

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC09-2225
Lower Tribunal No. 3D08-2892

MICHAEL HERNANDEZ,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW
TO THE THIRD DISTRICT COURT OF APPEAL

BRIEF OF RESPONDENT ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

Michael Hernandez was indicted for first degree murder and attempted first degree murder in the Eleventh Judicial Circuit. The case was transferred to the Ninth Judicial Circuit, Orange County, for trial, due to pretrial publicity. (Pet. App. 2). Immediately after the trial, the case was transferred back to the Eleventh Judicial Circuit for post-trial matters and for sentencing. Id.

A notice of appeal, seeking review of the judgment and sentence, were filed in the Eleventh Judicial Circuit, with the appeal proceeding to the Third District Court of Appeal. Id. A motion to transfer appeal to the Fifth District Court of Appeal was filed in the Third District, on the basis of the trial having been held in the Ninth Judicial Circuit. Id.

Based upon its interpretation of Vasilinda v. Lozano, 631 So. 2d 1082 (Fla. 1994), the Third District held that venue for the appeal was properly with the Third District, and the motion to transfer venue was therefore denied. Id. at 2-3. The Third District quoted this Court's holding in Vasilinda, that it was generally accepted "that when venue is transferred to another jurisdiction and the case is **concluded in the new jurisdiction**, review of the final order or judgment is properly commenced in

the appellate court which has jurisdiction over the transferee court.'" Id. at 2.

Thus, since the case had been transferred back to Miami for post-trial motions and sentencing, the court did not conclude in the "new jurisdiction," but concluded in the original jurisdiction, the Eleventh Judicial Circuit, and the appeal should therefore proceed to the Third District Court of Appeal:

Applying these clear and unambiguous holdings to the instant case, we conclude that appellate jurisdiction lies with the Third District Court of Appeal. Although venue was transferred to Orange County due to pre-trial publicity, and venue rested with the Fifth District Court of Appeal during pendency of the trial to rule on any interlocutory motions or petitions entered in Orange County, once the case was transferred back to Miami-Dade County and the Clerk of the Court in Miami-Dade County received the court file, Orange County lost jurisdiction and appellate jurisdiction was transferred to the Third District. This finding is further supported by the fact that post-trial motions, the issuance of the judgment and sentence, and the notice of appeal all occurred in Miami-Dade County after Orange County transferred the case back to and the file was received by Miami-Dade County. Because venue was transferred back to Miami-Dade County and the case was concluded in Miami-Dade County, review of the judgment is properly before the Third District Court of Appeal.

(Pet. App. 3). The Third District certified conflict with decisions in Cole v. State, 280 So. 2d 44 (Fla. 4th DCA 1973) and Stanek-Cousins v. State, 896 So. 2d 865 (Fla. 5th DCA 2005).

SUMMARY OF ARGUMENT

Based on a conflict between the lower court and the Fifth District Court of Appeal, in Stanek-Cousins v. State, 896 So. 2d 865 (Fla. 5th DCA 2005), this Court does have discretion to review the decision of the lower court. However, the Third District's decision reflects that it applied this Court's decision in Vasilinda v. Lozano properly, and, as a result, this Court could therefore decline review of the instant case.

ARGUMENT

THIS COURT HAS DISCRETIONARY JURISDICTION
BASED UPON A CERTIFIED CONFLICT FROM THE
DISTRICT COURT OF APPEAL.

The State agrees that this Court has discretionary jurisdiction based upon the certified conflict between the lower court's decision and that of the Fifth District, in Stanek-Cousins v. State, 896 So. 2d 865 (Fla. 5th DCA 2005).

In Stanek-Cousins, the defendant was indicted in the Ninth Judicial Circuit, but venue for the trial was transferred to Palm Beach County. After a jury verdict, as in the instant case, the trial court transferred venue back to the original county, Osceola, for sentencing. After the notice of appeal was filed in Osceola County, the Fifth District Court of Appeal, quoting the holding from Vasilinda v. Lozano, 631 So. 2d 1082 (Fla. 1994), transferred the appeal to the Fourth District Court of Appeal. The appeal then proceeded in the Fourth District. Stanek-Cousins v. State, 912 So. 2d 43 (Fla. 4th DCA 2005).

While the State agrees that there is a conflict with the Fifth District's decision in Stanek-Cousins, the State does not agree that there is a conflict with Cole v. State, 280 So. 2d 44 (Fla. 4th DCA 1973). Cole was decided prior to this Court's decision in Vasilinda, and therefore, unlike the Third District below and the Fifth District in Stanek-Cousins, was not

determining venue for an appeal on the basis of this Court's subsequent holding. Furthermore, the Cole decision predated amendments to the Florida Rules of Judicial Administration. Rule 2.260(b), Fla.R.Jud.Admin., was drafted after Cole and provides that "[t]he presiding judge from the originating court shall accompany the change of venue case. . . ." Additionally, Rule 2.260(g), Fla.R.Jud.Admin. was added after Cole and provides that: "After the conclusion of the trial, the file shall be returned to the clerk in the county of origin." These rules therefore authorize the transfer of the case back to the original jurisdiction for sentencing. As they did not exist at the time of Cole, and as the decision in Vasilinda did not exist at the time of Cole, Cole should be treated as an irrelevancy, not the basis for any express and direct conflict.

Although there is a conflict between the lower court's opinion and the decision of the Fifth District, this Court has the discretion to decline review. The Third District clearly followed the dictate of Vasilinda and concluded that jurisdiction for the appeal went where the case concluded. As a result of the proper application of Vasilinda, this Court could exercise its discretion and decline review of the instant case.

CONCLUSION

While an express and direct conflict among district courts of appeal exists and this Court has discretion to accept the case for review, as the Third District followed the mandate of Vasilinda, this Court should decline further review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Respondent on Jurisdiction was mailed this ___ day of December, 2009, to MANUEL ALVAREZ, Assistant Public Defender, Office of the Public Defender, 1320 N.W. 14th Street, Miami, Florida 33125.

RICHARD L. POLIN

CERTIFICATE REGARDING FONT SIZE AND TYPE

The undersigned attorney hereby certifies that the foregoing Brief of Respondent on Jurisdiction has been typed in Courier New, 12-point type.

RICHARD L. POLIN