

IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. SC: _____
4th DCA CASE NO: 4D04-4825

STATE OF FLORIDA,

Petitioner,

vs.

SALVATORE BENNETT,

Respondent.

PETITIONER'S BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

Petitioner was the prosecution and Respondent was the defendant in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida. Petitioner was the Appellee and Respondent was the Appellant in the Fourth District Court of Appeal. In this brief, the parties shall be referred to as they appear before this Honorable Court except that Petitioner may also be referred to as the State.

In this brief, the symbol "A" will be used to denote the appendix attached hereto.

All emphasis in this brief is supplied by Petitioner unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

The only relevant facts to a determination of this Court's discretionary jurisdiction under Article V, Section 3(b)(3) of the Florida Constitution are as follows:

Pursuant to a written plea bargain agreement, on June 15, 2004, Appellee pleaded guilty to second degree felony of aggravated fleeing and eluding (high speed), and was adjudicated by the trial court. Appellee was sentenced to nine (9) years in prison as a habitual felony offender, with credit for time served. Appellee filed a motion to correct illegal sentence

pursuant to Rule 3.800(a), Florida Rules of Criminal Procedure. The State filed a response, and the trial court issued an order denying the motion. Appellee filed a notice of appeal. The Fourth District Court of Appeal issued an order to show cause why the trial court's order denying the motion to correct illegal sentence should not be reversed. The State was ordered to limit its response to Appellee's claim that his prior convictions did not meet the sequential sentencing requirement for habitual offender sentencing. Appellant filed its response. The Fourth District Court of Appeal issued a per curiam opinion. In that opinion, the Fourth District reversed and remanded, stating that on remand, the trial court was to address Richardson v. State, 884 So. 2d 950 (Fla. 4th DCA 2004)¹, and was to either resentence Appellee or if Appellee's motion was once again denied, attach portions of the record to show that Appellee qualified for habitual offender sentencing.

Appellant filed a motion for rehearing on May 2, 2005, asking that the Fourth District either grant rehearing or certify conflict with McCall v. State, 862 So. 2d 807 (Fla. 2d DCA 2003). On June 1, 2005, the Fourth District denied the motion for rehearing, but granted the motion to certify

¹ This Court is scheduled to hear argument in Richardson at 9:00 a.m., Friday, June 10, 2005.

conflict.(In the decision upon rehearing, a clerical error mistakenly says that it was the defendant's motion for rehearing, when in fact it was the State's motion for rehearing.). In that decision, the Fourth District directly certified conflict with McCall v. State, 862 So. 2d 807 (Fla. 2d DCA 2003). Appellant filed a motion to stay mandate and a notice to invoke discretionary jurisdiction on June 1, 2005. Appellant now files the instant brief on jurisdiction.

SUMMARY OF THE ARGUMENT

This Court should accept jurisdiction to review the instant case because the opinion of the Fourth District Court of Appeal expressly and directly conflicts with a decision from the Second District Court of Appeal.

ARGUMENT

POINT I

THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL **EXPRESSLY AND DIRECTLY** CONFLICTS WITH THE DECISION IN MCCALL V. STATE, 862 SO. 2D 807 (FLA. 2D DCA 2003).

It is well settled that in order to establish conflict jurisdiction, the decision sought to be reviewed must expressly and directly create conflict with a decision of another District Court of Appeal or of the Supreme Court on the same question of law. Art. V, Sect. 3(b)(3) Fla. Const.; Jenkins v. State, 385 So.2d 1356 (Fla. 1980).

The State submits that this Court has jurisdiction. In this case the Fourth District Court of Appeal specifically stated in its decision as to the State's motion for rehearing and motion to certify conflict: "We deny appellant's motion for rehearing, but grant the motion to certify conflict. As to our reliance on Richardson v. State, 884 So. 2d 950 (Fla. 4th DCA 2004), we again certify conflict with McCall v. State, 862 So. 2d 807 (Fla. 2d DCA 2003)." (A copy of the Fourth District Court of Appeal's decision is attached hereto as Appendix A.).

It is well settled that in order to establish conflict jurisdiction, the decision sought to be reviewed must expressly and directly create a conflict with a decision of another

District Court of Appeal or of the Supreme Court on the same question of law. Article 5, Section 3(b)(3) Fla. Const.; Jenkins v. State, 385 So. 2d 1356 (Fla. 1980). This Court clearly has discretionary jurisdiction pursuant to Florida Rule of Appellate Procedure 9.030(a)(2)(iv), to review the instant case.

In order for two decisions to be in express and direct conflict for the purpose of invoking this Court's discretionary jurisdiction, the decisions should speak to the same point of law, in factual contexts of sufficient similarity to permit the inference that the result in each case would have been different had the deciding court employed the reasoning of the other court as mandatory authority. See generally Jenkins v. State, 385 So. 2d 1356, 1359 (Fla. 1980); Mancini v. State, 312 So. 2d 732 (Fla. 1975). The conflict must be of such magnitude that if both decisions were rendered by the same court, the later decision would have the effect of overruling the earlier decision. Kyle v. Kyle, 139 So. 2d 885, 887 (Fla. 1962).

In McCall v. State, the trial court sentenced McCall to fifteen (15) years as a habitual felony offender. McCall filed a 3.800(a) motion, claiming that his habitual felony offender sentence was illegal because he lacked the necessary predicate offenses for his sentence. The trial court denied the 3.800(a) motion. McCall challenged the summary denial of his motion. Id.

On appeal, McCall claimed that the predicate convictions used to classify him as a habitual felony offender were entered on the same day, and that his habitual sentence violated the sequential conviction requirement of section 775.084(5), Florida Statutes (2002).

In McCall, the Second District Court of Appeal stated that when the Legislature enacted the habitual felony offender statute, the Legislature intended that once a defendant had twice been convicted with sanctions the third conviction would be enhanced. The Second District Court of Appeal stated that a sentence, pursuant to section 775.084, included the sanction of probation. McCall v. State, 862 So. 2d at 807. The Second District affirmed the trial court's order and specifically certified conflict with Richardson v. State, 884 So. 2d 950 (Fla. 4th DCA 2003).

Similarly, in the instant case, Appellee alleged in his 3.800(a) motion and on appeal that he did not have the predicate convictions to sentence Appellee as a habitual felony offender. The Fourth District Court of Appeal in this case relied on Richardson v. State, 884 So. 2d 950 (Fla. 4th DCA 2004), in its original opinion. Bennett v. State, 2005 WL 97632 (Fla. App. 4 Dist.), 30 Fla. L. Weekly D1093 (Fla. 4th DCA April 27, 2005). Also, the Fourth District specifically certified conflict with

McCall v. State, 862 So. 2d 807 (Fla. 4th DCA 2003), on rehearing, Bennett v. State, 2005 WL 1279144 (Fla. App. 4 Dist.).

Based on the foregoing, Petitioner submits that the Fourth District's decision in the instant case is contrary to McCall. Accordingly, it is respectfully submitted that jurisdiction exists in this Court to accept review of the lower court's decision.

CONCLUSION

WHEREFORE, based on the foregoing arguments and the authorities cited therein, Petitioner respectfully requests this Court GRANT Petitioner's request for discretionary review over the instant cause.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Respondent's Brief on Jurisdiction" has been furnished to: SALVATORE BENNETT, DC# L02629, Moore Haven Correctional Institution, P.O. Box 718501, 1900 East SR 78 NW, Moore Haven, FL 33471, on this ____ day of June 2005.

MYRA J. FRIED

CERTIFICATE OF TYPE SIZE AND STYLE

In accordance with Fla. R. App. P. 9.210, the undersigned hereby certifies that the instant brief has been prepared with 12 point Courier New Type.

MYRA J. FRIED

APPENDIX A