IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. SC03-1291

DCA CASE NO. 01-2049

WILLIE PERRY,

Petitioner

vs.

STATE OF FLORIDA,

Respondent.

RESPONDENT'S BRIEF ON JURISDICTION

CHARLES J. CRIST JR.,
Attorney General
Tallahassee, Florida

CELIA TERENZIO
Assistant Attorney General
Bureau Chief, West Palm Beach
Florida Bar No. 656879

CLAUDINE M. LaFRANCE
Assistant Attorney General
Florida Bar No. 0094757
1515 N. Flagler Drive
Suite 900
West Palm Beach, Florida 33401

Telephone: (561) 837-5000

Counsel for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES
FEDERAL CASES

STATE CASES

STATE STATUTES

RULES

PRELIMINARY STATEMENT

Petitioner was the defendant and Respondent was the prosecution in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida. Petitioner was the Appellant and Respondent was the Appellee in the Fourth District Court of Appeal. In this brief, the parties shall be referred to as they appear before this Honorable Court of Appeal except that Respondent may also be referred to as the State.

All emphasis in this brief is supplied by Respondent unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

The State accepts Petitioner's Statement of the Case and Facts as set forth in his brief on jurisdiction for purposes of this Court's decision on whether to accept or decline jurisdiction in this case subject to the following additions, corrections, and/or clarifications set forth below and in the argument portion of this brief.

Appellant asserts that the Fourth District Court recognized the conflicting authority of *Taylor v. State*, 740 So. 2d 89 (Fla. 1st DCA 1999). *Perry v. State*, 846 So.2d 584, 586 (Fla. 4th DCA 2003). However, a subsequent review of the opinion reveals

that the Fourth District Court of Appeal did not cite *Taylor* for cited authority that clearly supports a proposition contrary to the main proposition but only cited it for authority that supports a proposition analogous to the contrary of the main proposition. *See*, *Perry v. State*, 846 So. 2d 584, 588 (Fla. 4th DCA 2003). This because and the facts in this case reveal that the defendant was being booked after being arrested for possession of cocaine and he violently resisted efforts by detention deputies to conduct a strip search of him. *Id*. at 584. Defendant was tried on charges of battery on a law enforcement officer and resisting an officer with violence. *Id*. These charges arose from events that occurred while Appellant was being booked into the Broward County jail following his arrest for possession of cocaine. Id. The evidence at trial established that Appellant violently resisted efforts by detention deputies to conduct a strip search of him. Id.

Deputy Enrique was the central intake booking deputy at the jail on the day of Appellant's arrest. Id. His duties included screening new inmates and introducing them into the facility. Id. Because Appellant had been arrested for a narcotics offense, he was subject to a strip search, pursuant to departmental policy. Id. Appellant was taken to the strip search room, where he complied with Deputy Enrique's request to undress. Id.

However, Appellant refused to follow the deputy's directions and started yelling and vehemently protested any inspection of his anal area. Id. Fearing for his safety, Deputy Enrique called for assistance. Id. Deputy Anton responded to the search cell and found appellant screaming and flailing his arms about in an aggressive manner. Id. The deputies tried to convince Appellant to calm down and cooperate, but he refused to comply. Id. When Deputy Enrique grabbed Appellant's right arm to handcuff him, Appellant fell to the ground, kicking his feet at the deputies and belligerently throwing his hands up. Id. Appellant then struck Deputy Enrique in the face with a closed fist and kicked Deputy Anton's legs. Id. Consequently, Appellant was charged with battery on a law enforcement officer and resisting with violence. Id.

Appellant proceeded to trial on the battery and resisting charges. *Id*. The trial court denied his motion for a judgment of acquittal, based on defendant's claim that the evidence failed to show that the deputies had conducted the search in compliance with Fla. Stat. ch. 901.211, and defendant was convicted of the resisting charge. *Id*. On appeal, the court held that whether the strip search was properly performed or not, defendant's use of force against it was not justified. *Id*. The court pointed out that the use of force was prohibited in

such a situation, similar to being prohibited in an arrest. *Id*.

SUMMARY OF THE ARGUMENT

POINT I: This Court should decline to accept jurisdiction to review the instant case because the opinion of the Fourth District Court of Appeal, does not directly conflict with the decision of this Court in Taylor v. State, 740 So. 2d 89 (Fla. 1st DCA 1999).

ARGUMENT

THIS COURT SHOULD DECLINE TO ACCEPT JURISDICTION TO REVIEW THE DECISION IN THE INSTANT CASE AS THE DECISION DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH TAYLOR V. STATE, 740 So. 2d 89 (Fla. 1st DCA 1999).

Petitioner contends the decision of the Fourth District in this case, Perry v. State, 846 So. 2d 584 (Fla. 4th DCA 2003), expressly and directly conflicts with the following decision in Taylor v. State, 740 So.2 d 89 (Fla. 1st DCA 1999). The State respectfully disagrees.

It is well settled that in order to establish conflict jurisdiction, the decision sought to be reviewed must expressly and directly create a conflict with a decision of another District Court of Appeal or of the Supreme Court on the same question of law. Article 5, Section 3(b)(3) Fla. Const.; Jenkins v. State, 385 So. 2d 1356 (Fla. 1980). Contrary to Petitioner's assertion, this Court does not have discretionary jurisdiction pursuant to Florida Rule of Appellate Procedure 9.030(a)(2)(iv), to review the instant case.

In order for two decisions to be in express and direct conflict for the purpose of invoking this Court's discretionary jurisdiction, the decisions should speak to the same point of law, in factual contexts of sufficient similarity to permit the

inference that the result in each case would have been different had the deciding court employed the reasoning of the other court as mandatory authority. See generally Jenkins v. State, 385 So. 2d 1356, 1359 (Fla. 1980); Mancini v. State, 312 So. 2d 732 (Fla. 1975). The conflict must be of such magnitude that if both decisions were rendered by the same court, the later decision would have the effect of overruling the earlier decision. Kyle v. Kyle, 139 So. 2d 885, 887 (Fla. 1962). "Obviously two cases can not be in conflict if they can be validly distinguished." Morningstar v. State, 405 So. 2d 778, 783 (Fla. 4th DCA 1981), Anstead J. concurring; affirmed, 428 So. 2d 220 (Fla. 1982). "If the two cases are distinguishable in controlling factual elements or if the points of law settled by the two cases are not the same, then conflict cannot arise." Id. at 887.

First, the State would submit that the decision in this case **does not** conflict with this Court's decision in Taylor, 740 So. 2d 89 (Fla. 1st DCA 1999). Taylor, is clearly factually distinguishable from the case at bar. In Taylor, a police officer unlawfully entered the defendant's home to investigate a noise complaint and the defendant shoved him. The defendant was convicted of battery on a law enforcement officer and resisting an officer with violence. The Taylor Court acknowledged prior holdings to the contrary but distinguished

its case, stating:

> . . . we do not think that section 776.051(1) can be extended to a situation in which an officer has entered someone's house without any arguable legal justification. An unlawful entry to a person's home is a far greater invasion of privacy than an unlawful arrest or detention on the street.

In Taylor, the officer entered the defendant's home without any arguable legal justification which had a far greater expectation of privacy.

It is readily apparent, that this case Petitioner cited as conflicting with this case is factually distinguishable. Here, Appellant was already in custody, undergoing post-arrest procedures, where the prohibition against violently resisting or opposing an officer would apply as well. See Vlahovich v. State, 757 So. 2d 1219 (Fla. 2d DCA 2000), quashed in part on other ground, 788 So. 2d 245 (Fla. 2001)(concluding that fact that defendant was already in custody at time of incident would not preclude his conviction for resisting arrest with violence). While a person in custody retains his or her Fourth Amendment rights against unreasonable searches and seizures, these rights are weighed against the legitimate concerns of jail officials for security and the prevention of smuggling drugs, weapons, and other contraband into the detention facility. See Bell v. Wolfish, 441 U.S. 520, 60 L. Ed. 2d 447, 99 S. Ct. 1861 (1979).

Clearly, the fact that Appellant was already in custody under going post-arrest makes Taylor distinguishable. To reiterate, “two cases cannot be in conflict if they can be validly distinguished." Morningstar v. State, 405 So. 2d 778, 783 (Fla. 4th DCA 1981), Anstead J., Concurring, affirmed, 428 So. 2d 220 (Fla. 1982). See also, Department of Health and Rehabilitative Services v. National Adoption Counseling Services, Inc., 498 So. 2d 888 (Fla. 1986)("inherent or so called 'implied' conflict may no longer serve as a basis for this Court's jurisdiction."). Therefore, Petitioner has not shown a conflicting result in a situation involving substantially the same facts as in any other case.

Appellant asserts that in reaching its decision the Fourth District Court of Appeal relied upon its previous holding in Harris v. State, 801 So. 2d 321 (Fla. 4th DCA 2001), rev. granted, 826 So. 2d 992 (Fla. 2002), and this compels this Court to accept jurisdiction because this Court accepted jurisdiction in Harris based upon conflict with Taylor. The State would respectfully disagree; the Fourth District Court’s reliance on Harris does not compel this Court to accept jurisdiction here. Again, the State would assert that Harris is factually distinguishable.

In Harris the police were conducting a narcotics

surveillance when they observed the defendant drive through the area and pull over to pick up a pill bottle in the street. An officer stopped defendant and a search of the vehicle revealed controlled substances. During the stop, the defendant struck the officer. Defendant was charged with possession of controlled substances and battery on a law enforcement officer. Again, the State would assert that the case at hand is factually distinguishable. At bar, Appellant was not merely stopped or temporarily detained. He was already in custody, undergoing post-arrest procedures. Clearly, the two cases cited to by Petitioner are distinguishable in an important factual element from this case, i.e., Appellant was already in custody and being booked into the department of corrections. Therefore, the State submits that this Court should decline to review the instant case because the Fourth District's decision in Perry is not in conflict with the cases cited by Petitioner.

CONCLUSION

The State respectfully requests this Court to DECLINE to accept jurisdiction to review the instant case.

Respectfully submitted,

CHARLES J. CRIST JR.,
Attorney General
Tallahassee, Florida

_____

CELIA TERENZIO

Assistant Attorney General
Bureau Chief, West Palm Beach
Florida Bar No. 656879

CLAUDINE M. LaFRANCE
Assistant Attorney General
Florida Bar No. 0094757
1515 N. Flagler Drive
Suite 900
West Palm Beach, FL 33401
Telephone: (561) 837-5000

Counsel for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Respondent's Brief on Jurisdiction" has been furnished by Courier to: DAVID JOHN MCPHERRIN, Assistant Public Defender, Criminal Justice Building/6th Floor, 421 Third Street, West Palm Beach, Florida 33401, on August ____, 2003.

Of Counsel

CERTIFICATE OF TYPE SIZE AND STYLE

The undersigned hereby certified that the instant brief has been prepared with 12 point Courier New type, a font that is not proportionately spaced, this ____ day of August, 2003.