IN THE SUPREME COURT OF FLORIDA

CASE NO. SC06-628

DEWARN ANTONIO BROWN,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF RESPONDENT ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

The State accepts the Petitioner's Statement of the Case and Facts as a verbatim restatement of the Third District Court's opinion in State v. Brown, 2006 Fla. App. LEXIS 3244 (Fla. 3d DCA 2006).

SUMMARY OF ARGUMENT

Based upon Florida Rule of Appellate Procedure 9.030(a), this Court should decline jurisdiction over Petitioner's case where there is no conflict between the decision of the lower court and a decision of another district court of appeal or this Court.

ARGUMENT

THIS COURT SHOULD DECLINE JURISDICTION WHERE THE LOWER COURT'S DECISION DOES NOT EXPRESSLY OR DIRECTLY CONFLICT WITH THE DECISION OF ANOTHER DISTRICT COURT OF APPEAL OR WITH A FLORIDA SUPREME COURT DECISION.

This Court has jurisdiction to review a decision from a district court of appeal which expressly or directly conflicts with a decision from this Court or from another district court of appeal on the same question of law. See Article V, section 3(b)(3), Fla. Const.; see also Rule 9.030(a)(2)(iv), Fla.R.App.P. "Conflict between decisions must be express and direct, i.e., it must appear within the four corners of the majority decision." Reaves v. State, 485 So. 2d 829, 830 at n.3 (Fla. 1986),

rev. denied, 485 So. 2d 829 (Fla. 1986). Even where a district court has failed to identify direct conflict with another Florida appellate decision, jurisdiction exists only if the legal principles discussed in a decision are in direct conflict with other Florida appellate decisions. See Ford Motor Co. v. Kikis, 401 So. 2d 1341 (Fla. 1981). Such is not the case here.

The decision below is not in express and direct conflict with a decision from this Court or from another district court of appeal on the same question of law. Below, the Third District Court reversed a trial court's post-trial order that vacated the "felony murder conviction as "legally inconsistent" with the theft conviction, on the theory that an acquittal of armed robbery, implied by the guilty verdict of the "lower" offense of theft, precluded the finding that the defendant had committed that felony, as required for a felony murder." Brown, 2006 Fla. App. LEXIS 3244 at *1. The district court's reversal was grounded on two reasons. The first reason for reversal was based on established precedent that a defendant may not claim a fatal inconsistency where he has endorsed and supported the trial judge's charge to the jury that the evidence as to each of the counts must be

> considered separately and a separate verdict returned as to each. A finding of guilty or not guilty as to one crime must not affect your verdict as to the other crime(s) charged.

Fla. Std. Jury Instr. (Crim.) 3.12(a). In support, of its holding on this point, the Third District Court cited cases from its own court, and from the Fourth District

Court of Appeal: See Dial v. State, 2006 Fla. App. LEXIS 1876 (Fla. 4th DCA 2006); McKee v. State, 450 So. 2d 563 (Fla. 3d DCA 1984); see also Davis v. State, 459 So. 2d 1120 (Fla. 3d DCA 1984); cf. State v. Barton, 523 So. 2d 152, 153 n.2 (Fla. 1988) (declining to decide question); State v. Jimenez, 542 So. 2d 430 (Fla. 3d DCA 1989). See Brown, 2006 Fla. App. LEXIS 3244 at *2-*3. Although Petitioner has challenged the existence of a waiver under the circumstances of his case, (see Petitioner's Brief on Jurisdiction at 5, n.2), he has not argued that conflict exists among the district courts or this Court on the point of law relied upon by the Third District Court in support of its first ground for reversal. Therefore, no conflict jurisdiction has been alleged, and no conflict appears to exist under current case law, as to the Third District Court's first ground for reversal.

The second reason cited by the Third District Court in support of reversal is that there is no true legal inconsistency in this case "because of the rational possibility (which is, in fact, consistent with the evidence in this case) that the guilty verdict as to the first degree felony was based on a finding that, as the felony statute provides, and as the jury was instructed, the death occurred in the course of an attempted robbery, rather than a completed one." See id. at * 3 (footnote and citations omitted). In support of its finding, the district court relied on its own precedent and that of this Court: Pitts v. State, 425 So. 2d 542 (Fla. 1983); McCray

v. State, 397 So. 2d at 1230 n.3 (Fla. 3d DCA 1981), approved, 425 So. 2d 1 (Fla. 1983); Davis, 459 So. 2d at 1120; Streeter v. State, 416 So. 2d 1203, 1206 n.3 (Fla. 3d DCA1982); Damon v. State, 397 So. 2d 1224 (Fla. 3d DCA 1981). See id.

Petitioner claims that the Third District Court's decision is in conflict with Mahaun v. State, 377 So. 2d 1158 (Fla. 1979) and Redondo v. State, 403 So. 2d 954 (Fla. 1981). Petitioner claims that Mahaun and Redondo control this case because the jury convicted Petitioner of petit theft thereby precluding the assumption that the jury found an attempted robbery to support the felony murder conviction. Petitioner's claim of conflict jurisdiction fails however, because the issue of Mahaun's and Redondo's applicability to facts similar to those here has already been addressed by this Court. McCray, 425 So. 2d at 2; see also Pitts, 425 So. 2d at 543-44.

Mahaun does not apply because its facts are distinguishable. In Mahaun, a defendant was charged with third degree felony murder and aggravated child abuse. 377 So. 2d at 1159. The jury found the defendant guilty of third degree felony murder and guilty of culpable negligence as a lesser included offense to aggravated child abuse or attempted aggravated child abuse. See id. at 1161. This Court held that the jury's verdict was inconsistent because the jury effectively held the defendant innocent of the aggravated child abuse charge and vacated defendant's conviction. See id. This Court wrote that "the jury failed to find [the

defendant] guilty of the underlying felony of aggravated child abuse or attempted aggravated child abuse, ..." Id. Thus, the felony murder verdict could not be supported where the jury actually acquitted defendant of both the completed and attempted felonies.

Redondo is similarly distinguishable because it involves a complex procedural posture that precluded a jury from finding a felony or an attempted felony on remand from direct appeal. 403 So. 2d at 955. In Redondo, the defendant was convicted of simple battery as a lesser included offense of aggravated battery and unlawful possession of a firearm while engaged in the commission of a felony, aggravated battery. See id. The trial court arrested judgment on the possession conviction believing that the verdict was inconsistent. See id. The defendant appealed his conviction of battery due to errors in the jury instructions and the district court remanded for a new trial on the battery and possession counts. See id. The State cross-appealed the trial court's arrest of judgment of the possession count. The district court agreed with the State that the verdicts could be reconciled, but did not reinstate the judgment because it had found errors in the jury instructions. See id.

The matter in Redondo came to this Court by defendant's petition for certiorari from the district court's decision on the State's cross-appeal. See id. This Court quashed the district court's order that reversed the trial court's order

that arrested judgment and remanded for a new trial on the charge of simple battery. See 403 So. 2d at 956. In Redondo, it was impossible to support a possession conviction where there was no underlying felony for which the defendant could be convicted on remand. See id.

Distinguishing Mahaun and Redondo, this Court in Pitts found no inconsistency writing that "while the jury made no explicit finding of an attempted aggravated battery, it is a logical and plausible inference on their part based on the evidence before them" to find that the defendant committed an attempted aggravated battery. Id.. In Pitts, the defendant was charged with aggravated battery and possession of a firearm during the commission of an aggravated battery. 425 So. 2d at 543. The jury found the defendant not guilty of the aggravated battery charge and guilty of the possession charge. See id. This Court found no inconsistency because the essential elements of the possession charge required a finding of either an aggravated battery or an attempted aggravated battery. See id. Thus, the jury, in finding the defendant guilty of the possession charge, must have inferred from the evidence that the defendant committed an attempted aggravated battery.

Like Pitts, the Third District Court in McCray found no inconsistency when a jury found a defendant not guilty of aggravated assault and simple assault, as a lesser included offense, and guilty of possession of a firearm while engaged in a

felony, aggravated assault. 397 So. 2d at 1230. The jury instructions provided that the defendant was guilty of the possession charge if "while committing or attempting to commit (the) felony of aggravated assault," the defendant displayed a gun. Id. at 1230. The verdict form for the aggravated assault count did not include an option for attempted aggravated assault as a lesser included charge. See id.

The Third District Court in McCray held that Mahaun did not control because the jury's verdict could be reconciled by inferring that the jury found the defendant guilty of an attempted aggravated assault, an option that was not included in the instructions or verdict form. See id. at 1230, n. 3. Moreover, the jury's acquittal of aggravated assault or simple assault did not preclude a finding of the attempted commission of the crime, which lacked the element of fear that violence was imminent. See id. at 1230. The district court wrote: "[T]here is therefore a perfectly reasonable explanation, in accordance with the supposed requirements of Mahaun . . . : the jury found only that [defendant] had committed an attempted aggravated assault with a firearm." Id. at 1231.

This Court approved the Third District Court's decision in McCray by writing:

> By petition for review we have before us a decision of the Third District Court of Appeal, McCray v. State, 397 So. 2d 1229 (Fla. 3d DCA 1981), which allegedly conflicts with the decisions of this Court in Mahaun v. State, 377 So. 2d 1158 (Fla. 1979), and Redondo v. State, 403 So. 2d 954 (Fla. 1981). We have jurisdiction. Art. V, § 3(b)(3), Fla. Const.

> The question presented in this case is the same as that presented in Pitts v. State, 425 So. 2d 542, case no. 61,086 (Fla. January 6, 1983). Based on Pitts, we approve the decision of the district court in this case.

McCray, 425 So. 2d at 2. Thus, this Court in McCray applied Pitts to allow an inference that a jury has found an attempted felony (in cases where the jury has not been given the choice to convict or acquit the defendant of the attempted felony) to support an offense predicated on such felony even where a defendant has been acquitted of a necessarily lesser included offense.

McCray is indistinguishable from the present case. There is no reason why McCray, which involved an acquittal of the necessarily lesser included offense, would not apply to this case where Petitioner was convicted of the necessarily lesser included offense (theft). A conviction of petit theft does not exonerate Petitioner of attempted robbery. See generally Barton, 523 So. 2d at 153. Thus, the conviction of petit theft does not preclude the possibility that the jury inferred an attempted robbery from the facts of Petitioner's case to support the felony murder conviction.

Like in Pitts and McCray, the jury below was not given the option to find defendant guilty or not guilty of the attempted felony and the verdict of felony murder and petit theft can be reconciled on the assumption that the jury believed that Petitioner committed an attempted robbery. Therefore, the present case is factually distinguishable from Mahaun and Redondo, where the juries' verdicts

resulted in an acquittal of the completed and attempted felonies thereby making it impossible to reconcile those verdicts. Accordingly, no express and direct conflict exists.

CONCLUSION

Based on the foregoing argument and cited authorities, this Court should decline to exercise its discretionary jurisdiction to review the decision below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF RESPONDENT ON JURISDICTION was mailed this 24th day of April, 2006, to ROY A. HEIMLICH, Assistant Public Defender, Eleventh Judicial Circuit of Florida, 1320 Northwest 14th Street, Miami, Florida 33125.

_____
VALENTINA M. TEJERA
Assistant Attorney General

CERTIFICATE REGARDING FONT SIZE AND TYPE

The undersigned attorney certifies that the foregoing Jurisdictional Brief of Respondent has been typed in Times New Roman, 14-point type.

_____
VALENTINA M. TEJERA
Assistant Attorney General