IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, Petitioner, v. ANTHONY LENARD HANKERSON, Respondent.	)	Case SC10- (Lower court case 4D08-3055)

ANSWER BRIEF AS TO JURISDICTION

(On Petition for Discretionary Review
From the Fourth District Court of Appeal)

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SUMMARY OF THE ARGUMENT

This Court does not have jurisdiction. Although petitioner says the decision below expressly and directly conflicts with *D.A.H. v. State*, 718 So.2d 195 (Fla. 2nd DCA 1998), *Knox v. State*, 689 So. 2d 1224 (Fla. 5th DCA 1997) , and *Dade County School Board v. Radio Station WQBA*, 731 So. 2d 638 (Fla. 1999) on the same question of law, it has failed to show a express and direct conflict as to those cases. Further, contrary to petitioner's argument, the lower court opinion was not "wrongly decided." This Court should dismiss this case for lack of jurisdiction.

ARGUMENT

THE DECISION BELOW DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH *D.A.H. v. STATE*, 718 So. 2d 195 (Fla. 2d DCA 1998), *KNOX v. STATE*, 689 So. 2d 1224 (Fla. 5th DCA 1997), AND *DADE COUNTY SCHOOL BOARD v. RADIO STATION WQBA*, 731 So. 2d 638 (Fla. 1999) ON THE SAME QUESTION OF LAW.

The lower court held that, regardless of whether they had a founded suspicion of criminal activity, the police did not have probable cause to search Hankerson. This decision does not expressly and directly conflict with petitioner's cases on the same question of law.

1. The decision does not expressly and directly conflict with *D.A.H. v. State*, 718 So. 2d 195 (Fla. 2d DCA 1998) on the same question of law.

Petitioner says (IBJ 4) the decision below expressly and directly conflicts with *D.A.H. v. State*, 718 So.2d 195 (Fla. 2nd DCA 1998). Petitioner has not identified the "question of law" that supposedly supports its claim of conflict jurisdiction. Instead, it

says the facts in *D.A.H.* are comparable to the facts at bar.

D.A.H. is so terse that it is hard to make much of it. Regardless, its facts are unlike the facts at bar.

At bar, Officer Lucas watched the house in question from an unmarked car and saw the following:

> Defendant arrived at the address late one afternoon and walked up to 3 or 4 people on the front porch. Defendant's contact with them was very brief. According to Lucas, defendant opened his hand and looked up and down the street. Lucas could not see what was in his hand. Each one of the porch people took something from his hand and handed him money. Defendant pocketed what he received from them and drove away.

Hankerson v. State, 32 So. 3d 175, 176 (Fla. 4th DCA 2010).

In *D.A.H.*, the officer saw D.A.H. make several sales of small packages to persons in vehicles (plural). Further, D.A.H. fled when he saw the officer. Thus, *D.A.H.* is unlike the case at bar because:

(1) The officer saw several transactions involving different vehicles in *D.A.H.* At bar, the officer saw only the one encounter between Hankerson and the persons on the porch.

(2) The officer saw "small packages" being exchanged for money in *D.A.H.* At bar, Lucas did not see what was exchanged for money.

(3) D.A.H. fled when he saw the officer. Such did not occur at bar.

The Fourth District found the facts at bar indistinguishable from those in *Coney v. State*, 820 So.2d 1012 (Fla. 2d DCA 2002). *Coney* specifically pointed out the differences between the facts of *D.A.H.* and a situation such as in the case at bar:

The State suggests that *D.A.H. v. State*, 718 So.2d 195 (Fla. 2d DCA 1998), and *Revels v. State*, 666 So.2d 213 (Fla. 2d DCA 1995), support the trial court's denial of the motion to suppress. In *D.A.H.*, the officer observed D.A.H. exchange ***small packages*** for money in several hand-to-hand transactions with persons in ***vehicles***. *D.A.H.*, 718 So.2d at 195. Additionally, D.A.H. ***fled when he saw the officer***. *Id*. In *Revels*, the officers were assigned to observe a house where the police had made numerous narcotics arrests. *Revels*, 666 So.2d at 214. The officers observed two separate hand-to-hand transactions in which a person sitting outside the house approached cars that pulled up to the curb. The officers saw money being exchanged for unidentified objects. Revels then approached the house on foot with money in his hand. He gave the money to the person and received an unidentified small object in exchange for the money. *Id*.

While we recognize that cases of this nature are often close, several factors are significant to our decision that the police officers did not have probable cause to search Coney: they did not see what was in Coney's hand when he reached into the car; they did not see what was in Coney's mouth before he spit out the object at the command of one of the officers; and they did not see Coney involved in more than one transaction.

Unlike the situations in D.A.H. and Revels, the officers here observed a single suspicious event. They did not see Coney pass drugs or other contraband to the person in the car. *See Burnette*, 658 So.2d at 1171; *Messer v. State*, 609 So.2d 164, 165 (Fla. 2d DCA 1992). Both officers admitted that before Coney spit out the marijuana, they did not have probable cause to arrest him. One officer felt that he had a basis to search Coney. The second officer stated that he had reasonable suspicion to stop and investigate Coney but not probable cause to search him. He suspected that Coney might be carrying a weapon because he thought Coney was selling drugs in an area where the police frequently "get" guns. However, the officer acknowledged that Coney did not do anything to make him believe Coney might be armed, and he did not do a pat-down until after Coney spit out the marijuana. While the officers saw money in Coney's hand after the transaction, and while they had a suspicion that a crime might have occurred, they did not have probable cause to effect Coney's arrest before Coney was ordered to empty his mouth. *Cf. Curtis*, 748 So.2d at 372; *Cummo*, 581 So.2d at 968.

Coney, 820 So.2d at 1014-15 (e.s.).

Thus, *D.A.H.* involved facts unlike *Coney* and the case at bar. Further, it does not expressly and directly conflict with the decision at bar as to the same question of law.

2. The decision does not expressly and directly conflict with *Knox v. State*, 689 So. 2d 1224 (Fla. 5th DCA 1997) on the same question of law.

Petitioner likewise claims (IBJ 5) an express and direct conflict with *Knox v. State*, 689 So. 2d 1224 (Fla. 5th DCA 1997) on the same question of law. In *Knox*, officers "***for two hours*** observed Knox approach vehicles that would pull up, lean into the vehicle and pass something to the occupants of the vehicle" in exchange for cash. *Id*. at 1225 (e.s.). At bar, by contrast, Officer Lucas saw only a single brief incident of suspicious behavior.

In comparing the case at bar to *Coney*, the Fourth District wrote:

> Similarly, in this case Lucas did not see what defendant exchanged for money. Schmidt did not see what was in his shoe. ***They did not see him similarly involved in more than one occasion***. These patterns on which they rely also occur in innocent public transactions and are not unique to narcotics violations. These patterns may be enough to inform a suspicion for further investigation-perhaps even enough for a Terry[FN 1] stop or a stop under the Florida Stop and Frisk Law [FN 2]-but they fall short of the requirements for probable cause. As in *Coney*, police did not have probable cause to search him without his consent. *See also Robinson v. State*, 976 So.2d 1229, 1233 (Fla. 2d DCA 2008) (mere suspicion person is carrying illegal drugs insufficient for probable cause).
>
> 1 *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).
>
> 2 § 901.151, Fla. Stat. (2009).

Hankerson, 32 So.3d at 177 (e.s.).

Thus, the facts of *Knox* are unlike the facts at bar. *Knox* does not expressly and directly conflict with the decision at bar as to the same question of law.

3. The decision does not expressly and directly conflict with *Dade County School Board v. Radio Station WQBA*, 731 So. 2d 638 (Fla. 1999) on the same question of law.

Petitioner says (IBJ 6) the decision directly and expressly conflicts with *Dade County School Board v. Radio Station WQBA*, 731 So. 2d 638 (Fla. 1999) and says that case held "that appellate courts are required to affirm the decision of a trial court, if the decision is legally correct, without regard to the arguments presented to the trial court." In fact, petitioner has misread *Dade County School Board*, and it does not expressly and directly conflict with the case at bar on the same question of law.

Dade County School Board involved issues of pleading and proof in a personal injury suit in which the school board and Three Kings were co-defendants. After the defendants settled with the plaintiffs, there was a trial to assess fault. The jury found the school board at fault and found Three Kings not at fault. Based on this finding, Three Kings claimed in a post-trial motion that the school board was liable to it for equitable subrogation. Three Kings had not raised this claim in the pleadings, and the judge denied it.

On appeal, the Third District held Three Kings could recover on its claim.

On discretionary review, this Court held that an appellate

court has discretion to rule on an issue not timely plead in the lower court.[1]

This Court noted: "Generally, if a claim is not raised in the trial court, it ***will not*** be considered on appeal." *Dade County School Board*, 731 So.2d at 644 (e.s.). To allow a losing party "to amend his initial pleading to assert matters not previously raised renders a mockery of the 'finality' concept in our system of justice." *Id*. Nonetheless: "***In some circumstances***, even though a trial court's ruling is based on improper reasoning, the ruling will be upheld if there is any theory or principle of law in the record which would support the ruling." *Id*. at 644 (e.s.). Under this exception to the general rule, an appellee "can present any argument supported by the record even if not expressly asserted in the lower court." *Id*. at 645. This is the "tipsy coachman rule." *Id*.

Thus, *Dade County School Board* involved a ***pure question of law*** concerning a ***pleading issue*** that ***was raised in the trial court***, albeit in an allegedly untimely manner. By contrast, the Fourth District ruled at bar that the state had completely failed to argue the fact-bound issue of whether there was consent to the search. *Cf*. *Robertson v. State*, 829 So.2d 901, 906-907 (Fla. 2002) (tipsy coachman doctrine could not be invoked to support admission of evidence based on fact-bound issue of collateral crimes evidence because record did not reflect an evidentiary basis sufficient to

[1] *See also Heuss v. State*, 687 So.2d 823 (Fla. 1996) (appellate courts have discretion to apply harmless error rule even if not argued by appellee).

permit determination of issue). Hence, the Fourth District's decision does not directly and expressly conflict with *Dade County School Board* on the same question of law.

At bar, the trial prosecutor abandoned any claim of consent for the obvious reason that the search was not consensual. "Schmidt pulled defendant over. … . [H]e directed defendant to exit the auto. … . Schmidt proceeded to perform a search of defendant's person. ***As he carried out the search*** he asked if defendant had anything in his shoes. Defendant responded in the negative. Before he could order defendant to remove his shoes, defendant began doing so." *Hankerson*, 32 So.2d at 176 (e.s.). Petitioner does not explain how this is not simply a case in which the detainee complied with the officer's apparent authority so that there was no voluntary consent to search. *See, e.g., Smith v. State*, 997 So.2d 499 (Fla. 4th DCA 2008), *Sizemore v. State*, 939 So.2d 209 (Fla. 1st DCA 2006). It would be ridiculous to assert that Hankerson would have taken off his shoes if he did not feel compelled to do so.

"The question of whether a consent is voluntary is a question of fact to be determined from the totality of the circumstances." *Ballenger v. State*, 16 So.3d 1022 (Fla. 2d DCA 2009). Petitioner has made no showing that it was entitled to the exception to the general rule requiring it to raise a fact-bound issue like consent in the trial court. It has not shown an evidentiary basis sufficient to permit determination of the issue in its favor, and it has not shown that respondent received adequate notice so that he was

able to fully litigate the issue in the trial court.

From the foregoing, petitioner has not shown an express and direct conflict between *Dade County School Board* and the case at bar on the same question of law.

4. The opinion below was not "wrongly decided."

A. Petitioner says (IBJ 7) the opinion below was "wrongly decided." Plainly, our constitution does not give this Court the general jurisdiction to review lower court decisions on this basis. Regardless, petitioner has not shown that the opinion below was wrongly decided.

B. In this regard, petitioner says (IBJ 7-9) the lower court failed to properly defer to Officer Lucas's determination of probable cause based on his observations as to the brevity of the event, the lack of eye contact between the persons involved, the manner of looking up and down the street, and the exchange of paper currency for some object.

In fact, Officer Lucas only said these facts were "consistent" with" transactions he had witnessed. *Hankerson*, 32 So.3d at 176. He ***did not*** say he decided that probable cause existed.

Regardless, these sketchy facts do not add up to probable cause.

There is no reasonable dividing line between the length of a legal transaction versus an illegal one. The lack of eye contact proves nothing. Criminality is also not shown by the fact that Hankerson and the men were looking about. Maybe they were concerned

about being robbed in this high crime neighborhood. After all, someone was staring at them from a nearby parked car; for all they knew, he was planning to commit a robbery. (Although the officer was in an unmarked car, neither he or the car was concealed.)

Cash transactions are not illegal and are common among poor people who do not have checks or credit cards. As the expression goes, paper money is “legal tender.” Perhaps Hankerson was merely collecting debts from some friends to whom he had lent money and they were taking back their IOU’s. Maybe he had bought lottery tickets for some friends. One need not dwell on the broad variety of innocent everyday transactions that involve cash, as the state had the duty to affirmatively show probable cause.

CONCLUSION

Petitioner has failed to show jurisdiction. The petition should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify a copy hereof has been sent by first class US Mail to: Mark Hamel, Assistant Attorney General, Counsel for Appellee, Ninth Floor, 1550 North Flagler Drive, West Palm Beach, Florida, 33401-2299, on 8 June 2010.

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CERTIFICATE OF FONT SIZE

I certify the instant brief has been prepared with 12 point Courier, a font that is not spaced proportionately.

_____
Attorney for Respondent