

IN THE SUPREME COURT OF FLORIDA

CASE NO.

DCA NO. 3D01-3414

THE STATE OF FLORIDA,

Petitioner,

-vs-

FERNANDO CASTILLO.

Respondent.

ON APPLICATION FOR DISCRETIONARY REVIEW

RESPONDENT'S BRIEF ON JURISDICTION

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INTRODUCTION

This is the Respondent's brief on jurisdiction requesting that this Court deny discretionary review because there is no direct and express conflict, or other jurisdictional basis for supreme court review, in this record.

The symbol (App) will be used to refer to portions of the attached appendix.

STATEMENT OF THE CASE AND FACTS

The Respondent/Defendant generally accepts the state's characterization of the evidence presented below. However, the references to the district court decision are incomplete.

The Respondent was convicted of unlawful compensation (i.e., exacting sexual relations *in lieu* of performing his official duty) and official misconduct (willfully submitting false daily activity reports). On direct appeal, the Third District Court of Appeal reversed the unlawful compensation count, but affirmed the official misconduct conviction.

In its decision, the district court quoted a significant portion of the alleged victim's testimony wherein she (A.S.) testified that 1) the Respondent *never* said or did anything to her remotely suggesting that he would ticket or arrest her if she refused to have sexual relations with him¹ and that there was no *quid pro quo* relationship between her engaging in sex and him not ticketing or arresting her.

A.S.'s own candid testimony belies any meeting of the minds, as reflected in the following exchange:

¹

Indeed, the defendant's statement -- that "she was lucky he didn't give her a ticket" -- was made *after* the couple reportedly had sexual relations and, therefore, does not demonstrate any type of pre-sex mutual understanding or agreement, or the "exacting" required by the unlawful compensation statute. (App. at 2).

Q: Did you ever tell the FBI that he [Castillo] said you can either get a DUI or you can follow me or something to that, of that nature?

A: Yes, I did.

Q: Why did you tell her that?

A: I didn't, I didn't think that was exactly what I said. Basically, I felt that everybody would be on his side -- I didn't know what I felt -- I was being asked to do.

Q: Did he say that?

A: No. He didn't. But who was going to believe me over a police officer.

Later, on cross-examination, A.S. testified as follows:

Q: He never suggested he was going to arrest you for DUI?

A: No.

Q: He never said anything about along the lines of DUI, the entire encounter, did he?

A: No.

Q: It was never any quid pro quo [sic] that he wouldn't arrest you if you come with me, was there?

A: No.

The State was thus unable to show any meeting of the minds. At best, the prosecution only showed that in mind of A.S., she thought that Castillo would arrest or ticket her if she did not have intercourse with him. But in the absence of any spoken understanding, Castillo could simply have thought that A.S. followed him voluntarily.

(App. at 3).

Consistent with this Court's decision in *Grady v. Coleman*, 133 Fla. 400, 183 So. 25 (1938), the district court held that in the absence of an agreement or understanding between the parties, the evidence was insufficient and could not support a conviction for unlawful compensation.

QUESTION PRESENTED

(Restated)

WHETHER THE DECISION ENTERED BY THE THIRD DISTRICT COURT OF APPEAL DIRECTLY AND EXPRESSLY CONFLICTS WITH THE DECISIONS OF THIS COURT AND OTHER DISTRICT COURTS OF APPEAL ON WHETHER THERE MUST BE SOME EVIDENCE OF AN AGREEMENT OR MUTUAL UNDERSTANDING BETWEEN THE PARTIES BEFORE A CONVICTION FOR UNLAWFUL COMPENSATION CAN BE UPHELD?

SUMMARY OF THE ARGUMENT

Florida caselaw is consistent that in order for the state to establish a *prima facie* case of guilt of unlawful compensation, the record must contain evidence of an agreement or mutual understanding between the parties that the performance or nonperformance of a public duty will be affected by the compensation and that the accused has exacted or demanded that compensation. Absent evidence of a “meeting of the minds” or a *quid pro quo* relationship, the conviction cannot be upheld.

This is precisely what the instant decision held. It is also what this Court’s decision in *Grady v. Coleman*, 133 Fla. 400, 183 So. 25 (1938) and the fourth district’s decision in *State v. Gerren*, 604 So. 2d 515 (Fla. 4th DCA 1992) held. There is no decisional conflict in this case.

ARGUMENT

IN VIEW OF THE REQUIREMENTS OF FLA. STAT. 838.016 AND THE UNBROKEN LAW BY THIS COURT AND OTHER DISTRICT COURTS OF APPEAL, AS TO THE NEED FOR MUTUAL ASSENT IN THE UNLAWFUL COMPENSATION CONTEXT, THE INSTANT DECISION OF THE THIRD DISTRICT COURT OF APPEAL DOES NOT CREATE ANY DECISIONAL CONFLICT FOR JURISDICTION PURPOSES.

The Respondent, a former Miami-Dade police officer, was convicted of unlawful compensation for allegedly extracting sexual intercourse *in lieu* of issuing the alleged victim a traffic ticket or arresting her for DUI. The driver testified that the Respondent never said or did anything to suggest such a transaction and that the compensation idea may have been suggested by her girlfriend's father the day after she interacted with the Respondent. (App. at 2).

The Respondent testified that the driver stopped him for information, refused to terminate their interaction and, in fact, encouraged a more "social" exchange between the two of them. While admitting to having sexual relations with the driver, the Respondent said their interaction occurred after work hours and was at all times consensual. He testified that he never said or did anything to give her the impression that she had to engage in sexual relations in order to avoid being ticketed or arrested.

This evidentiary showing is the foundation for the district court decision below. The district court found that in the absence of any type of agreement or mutual

understanding between the parties, referred to as a *quid pro quo* relationship, the requirements of Florida's unlawful compensation statute (section 838.016) had not been satisfied. The court's analysis and decision are entirely consistent with the law of this Court and other district courts of appeal.

For example, in *Grady v. Coleman*, 133 Fla. 400, 183 So. 25 (1938), this Court recognized that implicit within the unlawful compensation statute is the requirement that there be an agreement or mutual understanding between the parties that as a result of the compensation, a public duty either will be performed or not performed. Indeed, this conclusion was based upon the analysis in *Callaway v. State*, 112 Fla. 599, 601-02, 152 So. 429, 430 (1930) (distinguishing between the passive acceptance of compensation and the more onerous crime of exacting or demanding compensation in the unlawful compensation context).

Grady used the "meeting of the minds" and "*quid pro quo*" references to describe the agreement or mutual understanding elements of the statute. Irrespective of the precise references used, the meaning was clear: in order for the state to make a *prima facie* case for unlawful compensation, it must put forth some evidence of an agreement. This interpretation of section 838.016 has been applied consistently in a variety of contexts. *See, e.g., State v. Milbraith*, 527 So. 2d 864 (Fla. 5th DCA 1988); *Merkle v. State* 512 So. 2d 948 (Fla. 2d DCA 1987), *approved*, 529 So. 2d 269

(Fla. 1988); *Garrett v. State*, 508 So. 2d 427 (Fla. 2d DCA 1987).

In this case, the district court looked to the evidence propounded and concluded that it fell short of suggesting an agreement or mutual understanding that the Respondent exacted and received compensation *in lieu* of performing or not performing his duty. In view of the total absence of evidence to suggest a meeting of the minds, the state's evidence could not support a conviction for unlawful compensation.

In its motion for rehearing, the state cited for the first time the case of *State v. Gerren*, 604 So. 2d 515 (Fla. 4th DCA 1992) and argued, as it does here, that evidence of an agreement can be proved by circumstantial evidence and not just by an explicit statement of a *quid pro quo* relationship. This holding isn't novel and doesn't conflict with *Grady* or with the instant case.

Indeed, all the cases cited stand for the proposition that to prove a violation of section 838.016, the state must establish that the parties agreed that the compensation would affect the performance or nonperformance of a public duty, that the accused must exact or demand the unlawful compensation and that he alter his performance accordingly. In other words, the record must show a meeting of the minds between the parties -- which is precisely what the district court below found lacking in this case.

This case is entirely consistent with all other interpretations of the unlawful

compensation statute. There is no decisional conflict on this record.

CONCLUSION

For the foregoing reasons, the Respondent submits that conflict jurisdiction does not lie in this case and requests that this Court deny discretionary review jurisdiction.

Respectfully submitted,

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CERTIFICATE OF FONT SIZE

The undersigned certifies that this brief uses only the Times New Roman 14-point type size.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail to Andrea England, Assistant Attorney General, Office of the Attorney General, Criminal Division, 110 S.E. 6th Street, 9th Floor, Ft. Lauderdale, Florida 33301, this ___ day of March, 2003.

HARVEY J. SEPLER
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