prosecution was each vehicle involved, not each

person. Johnson was sentenced on the three remaining convictions for leaving the scene: one conviction of leaving the scene of a crash involving death; and two convictions of leaving the scene of a crash involving injury. Johnson appealed his convictions.

Johnson's claim of a double jeopardy violation was not preserved. However, a double jeopardy violation constitutes fundamental error, which can be raised for the first time on appeal. *Shipman v. State*, 171 So. 3d 199, 200 (Fla. 1st DCA 2015) ("[B]ecause [a] double jeopardy violation constitutes fundamental error, it may be addressed for the first time in a direct appeal.").

This Court has held that leaving the scene of a crash, even one resulting in death to one victim and injury to others, permits only a single conviction. *See Peer v. State*, 983 So. 2d 34, 34-35 (Fla. 1st DCA 2008). *See also Hardy v. State*, 705 So. 2d 979, 981 (Fla. 4th DCA 1998) (holding that convictions for leaving the scene of a crash involving death and leaving the scene of a crash involving personal injury constituted a single episode of leaving the scene—even though the single crash involved multiple cars and victims); *Hoag v. State*, 511 So. 2d 401, 402 (Fla. 5th DCA 1987) ("[T]he failure of [the defendant] to stop at the scene of his accident constituted but one offense although that accident resulted in injuries to four persons and the death of a fifth."). This rule applies here.

Johnson's convictions for leaving the scene in which injury resulted is a lesser offense of leaving the scene in which death resulted. Thus, "[t]he proper remedy is to vacate the conviction[s] for the lesser offense[s] while affirming the conviction for the greater one." *Hardy*, 705 So. 2d at 981 (citing *Williams v.*

> *Singletary*, 78 F.3d 1510, 1516 (11th Cir. 1996)). Here, the greater conviction is for leaving the scene of a crash in which death results. Therefore, the single conviction under section 316.027(2)(c) must stand, while the two convictions based on section 316.027(2)(a) must be vacated.

(PJA 4-6). This appeal follows.

ARGUMENT

PETITIONER HAS FAILED TO SHOW THAT THIS COURT HAS DISCRETIONARY JURISDICTION.

Petitioner has failed to show that discretionary jurisdiction can be exercised by this Court based on a certified question of public importance. Petitioner has not shown that a majority of the First District Court of Appeal passed on the question asserted by Petitioner, has not shown that a decision was issued for this Court to review and decide, and has also not shown that the court certified a question of great public importance within the four corners of their majority per curiam opinion. Even if Petitioner had shown a basis for discretionary jurisdiction, the issue is one of long-standing Florida law in the district courts in which no contrary decisions have been issued on the same point of law, and is therefore not an appropriate exercise of this Court's discretionary jurisdiction. This Court should deny jurisdiction.

In Floridians for a Level Playing Field v. Floridians Against Expanded Gambling, 967 So.2d 832, 833 (Fla. 2007), this Court stated the requirements for discretionary jurisdiction based on a certified question of great public importance.

> First, it is essential that the district court of appeal pass upon the question certified by it to be of great public importance. We have previously discharged jurisdiction where the district court of appeal has not in fact passed upon the question certified.[1] Second, there must be a district court "decision" to review. *See* art. V, § 3(b)(4), Fla. Const. For instance, where a district court is unable to reach a clear majority decision on an issue and elects to certify a question without resolving the merits, we are without jurisdiction to answer such a question under article V, section 3(b)(4) of the Florida Constitution. *See Boler v. State,* 678 So.2d 319, 320 n. 2 (Fla.1996) (stating that if a district court is evenly split on a legal issue and specifically withholds a decision on the merits, there is no "decision" on which to base certified conflict review under article V, section 3(b)(4)). Third, and most important for this case, the question must be in fact "certified" by a majority decision of the district court. For the same reasons that we are without jurisdiction under article V, section 3(b)(4) if there is no majority decision on the merits, we are equally without jurisdiction if there is no clear majority on the decision to certify. Accordingly, we conclude that under article V, section 3(b)(4) of the Florida Constitution, it is required that a majority of those judges participating in the case concur in the decision to certify.

This Court has explained that the requirement for a district court to issue a decision passing on its certified question is met by the court expressing concern with its holding and the ramifications thereof, and thereby demonstrating that the decision issued by the court passed on the question it certified to be of great public importance.

Carpenter v. State, 228 So.3d 535, 539-540 (Fla. 2017). Absent such consideration, the decision is not one for this Court to review and decide, but instead a final ruling on the issue. Id.

Regarding the first requirement, Respondent assumes that the question included in Petitioner's Statement of the Issues is the question upon which Petitioner bases its claim for jurisdiction. (PJB 1). Petitioner's question concerns the interplay between Section 316.062(1) and 316.027(2) and their impact on whether double jeopardy is violated for multiple convictions based on a single crash with multiple victims. (PJB 1). The district court's majority did not pass on this question, but instead merely acknowledged and applied longstanding precedent, which holds that leaving the scene of a crash permits only one conviction, without considering the interplay between the above statutes which form the question or whether the precedent should be receded from. (PJA 5-6). Additionally, the district court majority did not express concern or consider in any way the implications of its long-standing precedent. (PJA 5-6). Consequently, Petitioner failed to show that the first requirement for jurisdiction was met because the district court's majority did not pass upon the question.

Regarding the second requirement, the majority did not issue a decision for this Court to review and decide, but instead issued a final ruling. Per Carpenter, a "decision" of this type does not exist where a majority fails to express concern or otherwise discuss receding from prior precedent. While one judge on the panel wrote a concurring opinion that met this standard, a concurring opinion of one judge on the panel cannot be used to satisfy jurisdictional requirements. See also Jenkins v. State, 385 So.2d 1356, 1359 (Fla. 1980)(holding that a concurring opinion cannot support jurisdiction because it is not the decision of court). Therefore, Petitioner has failed to show that there is a decision of the district court to review.

Regarding the third requirement, Petitioner has failed to show that a majority of the district court certified a question of great public importance. Specifically, the four corners of the court's per curiam opinion is devoid of any certification of a question of great public importance. (PJA 4-6). As noted above, the majority does not even pass on the question presented by Petitioner, much less certify it within the four corners of the per curiam opinion to be one of great public importance. Respondent, of course, acknowledges

that the district court issued a separate order certifying a question, but this does not appear within the four corners of the opinion, and is therefore not properly considered. Petitioner has therefore failed to meet the third requirement for jurisdiction.

Petitioner's brief does not address the requirements for jurisdiction. The brief appears to rely primarily upon the discussion contained in the concurring opinion, not the majority per curiam opinion that is relevant for determining the issue of jurisdiction. Petitioner's reliance upon the concurring opinion, rather than the majority decision, supports Respondent's argument that the requirements were not met because if Petitioner could have relied on the majority decision for its argument, it would have done so rather than rely on the inapposite concurrence.

Petitioner also argues this Court should exercise its discretionary jurisdiction on the question "because it is a frequently recurring question . . ." (PJB 10). However, even if the jurisdictional requirements could be considered met, the question would be considered well-settled, and the authority answering it would be long-standing within Florida among the district courts of appeal. See Franklin v. State, 719 So.2d 938, 940 (Fla. 1st DCA

1998); Haag v. State, 67 So.3d 351, 352 (Fla. 2d DCA 1998); Hardy v. State, 705 So.2d 979, 980 (Fla. 4th DCA 1998); Hoag v. State, 511 So.2d 401, 402 (Fla. 5th DCA 1987); see also Fla. Jur 2d § 1431 (2d ed. Sept. 2020 update). It appears the only outlier to this precedent is the concurrence Petitioner relies upon. A single concurrence over thirty years is not a frequently recurring question.

Petitioner has failed to show that this Court has discretionary jurisdiction in this case. Not only did the district court not pass on Petitioner's question, but it failed to issue a decision for this Court to decide and rule upon. Additionally, Petitioner has failed to show that a majority certified a question as being of great public importance. Even if jurisdiction existed, this Court should decline to exercise its discretion because the law is longstanding and well-settled among the district courts. Jurisdiction should be denied.

CONCLUSION

Based on the foregoing, Respondent respectfully requests this Court deny jurisdiction in this case.

CERTIFICATES

I hereby certify, pursuant to Florida Rule of Appellate Procedure 9.045, that this brief complies with the applicable font and word-count-limit requirements. I hereby certify that this brief was served, via the Florida Courts E-Filing Portal, on Damaris E. Reynolds, Esq., Assistant Attorney General, at crimapptlh@myfloridalegal.com, on February 18, 2021.

Respectfully submitted,

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