IN THE SUPREME COURT OF FLORIDA

ANTHONY B. BOYKINS,

Petitioner,

v.

CASE NO. SC 01-1123
5TH DCA CASE NO. 5D00-1768

STATE OF FLORIDA,

Respondent.
_____/

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

RESPONDENT'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

Appellant was convicted of robbery with a firearm. During jury selection, the defense challenged Juror Dibari because she indicated she might not be able to be persuasive and might give in to the reasoning of the other jurors since they were all privy to the same evidence. Specifically, Juror Dibari, in response to defense counsel's question "if...there were five votes against you, the other five felt strongly one way and you felt strongly the other way and you are standing there alone with the greater number against you, would you give in to that greater number?," admitted "[u]nfortunately, I might give in....[b]ecause we all see the same facts pretty much and I don't know what I could prove that would hold up against the other people." The trial court denied the challenge for cause and the Fifth District Court of Appeal sustained the trial court's ruling. Boykins v. State, 26 Fla. L. Weekly D946 (Fla. 5th DCA April 6, 2001). (Mandate issued on May 29, 2001, after the district court denied Petitioner's Motion for Rehearing, Certification of Conflict and Request for Clarification). The Fifth District Court of Appeal distinguished the facts of Shannon in the opinion *sub judice*:

> The juror in Shannon was explicit about his weakness, his prior experience and previous failure to follow his oath. Ms. Dibari merely said that she might not be able to be persuasive and might give in to the reasoning of others since they were all privy to the same evidence.

It is from that opinion that Petitioner now seeks discretionary review by this Court in the above-styled case.

SUMMARY OF ARGUMENT

Petitioner's claim that the opinion of the Fifth District Court of Appeal is in express and direct conflict with Shannon v. State, 770 So.2d 714 (Fla. 4th DCA 2000), is without merit as the facts underlying these opinions are distinguishable and, accordingly, constitutes an insufficient basis upon which this Court could exercise its discretionary jurisdiction under Article V, Section 3(b)(3) of the Florida Constitution or Florida Rule of Appellate Procedure 9.030(a)(2)(A).

ARGUMENT

THE OPINION OF THE FIFTH DISTRICT COURT OF APPEAL IN THE CASE *SUB JUDICE* AFFIRMING THE TRIAL COURT'S DENIAL OF PETITIONER'S CHALLENGE FOR CAUSE OF JUROR DIBARI IS NOT IN EXPRESS AND DIRECT CONFLICT WITH SHANNON V. STATE, 770 So.2d 714 (Fla. 4th DCA 2000).

Under Article V, Section 3 (b)(3) of the Florida Constitution and Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv), this Court may review any decision of a district court of appeal that expressly and directly conflicts with a decision of another district court of appeal or of the Supreme Court on the same question of law. In Reaves v. State, 485 So. 2d 829 (Fla. 1986), this Court said that the conflict between decisions must be express and direct, i.e., it must appear within the four corners of the majority decision.

In the instant case, during jury selection defense counsel asked Juror Dibari "if...there were five votes against you, the other five felt strongly one way and you felt strongly the other way and you standing there alone with the greater number against you, would you give in to that greater number?" She responded by explaining "[u]nfortunately, I might give in....[b]ecause we all see the same facts pretty much and I don't know what I could prove that would hold up against the other people." Boykins v. State, 26 Fla. L. Weekly D946 (Fla. 5th DCA April 6, 2001).

On the other hand, the juror in Shannon v. State, 770 So.2d 714 (Fla. 4th DCA 2000), the case relied upon below by Petitioner, admitted on voir dire he could not promise he would stand by his convictions in the face of pressure from other jurors based on his

previous experience while serving on jury duty. The Fifth District Court of Appeal distinguished the facts of Shannon in the opinion *sub judice*:

> The juror in Shannon was explicit about his weakness, his prior experience and previous failure to follow his oath. Ms. Dibari merely said that she might not be able to be persuasive and might give in to the reasoning of others since they were all privy to the same evidence.

Boykins, 26 Fla. L. Weekly at 946.

In other words, the juror in Shannon was essentially advising the lawyers he could not stand by his convictions, as he had failed to do so in the past as a juror in a criminal case. Contrarily, as the district court noted, Juror Dibari merely stated "she might not be able to be persuasive and might give in to the reasoning of the other jurors since they were all privy to the same evidence." Id. The distinction in the facts of these two cases falls far short of demonstrating an express and direct conflict. Accordingly, Petitioner has failed to establish jurisdiction.

Finally, in Jenkins v. State, 385 So. 2d 1356, 1357-1358 (Fla. 1980), this Court discussed the creation of the district courts of appeal and quoted from Ansin v. Thurston, 101 So. 2d 808, 810 (Fla. 1958):

> It was never intended that the district courts of appeal should be intermediate courts. ... To fail to recognize that these are courts primarily of final appellate jurisdiction and to allow such courts to become intermediate courts of appeal would result in a condition far more detrimental to the general welfare and the speedy and efficient administration of justice than

> that which the system was designed to remedy.

Accordingly, not only has the Petitioner failed to establish jurisdiction as there is no express and direct conflict, but, also, such an issue is not requiring of this Court's time and attention, as the district courts have fairly addressed the matter.

CONCLUSION

Since Petitioner has failed to establish express and direct conflict or any other basis upon which this Court could exercise its discretionary jurisdiction in this case, Respondent respectfully prays this Honorable Court decline to do so.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Respondent's Brief on Jurisdiction has been mailed to Linda L. Gaustad, Assistant Public Defender, 112 Orange Avenue, Suite A, Daytona Beach, Florida 32114, this 11th day of June, 2001.

Pamela J. Koller
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Pamela J. Koller
Assistant Attorney General

Ricards, 515 P. 2d 585 n. 4 (Cal. 1973).

In this case, Crouse valued the remaining uplands in a conventional manner (sales comparisons and income approach) and the value of the easement being equal to the diminishment of value to the uplands being lost caused by loss of density development potential, for all of the properties except that owned by the Cordones. This method of valuing the easements was proper, based on facts adduced at trial. The Cordones' property was discounted considerably more because it could not be accessed or developed. However, the Cordones did not object to Crouse's testimony on valuation at the time it was entered and thus they waived this point for purposes of appeal. *See Griffing Bros. v. Winfield*, 43 So. 687 (Fla. 1907); *Horne v. Hudson*, 772 So.2d 556 (Fla. 1st DCA 2000); *Thai v. Roth*, 173 So. 2d 174 (Fla. 3d DCA 1965)(party who fails to object to introduction of parol evidence during trial waives right to raise objection on appeal).

AFFIRMED; REMANDED to Modify Order to Limit Duration of Easement to Fifty Years. (GRIFFIN and SAWAYA, JJ., concur.)

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[1]Citing *Canal Authority v. Miller*, 243 So.2d 131 (Fla. 1970).

* * *

Dissolution of marriage—Child custody—Modification of visitation schedule—Attorney's fees—Trial court did not err in adopting proposed judgments prepared by party's attorney, where trial judge had current knowledge of trial proceedings and requested proposed judgments from parties' attorneys in order to expedite finalization of matter

MARK R. THOMAS, Appellant, v. LYNN SAULS THOMAS, Appellee. 5th District. Case Nos. 5D00-210 & 5D00-2623. Opinion filed April 6, 2001. Appeal from the Circuit Court for Orange County, Jeffords D. Miller, Judge. Counsel: Shannon McLin Carlyle of Shannon McLin Carlyle, P.A., Leesburg and Patricia L. Strowbridge of Patricia L. Strowbridge, P.A., Orlando, for Appellant. Barbara Nolte of Giles & Robinson, P.A., Orlando, for Appellee.

(PER CURIAM.) Mark R. Thomas appeals two judgments: one that modifies the children's visitation schedule from the schedule established by the parties during the proceedings leading to their original dissolution of marriage; and the second that awards attorney's fees to his former wife, Lynn Sauls Thomas. Mr. Thomas alleges that the trial court committed reversible error when it adopted the two proposed final judgments that were prepared by Ms. Thomas' attorney, citing *Rykiel v. Rykiel*, 25 Fla. L. Weekly D2801 (Fla. 5th DCA Dec. 8, 2000) for the rule that proposed final judgments adopted verbatim by a trial court constitutes reversible error.

In *Douglas v. Douglas*, 2001 WL 227366 (Fla. 5th DCA Mar. 9, 2001) [26 Fla. L. Weekly D702], we distinguished the situation in *Rykiel* where there was numerous indicia of the trial judge's lack of participation and knowledge in the final judgment from a situation where a trial judge has current knowledge of the trial proceedings and simply requests proposed judgments from the parties' attorneys in order to expedite finalization of a matter. Indeed, this procedure has been a custom of litigation practice for many years and is a practice that is necessary in current times when increasing demands are made upon trial judges to make detailed findings of fact and conclusions of law.

We have scrutinized each of Mr. Thomas' detailed objections to the court's findings and conclusions that he alleges are unnecessary, irrelevant, unfair, or prejudicial to determine whether each is supported by competent substantial evidence, the standard of review required upon appeal. *See generally* Philip J. Padavano, Florida Appellate Practice, § 9.6 (1997). We have found competent, substantial evidence to support the findings of the trial court and affirm both judgments.

AFFIRMED. (PETERSON, SAWAYA and PLEUS, JJ., concur.)

* * *

Criminal law—Jurors—Challenge for cause—No error in denial of challenge for cause of juror who expressed doubt about whether she would give in to reasoning of majority of jurors

ANTHONY B. BOYKINS, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 5D00-1768. Opinion Filed April 6, 2001. Appeal from the Circuit Court for Seminole County, Nancy F. Alley, Judge. Counsel: James B. Gibson, Public Defender, and Linda L. Gaustad, Assistant Public Defender, Daytona Beach, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Pamela J. Koller, Assistant Attorney General, Daytona Beach, for Appellee.

(GRIFFIN, J.) The defendant below, Anthony B. Boykins ["Boykins"], was convicted of robbery with a firearm. He seeks a new trial, asserting that the trial court erred in refusing to strike four jurors for cause, in limiting the scope of cross-examination of a witness and in failing to grant a mistrial based on prosecutorial misconduct during closing argument. We find no reversible error, but we believe that one claim warrants discussion.

During voir dire, Juror Dibari expressed doubt about her ability or willingness to withstand the views of the other jurors during deliberation:

> [DEFENSE COUNSEL:] ... if you were selected to sit on this panel and went back to deliberate after all of the evidence is in and you are asked to decide the facts of this case because that's your role and there were five votes against you, the other five felt strongly one way and you felt strongly the other way and you standing there alone with the greater number against you, would you give in to that greater number?
>
> DIBARI: Unfortunately, I might give in.
>
> [DEFENSE COUNSEL]: You think that you might?
>
> DIBARI: Because we all see the same facts pretty much and I don't know what I could prove that would hold up against the other people.

Juror Dibari was challenged for cause based on her expressed misgivings about whether she would succumb to the will of the majority. The court denied the "for cause" challenge. Boykins used a peremptory to excuse her as the alternate juror and sought an additional peremptory.

On appeal, appellant relies on *Shannon v. State*, 770 So. 2d 714 (Fla. 4th DCA 2000). There, the court ordered a new trial where one juror said during voir dire that he had previously sat on a jury where he had succumbed to pressure from other jurors and expressed an inability to maintain his view of the evidence if pressured by other jurors.

Despite the similarities, *Shannon* does not control the outcome of this case. The juror in *Shannon* was explicit about his weakness, his prior experience and previous failure to follow his oath. Ms. Dibari merely said that she might not be able to be persuasive and might give in to the reasoning of others since they all were privy to the same evidence. We note that *Shannon* cites no cases in support of its conclusion that a juror who cannot commit to withstand the reasoning of other jurors is subject to a challenge for cause. Section 913.03, Florida Statutes (1999) identifies twelve grounds for a challenge for cause. None of these statutory grounds applies to the facts before us. Accordingly, we find no error in failing to allow this challenge for cause.

AFFIRMED. (PETERSON and ORFINGER, R. B., JJ., concur.)

* * *

Real property—Unreasonable restraint on alienation—Options—Reformation—Where option agreement on property which was prospectively subject to condemnation provided that if optionor had not received condemnation proceeds at time of expiration of option period, option would be automatically extended until optionor received such funds, and agreement set cap on purchase price, option agreement was void as an unreasonable restraint on alienation because the triggering event of condemnation might never occur—Where parties never reached an agreement on the term of the option, trial court erred in reforming option so as to provide it with a five year duration

RICHARD SANDER, Appellant, v. T. B. BALL, III, Appellee. 5th District. Case No. 5D00-1741. Opinion filed April 6, 2001. Appeal from the Circuit Court for Seminole County, O. H. Eaton, Jr., Judge. Counsel: Gary A. Chernay of Law