

IN THE SUPREME COURT OF FLORIDA

CASE NO.
Lower Tribunal No. 3D04-2348

THE STATE OF FLORIDA,

Petitioner,

vs.

DAVID DWAYNE BROWN,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF PETITIONER ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

David Dwayne Brown was convicted of two counts of first degree felony murder, one count of attempted first degree felony murder, one count of possession of a firearm by a violent career criminal and one count of use of a firearm in the commission of a felony. (Petitioner's Appendix p. 2). With respect to the murder and attempted murder charges, the court instructed the jury, in part, as follows:

. . . As to Count one, first Eric Williams is dead. Second, the death was caused by the criminal act of the defendant or another person acting as a principal.

As to Count 2, Edward Leon Bernard is dead. Second, the death was caused by the criminal act of the defendant or another person acting as a principal.

. . .

Before you can find the defendant guilty of attempted first degree murder premeditated murder the state must prove the following three elements beyond a reasonable doubt.

First, the defendant or another person acting as a principal did some act intended to cause the death of Lawrence Wade

Second, defendant or another person acting as a principal acted with a premeditated design to kill Lawrence Wade.

(Pet. App. 5).

As to count 2 (murder of Edward Bernard) and count 3 (attempted murder of Lawrence Wade), the court found the above instructions to constitute fundamental

error. (Pet. App. pp. 6-7). As to count 1 (murder of Eric Williams), the lower court found that the instructions were erroneous but not fundamental error. Id.

For those charges for which the lower court found the instructions to be fundamental error, the court relied on cases which have held that the inclusion of the “and/or” conjunction between the names of defendants in jury instruction results in fundamental error because it creates a situation in which the jury may have convicted the defendant based solely upon a finding that codefendant’s conduct satisfied an element of the offenses.” (Pet. App. p. 6). The lower court refused to find the error fundamental as to the murder of Eric Williams because the lower court’s review of the evidence compelled the lower court to conclude that the error could not have contributed to the verdict of the jury. (Pet. App. pp. 6-7).

Thus, the lower court affirmed the conviction as to count one and reversed for a new trial as to counts two and three.

SUMMARY OF ARGUMENT

The decision of the lower court expressly and directly conflicts with the decision of the Fourth District Court of Appeal, in Garzon v. State, 939 So.2 d 278 (Fla. 4th DCA 2006). The issue addressed in both cases is whether the use of the term “or” between the names of codefendants, when instructing the jury on the elements of the offense, constitutes fundamental error when the jury is also instructed on the law of principals.

ARGUMENT

THE DECISION OF THE LOWER COURT EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF ANOTHER DISTRICT COURT OF APPEAL.

The decision of the lower court expressly and directly conflicts with the decision of the Fourth District Court of Appeal in Garzon v. State, 939 So. 2d 278 (Fla. 4th DCA 2006). In Garzon, the court held that the use of the conjunction “and/or” between the names of the codefendants did not constitute fundamental error when the jury was instructed on the law of principals. As noted in Garzon, “If the law of principals applies to a defendant’s conduct, that defendant can properly be convicted for a codefendant’s criminal acts.” 939 So. 2d at 284.

In the instant case, the instructions quoted in the lower court’s opinion reflect that the jury was instructed that it could find the defendant guilty if the criminal acts were caused by the defendant or another person acting as a principal. As in Garzon, while the instruction permitted the jury to convict the defendant based on the acts of another person, the jury was able to do so in conjunction with instructions regarding the law of principals; otherwise the acts had to have been found to be committed by the defendant Brown. Just as the instruction on the law of principals precluded the existence of any fundamental error in Garzon, linking

the instruction in the instant case to the law of principals should have had the same effect.

Garzon is currently pending in this Court, SC06-2235, and jurisdiction has been accepted, briefs on the merits have been filed, and oral argument was heard on October 9, 2007.

The Third District's decision below reversed on the authority of Cabrera v. State, 890 So. 2d 506 (Fla. 2d DCA 2005), inter alia. The Fourth District, in Garzon, certified that Garzon was in conflict with Cabrera. 939 So. 2d at 287. Thus, this Court currently has accepted for review Garzon, which certified conflict with Cabrera, and the Third District's opinion relied on Cabrera, which conflicts with Garzon.

Thus, the issue of whether the disjunctive "or", when used between the names of codefendants, constitutes fundamental error when combined with instructions on the law of principals, is an issue which is currently before this Court; the lower court's decision conflicts with Garzon; and Garzon certified conflict with Cabrera, upon which the Third District herein expressly relied.

Accordingly, express and direct conflict exists between the lower court's decision and Garzon on the same issue of law.

CONCLUSION

Based on the foregoing, this Court should accept the instant case for review on the basis of the conflict with Garzon and stay further review in this Court pending disposition of Garzon.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Petitioner on Jurisdiction was mailed this ___ day of December, 2007 to HOWARD K. BLUMBERG, Assistant Public Defender, Office of the Public Defender, 1320 N.W. 14th Street, Miami, Florida 33125.

RICHARD L. POLIN

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing brief has been typed in Times New Roman, 14-point type.

RICHARD L. POLIN