

IN THE SUPREME COURT OF FLORIDA

ERIC CHRISTOPHER CALDWELL,

PETITIONER,

V.

CASE NO. SC08-1519

L.T. NO. 2D07-565

STATE OF FLORIDA,

RESPONDENT.

RESPONDENT'S JURISDICTIONAL BRIEF
ON REVIEW FROM THE SECOND
DISTRICT COURT OF APPEAL
STATE OF FLORIDA

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PRELIMINARY STATEMENT

Respondent acknowledges that pursuant to Fla. R. App. P. 9.120(d), no jurisdictional brief is required when a matter has been certified as conflict by a District Court under 9.030(a)(2)(A)(vi). However, as Petitioner has set forth argument as to the certification of the Second District Court of Appeal, Respondent has set forth's its response for the benefit of this Honorable Court.

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's rendition of the Statement of Case and Facts for the purpose of jurisdictional briefing with the following corrections, additions and/or clarifications:

When the arresting officer, Thaddeus S. Crisco, Jr., encountered the Petitioner on May 28, 2006, he had already viewed the closed circuit video tapes at the Vinoy which depicted the car burglaries. (V. I; R. 76-77) Although the images on the video tape were admittedly of poor quality, Officer Crisco was able to view "a white male wearing dark clothing and a backwards baseball cap," that the individual was wearing a short-sleeved dark colored shirt and dark colored long pants, as well as the general build of the person appearing on the video. (V. I; R. 77-78)

Upon seeing the Appellant the very next day only a few blocks away from the scene of the burglaries, Officer Crisco was struck by the similarities between what he had viewed on the Vinroy's videotape and the Petitioner, including his clothing and general build. (V. I; R. 78) Officer Crisco's contact with the Petitioner was in the nature of a consensual encounter and remained, throughout the contact, strictly voluntary. (V. I; R. 78)

Officer Crisco testified that he did not have any basis to detain the Petitioner and that he was free to go at any time, even after the Miranda warnings were read to him. (V. I; R. 79) After the Miranda warnings were read to the Petitioner, he was directly told by Officer Crisco that he was not under arrest. (V. I; R. 79, 89-90)

The Petitioner requested to view the videotape at the Vinoy. (V. I; R. 80, 85-86, 91) Officer Crisco offered Petitioner a ride to the Vinoy to view the videotape, Petitioner accepted. In order to take the Petitioner to the Vinoy to view the videotape, it was necessary to place him in the back of the patrol car. For purposes of officer safety Officer Crisco conducted a routine, non-intrusive pat down of the Petitioner's outer clothing before allowing him to ride in the patrol car to the Vinoy. Officer Crisco advised the Petitioner that he would need to be frisked

before riding in the patrol car, Petitioner did not object and voluntarily submitted to the frisk. Petitioner was not restrained in any manner during the encounter. Petitioner was free to leave at any time, before, during or after the pat down, even during the transport to the Vinoy. (V. I; R. 80-81, 85-86, 102-103)

SUMMARY OF THE ARGUMENT

Petitioner argues that pursuant to Art. V, §3(b)(3), Fla. Const., this Court may exercise its discretionary jurisdiction to review the instant issue as considered by the Second District Court of Appeal below as certified conflict; Fla. R. App. P. 9.030(a)(2)(A)(vi) and as being in direct and express conflict with other District Court opinions; Fla. R. App. P. 9.030(a)(2)(A)(iv). Respondent, however, submits the Second District's opinion in Caldwell v. State, 985 So.2d 602 (Fla. 2d DCA 2008), is factually distinguishable and does not expressly or directly conflict with the Fourth District's opinion in Raysor v. State, 795 So.2d 1071 (Fla. 4th DCA 2001), the Third District's opinion in Hidalgo v. State, 959 So.2d 353 (Fla. 3d DCA 2007), or the Second District's opinion in D.L.J. v. State, 932 So.2d 1133 (Fla. 2d DCA 2007). Respondent further argues that the Second District Court of Appeal did not have a proper

legal basis upon which to certify conflict with Raysor. Accordingly, Respondent respectfully requests this Court deny review of the instant case.

ARGUMENT

WHETHER THE SECOND DISTRICT'S OPINION IN CALDWELL v. STATE, 985 So.2d 602 (Fla. 2d DCA 2008), AS CERTIFIED, DIRECTLY AND EXPRESSLY CONFLICTS WITH RAYSOR v. STATE, 795 So.2d 1071 (Fla. 4TH DCA 2001), AND WHETHER IT FURTHER CONFLICTS WITH THE DECISION OF THE THIRD DISTRICT COURT IN HIDALGO v. STATE, 959 So.2d 353 (Fla. 3d DCA 2007), AND/OR THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL IN D.L.J. v. STATE, 932 So.2d 1133 (Fla. 2d DCA 2007)?

Pursuant to Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv), this Court is permitted to exercise its discretionary review of decisions of district courts of appeals that expressly and directly conflict with a decision of this Court or another district on the same question of law. Although the Second District Court of Appeal certified conflict with Raysor v. State, 795 So.2d 1071 (Fla. 4th DCA 2001), the facts of this case are significantly distinguishable from those presented for consideration in Raysor and do not present the requisite conflict to permit review by this Honorable Court. See also: Fla. R. App. P. 9.030(a)(2)(A)(iii).

This Court should decline to entertain jurisdiction because, based upon the facts presented below, the Second District's opinion in Caldwell v. State, 985 So.2d 602 (Fla. 2d DCA 2008) does not directly conflict with the Fourth District's holding in Raysor, nor does it expressly and directly conflict with the Second District's decision in D.L.J. v. State, 932 So.2d 1133 (Fla. 2d DCA 2007) or with the Third District's decision in Hidalgo v. State, 959 So.2d 353 (Fla. 3d DCA 2007).

The decision in Caldwell is distinguishable from Raysor in a number of ways. First, Officer Crisco engaged Petitioner in conversation and advised him about the burglaries at the Vinoy, the videotape and his belief that Petitioner was the person depicted in that videotape. In Raysor the officer waived at a citizen bicycling down a public street, there was no pending crime which was being investigated nor did anything suspicious draw the officer's attention to him, but, immediately upon observing the bicyclist's hands close-up the officer suspected that a crime might exist; i.e., that the bicyclist used crack cocaine and, therefore, could be in possession of an illegal substance, the officer then read him the Miranda warning. The purpose of this was to begin a criminal

investigation based solely upon the officer's observation of callouses on the person's hands, and no more.

Second, in Raysor, unlike the facts here, the Petitioner was explicitly told that he was not under arrest after he was read the Miranda warnings. When viewing the totality of the circumstances in determining whether a particular individual is "in custody," it is paramount to assess the individual's reasonable perception of the situation. In the case below the **Petitioner was expressly told he was not under arrest**, this coming directly **after** the Miranda warnings were given to him. In fact, it was the reading of the Miranda warnings that prompted the Petitioner to ask Officer Crisco why he was under arrest. At that point, upon being told that he was not under arrest, there was no reasonable basis for Petitioner to believe that he was not free to leave. In direct contrast, the Raysor court found that ". . . the officer's language, i.e., the giving of the Miranda warnings, gave the unmistakable message that the appellant was in custody." 795 So.2d at 1072.

Finally, the Raysor court viewed Miranda warnings as only being **required** when a person was taken into custody, not distinguishing which comes first custody or warnings. However, in the case below the Second District specifically

viewed the giving of the Miranda warning, not as a trigger for custody when there was no basis to find that custody previously existed; rather, it was viewed as a heightened protection for the citizen, putting him on notice that what he was about to say could have legal implications beyond that of a mere conversation. This extended citizen protection directed toward an individual's Fifth Amendment right against self-incrimination does not serve to transform an otherwise consensual encounter into custody for purposes of the Fourth Amendment.

As with the facts in Raysor, the facts found in both Hildago and D.L.J. are readily distinguished from those presented below; thus, do not provide a basis for conflict review by this Honorable Court.

In Hildago police, articulating only a generalized officer safety concern, patted down the defendant when they encountered him on the street with another individual known by the officers to be a burglar. When the defendant complied with the directions of the officers, he pulled a pawn receipt from his pocket while searching for identification. This pawn receipt was taken from the defendant even though there was no legal basis to argue that the receipt presented an officer safety concern. In the case below Officer Crisco only requested to conduct a

pat-down of the Petitioner in anticipation of placing him in the patrol car to take him to the Vinoy to view the videotape. The search was voluntary and occasioned by the Petitioner's desire to view the videotape. Officer Crisco did not have the Petitioner turn out his pockets or take anything from him. This is a significant distinction given the circumstances: Officer Crisco was about to place the Petitioner in his patrol car, in the backseat directly behind him, while he drove the Petitioner, at his request, to the Vinoy to view the videotape. This raised an express, well-articulated concern for Officer Crisco's safety. Importantly, this concern was prompted by the Petitioner's request to view the videotape and accepting a ride in the patrol car to travel to the Vinoy.

Officer Crisco did not place Petitioner in the position of submitting to a pat-down; rather, the Petitioner placed himself in that position. Petitioner had it within his power at all times during the encounter to decline the pat-down and leave the area, he knew he was not under arrest and that he was voluntarily going to look at the videotape. Officer Crisco was not presented with an amorphous, generalized concern for officer safety, he was presented with a palpable, direct concern for his safety if he placed an individual behind him in his patrol car

without knowing if that individual was armed and would thus pose a direct threat to his safety during the ride to the Vinoy.

Lastly, the facts in the present case are distinguishable from those presented for review in D.L.J., thus, the Second District's opinion does not provide the requisite conflict to establish jurisdiction. In D.L.J. the officers were responding to report of rock throwing at a vacant house, without more, the officers went to the address and upon arriving at the address they saw two juveniles running from the back of the house. Some of the officers gave chase while other officers approached the juveniles who had not run. Without more, one of the officers patted down the defendant who was among those juveniles who had not run from the house. At that point the officers were not certain that a crime had been committed, the defendant had not raised reasonable suspicion by fleeing; rather, he had remained and spoke with the officers. At the suppression hearing the officer who conducted the pat-down search did not testify, the record in that case did not support the speculation that officers had a basis to believe that the juvenile was armed. Contrary to those facts, the court below in this case was presented with direct testimony from Officer

Crisco explaining that Petitioner was voluntarily riding in his patrol car, this would place him directly behind the officer while he was driving to the Vinoy. This goes beyond those types of "searches performed routinely" for officer safety which have been condemned as constitutionally impermissible.

Given the foregoing, Respondent respectfully argues that this Honorable Court lacks jurisdiction to hear this matter since there is no direct, express conflict between the District Courts' rulings. Alternatively, should this Honorable Court determine that conflict exists, given the circumstances of the ruling below and the narrow facts upon which it is predicated, this would not be the type of case that would have wide-spread application and does not warrant review under this Court's discretionary jurisdiction.

CONCLUSION

Respondent respectfully requests that this Honorable Court decline to exercise its jurisdiction in this case.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Frank W. McDermott and J. Andrew Crawford, Attorneys for Petitioner, McDermott Law Firm, P.A., 7116-A Gulf Blvd., St. Pete Beach, Florida 33706, on this 28th day of September 2008.

CERTIFICATE OF FONT 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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