IN THE SUPREME COURT OF FLORIDA

ANTHONY DESHAWN GLOVER,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC10-254

JURISDICTIONAL BRIEF OF RESPONDENT

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PRELIMINARY STATEMENT

Respondent, the State of Florida, the Appellant in the District Court of Appeal (DCA) and the prosecuting authority in the trial court, will be referenced in this brief as Respondent, the prosecution, or the State. Petitioner, Anthony Deshawn Glover, the Appellee in the DCA and the defendant in the trial court, will be referenced in this brief as Petitioner or proper name.

"PJB" will designate Petitioner's Jurisdictional Brief. That symbol is followed by the appropriate page number.

A bold typeface will be used to add emphasis. Italics appeared in original quotations, unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

The pertinent history and facts are set out in the decision of the lower tribunal, attached in slip opinion form (hereinafter referenced as "slip op." at [page number].) It also can be found at 25 So.3d 38 (Fla. 1st DCA 2009).

SUMMARY OF ARGUMENT

ISSUE I.

There is no direct and express conflict between the decision of the First District Court in State v. Glover, 25 So.3d 38 (Fla. 1st DCA 2009), and that of the Third District Court of Appeal in State v. Williams, 20 So.3d 419 (Fla. 3d DCA 2009), State v. Davis, 997 So.2d 1278 (Fla. 3d DCA 2009), and State v. Berry, 976 So.2d 645 (Fla. 3d DCA 2008). The "four corners" of the DCAs' decisions, reveal no express and direct conflict with each other on the same point of law. The three conflict cases are factually and procedurally dissimilar to the case on appeal. Therefore, there is no express and direct conflict, and this Court should not exercise jurisdiction.

ISSUE II.

Due to the brevity of the argument, the State omits the summary.

ARGUMENT

ISSUE I: S THERE EXPRESS AND DIRECT CONFLICT BETWEEN THE DECISION BELOW AND STATE V. WILLIAMS, 20 SO.3D 419 (FLA. 3D DCA 2009), STATE V. DAVIS, 997 SO.2D 1278 (FLA. 3D DCA 2009), AND STATE V. BERRY, 976 SO.2D 645 (FLA. 3D DCA 2008)? (RESTATED)

A. The District Court of Appeal Did Not Certify Conflict With Any Of These Cases.

1. Jurisdictional Criteria

Petitioner contends that this Court has jurisdiction pursuant to Fla. R. App. P. 9.030(a)(2)(A)(iv), which parallels Article V, § 3(b)(3), Fla. Const. The constitution provides:

> The supreme court ... [m]ay review any decision of a district court of appeal ... 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.

The conflict between decisions "must be express and direct" and "must appear within the four corners of the majority decision." Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986). *Accord* Dept. of Health and Rehabilitative Services v. Nat'l Adoption Counseling Service, Inc., 498 So. 2d 888, 889 (Fla. 1986) (rejected "inherent" or "implied" conflict; dismissed petition). Neither the record, nor a concurring opinion, nor a dissenting opinion can be used to establish jurisdiction. Reaves, 485 So. 2d at 830; Jenkins v. State, 385 So. 2d 1356, 1359 (Fla. 1980)(“regardless of whether they are accompanied by a dissenting or concurring opinion”). Thus, conflict cannot be based upon "unelaborated per curiam denials of relief," Stallworth v. Moore, 827 So. 2d 974 (Fla. 2002).

In Ansin v. Thurston, 101 So. 2d 808, 810 (Fla. 1958), this Court

explained:

> It was never intended that the district courts of appeal should be intermediate courts. The revision and modernization of the Florida judicial system at the appellate level was prompted by the great volume of cases reaching the Supreme Court and the consequent delay in the administration of justice. The new article embodies throughout its terms the idea of a Supreme Court which functions as a supervisory body in the judicial system for the State, exercising appellate power in certain specified areas essential to the settlement of issues of public importance and the preservation of uniformity of principle and practice, with review by the district courts in most instances being final and absolute.

Accordingly, the determination of conflict jurisdiction distills to whether the District Court's decision reached a result opposite State v. Williams, 20 So.3d 419 (Fla. 3d DCA 2009), State v. Davis, 997 So.2d 1278 (Fla. 3d DCA 2009), and State v. Berry, 976 So.2d 645 (Fla. 3d DCA 2008).

2. The decision below is not in "express and direct" conflict with State v. Williams, State v. Davis, and State v. Berry.

Petitioner maintains that because Williams, Davis and Berry have the same controlling material facts and the Third District reached an opposite result in all three cases, then the present case is in conflict. The State adamantly disagrees. Even a cursory reading of these three opinions, shows all three cases are factually and procedurally dissimilar to the present case; therefore, no express and direct conflict exists.

Beginning with State v. Berry, 976 So.2d 645 (Fla. 3d DCA 2008), the State offered a plea bargain for a downward departure sentence. Once this case was before the trial court, the defendant requested an even lower sentence than the State offered and the trial court accepted it. The State withdrew the plea bargain offer and objected to the downward departure sentence by the trial court. The Third District held, "[i]n the absence of

a valid reason for downward departure, we are obligated to reverse and remand for resentencing consistent with the guidelines, or to permit the defendant to withdraw this plea." Id. at 645; citing State v. Green, 932 So.2d 365 (Fla. 3d DCA 2006)(the sentence is reversed and the cause remanded either to sentence defendant within the guidelines or to permit him to withdraw his plea.). The Third District stated, "[t]he defendant suggests that there is a valid reason for downward departure. That issue can be raised in the trial court on remand." Id. However, the Third District did not cite to any authority for that proposition and left the interpretation open-ended.

The Third District in State v. Davis, 997 So.2d 1278 (Fla. 3d DCA 2009), relied on its opinion in Berry. In Davis, the trial court entered into a plea with the defendant over the State's objection. Id. at 1278. The Third District reversed and remanded the case back to the trial court in order to vacate the judgment and sentence and allow the defendant to withdraw his plea. The Third District stated, "[t]his ruling does not preclude the imposition of a sentence that departs from the sentencing guidelines, and it supported by valid grounds for the departure." Id. at 1278-1279. It appears that the court was suggesting that the defendant would be permitted to withdraw his plea and begin the trial process over, including the possibility of departure, rather than suggesting that the trial court on remand could simply re-impose another departure sentence,

the very act that resulted in reversal.[1] However this extremely short opinion doesn't clarify whether this means after the plea withdrawal or not.

In State v. Williams, 20 So.3d 419 (Fla. 3d DCA 2009), the Third District relied on Davis. In Williams, the defendant pled guilty in two separate cases. In one case, he was designated as a Habitual Felony Offender and the other case, he was designated as a Prison Releasee Reoffender. The trial court improperly downward departed in both cases. The Third District stated:

> As the defendant was sentenced to a lesser sentence under the habitual offender act without oral or written reasons for the downward departure, and as prison release under the act without the reoffender designations, we reverse the trial court's order and the cause is remanded for resentencing, to include written reasons for the departure and designations for habitual offender and prison release, or for withdrawal of the plea.

Id. at 421. The Third District just cited to a case that held that outcome that it wanted. The Berry and Davis opinions are completely dissimilar and distinguishable from Williams, and should have not been included in this certification.

The present case is factually and procedurally dissimilar and distinguishable from these cases that the First District did not certify conflict with in this case, but did certify conflict in State v. Jackson,

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[1] Although the Third District did not explicitly base its reversals on it, it clearly appears that the trial court in Berry & Davis engaged in direct negotiations with the defendant, in violation of State v. Warner, 762 So.2d 507 (Fla. 2000).

22 So.3d 817 (Fla. 1st DCA 2009). In Jackson, the State appealed the downward departure sentence after defendant entered a **straight up plea**. The trial court did not enter written reasons. The First District reversed and remanded this case back to the trial court for resentencing within the guidelines. The Third District in Berry and Davis allowed the defendant to withdraw his plea or resentencing within the guidelines because the defendant entered into the plea in reliance on a sentencing agreement between the defendant and the trial court, to which the State objected. Under those circumstances resentencing within the guidelines may be an appropriate remedy. Implicitly, it appears that the Third District is instituting an exception by allowing defendants to withdraw their pleas when the trial court abused its discretion in both cases by heavily participating in plea negotiations with the defendants and with objections from the State. [2]

The District Court decided both Glover and Jackson on the same day, November 24, 2009. The main and overwhelming distinguishing factor between Glover and Jackson is the fact that Jackson was a straight up plea case and Glover was a bench trial. All three cases that were certified by the District Court in Jackson were also plea cases. It is pretty obvious that the District Court found this procedural difference between the Glover and Jackson significant to not certify conflict with the cases cited in

[2] See Note 1

Jackson.[3]

As such, the State contends that no direct and express conflict exists between the case below and the Third District cases cited in Jackson. Although the First District ruled that its decision in Jackson was in conflict with the Third District's cases, it is appropriate for this Court to deny jurisdiction when factual differences exist between the cases show no conflicts. See e.g., State v. Lovelace, 928 So.2d 1176 (Fla. 2006).

In Lovelace, the Fourth District had certified conflict with State v. Jackson, 784 So.2d 1229 (Fla. 1st DCA 2001), finding that Jackson violated this Court's decision in State v. A.G., 622 So.2d 473 (Fla. 1993). Id. This Court discharged jurisdiction, finding that a factual distinction, one that had not been noted by the Fourth District, showed that the case did not in fact conflict with Jackson. Id.

The same applies here. While the court below did not note the factual distinctions between this case and the Third District cases, the distinctions show that the decision below does not in fact conflict with the Third District cases. This Court should decline to exercise jurisdiction.

[3] Not only were Jackson and Glover decided on the same day, but by the same panel.

ISSUE II: IS THERE EXPRESS AND DIRECT CONFLICT BETWEEN THE DECISION BELOW AND BANKS V. STATE, 732 SO.2D 1065 (FLA. 1999)? (RESTATED)

A. The District Court of Appeal Did Not Certify Conflict With This Case.

The decision below is not in "express and direct" conflict with Banks v. State, 732 So.2d 1065 (Fla. 1999).

Petitioner contends that:

> While paying lip service to this standard of review, the First District violated this Court's admonition to let the trial judge exercise his discretion in determining what the correct punishment should be.

(PJB.9). The State adamantly disagrees. First the District Court correctly stated the test for abuse of discretion set out in Banks.

> In Banks v. State, 732 So. 2d 1065, 1067-68 (Fla. 1999), the supreme court outlined the two-step process for imposing a departure sentence. "First, the [trial] the court must determine whether it can depart, i.e., whether there is a valid legal ground," explaining "[l]egal grounds are set forth in case law and statute." Id. at 1067. (emphasis in original). "Second . . . the trial court further must determine whether it should depart . . . weigh[ing] the totality of the circumstances in the case, including aggravating and mitigating factors." Id. at 1068 (emphasis in original). This determination is reviewed for abuse of discretion, which is abused "only where no reasonable person would agree with the trial court's decision." Id.

Glover at 38-39. The District Court applied this rule to conclude that the downward departure reason was completely unreasonable.

The State recognizes that the District Court in this case took the unusual step of considering the second step in Banks without considering the first step. In many downward departure cases, the District Courts typically do not have to reach to the second step of the Banks analysis because trial courts usually don't give valid legal grounds for the downward departure. Here, regardless of whether the trial court gave a

legal ground for the downward departure, the District Court found that based on the totality of the circumstance showed that the departure reason to be unreasonable and decided to focus its analysis on the step second. The fact that Petitioner does not like the finding of the District Court that the trial court's reason was unreasonable, or that analysis of step two of Banks is unusual, is not basis for jurisdiction. Therefore, there is no conflict.

CONCLUSION

Based on the foregoing discussions, the State respectfully requests this Honorable Court determine that it does not have jurisdiction.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to the following by U.S. MAIL on April 22, 2010: Steve Seliger, Assistant Public Defender, Leon County Courthouse, 301 South Monroe Street, Suite 401, Tallahassee, Florida, 32301.

CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Courier New 12 point font.

Respectfully submitted and certified,
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