IN THE SUPREME COURT OF FLORIDA

DEMELLO BOLWARE,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. SC04-012

JURISDICTIONAL BRIEF OF RESPONDENT

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PRELIMINARY STATEMENT

Respondent, the State of Florida, the Respondent 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, Demello Bolware, the Petitioner 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 pertinent history and facts are set out in the decision of the lower tribunal, attached in slip opinion form as an appendix to this brief. It also can be found at 28 Fla. L. Weekly D2493 (Fla. 1st DCA October 31, 2003).

The only facts germane to the determination of jurisdiction are contained within the four corners of the decision and are as follows:

> The state seeks certiorari review of a judgment entered by the Circuit Court of Bay County acting in its capacity as an appellate court, by which it reversed a county court order granting post-conviction relief on respondent's claim that his "no contest"

> plea to the charge of Driving While License Suspended or Revoked (DWLSR)was not voluntary because he was not informed prior to her plea that as a consequence of the conviction (apparently his third), the Department of Highway Safety and Motor Vehicles could revoke his driver's license for five years pursuant to section 322.27(5), Florida Statutes. The circuit court essentially ruled that suspension or revocation of a drivers's license, a statutorily mandated administrative act, is a direct consequence of a plea to a specified driving offense, requiring defense counsel to warn the defendant prior to the entry of the plea.

Id.

SUMMARY OF ARGUMENT

In order for this Court to have jurisdiction the decisions alleged to be conflicting must expressly and directly conflict on the same point of law. Petitioner has not established an adequate basis for this Court to exercise its conflict jurisdiction. The decision of the lower tribunal is not in direct and express conflict with the decisions asserted to be in conflict. Therefore, Petitioner has failed to establish a basis for this Court to exercise its discretionary jurisdiction and review should be denied.

ARGUMENT

ISSUE I

IS THERE EXPRESS AND DIRECT CONFLICT BETWEEN THE DECISION BELOW AND WHIPPLE v. STATE, 789 So.2d 1132 (Fla. 4th DCA 2001), PRIANTI v. STATE, 819 So.2d 231 (Fla. 4th DCA 2002), DANIELS v. STATE, 716 So.2d 827 (Fla. 4th DCA 1998), MAJOR v. STATE, 814 So.2d 424 (Fla. 2002), or ALLSTATE INS. CO. v. KAKLAMANOS, 843 So.2d 885 (Fla. 2003) (Restated)

Jurisdictional 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.

In Reaves, this court defined the type of conflict which must exist to accept a petition for discretionary review. It said:

> Conflict between decisions must be express and direct, i.e., it must appear within the four corners of the majority decision. Neither a dissenting opinion nor the record itself can be used to establish jurisdiction.

To establish a basis for this Court's exercise of jurisdiction petitioner must show conflict between decisions which is "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 order for conflict to suffice as a basis for this Court's jurisdiction, the conflict must be on the same point of law. For, conflict jurisdiction can be invoked only when different principles of law are applied to indistinguishable facts. Department of Revenue v. Johnson, 442 So.2d 950 (Fla. 1983).

Petitioner points to no conflict of decisions sufficient to give rise to the discretionary jurisdiction of this Court. Therefore, this Court should decline review.

The decision below is not in "express and direct" conflict with the decisions of any other district court.

Petitioner's alleged conflict does not meet Florida's standards for vesting this court with jurisdiction to resolve conflicts between districts. The first step in analyzing the existence of conflict is to determine what were the decisions in the cases alleged to be in conflict.

The decision in Petitioner's case involved an application of well-settled principles of law to the specific facts in the case. The issue presented was whether under these facts,

Petitioner had to be informed of the mandatory license revocation in order for the plea to be voluntary. The determination of this issue was dependant upon whether the license revocation was a direct consequence of the plea. The First District held that it was not a direct consequence because in order for it to be a direct consequence the revocation had to be punishment. The case law provided that a license revocation was not punishment, thus the First District reasoned that a license revocation was not a direct consequence of the plea.

Petitioner alleges that this case conflicts with several cases from the Fourth District Court of Appeals and one case from this Court which he alleges adopted the Fourth District's position. Petitioner is wrong and review should be denied.

Petitioner alleges conflict with Whipple v. State, 789 So.2d 1132 (Fla. 4th DCA 2001) and with Prianti v. State, 819 So.2d 231 (Fla. 4th DCA 2002). These cases are factually and legally distinguishable from Petitioner's case. Whipple and Prianti involve allegations of affirmative misadvice by counsel regarding the consequences of a plea. Since it has long been held that affirmative misadvice can support withdrawal of a plea whether the advice relates to a direct or collateral consequence of a plea, See Watrous v. State, 793 So.2d 6 (Fla. 2nd DCA 2001), Ray v. State, 480 So.2d 228 (Fla. 2nd DCA 1985), these decisions are based on legal concepts and facts different from those in Petitioner's case. Therefore, there exists no express and direct conflict between these cases and the case at hand.

The state acknowledges that the opinion in Prianti talks about direct consequences of the plea, however, as noted above, it is not conflict in the language of opinions which confers jurisdiction but express and direct conflict in decisions. Jenkins, 385 So.2d at 1359. If the facts in the alleged conflicting decisions are different, then the decisions are not in express and direct conflict. Department of Revenue v. Johnson, 442 So.2d 950 (Fla. 1983). Therefore, Petitioner cannot show express and direct conflict with these Whipple and Prianti.

Petitioner also alleges conflict with Daniels v. State, 716 So.2d 827 (Fla. 4th DCA 1998) which Petitioner asserts this Court adopted in Major v. State, 814 So.2d 424 (Fla. 2002). Prior to this Court's decisions in Major and State v. Partlow, 840 So.2d 1040 (Fla. 2003), the state might have agreed that conflict exists, however no express and direct conflict sufficient to warrant the granting of jurisdiction now exists.

The decision in Daniels quoted the appropriate Zambuto v. State, 413 So.2d 461 (Fla. 4th DCA 1982) standard for distinguishing between direct and collateral consequences of a plea:

> "The distinction between 'direct' and 'collateral' consequences of a plea, while sometimes shaded in the relevant decisions, turns on whether the result represents a definite, immediate and largely automatic effect on the range of the defendant's punishment."

Daniels at 828, 829

While stating the correct standard, the court immediately deviated from this standard by stating: "the two year revocation was definite, immediate, and automatic upon Daniels' conviction. The revocation was a "consequence" of the plea under Ashley and a "penalty" contemplated by Rule 3.172." Daniels at 829. This application of the standard misstates the law by finding that a direct consequence is related to things which occur in conjunction with the conviction. It also totally ignores the language "**effect on the range of the defendant's punishment"**.

Petitioner's problem is that in Major, this Court rejected the notion that Ashley v. State, 614 So.2d 486 (Fla. 1993) altered the test for, or is even relevant to, a determination of direct or collateral consequences of a plea. Further, in Major, this Court reiterated the traditional test that to be a direct consequence, the result had to represent a definite, immediate and largely automatic effect on the **range of the defendant's punishment**.

Major was followed by State v. Partlow, in which this Court reversed the Fourth District's determination based on Daniels that failure to advise of sex offender registration, although collateral, was a consequence of the plea that allowed the plea to be withdrawn. See Partlow v. State, 813 So.2d 999 (Fla. 4th DCA 2002) This Court in reversing the Fourth District in Partlow held that sexual offender registration was not a **punishment** and thus no matter how definite, immediate, or automatic was not a direct consequence of the plea. This

reiteration that a direct consequence has to be punishment is why express conflict no longer exists.

This Court and various District Courts have held that suspension of a driver's license is not a punishment of the offender, but rather an administrative remedy for the public protection which follows conviction for certain offenses. See Smith v. City of Gainesville, 93 So.2d 105 (Fla. 1957), State v. Scibana, 726 So.2d 793 (Fla. 4th DCA 1999) Since, Partlow rejected the Daniels analysis and reaffirmed that punishment was the standard, and, because it has long been held that license suspension is not punishment, there exists no express and direct conflict between the decision of the First District in Petitioner's case and any holding of the Fourth District that could be considered viable after Partlow.

Petitioner also alleges that there exists conflict between the decision of the lower tribunal and this Court's case of Allstate Ins. Co. v. Kaklamanos, 843 So.2d 885 (Fla. 2003) This assertion is incorrect. First of all, the District Court applied Allstate Ins. Co. v. Kaklamanos in reaching its decision that a departure from the essential requirements of law exists. In doing so, the First District correctly applied the holding of the case.

Furthermore, the First District examined the lower tribunal's interpretation of Major and noticed the same flaw this Court found in Partlow, neither the Circuit Court below or the Court of Appeal in Partlow examined the issue of punishment. When the

District Court examined whether a drivers license revocation was punishment, it became clear that the Circuit Court, just like the Fourth District in Partlow, misapplied clearly established principles of law. Because the decisions of the lower tribunals ignored the issue of punishment, and the case law establishing that revocation of a drivers license is not punishment, these decisions departed from the essential requirements of law. Therefore, the First District's analysis does not conflict with this Court's decision in Allstate Ins. Co. v. Kaklamanos, and there exists no conflict which would establish this Court's jurisdiction.

Conflict

As set out in the general discussion on conflict jurisdiction, conflict jurisdiction can be invoked only when different principles of law are applied to indistinguishable facts. Department of Revenue v. Johnson, 442 So.2d 950 (Fla. 1983). As shown above, the District Courts of Appeal applied the correct legal tests to different factual situations. Thus, Petitioner provides this Court with no basis for finding conflict jurisdiction exists.

CONCLUSION

Based on the foregoing reasons, 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 Jeffery P. Whitton, Esq., Post Office Box 1956, Panama City, Florida 32402.,by MAIL on March ____, 2004.

Respectfully submitted and served,

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[AGO# L04-1-1668]

CERTIFICATE OF COMPLIANCE

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

_____
Edward C. Hill, Jr.
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