IN THE SUPREME COURT OF FLORIDA

SHANA BARNES,

Petitioner,

Case No. SC06-662

v.

STATE OF FLORIDA,

Respondent.

AMENDED JURISDICTIONAL BRIEF OF RESPONDENT

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

ROBERT R. WHEELER
TALLAHASSEE BUREAU CHIEF
CRIMINAL APPEALS
FLORIDA BAR NO. 0796409

THOMAS D. WINOKUR
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 906336

OFFICE OF THE ATTORNEY GENERAL
PL-01, THE CAPITOL
TALLAHASSEE, FL 32399-1050
(850) 414-3300
(850) 922-6674 (FAX)

COUNSEL FOR RESPONDENT

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PRELIMINARY STATEMENT

Respondent, the State of Florida, the Appellee 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, Shana Barnes, the Appellant in the DCA and the defendant in the trial court, will be referenced in this brief as Petitioner.

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 [hereinafter referenced as "Slip Op." It also can be found at Barnes v. State, 922 So.2d 380 (Fla. 1st DCA 2006).

SUMMARY OF ARGUMENT

The appropriate focus upon the operative facts, as contained within the "four corners" of the DCA's decision, reveals no express and direct conflict with this Court or another DCA. Therefore, this Court must dismiss this case for lack of jurisdiction.

ARGUMENT

ISSUE I

IS THE FIRST DISTRICT'S OPINION BELOW WITH RESPECT TO SUFFICENCY OF EVIDENCE IN EXPRESS AND DIRECT CONFLICT WITH THE VARIOUS DECISIONS OF THIS COURT AND THE DISTRICT COURTS OF APPEAL? (Restated)

Petitioner contends that this Court has jurisdiction pursuant to Fla. R. App. P. 9.030(a)(2)(A)(iv), which effectuates Article V, § 3(b)(3), Fla. Const. The constitution permits this Court review a decision of a district court of appeal that expressly and directly conflicts with a decision of another district court of appeal on the same question of law.

The conflict between decisions "must be 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)(rejecting "inherent" or "implied" conflict; dismissed petition). "Neither a dissenting opinion nor the record itself can be used to establish jurisdiction." Reaves at 830.

In addition, it is the "conflict of decisions, not conflict of opinions or reasons that supplies jurisdiction for review by certiorari." Jenkins v. State, 385 So.2d 1356, 1359 (Fla. 1980).

A district court of appeal opinion that is devoid of facts contains no holding that could conflict with another district court of appeal opinion:

> [I]n those cases where the district court has not explicitly identified a conflicting decision, it is necessary for the district court to have included some facts in its decision so that the question of law addressed by the district court in its decision can be discerned by this Court.

Persaud v. State, 838 So.2d 529, 532 (Fla. 2003).

Applying these standards, the decision below is not in "express and direct" conflict with any of these cases.

Petitioner contends that the decision below with regard to the issue of the sufficiency of the evidence supporting her conviction conflicts with several decisions of this Court and other district courts, including Darling v. State, 808 So.2d 145 (Fla. 2002); Pagan v. State, 830 So.2d 792 (Fla. 2002); Floyd v. State, 913 So.2d 564, 571 (Fla. 2005); Sutton v. State, 834 So.2d 332, 334 (Fla. 5th DCA 2003); R.R.W. v. State, 915 So.2d 633, 634-635 (Fla. 2d DCA 2005); and Davis v. State, 761 So.2d 1154 (Fla. 2d DCA 2000). The rulings in these cases state nothing more than well-settled rules of law regarding review of evidentiary sufficiency claims, as well as the special standard when the State's evidence is wholly circumstantial. The decision below properly applies this well-settled law: "A review of the record demonstrates that the State presented the jury

with adequate evidence supporting its theory that appellant shot and killed her husband in a fit of anger over his behavior on the night in question." Slip op. at 2. Nothing in this result conflicts with the rules in the cases stated above. More importantly, the decision below did not state that it was considering and rejecting these decisions, so Petitioner cannot suggest that the decision below "expressly and directly conflicts" with these cases. Routine application of settled law does not warrant discretionary review.

Second, Petitioner argues that the State failed to present competent, substantial evidence that her acts were the product of ill will, hatred, spite, or an evil intent, and that such failure constitutes conflict with Light v. State, 841 So.2d 623 (Fla. 2d DCA 2003); Tillman v. State, 842 So.2d 922 (Fla. 2d DCA 2003); Santiago v. State, 874 So.2d 617 (Fla. 5th DCA 2004) Williams v. State, 674 So.2d 177 (Fla. 2d DCA 1996); McDaniel v. State, 620 So.2d 1308 (Fla. 4th DCA 1993); Marasa v. State, 394 So. 2d 544 (Fla. 5th DCA 1981). Again, the court below ruled, "A review of the record demonstrates that the State presented the jury with adequate evidence supporting its theory that appellant shot and killed her husband in a fit of anger over his behavior on the night in question." Thus, unlike the cited cases, the court found that there *was* evidence of ill will,

hatred, spite, or an evil intent. Nothing in such a ruling directly and expressly conflicts with the cited decisions. Petitioner's disagreement with the ruling below does not constitute direct and express conflict.

Third, Petitioner claims that the reliance of the court below on Rasley v. State, 878 So.2d 473 (Fla. 1st DCA 2004), conflicts with the decision of the Fifth District in Lee v. St. Johns County Commissioners, 776 So.2d 1110 (Fla. 5th DCA 2001),[1] as the decision below conflicts with the definition of "de novo review" set forth in Lee. Other than arguing that the facts of Rasley differ from the facts in the case at bar, Petitioner does not explain how the decision below conflict with Lee. The court below did not rule that the judgment should be affirmed because it was controlled by Rasley; it cited Rasley for the proposition that "the issue of whether a defendant acted in self-defense is a question of fact for the jury." Lee in no way conflict with this rule of law.

Petitioner has failed to demonstrate that the district court's ruling with regard to sufficiency of evidence directly and expressly conflicted with any decisions of this Court or of

[1] Petitioner also cites conflict with the federal Tenth Circuit Court of Appeals, Heggy v. Heggy, 944 F.2d 1537 (10th Cir. 1991). Such a conflict is beyond the scope of this Court's discretionary review. Article V, § 3(b)(3), Fla. Const.

another District Court of Appeal. Accordingly, this Court should decline to exercise jurisdiction.

ISSUE II

IS THE FIRST DISTRICT'S OPINION BELOW WITH RESPECT TO PERMITTING THE JURY TO TAKE AN EXHIBIT INTO THE JURY ROOM IN EXPRESS AND DIRECT CONFLICT WITH THE VARIOUS DECISIONS OF THIS COURT AND THE DISTRICT COURTS OF APPEAL? (Restated)

Petitioner claimed below that the trial court abused its discretion in admitting written excerpts of her prior trial testimony. The DCA ruled that the trial court properly admitted the exhibit into evidence because it contained "numerous admissions made by the Appellant," citing Delacruz v. State, 734 So.2d 1116, 1122 (Fla. 1st DCA 1999). Slip op. at 2. "The fact that the State published the exhibit to the jury does not turn the exhibit into 'testimony.'" Slip op. at 3. As such, the DCA ruled that the trial court did not abuse its discretion in allowing the jury to take the exhibit into the jury room. Id.

Petitioner claims that this decision is in direct and express conflict with Janson v. State, 730 So.2d 734 (Fla. 5th DCA 1999); Young v. State, 645 So.2d 965 (Fla. 1994); Avila v. State, 781 So.2d 413 (Fla. 4th DCA 2001); and Schoeppl v. Okolowitz, 133 So.2d 124 (Fla. 3d DCA 1961). None of these cases involve a transcript of admissions by the defendant, which had been admitted into evidence at trial, being sent back to the

jury room. Janson and Avila, for instance, involved a readback of trial testimony to the jury, not a written admission admitted into evidence. Young involved videotaped depositions that had not been admitted into evidence, and specifically distinguished videotaped confessions from the ruling. Young at 967. Schoeppl involved depositions which were not read into evidence. Schoeppl at 127.

The rules of law set forth in those cases were properly distinguished in the case at bar. An exhibit containing admissions is admissible; publishing the exhibit did not transform it into "testimony," and exhibits may be brought into the jury room. This conclusion does not conflict with any of the cases cited by Petitioner. Accordingly, this Court should decline to exercise jurisdiction.

ISSUE III

IS THE FIRST DISTRICT'S OPINION BELOW WITH RESPECT TO THE DUTY TO RETREAT INSTRUCTION IN EXPRESS AND DIRECT CONFLICT WITH THE VARIOUS DECISIONS OF THIS COURT AND THE DISTRICT COURTS OF APPEAL? (Restated)

Petitioner claimed below that by giving the standard "duty to retreat" instruction, as well as the specific instruction on the co-occupant non-duty to retreat from one's home, the trial court confused or misled the jury into thinking she had a duty to retreat from her home. The DCA ruled that the trial court

gave the general duty-to-retreat instruction "to frame the issue at the outset," and then explicitly instructed the jury that Petitioner was not required to retreat from her home, making clear that the garage (where the murder occurred) was part of the house. Slip op. at 4.

Petitioner claims that this decision is in direct and express conflict with Butler v. State, 493 So.2d 457 (Fla. 1986); Tinker v. State, 784 So.2d 1198 (Fla. 2d DCA 2001); McKenzie v. State, 830 So.2d 234 (Fla. 4th DCA 2002); and Kirkland-El v. State, 883 So.2d 383 (Fla. 4th DCA 2004). Petitioner cites Butler for nothing more than the rule that misleading and confusing instructions should not be given. With regard to the other cases, Petitioner does nothing except list them in her brief and contend that the decision below conflicts with them. The State will only respond that none of those cases involve the trial court giving the general duty-to-retreat instruction "to frame the issue at the outset," and then explicitly instructing the jury that the defendant was not required to retreat from the home. Accordingly, Petitioner has failed to show that the decision below directly and expressly conflicts with any of these decisions. For these reasons, this Court should decline to exercise its jurisdiction in this case.

In this issue, as well as the prior issues, Petitioner simply takes cases citing general rules of law that she believes were not followed in the case below, and labels the disagreement direct and express conflict. This tactic suggests that the decision below directly and expressly conflicts with every case she cited in her brief below to support her argument. When the correct standards for determining direct and express conflict are applied, they reveal that this Court should decline to exercise jurisdiction.

CONCLUSION

Based on the foregoing reason, 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 Shana Barnes, DOC# J16067, Homestead Correctional Institution, 19000 S.W. 377th Street, Florida City, Florida 33034-6409, by MAIL on September 14, 2006.

Respectfully submitted and served,

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

_____
ROBERT R. WHEELER
Tallahassee Bureau Chief,
Criminal Appeals
Florida Bar No. 0796409

_____
THOMAS D. WINOKUR
Assistant Attorney General
Florida Bar No. 906336

Attorneys for State of Florida
Office of the Attorney General
Pl-01, the Capitol
Tallahassee, Fl 32399-1050
(850) 414-3300
(850) 922-6674 (Fax)

CERTIFICATE OF COMPLIANCE

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

_____
Thomas D. Winokur
Attorney for State of Florida

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APPENDIX

Barnes v. State, Case No. 1D04-5450, March 3, 2006