

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC21-1204

L.T. NO. 3D18-1982

KEVIN F. TOMLINSON,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL, THIRD DISTRICT

BRIEF OF RESPONDENT ON JURISDICTION

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STATEMENT OF THE ISSUES

Pursuant to Florida Rule of Appellate Procedure 9.210(f), if this Court grants review, the State does not intend to raise any affirmative issues on cross-review, which are independent of those on which jurisdiction is invoked and independent of those raised by Petitioner in his statement of the issues.

STATEMENT OF THE CASE AND FACTS

Petitioner threatened to ruin the careers of two real estate brokers unless they paid him \$500,000. (A. 2). He later increased his demand to \$800,000. (A. 2). The State charged him with two counts of Extortion pursuant to section 836.05, Florida Statutes (2015), which provides:

Whoever, either verbally or by a written or printed communication, ... maliciously threatens an injury to the person, property or reputation of another, or maliciously threatens to expose another to disgrace, or to expose any secret affecting another ... with intent thereby to extort money or any pecuniary advantage whatsoever ... shall be guilty of a felony of the second degree ...

§ 836.05, Fla. Stat. (2015).

At trial, the court denied a defense request to instruct the jury that actual malice¹ was an essential element of Extortion. Instead, the judge

¹ Actual malice means ill will, hatred, spite, an evil intent. (A. 5).

instructed the jury on legal malice.² The jury found Petitioner guilty of both Extortion counts. (A. 3).

On appeal, Petitioner argued, inter alia, that the trial court committed fundamental error by denying his request to instruct the jury on actual malice as an essential element of Extortion. Adopting the Fourth District's reasoning in Alonso v. State, 447 So. 2d 1029 (Fla. 4th DCA 1984), and the Second District's reasoning Dudley v. State, 634 So. 2d 1093 (Fla. 2d DCA 1994), the Third District Court of Appeal ("Third District") held that legal malice, not actual malice, is an essential element of Extortion. It held:

[We] find that legal malice is the more appropriate standard to be applied in extortion cases...The conduct that the statute criminalizes is a malicious threat with the intent "to extort money or any pecuniary advantage" or to compel the person to do an act against his or her will. § 836.05, Fla. Stat. "[T]he extortionist need not hate his victim. That kind of malice is not contemplated by the crime of extortion." Alonso [v. State], 447 So. 2d [1029,] 1030 [(Fla. 4th DCA 1984)]. In an extortion case, the defendant is driven by greed, not hatred. "Taking the text of [section 836.05] as a whole, and considering its context and the discernable purposes of the legislature," we conclude that the statutory term "maliciously" means legal malice. Seese [v. State], 955 So. 2d [1145, 1149 (Fla. 4th DCA 2007)].

(A. 7-8).

Further, the Third District rejected the Fifth District's holding in Calamia

² Legal malice means wrongfully, intentionally, without legal justification or excuse. (A. 5).

v. State, 125 So. 3d 1007, 1011 (Fla. 5th DCA 2013), in which the court concluded that actual malice is an essential element of Extortion. (A. 8). In so finding, the Fifth District wrote: “Although we think the Fourth District’s analysis in Alonso is correct and legal malice is the more appropriate definition, we are compelled to follow the supreme court’s directive in Carricate [v. State, 384 So. 2d 1261 (Fla. 1980)]. Therefore we hold actual malice is the correct standard for extortion and certify conflict with Alonso and Dudley.” (A. 4 n.1).

Petitioner now seeks this Court’s review.

SUMMARY OF ARGUMENT

There is express and direct conflict between the Third District’s decision in Tomlinson v. State, 322 So. 3d 212 (Fla. 3d DCA 2021), and the Fifth District’s decision in Calamia v. State, 125 So. 3d 1007 (Fla. 5th DCA 2013). In both cases, the legal issue was whether a required element of Extortion is legal malice or actual malice. The Third District held that legal malice is an essential element of Extortion, while the Fifth District held that the State must prove actual malice. Express and direct conflict exists. This Court should nevertheless decline to exercise its discretionary jurisdiction. This issue is unimportant because, in the context of extortion, there is no practical difference between legal and

actual malice. Further, this case is a poor vehicle for resolving the conflict because any alleged error was harmless beyond a reasonable doubt. Finally, the decision below is correct in any event.

ARGUMENT

THE COURT SHOULD DECLINE TO ACCEPT JURISDICTION.

Respondent agrees with Petitioner that express and direct conflict exists between Tomlinson and Calamia. See Art. V, § 3(b)(3), Fla. Const. Both address the identical legal issue: whether a jury should be instructed on actual malice versus legal malice in Extortion cases, but they reached opposite conclusions.

An express and direct conflict is one in which it can be shown that two opinions cannot be reconciled. Aravena v. Miami-Dade Co., 928 So. 2d 1163, 1166-67 (Fla. 2006). A conflict arises where the appellate court “reached the opposite result on controlling facts which, if not virtually identical, more strongly dictated” the result reached by the conflicting appellate decision. Id. (quoting Crossley v. State, 596 So. 2d 447, 449 (Fla. 1992)).

The conflict between decisions “must appear within the four corners of the majority decision.” Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986). Any conflict may not be inherent or implied and any conflicting

language must be more than “mere obiter dicta.” Dep’t Health and Rehab. Servs. v. Nat’l Adoption Counseling Servs., 498 So. 2d 888, 889 (Fla. 1986); Ciongoli v. State, 337 So. 2d 780, 781 (Fla. 1976). “‘Express and direct conflict’ is a strict standard that requires either the announcement of a conflicting rule of law or the application of a rule of law in a manner that results in a conflicting outcome despite ‘substantially the same controlling facts.’” Kartsonis v. State, 319 So. 3d 622, 623 (Fla. 2021) (citations omitted).

Here, the conflict between the reasoning of Calamia and the instant decision was recognized by the Third District. Similarly, the Calamia court acknowledged a conflict with Dudley v. State, 634 So. 2d 1093, 1094 (Fla. 2d DCA 1984) (“To prove extortion...the prosecution [must] show there was a malicious threat...made intentionally and without any lawful justification.”); and Alonso v. State, 447 So. 2d 1029, 1030 (Fla. 4th DCA 1984) (“The malice requirement [of Extortion] is satisfied if the treat is made ‘willfully and purposely to the prejudice and injury of another...’”). Calamia, 125 So. 3d at 1012.

This Court should nevertheless decline to exercise its discretionary jurisdiction for three reasons.

The decision below is correct. Even to the extent there is any meaningful difference between actual and legal malice in the extortion context, the trial court properly instructed the jury that section 836.05 requires only legal malice. Indeed, the first sense of “malice” listed in Black’s Law Dictionary is precisely that type: “[t]he intent, without justification or excuse, to commit a wrongful act.” Malice, Black’s Law Dictionary (11th ed. 2019). To be sure, Black’s also recognizes that “malice” can mean “[i]ll will; wickedness of heart”—but it stresses that “[t]his sense is most typical in **nonlegal** contexts.” Id. (emphasis added).

Confirming the State’s reading of the law, the extortion statute also requires that the offense have been committed “with intent to extort money or any pecuniary advantage.” § 836.05, Fla. Stat. That mens rea provision clarifies that the malice required for the crime is the intent to obtain money via threat without a lawful justification—in other words, legal malice.

And context also informs the issue. As nearly every district court to have considered the question agrees, “the extortionist need not hate his victim.” Alonso, 447 So. 2d at 1030. “That kind of malice is not contemplated by the crime of extortion.” Id. Instead, the purpose of the extortion statute is to prevent one person from unjustly enriching himself by threatening another’s person, property, or reputation. The State, this Court has said, has

an “interest . . . in shielding its citizens from these types of strong-arm tactics,” Carricarte, 384 So. 2d at 1263, and it hardly matters whether those tactics are motivated by personal animosity or simple greed. Accordingly, whether the perpetrator extorts a rival businessperson whom he dislikes or a family member whom he purports to love, the injury—and thus the crime—is committed. In sum, “[t]aking the text of [Section 836.05] as a whole, and considering its context and the discernable purposes of the legislature,” (A. 8), “maliciously” means legal malice.

Further, this issue has little practical consequence that might warrant the expenditure of the Court’s scarce judicial resources. That is because there is no meaningful difference—at least in the extortion context—between the actual and legal malice standards. To act with actual malice means to act “with ill will, hatred, spite, or an evil intent,”³ while legal malice refers to an act taken “intentionally and without any lawful justification.” Fla. Std. Jury Instr. (Crim.) 8.23. By definition, however, a person who threatens to injure another “with intent thereby to extort money or any pecuniary advantage,” § 836.05, Fla. Stat.—as the extortion statute requires—has simultaneously acted with the “ill will” or “evil intent” necessary

³ That definition is in the disjunctive: it is satisfied if the defendant acted with “ill will,” or “hatred,” or “spite,” or “an evil intent.”

for a finding of actual malice *and* with the intention and lack of justification required for legal malice.

Put differently, few if any extortion fact patterns will present a case for legal malice but not actual malice; in every instance of a threat for the purpose of extorting money, the jury will rightly conclude that the defendant acted with “ill will” or “evil intent.”⁴

Finally, for substantially the same reasons, this case is a poor vehicle for resolving the legal dispute because Petitioner cannot prevail even under the definition of “malice” he proposes. Indeed, any error in the trial court’s instructions to the jury was harmless beyond a reasonable doubt because no reasonable jury could have concluded that Petitioner lacked actual malice. See State v. DiGuilio, 491 So. 2d 1129, 1135 (Fla. 1986). The facts make that plain. After learning that two fellow realtors were allegedly engaged in professional misconduct, Petitioner threatened to “ruin their careers . . . unless they paid him \$500,000,” later upping his demand to “\$800,000.” (A. 2). That conduct was motivated by “ill will” or “evil intent” just as surely as it was “intentional[] and without any

⁴ Black’s Law Dictionary defines “actual malice” to mean “[t]he deliberate intent to commit an injury, as evidenced by external circumstances.” Actual Malice, Black’s Law Dictionary (11th ed. 2019). “Ill will” and “evil intent” signify nothing more than that.

lawful justification.” No reasonable jury finding one could have failed to find the other.

Any resolution of the definitional question presented here can therefore await a case (if one ever arises) in which the answer will actually affect the outcome. And that is preferable anyways, as a hypothetical fact pattern highlighting any potential differences between the actual and legal malice standards could shed additional light on how the Legislature might have viewed the question.

CONCLUSION

This Court should decline to exercise its discretionary jurisdiction.

Respectfully submitted,
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CERTIFICATE OF SERVICE AND COMPLIANCE

I HEREBY CERTIFY that on November 9, 2021, a true and correct copy of the foregoing document – *Brief of Respondent on Jurisdiction* – has been filed with the Clerk of Court using Florida’s E-Filing Portal, which will send notice via e-mail to counsel for Petitioner, Mr. John E. Bergendahl, Esq., at lojeb1100@gmail; and info@jeblawoffice.com. I also certify that this brief was computer generated using Arial14-point font and contains 1,862 words.

/s/ Brian H. Zack
By: BRIAN H. ZACK
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