

In The Supreme Court of Florida

TYWAN D. STABLER,

Appellant,

v.

CASE NO. SC08-2006

STATE OF FLORIDA,

Appellee.

_____ /

ON APPEAL FROM THE FIRST DISTRICT COURT OF APPEAL
BASED ON CERTIFIED CONFLICT

JURISDICTIONAL BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

The facts, according to the First District's written opinion, are:

The front door of the apartment was open to public access and to a common area. Officers brought a police drug dog to the front door of the apartment and it alerted to drugs. Officers also took the dog to the front door of another apartment in the complex where it did not alert to drugs.

Based upon the information they had gathered during their surveillance of the apartment, officers prepared a probable cause affidavit and subsequently received a search warrant for the apartment.

Stabler v. State, - So.2d -, 33 Fla. L. Weekly D2291, 2008 WL 4361853,

*1 (Fla. 1st DCA September 26, 2008).

SUMMARY OF ARGUMENT

There is express and direct conflict between the First District's decision in *Stabler v. State*, - So.2d -, 33 Fla. L. Weekly D2291, 2008 WL 4361853 (Fla. 1st DCA September 26, 2008) and the Fourth District's decision in *Rabb v. State*, 920 So.2d 1175, 1179 (Fla. 4th DCA 2006), *review denied*, 933 So.2d 522 (Fla.2006), *cert. denied*, - U.S. -, 127 S.Ct. 665, 166 L.Ed.2d 513 (2006). The decisions are factually indistinguishable. In both cases, a narcotics dog, in a common area, sniffed the front door of a residence, and the dog's alert was then used to obtain a warrant. And the legal issue presented by both cases was the same. The legal issue was whether *Illinois v. Caballes*, 543 U.S. 405, 125 S.Ct. 834, 160 L.Ed.2d 842 (2005) or *Kyllo v. United States*, 533 U.S. 27, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001) governs a dog sniff of a residence. The First District held that *Caballes* controlled; whereas, the Fourth District held that *Kyllo* controlled. The First District certified conflict and the parties agree that this Court has conflict jurisdiction. Express and direct conflict exists. So, this Court has discretionary jurisdiction to review this case.

This Court should exercise its discretionary jurisdiction for two reasons. First, the searches and seizures provision of the Florida Constitution is interpreted in conformity with the Fourth Amendment of the United States Constitution, Art. I, § 12, Fla. Const, and this Court has a duty to enforce that provision. The Fourth District's decision is contrary to United States Supreme Court precedent. *Caballes*, not *Kyllo*, controls the dog sniff of a residence.

As the dissent in *Rabb* points out, the Fourth District was engaging in "freewheeling jurisprudence" regarding a Fourth Amendment issue. This is exactly what the state constitutional provision prohibits.

Secondly, this is an important matter to law enforcement throughout the state. Canine units are widespread law enforcement tools and canine officers need to know whether they may use their dogs to sniff the outside of a house. Under the law as it stands, due to this conflict, canine officers in the other three district courts do not know if their conduct is legally authorized or not. Due to the importance of canine units to law enforcement, there should be consistency in the law regarding the use of canines. Additionally, Florida trial courts need guidance as to whether they should issue warrants to search a residence based on dog alerts. For these reasons, this Court should exercise its discretionary jurisdiction.

An express and direct conflict exists. This Court should exercise its discretionary jurisdiction and resolve the conflict.

ARGUMENT

ISSUE

WHETHER EXPRESS AND DIRECT CONFLICT EXISTS BETWEEN THE FIRST DISTRICT'S DECISION IN *STABLER V. STATE*, - So.2d -, 33 FLA. L. WEEKLY D2291, 2008 WL 4361853 (Fla. 1st DCA September 26, 2008) AND THE FOURTH DISTRICT'S DECISION IN *RABB V. STATE*, 920 So.2d 1175, 1179 (Fla. 4th DCA 2006), *REVIEW DENIED*, 933 So.2d 522 (Fla.2006), *CERT. DENIED*, - U.S. -, 127 S.Ct. 665, 166 L.Ed.2d 513 (2006)? (Restated)

The First District's decision in this case conflicts with the Fourth District's decision in *State v. Rabb*, 920 So. 2d 1175 (Fla. 4th DCA 2006). The decisions are factually indistinguishable. In both cases, a narcotics dog, in a common area, sniffed the front door of a residence. The legal issue presented by both cases was the same. The First District certified conflict and the parties agree that the two decision conflict. Express and direct conflict exists, giving this Court discretionary jurisdiction. This Court should exercise its discretionary jurisdiction for two reasons: (1) the Florida Constitution's conformity clause and (2) due to the importance of canine units to law enforcement, there should be consistency in the law regarding the use of canines. An express and direct conflict exists between these two decisions. This Court should exercise its discretionary jurisdiction and resolve the conflict.

The standard of review & other governing principles

Whether a direct and express conflict exists between decisions of the district courts of appeal is a pure question of law reviewed by this Court *de novo*. This Court does not defer to the district

court's determination that conflict exists. *Cf. In re Amendments to The Florida Rules of Appellate Procedure*, 941 So.2d 352, 353 (Fla. 2006)(concluding that jurisdictional briefing in cases of certified direct conflict would be beneficial to the Court and amending rule 9.120(d), Fla. R. App. P. to require jurisdictional briefs in conflict cases).

Additionally, the searches and seizures provision of the Florida Constitution is interpreted in conformity with the Fourth Amendment of the United States Constitution. Art. I, § 12, Fla. Const. (providing "[t]his right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court."); *Perez v. State*, 620 So.2d 1256, 1258 (Fla. 1993)(noting by reason of the 1982 amendment to article I, section 12 of the Florida Constitution, this Court is bound to follow the United States Supreme Court's interpretations of the Fourth Amendment and to provide no greater protection than those interpretations). In other words, the United States Supreme Court's Fourth Amendment precedent is binding precedent to Florida courts.

Jurisdiction

The jurisdiction of the Supreme Court provision, article V, section 3(b)(3) of Florida's constitution provides:

The supreme court:

* * *

May review any decision of a district court of appeal that expressly declares valid a state statute, or that expressly construes a provision of the state or federal constitution, or that expressly affects a class of constitutional or

state officers, or that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law.

For there to be express conflict, the majority opinions of the district courts must conflict, not the concurring opinions, not the dissenting opinions. *Reaves v. State*, 485 So.2d 829 (Fla. 1986)(concluding that conflict must be determined within the four corners of the district court's majority decision.). Conflict exists between the unanimous opinion of the First District and the majority opinion of the Fourth District. Furthermore, for there to be direct conflict, the majority opinions of the district courts must involve the same facts and decide the same legal issue. *Ortiz v. State*, 963 So.2d 226 (Fla. 2007)(discharging jurisdiction because "the alleged conflict decisions are factually distinguishable.").

There is express and direct conflict between the First District's decision in *Stabler* and the Fourth District's decision in *Rabb*. The two decisions are factually indistinguishable. *Department of Revenue v. Johnston*, 442 So.2d 950 (Fla. 1983)(discharging jurisdiction where the "conflict" decisions were distinguishable on their facts creating only apparent, not actual, conflict). In both cases, a narcotics dog, in a common area, alerted on the front door of a residence. Compare *Stabler v. State*, 2008 WL 4361853, 1 (Fla. 1st DCA 2008)(stating: "[o]fficers brought a police drug dog to the front door of the apartment and it alerted to drugs.") with *Rabb v. State*, 920 So.2d 1175, 1179 (Fla. 4th DCA 2006), review denied, 933 So.2d 522 (Fla.2006), cert. denied, - U.S. -, 127 S.Ct. 665, 166 L.Ed.2d 513 (2006)(quoting the affidavit in support of the search

warrant as stating: "Det. Taranu and his drug detector dog, 'Chevy' walked by the front of the residence. The drug detector dog walked from the public roadway in front of the residence, up to the front door and alerted."). The two cases involve the same set of facts.

And the same question of law was decided by both district courts. The legal issue presented by both cases was the same, *i.e.*, whether *Caballes* or *Kyllo* governs a dog sniff of a residence. The First District held that *Caballes* controlled; whereas, the Fourth District held that *Kyllo* controlled.

The Fourth District, in *Rabb*, concluded "that *Kyllo v. United States*, 533 U.S. 27, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001), controls the outcome of the case at bar." *Rabb*, 920 So.2d at 1182. The Fourth District stated: "we are bound to conclude that the use of a dog sniff to detect contraband inside a house does not pass constitutional muster. The dog sniff at the house in this case constitutes an illegal search." *Rabb*, 920 So.2d at 1184. The Fourth District also held "that the trial court did not err by granting Rabb's motion to suppress where the marijuana seized was discovered by a dog sniff at the exterior of his house." *Rabb*, 920 So.2d at 1188.

In contrast, the First District, in *Stabler*, found that "[c]onsidering that *Caballes* and *Place* represent the only two cases in which the Court has endeavored to address the dog sniff issue, the reasoning espoused therein is controlling and must guide this Court's ruling in the instant case." *Stabler*, 2008 WL 4361853 at * 2. The First District observed that the *Rabb* Court's "holding is contrary to United States Supreme Court precedent." *Stabler*, 2008 WL 4361853

at *3. The First District stated: "We disagree with the holding in *Rabb*." *Stabler*, 2008 WL 4361853 at *3. The First District found "that the appellant had neither a legitimate interest in possessing the cocaine, nor a legitimate expectation that the cocaine hidden in the apartment would not be revealed." *Stabler*, 2008 WL 4361853 at *5. The First District concluded "that the dog sniff at the front door of the apartment did not constitute a Fourth Amendment search because it did not violate a legitimate privacy interest." *Stabler*, 2008 WL 4361853 at *5. The First District held "the trial court did not err in denying the appellant's motion to suppress." *Stabler*, 2008 WL 4361853 at *5. The actual holdings and conclusions of law of the two district courts conflict with each other.

The First District certified conflict. And the parties agree that the two decisions conflict. Express and direct conflict exists.

Express and direct conflict invokes this Court's discretionary jurisdiction. *Sims v. State*, 2008 WL 4354880, 9 (Fla. September 25, 2008)(Cantero, J., dissenting)(explaining that express and direct conflict between the decision below and that of other district courts of appeal on the same issue invokes "our discretionary jurisdiction to review the case.")(emphasis in original). This Court should exercise that discretion for two reasons: (1) the Florida Constitution's conformity clause and (2) the importance of canine units to law enforcement.

This Court should exercise its discretionary jurisdiction to enforce the state constitution's conformity clause. The Fourth District's decision in *Rabb* is contrary to the United States Supreme

Court's decision in *Illinois v. Caballes*, 543 U.S. 405, 125 S.Ct. 834, 160 L.Ed.2d 842 (2005). In *Caballes*, the United States Supreme Court held that a dog sniff was not a search under the Fourth Amendment. As Judge Gross observed in his dissent, the Florida Constitution "prohibits this type of freewheeling jurisprudence" regarding a Fourth Amendment issue.

Secondly, this is an important matter to law enforcement throughout the state. Canine units are widespread law enforcement tools and canine officers need to know whether they may use their dogs to sniff the outside of a house. Under the law as it stands, to due this conflict, canine officers in the other three district courts do not know if their conduct is legally authorized or not. Additionally, Florida trial courts need guidance as to whether they should issue warrants to search a residence based on dog alerts. This Court should exercise its discretionary jurisdiction.

CONCLUSION

There is express and direct conflict between the First District's decision in *Stabler* and the Fourth District's decision in *Rabb*. This Court should exercise its discretionary jurisdiction and resolve the conflict.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Jurisdictional Brief has been furnished by U.S. Mail to David A. Davis, Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, this 28th day of October, 2008.

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In The Supreme Court of Florida

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APPENDIX

Copy of *Stabler v. State*, - So.2d -, 33 Fla. L. Weekly D2291,
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