IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,		
Petitioner,		
v.	Case No.	SC04-490
	Lower Tribunal No.	2D00-1611
GARY ALAN MATHESON,		
Respondent.		

RESPONDENT'S JURISDICTIONAL BRIEF

On Review from the District Court
of Appeal, Second District
State of Florida

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STATEMENT OF THE CASE AND FACTS

In this case, a deputy relied exclusively on a drug-detecting dog's positive alert to the Respondent's vehicle to conclude that the vehicle contained illegal narcotics. A search revealed narcotics and paraphernalia. The State then charged the Respondent with three counts of possession of controlled substance and one count of possession of drug paraphernalia.

The respondent filed a motion to suppress, asserting that the drug-detecting dog was not qualified to provide the deputies with probable cause to believe that illegal narcotics would be found in the vehicle. At the hearing, the State presented the testimony of the K-9 deputy and evidence consisting of the drug-detecting dog's certification from the United States Police Canine Association. The trial court held that the evidence of the dog's certification was sufficient for the State to meet its burden of establishing a prima facie basis of probable cause, and permitted defense counsel to offer evidence in rebuttal.

Defense counsel then presented evidence, including the expert testimony of Dr. Craig, establishing that Razor was not sufficiently reliable to provide the K-9 deputy with probable cause to conclude that illegal narcotics would be found in the Respondent's vehicle. At the conclusion of the hearing, the trial court denied the motion to suppress, ruling that the dog was trained, competent and reliable.

The Respondent then pled no contest, reserving his right to appeal the denial of the motion to suppress. The trial court found that the motion to suppress was dispositive. Mr. Matheson timely filed his notice of appeal to the Second District Court of Appeal.

In its August 1, 2003, decision, the District Court reversed the trial court's denial of the Respondent 's motion to suppress. The District Court held that the State failed to meet its burden of proving that the drug-detection dog's alert to the Respondent's vehicle provided the K-9 deputy with probable cause to believe that illegal narcotics were present in the vehicle.

On March 5, 2004, the District Court denied the State's motion for rehearing, rehearing en banc, clarification and certification. On March 18, 2004, the State filed its notice to invoke the discretionary jurisdiction of this Court.

SUMMARY OF THE ARGUMENT

In this case, the District Court relied on the Third District decision in State v. Foster, 390 So. 2d 469 (Fla. 3d DCA 1980), to hold that the State failed to meet its burden of proving that a drug-detection dog's alert to the Respondent's vehicle provided the K-9 deputy with probable cause to believe that illegal narcotics were present in the vehicle. The District Court relied, in part, on the K-9 deputy's testimony that he did not maintain a record of the drug-detection dog's false alert rate.

In Vetter v. State, 395 So. 2d 1199 (Fla. 3d DCA 1981), the Third District relied upon its decision in Foster to affirm the trial court's finding that the State met its burden where Vetter tendered a plea before the State was able to present evidence of the drug-detecting dog's reliability, and where the affidavit to the search warrant represented that the drug-detection dog had a significant record of positively alerting on vehicles that contained controlled substances.

Accordingly, the decision of the Second District cannot be said to expressly and directly conflict with the Third District decision in Vetter.

JURISDICTIONAL STATEMENT

The Florida Supreme Court does not have discretionary jurisdiction to review the subject decision of the Second District Court because that decision does not

expressly and directly conflict with a decision of the supreme court or another district court of appeal on the same point of law. See Art. V, §3(b)(3), Fla. Const. (1980); Fla. R. App. P. 9.030(a)(2)(A)(iv).

ARGUMENT

THE DECISION OF THE SECOND DISTRICT IN THIS CASE DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL IN VETTER V. STATE, 395 SO. 2D 1199 (FLA. 3D DCA 1981).

The State asserts that the decision in Matheson v. State, 2003 WL 21766489, 28 Fla. L. Weekly D1791, (Fla. 2d DCA Aug. 01, 2003), conflicts with Vetter v. State, 395 So. 2d 1199 (Fla. 3d DCA 1981), issued by the Third District Court of Appeal, and that this conflict provides this Court with discretionary jurisdiction to review Matheson. This assertion is wrong.

Discretionary jurisdiction to resolve conflicts is limited to those cases in which the decision of the district court of appeal expressly and directly conflicts with a decision of the supreme court or of another district court of appeal. It is not enough to show that the district court decision is effectively in conflict with other appellate decisions.

In this case, the decision in Matheson does not expressly and directly with

Vetter. In fact, both decisions cite the same Third District Decision, issued in 1980. In State v. Foster, 390 So. 2d 469 (Fla. 3d DCA 1980), the Third District set forth set forth the following additional factors that must be known in order to establish that a drug detection dog's alert is a sufficient basis for finding probable cause to search:

> the exact training the detector dog has received; the standards or criteria employed in selecting dogs for marijuana detection training; the standards the dog was required to meet to successfully complete his training program; the "track record" of the dog up until the search (emphasis must be placed on the amount of false alerts or mistakes the dog has furnished).

The Third District cited Foster with approval when it issued Vetter the following year, stating:

> Both sides submitted to the court written (and widely divergent) versions of events leading up to the dog sniff, which bear upon the issues of an illegal stop (vel non) and appellant's purported consent. At pretrial hearing, appellant alleged in addition that the affidavit for warrant contained material misrepresentations concerning the dog Ringo; the affidavit stated: The narcotics detection dog "Ringo" is specially trained in the detection of heroin, cocaine, marijuana, hashish and all of their derivatives. "Ringo" has positively alerted on thirteen consecutive occasions for substances which were subsequently verified to be controlled substances. At no time has Ringo alerted falsely.
>
> Appellant claimed that Ringo's training, or lack thereof, does not give his alerts that quantum of reliability necessary to constitute probable cause. Two experts in the canine training field testified for appellant to the effect that Ringo's training regimen, and his work routine, precluded an

> objective demonstration of reliability. . . .
> . . . .
>
> Criteria by which to assess the training a narcotics dog has received are collected in our opinion in State v. Foster, 390 So.2d 469 (Fla.3d DCA) (1980) (1980 FLW 2229) (involving a warrantless search). The trial court was not convinced by appellant's experts that Ringo's training was inadequate to establish his reliability; on this record, where a plea was made to the court, and accepted, before the state put on its case for Ringo's training and general reliability, we will not gainsay the decision of the learned trial judge that appellant did not carry his burden.

Citing Vetter's plea to the Court and the Court's acceptance of that plea, which denied the State the opportunity to put on evidence of the drug-detecting dog's reliability, the Third District declined to find the trial court's ruling error.

The subject decision of the Second District Court also cites Foster with approval, stating, "We agree with this list of factors, and we especially join in the Foster court's emphasis on the dog's performance history." Matheson. Unlike Vetter, the State in this case did undertake to establish the drug-detecting dog's reliability. It attempted to do so only by introducing general evidence of his training and his certification. And, unlike Vetter, the K-9 deputy in the subject decision testified that he did not maintain a record of the drug-detection dog's false alert rate. In fact, the K-9 deputy testified that he often does not learn whether his dog's alert leads to the discovery of contraband because he frequently leaves the scene of a sniff

once he advises other deputies of the alert.

Accordingly, it cannot be said that there is an express and direct conflict between the subject decision in Matheson and Vetter.

Should this Court perceive a conflict, it is more aptly defined as an intradistrict conflict within the Third District, between the decisions in Vetter and Foster. Section 3(b)(3)of the Florida Constitution does not allow the supreme court to resolve conflicts within a district court of appeal.

Moreover, even if an argument exists for discretionary jurisdiction on this basis, this Court is not under an obligation to review the subject decision. Discretionary jurisdiction entails only a judicial power to review case. This Court may elect not to exercise that power.

CONCLUSION

This Court does not have discretionary jurisdiction to review the decision below. Should this Court find that such jurisdiction exists, there is no need for it to exercise that jurisdiction to consider the merits of the Petitioner's argument.

CERTIFICATE OF SERVICE

I certify that a true and correct copy of this brief has been mailed to opposing

counsel, Robert J. Krauss and Susan M. Shanahan, Office of the Attorney General, Concourse Center #4, 3507 E. Frontage Road, Suite 200, Tampa, FL 33607, on this 30th day of April 2004.

CERTIFICATE OF FONT COMPLIANCE

I certify that the size and style of type used in this brief is 12-point Courier new, in compliance with Fla. R. App. 9.210(a)(2).

Respectfully submitted,

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