ORIGINAL

IN THE SUPREME COURT OF THE STATE OF FLORIDA

LENNARD LAPOINT JENKINS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.
_____/

CASE NO.: SC00-310

District Court case no.: 5D99-341

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

JURISDICTIONAL BRIEF OF RESPONDENT

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STATEMENT OF CASE AND FACTS

In addition to the facts provided by the Petitioner, the State offers the following relevant information (all of which is specifically set out in the majority opinion of the district court):

1. The victim testified that after being hit by the car:

> The car began to accelerate and I was still with my right hand trying to hold the strap (of her purse) that I was clinging to. As the car accelerated, I started to lose ground, and that's when I went down. I fell. I was dragged along the asphalt....

(TR 34). When asked how far she was dragged, the victim responded

> I don't honestly remember how long I was being dragged, but it seemed like forever at the time. But once I felt the actual burning and ripping of my skin, I just gave up.

(TR 36).

2. The majority opinion also noted in response to the defense's argument that the car was simply a conveyance and was not used as a weapon:

> The notion that the evidence at trial does no more than show that the vehicle was used as transportation to and from the site of the purse snatching ignores the victim's description of the events. At the very least, it is a jury question whether the automobile was used as a weapon.

Jenkins v. State, 24 Fla. L. Weekly D2693 (Fla. 5th DCA December 3, 1999).

CERTIFICATE OF FONT AND TYPE SIZE

The undersigned counsel certifies that this brief was typed using 12 point Courier New, a font that is not proportionately spaced.

SUMMARY OF ARGUMENT

This Court should decline to accept jurisdiction in this case. The Petitioner has failed to demonstrate that the decision of the court below conflicts with any decision of this Court or the other district courts.

ARGUMENT

POINT OF LAW

SINCE THE DECISION BY THE DISTRICT COURT IN THE INSTANT CASE DOES NOT CONFLICT WITH ANY OTHER CASE, JURISDICTION SHOULD NOT BE ACCEPTED.

This Court has jurisdiction to review the decision of a district court when that decision "expressly and directly conflicts" with a decision of either this Court or of another district court. Art. V, § 3(b)(3), Fla. Const. This Court has repeatedly held that such conflict must be express and direct, that is, "it must appear within the four corners of the majority decision." Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986). The Petitioner in this case has failed to show such a conflict.

In his jurisdictional brief, the Petitioner submits that the Fifth District Court of Appeal's decision in this case is somehow in direct conflict with the case of Houck v. State, 652 So. 2d 359 (Fla. 1995). Interestingly, review of the appellate opinion shows that Houck was not even cited by the majority opinion.

The issue presented to the appellate court by the Petitioner was whether the trial court erred by failing to grant the defense's motion for judgment of acquittal. Consistent with case law from this Court and all the other district courts, the majority's decision found that there was sufficient evidence to support the jury's verdict. The evidence showed that the moving car hit the

victim, the car accelerated away when she resisted the robbery, and the car dragged her down and across the asphalt. The moving car hitting her and dragging her increased her fear and her injuries, and the evidence clearly showed that it was used as a weapon to assist the Petitioner in his robbery.

For this Court to have jurisdiction, any case conflict should be within the majority's opinion[1]. Since no such conflict exists in this case, jurisdiction should not be granted.

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[1]The majority notes in its opinion that the dissent does discuss a case from the First District Court of Appeal (Jackson v. State, 662 So. 2d 1369 (Fla. 1st DCA 1995)); however, the majority also points out that the issue addressed by the dissent was not even raised on appeal. Surely, a dissenting opinion addressing an issue not even raised on appeal by the defense does not create conflict which is "within the four corners of the majority decision."

victim, the car accelerated away when she resisted the robbery, and the car dragged her down and across the asphalt. The moving car hitting her and dragging her increased her fear and her injuries, and the evidence clearly showed that it was used as a weapon to assist the Petitioner in his robbery.

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CONCLUSION

Based on the arguments and authorities presented above, the State respectfully prays this Honorable Court does not accept jurisdiction in this matter.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copy of the above Jurisdictional Brief has been furnished by delivery via the basket of the Office of the Public Defender at the Fifth District Court of Appeal to S.C. Van Voorhees, attorney for the Petitioner, this 28th day of February 2000.

Wesley Heidt

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ASSISTANT ATTORNEY GENERAL

judge dated July 12, 1999, requested a hearing. Despite this, no hearing was set and no ruling was made. Rule 2.160, by affirmatively requiring the trial judge to rule immediately on the motion to disqualify, does not permit the court to accept a passive role when confronted with such motion. The rule requires affirmative action. Judge Dickey failed in this case to order an expedited hearing and/or rule on the motion for over two months despite the clear directive of Rule 2.160.

Our conclusion is simple: a trial judge, confronted by a motion for disqualification, is obligated to dispose of that motion by "an immediate ruling" pursuant to Florida Rule of Judicial Administration 2.160. If the judge affords a hearing to the parties on that motion, it must be an expedited one. (DAUKSCH and GRIFFIN, JJ., concur.)

* * *

Criminal law—Armed robbery with weapon—Jury's finding that automobile was used as a weapon was supported by sufficient evidence, including evidence that victim was walking in parking lot with purse over her shoulder, victim was bumped in the hip by automobile in which defendant was passenger, and defendant reached through open window and grabbed purse strap, thereby yanking victim to the ground and dragging her along pavement until she relinquished her hold on her purse

LENNARD LAPOINT JENKINS, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 99-341. Opinion Filed December 3, 1999. Appeal from the Circuit Court for Volusia County, William C. Johnson, Jr., Judge. Counsel: James B. Gibson, Public Defender, and S.C. Van Voorhees, Assistant Public Defender, Daytona Beach, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Wesley Heidt, Assistant Attorney General, Daytona Beach, for Appellee.

(GRIFFIN, J.) Lennard L. Jenkins ["Jenkins"] appeals his judgment and sentence for armed robbery with a weapon.[1] We affirm.

On November 22, 1997, Jenkins, seated in the passenger seat of an automobile driven by his female co-defendant, snatched a woman's purse in the Best Buy parking lot in Daytona Beach. The vehicle bumped the victim's hip and Jenkins reached through the open window grabbing the purse strap, thereby yanking the victim to the ground and dragging her along the pavement until she relinquished her hold on her purse. The victim sustained a fractured upper arm, contusions on her knees and elbow and asphalt burns.

After grabbing the purse, the car drove off, pursued on foot by members of the victim's family and other "good Samaritans." The police quickly apprehended the couple and Jenkins confessed to snatching the purse. The State charged Jenkins with: (1) principal to armed robbery with a weapon, to wit: an automobile and (2) principal to aggravated battery.

The court conducted a jury trial on November 12, 1998. At trial, the victim testified that the force of the automobile caused her injuries:

> A. I was no more than two cars' length away, two cars from where I just parked my car. All of a sudden I got hit in my hip. The first thing I said, "This guy just hit me in the hip with this car." And the next thing I knew the purse, the strap of my purse, was being tugged off from my shoulder and I immediately grabbed the bulk of my pocketbook with my left arm to hold it close to me. He kept pulling it towards me, the purse kept getting tugged ahead.
>
> * * *
>
> Q. Now, when you say this arm came out and grabbed your hand, the purse at that point was in the process of being tugged at the same time?
>
> A. Yes.
>
> Q. So what happens after this arm grabs your hand?
>
> A. The car began to accelerate and I was still with my right hand trying to hold the strap that I was clinging to. As the car accelerated I started to lose ground, and that's when I went down. I fell. I was dragged along the asphalt. And the pocketbook was gone. I actually saw the strap had been broken in the air. It was gone.

She also testified that she was dragged by the automobile until she surrendered the purse:

> Q. Once you fell to the ground, you said you were dragged. Do you know how far you were dragged?
>
> A. I don't honestly remember how long I was being dragged, but it seemed like forever at that time. But once I felt the actual burning and the ripping of my skin, I just gave up.

On cross-examination, the victim reiterated:

> Q. Now, as I understand it, when you first become [sic] aware there was a problem, you were bumped on the hip by the car; is that correct?
>
> A. That's correct.
>
> Q. Did this knock you out?
>
> A. I wasn't just bumped, I was hit.

The victim testified that she sustained permanent scarring and underwent numerous physical therapy sessions.

Jenkins moved for judgment of acquittal at the close of the State's case and renewed it at the close of his own arguing that, as a matter of law, the car was not used as a weapon. The court denied both motions. The jury returned a verdict of guilty as charged on all counts. Jenkins filed a post-verdict motion for judgment of acquittal and for new trial. The trial court denied the motions.

On appeal, Jenkins contends that the trial court erroneously denied his motion for judgment of acquittal and for new trial. According to Jenkins: "[T]he central issue on appeal, is whether, in the specific circumstances of this case, the car was to be classed as a weapon so as to enhance a strong-arm robbery to an armed robbery." We agree with the lower court that the evidence was sufficient for a jury to find that the automobile was used as a weapon. The notion that the evidence at trial does no more than show that the vehicle was used as transportation to and from the site of the purse snatching ignores the victim's description of events. At the very least, it is a jury question whether the automobile was used as a weapon.

The dissent's discussion of *Jackson v. State*, 662 So. 2d 1369 (Fla. 1st DCA 1995), is not without interest and if we were faced with deciding whether a car could be "carried" as a weapon within the meaning of Section 812.13(2)(b), we might or might not embrace the First District's view. The issue plainly has not been raised as an issue on appeal, however, and we do not reach it.

AFFIRMED. (DAUKSCH, J., concurs. HARRIS, J., dissents, with opinion.)

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[1] § 812.13(2)(b), Fla. Stat. (1997).

(HARRIS, J., dissenting.) I respectfully dissent.

In this parking lot purse snatching incident which went awry, Jenkins was convicted of armed robbery with a weapon (automobile) and aggravated battery. He was sentenced to twenty years in prison on each count. Jenkins appeals only the finding of the enhancer (automobile) which increased the robbery count from a second degree felony to a first degree felony.

The issue in this case is whether an automobile can ever be a weapon under the provisions of section 812.13(2)(b), Florida Statutes, and, if so, whether the State proved that the automobile was a weapon based on the "purpose" of its use in this purse snatching incident. The above-cited statute enhances a robbery "if in the course of committing the robbery the *offender carried a weapon*."

The victim herein testified that while she was walking in the parking lot of Best Buy with her purse over her shoulder: "[A]ll of a sudden I got hit in my hip. The first thing I said, 'this guy just hit me in the hip with his car.' And the next thing I knew the purse, the strap of my purse, was being tugged off my shoulder and I immediately grabbed the bulk of my pocketbook with my left arm to hold close to me. He kept pulling it towards me, the purse getting tugged ahead." The victim was then specifically asked: "Do you see a car or do you see hands on you or anything like that?" She responded: "What I saw was a black arm reach out of the car and pull my left hand away from where I was holding the bulk of my purse toward in. That's what I saw." The victim ultimately tripped and fell to the ground as the automobile accelerated as both Jenkins, a passenger

Jackson, it constituted a weapon. However, I do not believe that the mere use of an automobile to assist in the commission of a crime, without showing a purpose to injure or intimidate the victim by the use of the automobile, makes that automobile a weapon even under the *Jackson* interpretation of the statute.

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[1]I recognize Holmes' "experience" argument to the contrary.

[2]The issue on appeal in this case was the following: "The court erred in denying the defendant's motions for judgment of acquittal and for a new trial on the armed robbery count because the car used in the offense was not legally to be considered a weapon." Hence, the issue was properly raised. Does the answer to this issue really change because appellant, in deference to the First District, did not argue that the statute simply did not make a vehicle a weapon under the robbery statute?

[3]In this case, there is no reason for the trial court to be embarrassed in any event. In the absence of a contrary ruling by this court, the trial court was required to follow *Jackson*. It did so.

[4]The absurdity which concerned the *Jackson* court is that a strict reading of the statute means that one's robbery sentence can be enhanced if he carries brass knuckles during the offense but cannot be enhanced if he runs over his victim with a vehicle. Such is the problem of permitting the legislature to enact laws. Since the legislature could have eliminated all enhancers, it can pick and choose such enhancers as it deems most appropriate. In this instance, it seems to have concentrated on those weapons most commonly associated with robbery—hand held weapons—and has left it to the State to prosecute one who uses a vehicle to intentionally injure another under the attempted murder or aggravated battery statutes.

[5]In this case, the automobile was alleged merely to be a weapon under section 812.13(2)(b). Had the offender carried a firearm then under section 812.13(2)(a) an even greater enhancer would have applied.

* * *

Criminal law—Evidence—Confession—Voluntariness—Record supports trial court's determination that defendant's taped confession was knowing and voluntary—Officer's affirmative response of "uh huh" to defendant's question concerning whether he could have a lawyer in to talk with him was adequate, and detective waited several seconds for defendant to ponder the response before moving on and obtaining defendant's equivocal verbal waiver of counsel and unambiguous written waiver

JERMAINE O. LEWIS, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 98-1607. Opinion Filed December 3, 1999. Appeal from the Circuit Court for Brevard County, Warren Burk, Judge. Counsel: James B. Gibson, Public Defender, and Noel A. Pelella, Assistant Public Defender, Daytona Beach, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Lori E. Nelson, Assistant Attorney General, Daytona Beach, for Appellee.

(GRIFFIN, J.) We find no error in the issue raised on appeal and affirm the defendant's judgments and sentences for first-degree felony murder, armed burglary of a dwelling and two counts of robbery with a firearm. One of the issues raised below, however, merits discussion in light of the recent opinion of the Supreme Court of Florida in *Almeida v. State*, 737 So. 2d 520 (Fla. 1999).

Jermaine O. Lewis ["Appellant"] contended below and on appeal that his confession to participation in the robbery during which Phillip Quarno was killed should be suppressed because his waiver of his Miranda rights was not knowing and voluntary. He relies on evidence adduced at the hearing below that he is at the borderline of mental retardation, possesses the sophistication and verbal skills of a nine-year-old, and is dyslexic. The lower court, after reviewing appellant's taped confession and hearing the testimony of appellant and the detective who concluded the interview, determined that the confession was knowing and voluntary. There is evidence in the record to support that conclusion.

In support of the involuntariness argument, appellant referenced the following colloquy concerning his *Miranda* rights:

> AGENT BARNETT: Okay, Jermaine. Like I told you before we got started here, I've got this preamble here I'm going to read to you and make sure you understand everything. Then we'll get started; okay?
>
> So I'm going to read it to you verbatim—move your cup over here—it says:
>
> I, Jermaine O. Lewis, have been advised and had explained to me my Constitutional rights as follows:
>
> Number one, I have the right to remain silent.
>
> Number two, anything I can say can and will be used against me in a court of law.
>
> Number three, I have the right to talk to a lawyer and have him present with me while I'm being questioned.
>
> Number four, if I cannot afford to hire a lawyer, one will be appointed to represent me before any questioning, if I wish one.
>
> Number five, I understand that this interview and interrogation can and will be stopped at any time upon my request.
>
> Now do you understand each of those rights?
>
> THE DEFENDANT: (No audible response.)
>
> AGENT BARNETT: Is that a yes?
>
> THE DEFENDANT: Yeah, yeah.
>
> AGENT BARNETT: Okay. The A Section —
>
> THE DEFENDANT: What you saying? That I can have a lawyer in here to talk with me?
>
> AGENT BARNETT: Uh-huh. Let me explain something to you. What I want to do is, I read this over to you.
>
> THE DEFENDANT: Uh-huh.
>
> AGENT BARNETT: If you have a problem with something, you let me know; okay?
>
> What this says here, it says: "I understand each of these rights that have been explained to me."
>
> If you understand everything, I just want you to initial that.
>
> THE DEFENDANT: Yeah.
>
> AGENT BARNETT: Okay. And then B: "Knowing these rights, I do or do not wish to talk to you at this time."
>
> I need you to circle one of those, and then also initial there and sign there.
>
> Now I know you're concerned about the lawyer, okay?
>
> I understand you've already told your mom and dad a little about what's going on, and your sister a little bit about what's going on. And we've kind of talked to them, so —
>
> THE DEFENDANT: I ain't concerned about a lawyer. I'm concerned about my life.
>
> AGENT BARNETT: Well, I understand that.

The lower court addressed the appellant's contention in his motion to suppress that the above constituted an equivocal request for counsel. Citing to *Davis v. United States*, 512 U.S. 452 (1994) and *State v. Owen*, 696 So. 2d 715 (Fla.), *cert. denied*, __ U.S. __, 118 S. Ct. 574 (1997), the court denied that suppression ground. Recently, however, in *Almeida*, the high court clarified *Davis* and *Owen*, drawing a distinction between the equivocal evocation of a right and the posing of a question concerning those rights. The court held:

> [W]e hold that if, at any point during custodial interrogation, a suspect asks a clear question concerning his or her rights, the officer must stop the interview and make a good-faith effort to give a simple and straightforward answer. To do otherwise—i.e., to give an evasive answer, or to skip over the question, or to override or "steamroll" the suspect—is to actively promote the very coercion that *Traylor* was intended to dispel. A suspect who has been ignored or overridden concerning a right will be reluctant to exercise that right freely. Once the officer properly answers the question, the officer may then resume the interview (provided of course that the defendant in the meantime has not invoked his or her rights). Any statement obtained in violation of this proscription violates the Florida Constitution and cannot be used by the State. *See Traylor*, 596 So.2d at 966.

Id. at 525.

Here, the appellant's question fits within the "clear question" category covered by the *Almeida* decision. The transcript leaves open to debate whether the police response to the query was adequate. As the transcript reveals, the detective answered this question with a simple "un huh." This response does barely meet the letter of the holding in *Almeida*, if not its spirit. Far better than the cold transcript, however, the videotape of the interview shows that the "uh-huh" did communicate an affirmative response to the defendant. Further, the detective waited several seconds for the defendant to ponder the affirmative answer before moving on eventually obtaining appellant's equivocal verbal waiver ("I ain concerned about a lawyer . . . .") and the unambiguous written