

IN THE SUPREME COURT OF FLORIDA

ANICETO JAIMES,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

Case No. SC09-1694

ON APPEAL FROM THE CIRCUIT COURT
IN AND FOR HENDRY COUNTY
STATE OF FLORIDA

JURISDICTIONAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE AND FACTS

Respondent accepts the Statement of Case and Statement of Facts presented by Petitioner for purposes of this Petition.

SUMMARY OF THE ARGUMENT

Contrary to Petitioner's assertion (that the lower court cited and relied upon decisions with distinguishable facts), the lower court cited and relied upon only one decision to support its conclusion, fundamental error did not occur, under the facts of this case. The Second District, citing this Court's ruling in State v. Weaver, 957 So. 2d 586 (Fla. 2007), declined to find error. This Court should decline to exercise its discretionary review, because Petitioner has failed to direct this Court or Respondent to authorities, which directly and expressly conflict with the decision in the instant case.

ARGUMENT

THIS COURT SHOULD NOT GRANT DISCRETIONARY REVIEW WHERE PETITIONER HAS FAILED TO DEMONSTRATE EXPRESS AND DIRECT CONFLICT ON THE FACE OF THE LOWER COURT'S DECISION IN ANICETO JAIMES V. STATE OF FLORIDA, 34 FLA. L. WEEKLY D852, (FLA. 2D DCA., APRIL 29, 2009 (NO. 2D07-2482) .

The jurisdiction of this Court is limited to a narrow class of cases enumerated in the Florida Constitution. For example, this Court may review any decision of a district court of appeal that "expressly and directly conflicts with the decision of another district court of appeal, or with the Supreme Court on the same question of law." Fla. Const.Art.V, §3(b)(3). The issue of the Court's jurisdiction is a "threshold matter that must be addressed" before the Court can reach the merits of the issue. In Re Holder, 945 So. 2d 1130, 1134 Fla. 2006).

The rationale for limiting this Court's jurisdiction is the recognition that district courts "are courts primarily of final appellate jurisdiction and to allow such courts to become intermediate courts of appeal would result in a condition far more detrimental to the general welfare and the speedy and efficient administration of justice than that which the system was designed to remedy." Jenkins v. State, 385 So. 2d 1356, 1358 (Fla. 1980).

As this Court explained in The Florida Star v. B.J.F., 530 So. 2d 286, 288 (Fla. 1988), the state constitution creates two

separate concepts regarding this Court's discretionary review. The first concept is the broad general grant of subject-matter jurisdiction. The second more limited concept is a constitutional command as to how this Court may exercise its discretion in accepting jurisdiction. 530 So. 2d at 288.

In order for this Court to exercise its discretionary jurisdiction based on *express and direct* conflict, the conflict must appear on the face of the allegedly conflicting opinions. Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986). The standard is direct and express conflict; not misapplication of the law. See, Knowles v. State, 848 So. 2d 1055, 1059 (Fla. 2003)(Wells, J. dissenting)(neither the concept nor words "misapplication jurisdiction" appear in Article V, Sec. 3(b), Fla. Const.) In order for a misapplication of the law to provide review jurisdiction, the misapplication must result in direct and express conflict with the decision of another district or this Court.

First, Petitioner alleges the Second District's decision, which found fundamental error did not occur, directly conflicts with Reed v. State, 837 So. 2d 366 (Fla. 2002). Specifically, he maintains fundamental error occurred because the jury not only was improperly instructed on an offense, not charged in the information, but also received an improperly worded verdict form, which resulted in his conviction for an uncharged crime.

Petitioner, however, fails to advise Respondent or this Court, how the decision here conflicts with Reed, and Respondent asserts, no conflict exists. In Reed, this Court held, jury instructions are subject to the contemporaneous objection rule, and absent an objection at trial, any alleged error can be raised on appeal only if fundamental error has occurred. The Second District implicitly followed Reed, finding the failure of counsel to object to the erroneous jury instruction left the issue unpreserved. Also, the district court, citing State v. Weaver, 957 So. 2d 586 (Fla. 2007), found the error did not rise to the level of fundamental error.

Although Petitioner acknowledges this Court's ruling in State v. Weaver, 957 So. 2d 586 (Fla. 2007), which found, it is not fundamental error to instruct a jury on an alternate, uncharged theory, where the theory was not in dispute, or relied upon, he maintains Weaver is inapplicable to his case. He also asserts Weaver is in conflict with the Second District's ruling. Yet, the Second District cited Weaver, as the basis for its holding fundamental error did not occur. A careful review of Petitioner's argument suggests he is requesting review in this Court, based on misapplication of the law. Without direct and express conflict, review on such grounds is not permitted.

Secondly, in a conclusory manner, Petitioner argues the Second District's decision expressly and directly conflicts with

numerous decisions of this Court and other district courts. He cites a few decisions without identifying the holdings of each, or citing the basis on which conflict exists in these holdings with his own case. (*Emphasis added*) In Polyglycoat Corporation v. Hirsch, 442 So. 2d 958 (Fla. 4th DCA 1984), the district court stated:

It is the duty of counsel to prepare appellate briefs so as to acquaint the Court with the material facts, the points of law involved, and the legal arguments supporting the positions of the respective parties. See Re: *Estate of Barret*, 137 So. 2d 587 (Fla. 1st DCA 1962) and *Clonts v. Spurway*, 104 Fla. 340, 139 So. 896 (1932). When points, positions, facts and supporting authorities are omitted from the brief, a court is entitled to believe that such are waived, abandoned, or deemed by counsel to be unworthy.

Id. at 960. Respondent asserts Petitioner's conclusory assertion of conflict without such appearing within the four corners of the opinion leaves Petitioner unable to demonstrate this Court should exercise its discretionary power to review the instant decision, on the basis of conflict. This Court is to consider only the four corners of the opinion to determine if there is conflict, as Petitioner alleges. Reaves v. State, 485 So. 2d 829 (Fla. 1986). Petitioner presents no constitutionally recognized basis for this Court to accept review of the instant issue. Accordingly, there is no basis for this Court to exercise its discretionary jurisdiction.

CONCLUSION

Respondent respectfully requests that this Court deny jurisdiction.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Bruce P. Taylor, Assistant Public Defender, Office of the Public Defender, P.O. Box 9000 - Drawer PD, Bartow, Florida 33831 this 9th day of October, 2009.

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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