IN THE SUPREME COURT OF FLORIDA

ANTHONY K. RUSSELL,

Petitioner,

v.

CASE NO. SC06-335
5TH DCA CASE NO. 5D05-2630

STATE OF FLORIDA,

Respondent.
_____/

ON NOTICE TO INVOKE DISCRETIONARY REVIEW
OF A DECISION OF THE FIFTH DISTRICT COURT OF APPEAL

RESPONDENT'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

The Fifth District Court of Appeal's opinion in Russell v. State, 31 Fla. L. Weekly D235 (Fla. 5th DCA January 20, 2006), sets forth the following relevant facts:

> Appellant's probation was revoked based on proof that he battered his pregnant girlfriend. He raises three grounds on appeal, but only two grounds, both of which challenge the use of hearsay evidence to prove the violation, merit discussion.
>
> Sheriff's Deputy Torrellas provided the only testimony in support of the sustained charge. He testified that he responded to a gas station at the request of the victim. There, she explained that, during an argument with Appellant, he had grabbed her by the hair and struck her on the neck. After the victim escaped Appellant's grasp, she called sheriff's deputies, and Appellant left the area in her car. The victim told Torrellas she was pregnant. Torrellas described her demeanor as nervous and scared. He observed a red mark on the back side of her neck, which appeared to have been caused by a fist. The victim provided a written statement confirming the story, which was also received as evidence. When Deputy Torrellas later contacted Appellant, he told the deputy that he "doesn't hit [the victim], he just roughs her up." He also acknowledged that the victim was pregnant but questioned whether he was the father of her unborn child.
>
> As his first point, Appellant contends that his probation was improperly revoked because the revocation was based solely on otherwise inadmissible hearsay evidence. In response, the State argues that the hearsay evidence was corroborated by the

> officer's observations of the injury, the agitated state of the victim and the admissions of Appellant.
>
> Although not cited by either party, our resolution of this issue is controlled by our decision in Arndt v. State, 815 So. 2d 674 (Fla. 5th DCA 2002), wherein we concluded that the hearsay statements of the battery victim, coupled with the officer's observation of injury, were sufficient to prove a probation violation. See also Morris v. State, 727 So. 2d 975 (Fla. 5th DCA 1999) (evidence of struggle, victim injury and victim s emotional state sufficient to corroborate hearsay testimony of battery), another case not cited by either party.n2
>
> n2 We acknowledge what appears to be contrary authority on this point in Santiago v. State, 889 So. 2d 200 (Fla. 4th DCA 2004), Colwell v. State, 838 So. 2d 670 (Fla. 2d DCA 2003) and Blair v. State, 805 So. 2d 873 (Fla. 2d DCA 2001)....

Petitioner filed a motion for certification and Respondent filed a motion for rehearing. Both motions were denied by the Fifth District Court of Appeal in an order dated February 10, 2006.

Petitioner filed a notice to invoke the discretionary jurisdiction of this Court. Respondent's brief on jurisdiction follows.

SUMMARY OF ARGUMENT

Petitioner's claim that the opinion of the Fifth District Court of Appeal is in express and direct conflict with Santiago v. State, 889 So. 2d 200 (Fla. 4th DCA 2004), Colwell v. State, 838 So. 2d 670 (Fla. 2d DCA 2003), and, implicitly, Colina v. State, 629 So. 2d 274 (Fla. 2d DCA 1993), was essentially acknowledged by the Fifth District Court of Appeal in the instant opinion. However, this Court should refuse to accept jurisdiction since this issue has been adequately addressed by the district court of appeal.

ARGUMENT

THE FIFTH DISTRICT COURT OF APPEAL IN THE CASE *SUB JUDICE* ADMITTED THERE APPEARED TO BE CONFLICT WITH SANTIAGO V. STATE, 889 So. 2d 200 (Fla. 4th DCA 2004), COLWELL V. STATE, 838 So. 2d 670 (Fla. 2d DCA 2003), AND, IMPLICITLY, COLINA V. STATE, 629 So. 2d 274 (Fla. 2d DCA 1993); HOWEVER, THIS COURT SHOULD REFUSE TO ACCEPT JURISDICTION AS THE DISTRICT COURT HAS ADEQUATELY ADDRESSED THE ISSUE.

Under Article V, Section 3 (b)(3) of the Florida Constitution and Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv), this Court may 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 v. State, 485 So. 2d 829 (Fla. 1986), this Court said that the conflict between decisions must be express and direct, i.e., it must appear within the four corners of the majority decision. Additionally, this Court has held that inherent or so-called "implied" conflict may not serve as a basis for this Court's jurisdiction. DHRS v. National Adoption Counseling Service, Inc., 498 So. 2d 888, 889 (Fla. 1986).

Petitioner asserts that the instant opinion conflicts with Santiago v. State, 889 So. 2d 200 (Fla. 4th DCA 2004), Colwell v.State, 838 So. 2d 670 (Fla. 2d DCA 2003), and Colina v. State, 629 So. 2d 274 (Fla. 2d DCA 1993), wherein those courts essentially found that a violation of probation could not be

based upon the hearsay statements of the victim coupled with an officer's observations of injury. The Fifth District Court of Appeal admitted that its opinion herein appeared to conflict with Coldwell and Santiago, and, by implication, Colina. Infra. at 234, n.2. However, this Court should decline to accept jurisdiction since the appellate court has adequately addressed this issue and this Court would come to the same ultimate result as the appellate court.

While on probation, Petitioner was charged with aggravated battery of a pregnant woman, i.e., his girlfriend. Infra. When he was arrested, Petitioner made a spontaneous statement to police to the effect that he does not hit his girlfriend, he just roughs her up. Infra. The State argued in response to Petitioner's hearsay complaint that Petitioner had been found to be in violation upon not only hearsay evidence, but also based upon his admission by a party opponent, which falls under section 90.804, Florida Statutes, exceptions to the hearsay rule. Infra. The Fifth District Court of Appeal erroneously not only found this statement to not be probative, but also exculpatory, and refused to consider it in sustaining Petitioner's probation violation. Infra., n.1. In so doing, the district court of appeal suggested that there appeared to be conflict with other district court of appeal opinions. Infa., n. 2.

However, this Court should decline to accept jurisdiction since despite the district court of appeal's erroneous

disregard of the statement by a party opponent, the district court's ultimate holding is correct.

Finally, in Jenkins v. State, 385 So. 2d 1356, 1357-1358 (Fla. 1980), this Court discussed the creation of the district courts of appeal and quoted from Ansin v. Thurston, 101 So. 2d 808, 810 (Fla. 1958):

> It was never intended that the district courts of appeal should be intermediate courts. ... To fail to recognize that these are courts primarily of final appellate jurisdiction and to allow such courts to become intermediate courts of appeal would result in a condition far more detrimental to the general welfare and the speedy and efficient administration of justice than that which the system was designed to remedy.

Accordingly, while the district court of appeal admitted that there appeared to be conflict with the other district court of appeal cases, this Court should decline to accept jurisdiction since this issue does not warrant this Court's time and attention, as the district courts of appeal have fairly addressed the matter.

CONCLUSION

Although the Fifth District Court of Appeal admitted there appeared to be conflict with these cases, this Court should decline to accept jurisdiction since the appellate court has adequately addressed the issue, albeit by erroneously disregarding the statement by a party opponent.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Respondent's Brief on Jurisdiction has been hand delivered to David S. Morgan, Assistant Public Defender, 444 Seabreeze Blvd., Suite 210, Daytona Beach, Florida 32118, this 15th day of March, 2006.

CERTIFICATE OF COMPLIANCE

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

Respectfully submitted,

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