IN THE SUPREME COURT OF FLORIDA

CASE NO. SC10-61
L.T. CASE NO. 3D07-3046

STEVEN HAZURI,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

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

RESPONDENT'S BRIEF ON JURISDICTION

BILL McCOLLUM
Attorney General
Tallahassee, Florida

RICHARD L. POLIN
Criminal Appeals Bureau Chief,
Miami
Florida Bar Number 0230987

LUNAR C. ALVEY
Assistant Attorney General
Florida Bar Number 0713473
Office of the Attorney General
Department of Legal Affairs
444 Brickell Avenue, Suite 650
Miami, Florida 33131
Tel: (305) 377-5441
Fax: (305) 377-5655

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

STATEMENT OF CASE AND FACTS[1]

The relevant facts stated in the Third District Court of Appeal's slip opinion Hazuri v. State, 23 So. 3d 857 (Fla. 3d DCA 2009), are as follows:

The only issue on appeal is whether the trial court abused its discretion in failing to advise the jury they could receive a "readback" of trial testimony in response to a request sent during deliberations for transcripts. We conclude the trial court had no duty to volunteer this information and thus did not abuse its discretion in declining to do so…

Hazuri was tried for armed robbery and aggravated battery with a weapon. After a couple of hours of deliberation, the jury sent a note to the court stating the jurors were unable to reach a verdict. The parties agreed the jury should be sent home for the evening and return the next day to continue its deliberations. The next morning, after an hour of deliberations, the jury sent a note to the court requesting trial transcripts. The following transpired.

> THE COURT: Back on the record. Note for the record the presence of the defendant, his attorney, the assistant state attorney. Counsel, we have a note from the jury. Could they get transcripts from the trial. State, suggestions.
>
> [ASSISTANT STATE ATTORNEY]: My only suggestion is that we tell them they must rely on their own recollection of the testimony.
>
> THE COURT: [Defense counsel].
>
> [DEFENSE COUNSEL]: My answer is you should inform the jury that they are allowed to have whatever, you know, portion of the transcript read back to them if they have a question about some evidence, but to have a set of transcripts from the trial, absolutely not.

[1] The Symbol "A." refers to Petitioner's Appendix which was attached to his jurisdictional brief, and consisted of a conformed copy of the district court's opinion.

> THE COURT: There are no trial transcripts of moment. Certainly portions of the record could be read, however, I do believe that the accurate and correct response is that they must rely on their own collective recollection of the evidence and we will answer the question that way.
>
> [DEFENSE COUNSEL]: You are not going to advise them that they have a right to have the transcript read back?
>
> THE COURT: They don't have a right. It is within my discretion.
>
> [DEFENSE COUNSEL]: Would you note my objection for the record.
>
> THE COURT: I will note your objection, counselor. I will note it for the record.
>
> [DEFENSE COUNSEL]: You are just going to send the note back?
>
> THE COURT: Yeah. Okay. Okay. There you go. Okay.

Hazuri argues the trial court abused its discretion in refusing to advise the jurors that although they could not have a copy of the transcripts, they were entitled to have portions of the transcript read back to them. Florida Rule of Criminal Procedures 3.410, governing "readbacks," provides as follows:

> After the jurors have retired to consider their verdict, if they request additional instructions or to have any testimony read to them they shall be conducted into the courtroom by the officer who has them in charge and the court may give them the additional instructions or *may* order the testimony read to them. The instructions shall be given and the testimony read only after notice to the prosecuting attorney and counsel for the defendant.

(A. 2-3).

[T]he jury in this case did not ask for a "readback." Rather, the jury asked a specific question. The court's purported answer – the jury "must rely on their own recollection of the evidence" – was fair and legally accurate. …

* * *

Nowhere does the above-quoted rule [3.410] contain a provision allowing the jury to receive transcripts of trial testimony in the jury room. See Janson v. State, 730 So. 2d 734, 735 (Fla. 5th DCA 1999); cf. Barnes v. State, 970 So. 2d 332, 339 (Fla. 2007) (holding transcript of testimony at prior trial which was admitted in evidence could not be taken to jury room); Young v. State, 645 So. 2d 965, 967 (Fla. 1994) (holding videotaped witnesses testimony could not be taken back to jury room for unrestricted view during jury deliberations). Thus, the trial court was bound to refuse the jury's request, and its further answer that the jury "must rely on their own recollection" was true in relation to the question posed. Upon giving such an answer, the trial court was under no obligation – as defense counsel suggested – to inform the jurors that a "readback" of trial testimony may be available upon request.

The assertion by the defense that the trial court's legally accurate answer created a misimpression in the minds of the jury that any further request for a "readback" also would be rejected is unpersuasive. It is true that "while the trial court has the discretion to deny a jury's request to read back testimony, it may not mislead the jury into thinking that a readback is prohibited." Avila v. State, 781 So. 2d 413, 415 (Fla. 4th DCA 2001). However, in this case, nowhere in the colloquy between counsel and the court can there be found any statement that the court would disobey Rule 3.410 and deny a "readback" if requested. In fact, the trial judge expressly stated to the contrary. Because no transcripts were to be forthcoming, it was entirely correct to instruct the jury they "must rely on their own recollection of the evidence…." See Coleman v. State, 610 So. 2d 1283, 1286 (Fla. 1992) (approving instruction to jurors that they "must rely on their recollection of the evidence in response to jury question pertaining to testimonial fact evidence); Infantes v. State, 941 So. 2d 432, 434 (Fla. 3d DCA 2006) ("We find no abuse of discretion in the trial court's refusal to reread the first officer's testimony and instructing the jury to rely on its collective memory.").

(A.4-6) (footnote omitted).

SUMMARY OF THE ARGUMENT

There is no basis upon which discretionary review can be granted in this case. The Third District Court's opinion does not conflict with any case of this Court or of any other district court in Florida. Consequently, conflict jurisdiction

does not exist for the exercise of this Court's discretionary jurisdiction to review the decision below. This Court should therefore deny Petitioner's petition to review the decision of the district court.

ARGUMENT

PETITIONER'S APPLICATION FOR DISCRETIONARY REVIEW MUST BE DENIED BECAUSE THE THIRD DISTRICT COURT OF APPEAL'S DECISION DOES NOT DIRECTLY OR EXPRESSLY CONFLICT WITH A DECISION OF ANOTHER DISTRICT COURT OR THIS COURT.

Petitioner contends that this Court should invoke its discretionary review power to review the Third District Court of Appeal's decision in the instant case. Petitioner claims that the Third District erred by failing to apply the standard contained in Barrow v. State, ___ So. 2d ___ 2010 WL 445388 (Fla. 4th DCA 2010), Avila v. State, 781 So. 2d 413 (Fla. 4th DCA 2001), Huhn v. State, 511 So. 2d 583, 591 (Fla. 4th DCA 1987) and Roper v. State, 608 So. 2d 533 (Fla. 4th DCA 1987). Petitioner contends that the trial court's response to the jury's question if transcripts were available left the jury with the impression that they were not entitled to ask to have testimony read back. Respondent submits that this Court does not have any jurisdiction to review the Third District Court's opinion.

The jurisdiction of this Court is limited to a narrow class of cases enumerated in the Florida Constitution. 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. This Court noted it lacked jurisdiction to review district court opinions that fail to expressly address a question of law. Id. Further, this Court lacks jurisdiction over district court opinions that contain only citation to other case law unless the case cited as controlling authority is pending before this Court, or has been reversed or receded by this Court, or explicitly notes a contrary holding of another district court or this Court. 530 So.2d at 288 n.3, citing, Jollie v. State, 405 So.2d 418 (Fla. 1981).

Article V, Section 3(b)(3), Fla. Const. (1980) and Fla.R.App.P. 9.030(a)(2)(A)(iv), which provides that the discretionary jurisdiction of the Supreme Court may be sought to review a decision of a district court of appeal which **expressly and directly conflicts** with a decision of another district court of appeal or of the Supreme Court on the **same question of law.** Decisions are considered to be in express and direct conflict when the conflict appears within the four corners of the majority decisions. Reaves v. State, 485 So.2d 829, 830 (Fla. 1986). Neither the record itself nor the dissenting opinion may be used to establish jurisdiction. Id. at 830 (citing to Jenkins v. State, 385 So. 2d 1356 (Fla.1980)). Accord Dept. of Health and Rehabilitative Services v. National Adoption

Counseling Service, Inc., 498 So. 2d 888, 889 (Fla. 1986) (the court rejected "inherent" or "implied" conflicts).

This Court cannot exercise its discretionary jurisdiction to review the decision below because, contrary to Petitioner's claim, the decision below is not in direct or express conflict with "Florida Supreme Court precedent," or any decision from this Court or any other district court on the same question of law.

In the decision below, the Third District Court specifically held that that the trial court did not abuse its discretion when it told the jury to rely upon their recollection in response to their request to "get transcripts from the trial." (A. 2) This statement does not contradict the holding in any of the above cited cases as they are factually distinguishable from the instant case. None of the cases upon which Petitioner relies establishes express or direct conflict with the Third District's opinion in this case. Each case cited has its own unique and distinctive facts, as does the instant case.

In the instant case, the jury asked if they could get transcripts from the trial. The Third District noted that the written response by the judge, which advised the jury to rely upon its recollection, was not read into the record and the Third District further opined that it was defense counsel who inserted "readback" into the dialogue. (A. 3, 4, FN 1). While the parties were discussing the jury's request, the trial court stated, "Certainly portions of the record could be read…" (A. 3). Based

upon the this statement and the facts contained in the Third District's opinion, the jury asked a general question whether they could have transcripts from the trial and did not request the specific testimony of a witness or a specific portion of the trial. It appears that the trial judge would have been amendable to providing specific portions.

Barrow can be distinguished in that the Barrow jury requested "all the transcripts of the witnesses' testimonies, Zack, Shannon, Mark Jones, Mark Barrow." The trial judge decided to respond "that there are no transcripts, please rely on your own recollection of the proceedings." Barrow at 3. The Fourth District, which certified conflict with the instant case, noted that the lawyers' request for the jury to be advised of the availability of read backs may have been fruitless in light of the judge's stated policy: "I don't do read backs." Id. at 4. The Barrow jury requested the transcripts of the testimony of specific witnesses The jury in the instant case made a general request for transcripts. Additionally, while the note sent back to the jury was not in the record, the record of the proceedings does not reflect that the judge told the jurors that there were no transcripts. Furthermore, the judge in Barrow stated specifically that he did not do read backs, where the judge in the instant case stated, "Certainly portions of the record could be read…" (A. 3).

In Avila, the jury asked to review the timing of specific events set forth by the testimonies of four named alibi witnesses. The trial court believed it was prohibited from providing a partial read back. Avila at 414. In its lengthy response to the jury, the trial court stated, "We do not print transcripts, we have no such transcripts, there are no printed transcripts." Avila at 415. Thus, Avila can be distinguished from the instant case in that the Avila jury requested the specific portion of the transcript involving the timeline set forth by the testimonies of four named alibi witnesses. Additionally, the court's response to the jury affirmatively stated that there were no printed transcripts and that none existed. No such facts exist in the instant case.

In Roper the jury wanted to specifically see "Bobby's cross-examination." Roper at 533. After discussion with counsel, the trial court re-assembled the jury in the court room, explained the transcription process and stated, "So I will instruct you at this time, there is no way that you can see his cross-examination." Roper at 534. Thus, the Roper jury requested the transcript for the cross-examination of a specific witness and was instructed by the trial court that there was no way they could do so.

In Huhn, while instructing the jury, the trial court advised the jurors that they could not take the instructions back to the jury room, there was no provision for it either to reinstruct the jury, have any testimony read back, or recall any witnesses.

Huhn at 588. The Huhn court held that Fla.R.Crim.P. 3.410 does not require the trial court, on the juror's request, to "…order such testimony read to them." The Huhn court further held that the jury so understood the trial court's remarks to mean that such a prohibition existed. Huhn at 591.

Thus, all of the cases relied upon by Appellant do not conflict with the decision in the instant case as those cases involve the jury asking for the transcript of specific witnesses or portions of the proceedings and the trial judge informing them that there were no transcripts available to be read back. Additionally, Huhn involves the trial court preemptively instructing the jury that no read back was available. As noted above, Fla. R. Crim. P. 3.410 is permissive in nature as it uses the word "may" providing the trial court with discretion. In the instant case, the jury did not ask for a specific portion of the proceedings and the trial court did not advise that there were no transcripts available.

CONCLUSION

Wherefore, based upon the foregoing argument and authorities cited herein, Respondent respectfully requests that this Honorable Court reject discretionary jurisdiction in this cause as the Third District's opinion does not give rise to any express conflict.

Respectfully Submitted,

BILL McCOLLUM
Attorney General
Tallahassee, Florida

and

RICHARD L. POLIN
Miami Bureau Chief
Florida Bar Number 230987

LUNAR C. ALVEY
Florida Bar Number 0713473
Assistant Attorney General
Office of the Attorney General
Department of Legal Affairs
444 Brickell Avenue, Suite 650
Miami, Florida 33131
(305) 377-5441

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed this 22nd day of February, 2010, to **Robert Kalter, Assistant Public Defender**, 1320 N.W. 14th Street, Miami, Florida 33125.

LUNAR C. ALVEY
Florida Bar Number 0713473
Assistant Attorney General

CERTIFICATION OF FONT AND TYPE SIZE

I HEREBY CERTIFY that the font and type size in this Brief of Respondent on Jurisdiction comply with Florida Rules of Appellate Procedure requirements in that Times New Roman 14-point was utilized.

LUNAR C. ALVEY
Assistant Attorney General