IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. SC07-

(LOWER CASE NO. 5D06-3988)

SAMUEL D. GRANBERRY,

Respondent.
_____/

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

JURISDICTIONAL BRIEF OF PETITIONER

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STATEMENT OF THE CASE AND FACTS

The relevant facts of this case are not generally in dispute. It is noted in the opinion below that Respondent Granberry was charged with second degree murder and carrying a concealed firearm. The appellate court also found that Granberry presented sufficient evidence of self-defense to reach a jury on that issue. Defense counsel requested a jury instruction on the justifiable use of deadly force and said instruction was given to the jury.

The trial court also gave the self-defense instruction which included the forcible felony exception to self-defense, as follows:

> ...[H]owever, the use of force likely to cause death or great bodily harm is not justifiable if you find: the defendant was attempting to commit, committing or escaping after the commission of a forcible felony; or the defendant initially provoked the use of force against the defendant,...

There was no objection to this instruction. On appeal, the district court reversed the conviction solely on the basis of established precedent. "As the concurring opinion points out, we are bound by our prior precedent and must follow it." (See slip opinion at page 3) The court held that where a defendant is charged with a single forcible felony for which he or she claims self-defense, it is fundamental error to instruct the jury on the

forcible felony exception to self-defense because to do so involves circular reasoning and essentially negates the defense.

The district court certified conflict with Martinez v. State, 933 So.2d 1155 (Fla. 3d DCA 2006), review granted, 959 So.2d 717 (Fla. 2007), which concluded there was no fundamental error in instructing the jury on the forcible felony exception when self-defense was asserted and where there was only one forcible felony charged. The Court heard oral argument in Martinez this week.

Judge Lawson concurred specially and opined that the forcible felony exception instruction was properly given and was not fundamental error. He suggested a refinement of the language of the instruction and concluded that the reversal of the case was a miscarriage of justice. The State petitions this Court to resolve the certified conflict in district court opinions.

SUMMARY OF ARGUMENT

In reversing the trial court for giving the forcible felony exception instruction, the district court certified conflict with a case which is presently pending review in this Court. This Court therefore has jurisdiction of the present case as well. In addition, the decision of the district court concerns an issue which is pending resolution by this Court in numerous cases.

The questioned instruction is simple; there are no reported jury questions regarding the import of said instruction in any of the various pending cases. Moreover, the ruling below also conflicts with decisions of this Court which hold that jury instruction error is never fundamental when it applies to an affirmative defense.

This Court should accept jurisdiction in this cause to resolve the conflicts.

ARGUMENT

THE OPINION OF THE DISTRICT COURT EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF THIS COURT AND ANOTHER DISTRICT COURT.

This Court has jurisdiction under article V, section (3)(b)(3) of the Florida Constitution where a decision of a district court "expressly and directly conflicts" with a decision of this Court or another district court. This Court has repeatedly held that such conflict must be express and direct, that is, "it must appear within the four corners of the majority decision." Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986).

Initially, the State submits that this Court should accept jurisdiction based upon the district court's certification of conflict with another district court opinion. See Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv) and (vi). Moreover, the case with which the decision conflicts, Martinez v. State, 933 So.2d 1155 (Fla. 3d DCA), review granted, 959 So.2d 717 (Fla. 2007) is currently pending in this Court. This exact question has been certified at least three other times by the Fifth District Court of Appeal. See Zinnerman v. State, 942 So.2d 932 (Fla. 5th DCA 2006); Slattery v. State, 32 Fla. L. Weekly D305 (Fla. 5th DCA 2006); and Sloss v. State, 965 So.2d 1204 (Fla. 5th DCA 2007). Therefore, in the interest of judicial economy and uniformity this Court should accept jurisdiction.

Secondly, in Sochor v. State, 619 So. 2d 285 (Fla.), cert. denied, 510 U.S. 1025 (1993), this Court addressed the proper application of the fundamental error doctrine to claims of error involving jury instructions. There, this Court held as follows:

> Failure to give an instruction unnecessary to prove an essential element of the crime charged is not fundamental error. ... **Because the complained of instruction went to [the defendant's] defense and not to an essential element of the crime charged, an objection was necessary to preserve this issue on appeal**.

Id. at 290 (emphasis added). Because the defendant's claim of error involved the instruction on the *affirmative defense* of voluntary intoxication, the error was not fundamental. Id.

Similar reasoning was used by this Court in other cases addressing erroneous jury instructions on the affirmative defenses of entrapment and insanity – in each case, this Court concluded that an objection was required to preserve such an issue for appeal. See Holiday v. State, 753 So. 2d 1264, 1269 (Fla. 2000); Smith v. State, 521 So. 2d 106 (Fla. 1988). Indeed, this Court has consistently held that fundamental error is demonstrated only where the jury instruction relates to a *disputed element* of the charged offense. Battle v. State, 911 So. 2d 85, 88-89 (Fla. 2005), cert. denied, 126 S.Ct. 1069 (2006); Cardenas v. State, 867 So. 2d 384, 392-93 (Fla. 2004); Reed v. State, 837 So. 2d 366, 369 (Fla. 2002).

In direct opposition to this line of cases is the district court's holding in the instant case. Here, the district court addressed an allegedly erroneous instruction on the affirmative defense of self-defense. Recognizing that this alleged error was not preserved in the trial court, the district court found this instruction to constitute fundamental error. Such a holding directly conflicts with the holding of this Court in Sochor, as well as the other cases addressing fundamental error in this context.

The Respondent may contend that these cases are distinguishable because they do not specifically address a claim of self-defense. The Petitioner submits that this is a distinction without a difference. This Court has clearly stated that a jury instruction is fundamentally erroneous only when it relates to a *disputed element* of the offense charged, and has further repeatedly held that a claim of error involving an affirmative defense must be preserved in the trial court. If self-defense somehow warrants treatment as an exception to this general rule of law, then such an exception should come from this Court.

Practical necessity and basic fairness in the operation of the judicial system necessitate a requirement that claims of error be raised for the first time at trial, where any error can be corrected at an early stage of the proceedings. City of Orlando v. Birmingham, 539 So. 2d 1133, 1134-35 (Fla. 1989).

Accordingly, this Court has carefully limited the application of the fundamental error doctrine, especially in cases involving jury instructions, where any alleged problems can be easily remedied if brought to the attention of the trial judge.

The district court's decision ignores this limitation and dramatically expands the reach of fundamental error.[1] As noted by Judge Lawson in his concurring opinion, this case revolved around the existence of *facts* to support Granberry's self-defense claim, instead of whether self-defense was negated by jury instruction. The closing arguments, in their entirety, discuss the facts *vis a vis* Granberry's claim of self-defense. The existence of the "self-defense" defense was not in issue. The holding that an allegedly erroneous instruction on an affirmative defense constitutes fundamental error expressly and directly conflicts with numerous cases decided by this Court, as cited above. Accordingly, this Court should exercise its discretion to consider whether such an exception to its earlier precedent is warranted based on the nature of the error alleged.

[1]Because a defendant is entitled to an instruction on an affirmative defense where even a scintilla of evidence is introduced in support of that defense, expanding the fundamental error doctrine to such defenses has the potential to result in numerous reversals in cases where the defense is questionable at best and blatantly absurd at worst.

CONCLUSION

Based on the arguments and authorities presented herein, the Petitioner respectfully requests this honorable Court accept jurisdiction of this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above Jurisdictional Brief has been furnished by U.S. mail to Henry T. Swan, III, counsel for Respondent, 444 Seabreeze Boulevard, Suite 210, Daytona Beach, Florida 32118, this _____ day of December, 2007.

CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that this brief was typed using 12 point Courier New, a font that is not proportionately spaced.

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