

IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. SC08-1316

RICKY WEAVER,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

RESPONDENT'S BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

Petitioner was the defendant and Respondent was the prosecution in the Criminal Division of the Circuit Court of the Nineteenth Judicial Circuit, in and for Martin County, Florida. Petitioner was the Appellant and Respondent was the Appellee in the Fourth District Court of Appeal ("Fourth District"). In this brief, the parties shall be referred to as they appear before this Honorable Court.

STATEMENT OF THE CASE AND FACTS

The facts appear in the opinion of the Fourth District. Weaver v. State, 981 So. 2d 508 (Fla. 4th DCA 2008). The Respondent respectfully submits that the Petitioner's "Statement of the Case and Facts" is both argumentative and goes beyond the facts as set forth in the opinion of the District Court. "The only facts relevant to our decision to accept or reject [conflict] petitions are those facts contained within the four corners of the decisions allegedly in conflict." Reaves v. State, 485 So. 2d 829, 830 FN3 (Fla. 1986).

The Petitioner was convicted of scheme to defraud less than \$20,000, in violation of section 817.034(4)(a)3, Florida Statutes (2007). 981 So. 2d at 508.

Weaver operated a paralegal business. He promised clients that he would complete legal work within a short time, usually less than ten days. At the time he made these promises

and took the client's money, he did not intend to perform within such a time frame. To most of the clients, the time for performance was an important part of the contract. Weaver developed an elaborate set of fake excuses for his assistant to tell clients when he failed to timely produce the legal work. Even while he was not performing as promised for existing clients, Weaver continued to make the same bogus promises to prospective clients to get them to enter into contracts and pay him money. Most of the clients who testified at trial said that they never heard or received legal work from Weaver after they paid him. Weaver performed on some contracts, but he did so well beyond the promised time frame.

Weaver defended on the theory that he ran a legitimate business, that he had merely fallen behind in his work, and that the case was proper for the civil court system, but was not a criminal matter. Weaver pointed to the written contracts signed by the clients, which provided that there was no guarantee on how quickly the business would produce legal documents. In an instant message to his secretary, Weaver was confident that his business practices were not criminal: "If you call the cops on a business, it's a civil matter. It's not a criminal matter. They don't deal with that and neither does the State Attorney."

Id. at 508-509.

The Petitioner argued that the trial court erroneously denied his motion for judgment of acquittal because the state failed to prove that he acted with criminal intent. Id. at 509. However, this argument was rejected by the Fourth District. The Court found that the Petitioner's operation of a business did not insulate him from criminal liability since the Petitioner's "business practices cross[ed] the line that converted[ed] them from legal to illegal

activities." Id., quoting, Kipping v. State, 702 So. 2d 578, 581 (Fla. 2d DCA 1997).

The Fourth District then reviewed several subsections of section 817.034 (Florida Communications Fraud Act), as well as this Court's decision in Pizzo v. State, 945 So. 2d 1203 (Fla. 2006), and concluded, in this case, that:

. . . Weaver, at the very least, temporarily deprived the victims of the use of their money by falsely representing that he would perform his side of the contract within a specific time. The evidence supports the view that when he made the promises, he had no intention of performing them, so that he "willful[ly] misrepresented a future act" within the meaning of section 817.034(3)(d). This interpretation of the statute is consistent with the tort of fraudulent misrepresentation, which may be based "upon a promise of future action" where the promise "is made with no intention of performing." . . . It is also consistent with theft by "false pretenses" under section 812.012(3)(d)1, Florida Statutes (2007); "[a] promise to do something in the future" will support a conviction for false pretenses if there is "evidence that the defendant knew at the time this promise was made that it would not be honored." . . .

981 So. 2d at 509-510 (internal citations omitted).

The Fourth District concluded that the state's evidence in this case established a violation of section 817.034(4)(a)3, and affirmed the conviction. Id. at 508, 510

SUMMARY OF THE ARGUMENT

This Court should decline jurisdiction. The decision of the Fourth District does not expressly and directly conflict with the decisions of other district courts or with this Court on the same question of law. The decisions which the Petitioner claim are in conflict with the instant decision are all clearly distinguishable, involve materially different facts, or are entirely inapplicable. Therefore, jurisdiction should be declined.

ARGUMENT

THIS COURT SHOULD DECLINE JURISDICTION IN THE INSTANT CASE; THE DECISION OF THE FOURTH DISTRICT DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH A DECISION OF ANOTHER DISTRICT COURT OF APPEAL OR OF THE SUPREME COURT ON THE SAME QUESTION OF LAW (RESTATED)

The Petitioner has invoked the discretionary jurisdiction of this Court pursuant to Rule 9.030(a)(2)(A)(iv), Fla. R. App. P, and Article V, Section 3(b)(3), Constitution of the State of Florida. He asserts that the decision of the Fourth District is in express and direct conflict with the decision of the Third District in Benitez v. State, 852 So. 2d 386 (Fla. 3d DCA 2003), the decision of the First District in Redding v. State, 666 So. 2d 921 (Fla. 1st DCA 1995), and the decision of this Court in Indemnity Insurance Company of North America v. American Aviation, Inc., 891 So. 2d 532 (Fla. 2004). However, the instant decision is not in conflict with any of these decisions on the same question of law.

In Benitez, the Third District reversed the defendant's

conviction for grand theft because the state failed to prove felonious intent. Id. at 387-389. In that case, Benitez claimed that he never intended to deprive the victims of their money and that he was a legitimate businessman who ran into numerous unforeseen problems with the construction project which he was hired to complete. Id. at 388. The Court found that the evidence was legally insufficient to show that Benitez had an intent to steal, and that the evidence was not inconsistent with his reasonable hypothesis of innocence. Id. at 389.

Although the Petitioner makes a similar argument - - that he was a legitimate businessperson who had simply fallen behind in his work - - the Benitez decision is clearly distinguishable. In that case, the defendant, a contractor, was paid for a renovation project which he did not complete as agreed; however, "[w]hile serious questions exist regarding the adequacy of Benitez's performance, that is, whether his work was worth what he had been paid to perform it, there is no question that he performed work mandated by the contract (demolition work was performed and an in-ground swimming pool was installed), behavior that further demonstrates lack of criminal intent." Id.

In the instant case, the petitioner made false representations to clients that work would be completed by a certain date, and at the time the promises were made, the Petitioner did not intend to perform the work in that time frame. Weaver, 981 So. 2d at 508-509.

No such misrepresentations were made in Benitez: "He did not . . . misrepresent his qualifications to perform the agreed upon construction work which formed the basis of the theft charge." Id. at 389. Moreover, it was clear that the Petitioner had no intention of performing the work which was promised. Weaver, 981 So. 2d at 509. This was not the case in Benitez. Id. at 389. Therefore, the two decisions are completely distinguishable.

In Redding v. State, 666 So. 2d 921 (Fla. 1st DCA 1995), the First District reversed the defendant's convictions for grand theft and perjury "which arose following Redding's unsatisfactory performance under a contract in which he agreed to construct mini-storage warehouses." Id. at 291. The Court held that "the state's evidence failed to establish specific intent to commit theft, which is an essential element of the crime." Id. at 922. However, the opinion does not contain facts about the theft charge beyond those quoted above. As a consequence, it is unknown whether there is substantial factual similarity to the instant case. Therefore, since Redding does not announce a rule of law in conflict with the instant case, there is no basis for conflict jurisdiction. "Our jurisdiction cannot be invoked merely because we might disagree with the decision of the district court nor because we might have made a factual determination if we had been the trier of fact . . . our jurisdiction to review decisions of courts of appeal because of alleged conflict is invoked by (1) the announcement of a rule of

law which conflicts with a rule previously announced by this court or another district, or (2) the application of a rule of law to produce a different result in a case which involves substantially the same facts as a prior case." Mancini v. State, 312 So. 2d 732, 733 (Fla. 1975).

Likewise, the Benitez decision does not announce a rule of law in conflict with the instant decision. Furthermore, the Respondent has shown that Benitez is factually distinguishable from the instant decision. Therefore, the decision of the Fourth District in Weaver is not in conflict with the decision of the Third District in Benitez or with the decision of the First District in Redding.

Finally, this Court's decision in Indemnity Ins. Co. addresses the application of the "economic loss doctrine" to certain negligence actions, and is completely different from the instant case. It is readily apparent that there is no conflict between Indemnity Insurance Co. and the instant case.

Since there is no conflict between the instant decision and either Indemnity Insurance Co., Benitez, or Redding, this Court should decline review.

CONCLUSION

WHEREFORE, based on the foregoing arguments and the authorities cited therein, Respondent respectfully requests that this Court decline discretionary review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing "Respondent's Brief on Jurisdiction" has been furnished by mail on October 15, 2008, to Ricky Weaver, *Pro Se*, DC # 309019, Marion Correctional Institution, P.O. Box 158, Lowell, FL 32663-0158.

DANIEL P. HYNDMAN

CERTIFICATE OF TYPE SIZE AND STYLE

In accordance with Fla. R. App. P. 9.210, the undersigned hereby certifies that the instant brief has been prepared with 12 point Courier New Type.

DANIEL P. HYNDMAN