

IN THE SUPREME COURT OF FLORIDA OF THE STATE OF FLORIDA

HORACE MCKINNEY,

Petitioner,

v.

Case No. SC10-140
5th DCA No. 5D08-1862

STATE OF FLORIDA,

Respondent.

_____ /

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

JURISDICTIONAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE AND FACTS

Respondent agrees with Petitioner's statement of the case and facts.

SUMMARY OF THE ARGUMENT

This Court may exercise its discretion to accept jurisdiction in the instant case where the District Court of Appeal expressly and directly certified conflict between the instant case and an opinion issued by the Fourth District Court of Appeal.

ARGUMENT

THIS COURT MAY EXERCISE ITS
DISCRETION TO ACCEPT JURISDICTION
IN THIS MATTER.

Petitioner seeks discretionary review with this Honorable Court pursuant to Article V, Section 3(b)(4) of the Florida Constitution. See also Fla. R. App. P. 9.030(a)(2)(A)(iv), (vi). Article V, Section 3(b)(4) provides that the Florida Supreme Court may review a district court of appeal decision that is certified by the issuing court to be "in direct conflict with a decision of another district court of appeal." In Reaves v. State, 485 So. 2d 829 (Fla. 1986), this Court explained:

Conflict between decisions must be
express and direct, i.e., it must
appear within the four corners of
the majority decision. Neither a
dissenting opinion nor the record
itself can be used to establish
jurisdiction.

Reaves, 485 So. 2d at 830.

In its opinion, the Fifth District certified express and direct conflict between its opinion in the instant case of McKinney v. State, 34 Fla. L. Weekly D2592 (Fla. 5th DCA Dec. 18, 2009) and that of the Fourth District in Shazar v. State, 3 So. 2d 453 (Fla. 4th DCA 2009). Both cases address double jeopardy principles as applied to dual convictions for robbery and grand theft involving a single taking.

In McKinney, the defendant argued that his dual convictions violated his protection against double jeopardy. The Fifth District upheld both convictions in light of this Court's decision in Valdes v. State, 3 So. 2d 1067 (Fla. 2009), which receded from the "primary evil" test. The Court stated:

By statute, robbery is not a degree of theft nor is theft a degree of robbery. As a result, utilizing the analysis mandated by Valdes, we conclude that section 775.021(4)(b)2. does not prohibit McKinney's convictions for robbery with a firearm and grand theft.

McKinney v. State, 34 Fla. L. Weekly D2592, 2 (Fla. 5th DCA 2009).

In Shazar, the defendant also received dual convictions for robbery and grand theft. Shazar, 3 So. 2d at 454. The Fourth District reversed the defendant's conviction and sentence for grand theft and remanded the matter to the trial court with directions to vacate the same. In so doing, the Fourth District relied upon both the State's concession and another decision out of the Fourth District, Ingram v. State, 928 So. 2d 1262 (Fla. 4th DCA 2006).¹

The State would note, however, that while both cases involve dual convictions for the same offenses, the Fifth District, in its opinion in McKinney, undertook an analysis of

¹ Ingram, issued prior to this Court's opinion in Valdes, relied upon Sirmons v. State, 634 So. 2d 153 (Fla. 1994).

the evolution of double jeopardy principles under Florida law and, in a well-reasoned opinion, applied the analysis set forth in Valdes. In contrast, the Fourth District in Shazar did not address the applicability of Valdes, but accepted the State's concession. Thus, while the two cases do reach opposite results, the Fourth District neither conducted an analysis nor applied double jeopardy law as enunciated in Valdes. To the extent that McKinney and Shazar, apply the same analysis and reach a different result, the two cases do not conflict.

CONCLUSION

Based upon the authorities and argument presented herein, Respondent acknowledges that this Court may exercise its discretion to accept jurisdiction in this matter.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Jurisdictional Brief of Respondent has been furnished by delivery to Assistant Public Defender Rebecca M. Becker, counsel for Petitioner, whose office is located at 444 Seabreeze Boulevard, Suite 210, Daytona Beach, Florida 32118, this 8th day of February, 2010.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Florida Rule of Appellate Procedure 9.210(a)(2).

Respectfully submitted,

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APPENDIX

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