

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC03-282

STATE OF FLORIDA,

Petitioner,

vs.

FERNANDO CASTILLO,

Respondent.

* * * * *

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE THIRD DISTRICT COURT OF APPEAL

* * * * *

PETITIONER'S REPLY BRIEF ON THE MERITS

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INTRODUCTION

Petitioner relies on the Introduction as stated in the Initial Brief on the Merits.

STATEMENT OF THE CASE AND FACTS

Petitioner relies on the Statement of the Case and Facts as stated in the Initial Brief on the Merits, and adds the following facts which relate to a new issue raised in Respondent's Answer Brief: his conviction for official misconduct (Issue II herein).¹

Respondent wrote in his daily activity report that he conducted an area check of the deserted warehouse area between 4:00 and 4:14 a.m. on the date of his encounter with A.S. (R. 94; T. 157-58, 481.) However, the Burger King surveillance tapes show that Respondent was talking with A.S. in the Burger King parking lot during that time. (T. 303-304, 481-82, 563-64.)

Respondent wrote in his daily activity report that, after the area check, he went to the shop for vehicle maintenance, from 4:14 to 4:31. (R. 94; T. 482.) The computer-aided dispatch "CAD" sheet (generated from Respondent's oral communication with the police dispatcher) also reflects a visit

¹ Petitioner did not raise this issue in the Initial Brief because the district court affirmed Respondent's conviction for official misconduct.

to the shop, for fueling, from 4:13 to 4:39. (R. 96; T. 156, 161-62.) However, no vehicle maintenance or fueling was done during this period of time. (T. 190-91.) Instead, the Burger King surveillance tapes show that Respondent and A.S. drove into the warehouse area and did not emerge from that area for approximately 26 minutes (from 4:10 to 4:36). (T. 304-305, 310, 565-66.)

Respondent's daily activity report shows he conducted a traffic stop from 3:42 a.m. to 3:52 a.m. (R. 94; T. 155-56.) He failed to advise the police dispatcher when the traffic stop was completed, so his CAD sheet showed the stop lasted from 3:44 a.m. to 4:13 a.m., when he next made contact with the dispatcher. (R. 96; T. 155-59, 161-62.) The license tag number from the vehicle which was stopped did not match the tag from A.S.'s vehicle. (T. 237.)

Respondent spent roughly 45 minutes or more with A.S. (T. 302-304), but he did not record pulling her over, talking with her, or spending 26 minutes in the warehouse area with her. (T. 166, 237, 310, 489-90.) Instead, during this time, Respondent reported both in writing and orally he was busy with other police business. (T. 166.) According to Respondent's supervisor at the time, it would be of "grave concern" to the police department if an officer stopped a motorist for

approximately 48 minutes and did not reflect that stop in his daily activity worksheet. (T. 530-31.) Another police officer testified it would not be common for a police officer to stop a motorist who was intoxicated, give her a verbal warning, then allow her to drive away. (T. 180-81.)

At the conclusion of the evidence, the jury found Respondent guilty as charged. (T. 713-15; R. 146.)

On appeal, the Third District Court of Appeal affirmed the official misconduct conviction. Castillo v. State, 835 So. 2d 306 (Fla. 3d DCA 2003).

Castillo acknowledged that the daily activity report he prepared contained a few errors, but claimed that they had been mistakes. All the mistakes, of course, occurred around the time he was with A.S. The jury could reasonably reject his explanation. We thus conclude that after all conflicts in the evidence and all reasonable inferences have been resolved in favor of the verdict, there is substantial, competent evidence to support the verdict and judgment. See Tibbs v. State, 397 So. 2d 1120 (Fla. 1981).

Id. at 309.

SUMMARY OF THE ARGUMENT

Petitioner relies on the Summary of the Argument as stated in the Initial Brief on the Merits.

Additionally, Petitioner respectfully urges this Court to decline to exercise its discretionary jurisdiction to review the new issue raised in Respondent's answer brief as Issue II. This new issue, a challenge to the legal sufficiency of Respondent's

conviction for official misconduct, is outside the scope of the conflict issue which is the basis for this Court's jurisdiction. Respondent's conviction for official misconduct is entirely independent of, and unrelated to, the conviction for unlawful compensation at issue in Issue I. The new issue raised in Issue II does not in any way implicate the issue which forms the basis for this Court's review; resolution of Issue II will have no bearing on the final outcome of this case; and there is no precedential significance to the district court's resolution of Issue II. By submitting Issue II to this Court, Respondent is attempting to obtain a second-level evidentiary review. For this, a garden-variety sufficiency of the evidence issue, the district court of appeal is presumptively the court of final jurisdiction. Accordingly, this Court should decline to consider Issue II.

In the event the Court elects to consider Issue II, Petitioner submits the district court properly affirmed Respondent's conviction for official misconduct. The State presented evidence that Respondent's daily activity report contained significant errors which, under the circumstances, the jury could reasonably believe were intended by Respondent to cover up his sexual encounter with A.S. As the district court correctly concluded, after all conflicts in the evidence and all

reasonable inferences are resolved in favor of the jury verdict, substantial, competent evidence supports Respondent's conviction for official misconduct.

ARGUMENT

I

THE DISTRICT COURT ERRED IN CONCLUDING THAT DIRECT PROOF OF AN EXPLICIT QUID PRO QUO AGREEMENT WAS NECESSARY TO PROVE UNLAWFUL COMPENSATION UNDER SECTION 838.016, FLORIDA STATUTES (2000), AND IN REVERSING RESPONDENT'S CONVICTION FOR THIS OFFENSE WHERE THE CIRCUMSTANTIAL EVIDENCE ADDUCED AT TRIAL WAS INCONSISTENT WITH ANY REASONABLE HYPOTHESIS OF INNOCENCE AND LEGALLY SUFFICIENT TO PROVE THAT RESPONDENT REQUESTED, SOLICITED, OR ACCEPTED SEX FROM A.S. IN LIEU OF ISSUING HER A TICKET OR ARRESTING HER.

In his Answer Brief, Respondent posits that the Third District Court of Appeal examined the legal sufficiency of both direct and circumstantial evidence when it ruled the State had failed to prove a meeting of the minds between Respondent and A.S. See Respondent's Brief on the Merits at 9. On the contrary, it is quite clear the district court was considering only the direct evidence in the case when it wrote, "But in the absence of any spoken understanding, Castillo could simply have thought that A.S. followed him [to the warehouse area and had sex with him] voluntarily." Castillo v. State, 835 So. 2d 306, 309 (Fla. 3d DCA 2002) (emphasis supplied). In so ruling, the court entirely ignored other, circumstantial evidence showing that Respondent stopped A.S. early one morning, noticed her intoxication, compelled her by virtue of his position and the circumstances to drive to a deserted area and have sex with him, remarked she was lucky to not get a ticket from him, allowed her

to drive away, then falsified official paperwork to hide the aforementioned encounter.

The district court's ruling effectively forces the State to prove the element of intent in unlawful compensation cases through direct evidence of an explicit agreement. However, because a person's intent can seldom be proven by direct evidence, circumstantial evidence frequently is necessary to demonstrate intent. The Florida Bar v. Marable, 645 So. 2d 438, 443 (Fla. 1994); Webb v. Blancett, 473 So. 2d 1376, 1378 (Fla. 5th DCA 1985).

The Fourth District Court of Appeal in State v. Gerren, 605 So. 2d 515, 520-21 (Fla. 4th DCA 1992), correctly concluded that a violation of the unlawful compensation statute could be proven circumstantially. The Gerren court expressly rejected the defendant's argument that proof of an explicit agreement was required, noting it would be illogical to allow a public official who accepted bribes to avoid prosecution simply because he never expressed out loud a promise to perform his public duties improperly. Id. at 519-20. Thus, the court held, the State should be permitted to prove quid pro quo "indirectly, through the use of circumstantial evidence." Id. at 520-21. See also Merckle v. State, 512 So. 2d 948 (Fla. 2d DCA 1987); Garrett v. State, 508 So. 2d 427 (Fla. 2d DCA 1987); Bias v.

State, 118 So. 2d 63 (Fla. 2d DCA 1960). As the federal court of appeals explained in United States v. Massey, 89 F.3d 1433 (11th Cir. 1996), a bribery case:

[P]roof of such an agreement may rest upon inferences drawn from relevant and competent circumstantial evidence. To hold otherwise 'would allow [defendants] to escape liability . . . with winks and nods, even when the evidence as a whole proves that there has been a meeting of the minds to exchange official action for money.'

Id. at 1439 (citations omitted).

By contrast, in the decision below, the district court disregarded the aforementioned well-settled legal principles when it required the State to prove an explicit quid pro quo agreement existed. The district court focused on the fact there had been no "spoken" agreement between the parties and ignored the circumstantial evidence that Respondent requested, solicited, or accepted sex in lieu of issuing A.S. a ticket or arresting her. The court thus rendered irrelevant the jury's determination of Respondent's intent through examination of his conduct and other evidence adduced at trial. In other words, the district court ignored the circumstantial evidence in overturning the jury's decision below.

This evidence, summarized in Petitioner's Initial Brief at 24-26, was legally sufficient to establish a meeting of the

minds between Respondent and A.S.² When Respondent pulled her over, A.S. thought she would get in trouble for drunk driving. Respondent indicated his awareness of her intoxicated state by commenting, after she stumbled, "the party must have been good." However, A.S. did not receive a ticket, notwithstanding conduct which reasonably could have been expected to result in a ticket or arrest (underage drinking, driving under the influence). Respondent's comment, about her being lucky she did not receive a ticket, occurred immediately after the sexual act. The latter statement, by virtue of its timing, clearly showed that Respondent linked the sexual act and the absence of a ticket in his own mind. Finally, Respondent's failure to report the contact with A.S. suggested wrongful conduct.

The evidence also excludes every reasonable hypothesis of innocence. Respondent's theory was that he and A.S. did not have vaginal intercourse in the warehouse right after leaving the Burger King parking lot; instead, they had masturbatory sex in another location several hours later, after he had completed his work shift. The surveillance tapes, however, flatly contradicted his testimony that they went their separate ways

² Petitioner continues to assert the alternative argument made in the Initial Brief at 20-24, that a meeting of the minds is not required to prove unlawful compensation under Section 836.016, Florida Statutes (2000).

after leaving the Burger King lot. The evidence constituted competent substantial evidence to support the jury findings of guilt as to unlawful compensation.

The State respectfully requests that this Court quash the decision below, approve State v. Gerren, 604 So. 2d 515 (Fla. 4th DCA 1992), and hold that the State may use circumstantial evidence to establish the quid pro quo necessary to prove a violation of the unlawful compensation statute.

II

THIS COURT SHOULD DECLINE TO CONSIDER ISSUE II BECAUSE IT IS OUTSIDE THE SCOPE OF THE CONFLICT ISSUE; ON THE MERITS, THE DISTRICT COURT PROPERLY AFFIRMED RESPONDENT'S CONVICTION FOR OFFICIAL MISCONDUCT WHERE SUBSTANTIAL, COMPETENT EVIDENCE SUPPORTED THE VERDICT.

Petitioner respectfully urges this Court to decline to review Issue II, raised by Respondent in his answer brief, see Respondent's Brief on the Merits at 17-23, because it is outside the scope of the conflict issue. Issue II involves a challenge to the legal sufficiency of Respondent's conviction for official misconduct. The district court rejected Respondent's claim on this point, finding substantial competent evidence supported this conviction. Castillo, 835 So. 2d at 309. This conviction is, of course, separate from Respondent's unlawful compensation conviction, and thus is entirely independent of, and unrelated to, the issue which forms the basis for the Court's express and

direct conflict jurisdiction, i.e., whether the State may prove the offense of unlawful compensation by circumstantial evidence.

Although once this Court has jurisdiction of a cause, it may consider issues other than those upon which jurisdiction is based, such jurisdiction is discretionary and "should be exercised only when these other issues have been properly briefed and argued and are dispositive of the case." Savoie v. State, 422 So. 2d 308, 312 (Fla. 1982) (emphasis supplied). This Court routinely has declined to address issues other than those which are the basis for its review. See e.g., Diaz v. Diaz, 826 So. 2d 229, 232 n.2 (Fla. 2002); Murphy v. International Robotic Systems, Inc., 766 So. 2d 1010, 1016 n.10 (Fla. 2000); Asbell v. State, 715 So. 2d 258 (Fla. 1998); Trushin v. State, 425 So. 2d 1126, 1130 (Fla. 1983). Because generally the district courts of appeal function as courts of final jurisdiction, this Court should refrain from entertaining ancillary issues unless those issues affect the outcome of the case after review of the conflict issue. See Trushin, 425 So. 2d at 1130; Jenkins v. State, 385 So. 2d 1356, 1357-58 (Fla. 1980) (quoting Ansin v. Thurston, 101 So. 2d 808 (Fla. 1958)). That is not the case here; the claim raised in Issue II in no way implicates the conflict issue, and resolution of Issue II will have no bearing on the final outcome of this case.

It is particularly inappropriate for this Court to address the merits of Respondent's Issue II as it amounts to nothing more than a second-level evidentiary review. There is no precedential significance to the district court's determination that substantial competent evidence supported the official misconduct conviction. That decision does not involve any alleged conflict or question of great public importance; it is merely a garden-variety sufficiency of the evidence issue for which district courts are presumptively the courts of final jurisdiction. Accordingly, Petitioner respectfully requests this Court decline to consider Issue II.³

In an abundance of caution, though, Petitioner will address the merits of the claim raised herein. Respondent was charged with official misconduct in violation of Section 839.25, Florida Statutes (2000), which prohibits a public servant from "knowingly falsifying . . . any official record or official document" with the "corrupt intent to obtain a benefit for himself." Respondent acknowledged at trial that his daily activity report contained a few errors (R. 94, 96), but he insisted they were just "mistakes" and that he did not act with

³ Petitioner notes that initially, Respondent urged this Court to deny discretionary review of this case because "there is no direct and express conflict, or other jurisdictional basis for supreme court review, in this record." Respondent's Brief on Jurisdiction at 1.

improper motive. (T. 452-54, 481-82.) Viewing the evidence and all inferences reasonably derived therefrom in a light most favorable to sustaining the verdict, Tibbs v. State, 397 So. 2d 1120, 1123 (Fla. 1981), the jury reasonably could have rejected Respondent's "honest mistake" theory and found he intentionally falsified his paperwork to hide the fact he had a sexual encounter with A.S. during his work shift. Bauer v. State, 609 So. 2d 608, 611 (Fla. 4th DCA 1992).

Petitioner presented competent evidence from which the jury could conclude the errors on Respondent's paperwork were more than inadvertent mistakes, they were designed to camouflage his liaison with A.S. First, Respondent wrote in his daily activity report that he conducted an area check of the deserted warehouse area between 4:00 and 4:14 a.m. (R. 94; T. 157-58, 481.) Actually, the Burger King surveillance tapes show that Respondent was talking with A.S. in the Burger King parking lot during that time. (T. 303-304, 481-82, 563-64.)

Next, Respondent wrote in his daily activity report that, after the area check, he went to the shop for vehicle maintenance, from 4:14 to 4:31. (R. 94; T. 482.) Respondent's CAD sheet also reflects a shop visit, though for fueling, during this approximate time period (from 4:13 to 4:39). (R. 96, T. 156, 161-62.) In fact, Respondent had neither vehicle

maintenance nor fueling done during this period of time. (T. 190-91.) The surveillance tapes show what Respondent really was doing: he and A.S. drove into the warehouse area and remained there for approximately 26 minutes (from 4:10 to 4:36). (T. 304-305, 310, 565-66.)

Finally, Respondent's daily activity report shows he conducted a traffic stop from 3:42 a.m. to 3:52 a.m. (R. 94; T. 155-56.) He failed to advise the police dispatcher once the traffic stop was completed, so according to the CAD sheet, the stop lasted from 3:44 a.m. to 4:13 a.m. (R. 96; T. 155-59, 161-62.) Importantly, the license number of the vehicle Respondent stopped was not A.S.'s (T. 237), though the tapes clearly show Respondent was with her then.

Although Respondent spent roughly 45 minutes or more with A.S. (T. 302-304), he never reported pulling her over, talking with her, or spending 26 minutes in a deserted warehouse area with her. (T. 166, 237, 310, 489-90.) Instead, during this time, Respondent reported both in writing and orally that he was busy with other police business. (T. 166.) The police department would have been "gravely" concerned if an officer stopped a motorist for this length of time and did not report the stop. (T. 530-31.) In connection with the unlawful compensation claim, the jury heard other evidence showing

Respondent noticed A.S. was intoxicated (and under-age), compelled her to go to the deserted warehouse area and have sex with him, immediately thereafter commented she was lucky he didn't ticket her, then let her continue on her way. It would not be common for an officer to stop an intoxicated motorist, give her a verbal warning, then allow her to drive away. (T. 180-81.)

A reasonable jury could have concluded that Respondent intentionally falsified his daily activity report to cover up the time he spent time with, and had sex with, A.S. Viewing all conflicts in the evidence and all reasonable inferences therefrom in favor of the verdict on appeal, the district court properly concluded substantial, competent evidence supported the jury verdict. Thus, this Court should affirm Respondent's conviction for official misconduct.

CONCLUSION

Wherefore, based upon the foregoing argument and authorities cited herein, Petitioner respectfully requests that this Honorable Court (a) quash the decision of the Third District Court of Appeal below as to the unlawful compensation claim, approve State v. Gerren, 604 So. 2d 515 (Fla. 4th DCA 1992), and remand the case back to the district court to reinstate the jury verdict for unlawful compensation (Count I); (b) remand the case for consideration of the sentencing issues that were not resolved by the district court's decision; and (c) decline to exercise its discretionary jurisdiction to consider Issue II, but if it does, affirm Respondent's conviction for official misconduct (Count II).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petitioner's Reply Brief on the Merits was furnished by U.S. Mail to Harvey J. Sepler, Assistant Public Defender, Eleventh Judicial Circuit of Florida, 1320 N.W. 14th Street, Miami, Florida 33125, on this ___ day of September, 2003.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief, submitted in Courier New 12-point font, complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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