IN THE SUPREME COURT OF FLORIDA

COSTA VATHIS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. SC03-2268

JURISDICTIONAL BRIEF OF RESPONDENT

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

ROBERT R. WHEELER
TALLAHASSEE BUREAU CHIEF,
CRIMINAL APPEALS
FLORIDA BAR NO. 0796409

GISELLE LYLEN RIVERA
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0508012

OFFICE OF THE ATTORNEY GENERAL
PL-01, THE CAPITOL
TALLAHASSEE, FL 32399-1050
(850) 414-3300
(850) 922-6674 (FAX)

COUNSEL FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF CITATIONS

FLORIDA STATUTES

OTHER

PRELIMINARY STATEMENT

Respondent, the State of Florida, the Appellee in the District Court of Appeal (DCA) and the prosecuting authority in the trial court, will be referenced in this brief as Respondent, the prosecution, or the State. Petitioner, Costa Vathis, the Appellant in the DCA and the defendant in the trial court, will be referenced in this brief as Petitioner or proper name.

"PJB" will designate Petitioner's Jurisdictional Brief. That symbol is followed by the appropriate page number.

A bold typeface will be used to add emphasis. Italics appeared in original quotations, unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

The state rejects petitioner’s statement of the case and facts because it goes outside the four corners of the opinion below.

The pertinent history and facts are set out in the decision of the lower tribunal, attached in published form as Vathis v. State, 859 So.2d 517 (Fla. 1st DCA 2003). These are:

> The defendant, Costa T. Vathis, appeals a final order summarily denying his postconviction motion under rule 3.850 of the Florida Rules of Criminal Procesure. Seven arguments are presented in the appeal but only one merits discussion. The defendant contends that his lawyer should have objected to an emotional outburst in the courtroom. We conclude that this claims is facially insufficient and we therefore affirm the summary denial of the motion.
>
> A jury convicted the defendant of sexual battery on a child under the age of twelve. The child testified

> for the state during the trial, and when she was finished, her parents allegedly rushed forward in the presence of the jury to escort her back to her seat. The defendant maintains that the parents' conduct was a form of nonverbal bolstering of the child's testimony and that he did not receive effective assistance of counsel because his lawyer failed to object or move for a mistrial.

859 So.2d at 518.

SUMMARY OF ARGUMENT

Petitioner has improperly relied upon the reasoning and dissent in the DCA case. The appropriate focus upon the operative facts, as contained within the "four corners" of the DCA's decision, reveals no express and direct conflict with this Court or another DCA.

ARGUMENT

ISSUE I

WHETHER EXPRESS AND DIRECT CONFLICT EXISTS BETWEEN THE DECISION IN THIS CASE AND THE DECISIONS IN BEASLEY V. STATE, 774 So.2d 649 (Fla. 2000), REAVES V. STATE, 826 So.2d 932 (Fla. 2002), ROSE V. STATE, 774 So.2d 629 (Fla. 2000), and SEMINOLE SHELL COMPANY, INC. V. CLEARWATER FLYING COMPANY, INC., 156 So.2d 543 (Fla. 1963)? (Restated)

Applicable Appellate Standard of Review and Jurisdictional Criteria

The standard of review is **de novo** subject to the following jurisdiction criteria.

Petitioner contends that this Court has jurisdiction pursuant to Fla. R. App. P. 9.030(a)(2)(A)(iv), which parallels Article V, § 3(b)(3), Fla. Const. The constitution provides:

> The supreme court ... [m]ay 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.

The conflict between decisions "must be express and direct" and "must appear within the four corners of the majority decision." Reaves v. State, 485 So.2d 829, 830 (Fla. 1986). Accord Dept. of Health and Rehabilitative Services v. Nat'l Adoption Counseling Service, Inc., 498 So.2d 888, 889 (Fla. 1986)(rejected "inherent" or "implied" conflict; dismissed

petition). Neither the record, nor a concurring opinion, nor a dissenting opinion can be used to establish jurisdiction. Reaves, supra; Jenkins v. State, 385 So.2d 1356, 1359 (Fla. 1980)("regardless of whether they are accompanied by a dissenting or concurring opinion"). In addition, it is the "conflict of *decisions*, not conflict of *opinions* or *reasons* that supplies jurisdiction for review by certiorari." Jenkins, 385 So. 2d at 1359.

In Ansin v. Thurston, 101 So. 2d 808, 810 (Fla. 1958), this Court explained:

> It was never intended that the district courts of appeal should be intermediate courts. The revision and modernization of the Florida judicial system at the appellate level was prompted by the great volume of cases reaching the Supreme Court and the consequent delay in the administration of justice. The new article embodies throughout its terms the idea of a Supreme Court which functions as a supervisory body in the judicial system for the State, exercising appellate power in certain specified areas essential to the settlement of issues of public importance and the preservation of uniformity of principle and practice, with review by the district courts in most instances being final and absolute.

Accordingly, the determination of conflict jurisdiction distills to whether the district court's decision reached a result opposite to that in Beasley, Reaves, Rose, and Seminole Shell based upon the same operative facts.

Express and Direct Conflict of Opinions Does Not Lie

The District Court below ruled, in pertinent part, that

This allegation fails to meet either part of the standard set by the Supreme Court in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). First, the defendant must allege facts that would support a conclusion that his lawyer's performance was deficient. As the Court explained in Strickland, "This requires [a] showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." 466 U.S. at 687, 104 S.Ct. 2052. We cannot say that the trial lawyer in this case made an error at all, much less an error so serious as to be the equivalent of a deprivation of the constitutional right to counsel.

All we know from the defendant's allegation is that his lawyer did not object to the emotional outburst. The argument advanced by the defendant proceeds from this simple fact to an assumption that an evidentiary hearing is required. However, the defendant has not alleged that an objection was necessary, or even that it would have been wise. Some lawyers might conclude that the jurors would see the parents' emotional display for what it is, and that an objection would be out of place.

The defendant contends that the actions or inactions of an attorney cannot be justified as a trial strategy unless the court has made a finding to that effect after an evidentiary hearing, but this argument assumes that the postconviction motion has first identified some act or omission that is below the applicable standard of performance. If the motion fails to establish that a particular act or omission fell below the standard, there is no need for counsel to explain, or for the court to consider whether the act or omission was strategic. The question here is not whether the defendant's trial counsel could have objected; rather, it is whether a reasonably effective lawyer would have objected.

In addressing this question we must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 689, 104 S.Ct. 2052. Furthermore, we have been warned that we should "eliminate the distorting effects of hindsight" in evaluating an attorney's performance. Id. There are many different ways to provide effective assistance of counsel. That is why the Supreme Court said, "[T]he defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' " Id. (quoting Michel v. Louisiana, 350 U.S. 91, 101, 76 S.Ct. 158,

> 100 L.Ed. 83 (1955)). In this case, the defendant has succeeded only in showing that there was no objection. That is not enough to support a conclusion that his lawyer's performance was constitutionally defective.
>
> The second part of the test in Strickland requires a showing that the action or inaction of counsel was prejudicial. This means that counsel's errors must have been "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." 466 U.S. at 687, 104 S.Ct. 2052. In our view, the allegations of the postconviction motion fall short of meeting this standard. The defendant claims that the parents' outburst was a form of nonverbal "bolstering" of the child's testimony, but that is not necessarily so. A more logical deduction from these facts is that the parents were trying, in their way, to comfort a child who had been through the ordeal of testifying. In any event, we would be giving very little credit to the jurors to say that the incident made them more likely to believe the child's account of the crime. Few criminal trials are completely devoid of emotion. We cannot presume that the emotion shown in this one must have been prejudicial.
>
> Even if we were to speculate that the incident caused some jurors to become unduly sympathetic, that would not establish prejudice. As the documents attached to the trial judge's order reveal, the jurors were instructed that "[the] case must not be decided for or against anyone because [they] feel sorry for anyone or are angry at anyone." This instruction was given for a purpose, and we must assume that the jurors followed it in deciding their verdict.
>
> For these reasons we conclude that the defendant's postconviction motion was properly denied without a hearing.

All of the cases relied upon by Petitioner fail to satisfy the standard by which conflict jurisdiction is established. For example, Beasley, a direct appeal in which Beasley challenged imposition of the death penalty, is distinguishable from the instant case as Beasley did not address whatsoever a claim of ineffective assistance of counsel at trial. Additionally, Beasley challenged the court’s failure to sequester members of the victim’s family who were also witnesses in the case and the

potential prejudice caused by emotional reactions of the victim's family members. Unlike this case, Beasley's trial counsel repeatedly brought to the court's attention disruptions caused by the family and the trial court repeatedly cautioned persons in the courtroom to keep their comments and emotions in check, ensuring the jury was not distracted by emotional reactions. Beasley is thus factually distinguishable from this case.

Reaves, a case which addresses post-conviction claims, is also distinguishable from the instant case. There, Reaves asserted entitlement to an evidentiary hearing after the trial court summarily denied his claim that counsel, on retrial, was ineffective for failing to present a voluntary intoxication defense despite the fact that Reaves' confession could have supported such a defense and it was determined during the charge conference that because the jury had been informed of this defense during his first trial, an instruction on voluntary intoxication should be given. The trial court denied relief finding that voluntary intoxication was not an available defense since Reaves' expert testified during a proffer that Reaves was not so intoxicated he did not know right from wrong. The appellate court reversed because the lower court's reasoning obscured the difference between an insanity defense and a voluntary intoxication defense, voluntary intoxication was an available defense supported by the record, the claim of ineffective assistance was legally sufficient and the record was

inconclusive as to why counsel did not advance the defense. The instant case simply does not involve a factually identical case to which the same law was applied to nonetheless yield different results.

Although Petitioner also relies upon Rose v. State, 774 So.2d 629 (Fla. 2000) in his attempt to establish the existence of conflict jurisdiction, Rose is also distinguishable from this case. Rose appealed the trial court's summary denial of a successive motion for post-conviction relief which asserted that the State had withheld material evidence regarding two of its witnesses pursuant to Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) and had violated Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), by intentionally misleading the defense and jury about the motives of those witnesses to testify against him. Rose therefore not only presented a different procedural and factual scenario, the legal issues presented were also different than in this case.

Finally, Petitioner's reliance upon Seminole Shell Company, Inc. v. Clearwater Flying Company, Inc., 156 So.2d 543 (Fla. 1963) for conflict jurisdiction is also misplaced. Seminole Shell is a civil litigation case seeking damages following an aircraft accident. There, the court held that the inadvertent reference of the owner's witness to the existence of insurance, to which opposing counsel did not object, did not justify a later attempt by opposing counsel to determine if the owner had in fact been compensated by insurance, and the court's belated

instruction, in general instructions at the close of the case, that insurance was not an issue, was deemed insufficient to cure the error. Again, conflict jurisdiction does not lie.

Because the cases relied upon by petitioner do not reach a contrary result to this one based upon identical facts, express and direct conflict of decisions does not exist. This Court should decline to accept jurisdiction of this case.

CONCLUSION

Based on the foregoing reason, the State respectfully requests this Honorable Court decline to exercise jurisdiction.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Robert Augustus Harper, and Michael Robert Ufferman, Esq., Counsel for Petitioner, 300 West Park Avenue, Post Office Box 10132, Tallahassee, FL 32302-2132, by MAIL on January _____, 2004.

Respectfully submitted and served,

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

_____
ROBERT R. WHEELER
Tallahassee Bureau Chief,
Criminal Appeals
Florida Bar No. 0796409

_____
GISELLE LYLEN RIVERA
ASSISTANT ATTORNEY GENERAL
Florida Bar No. 0508012

Attorneys for State of Florida
Office of the Attorney General
Pl-01, the Capitol
Tallahassee, Fl 32399-1050
(850) 414-3300 Ext. 4579
(850) 487-0997 (Fax)

[AGO# L04-1-1086]

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of Fla. R. App. P. 9.210.

_____
Giselle Lylen Rivera
Attorney for State of Florida

[T:\BRIEFS\Briefs pdf'd\03-2268_JurisAns.wpd --- 2/6/04,8:26 am]