IN THE SUPREME COURT OF THE STATE OF FLORIDA

CANDIE ANDERSON,

Petitioner,

v.

Case No. SC11-3
5th DCA No. 5D09-4267

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

The only facts relevant to this Court in determining whether to accept jurisdiction are those contained within the opinion of the district court.

The Fifth District Court of Appeal's (Fifth District Court) opinion in Anderson v. State, 48 So. 3d 1015 (Fla. 5th DCA 2010), stated:

> The trial court found that Appellant violated her community control by committing the new law violation of driving with a suspended driver's license. Appellant challenges this conviction, contending that the State failed to prove that she knew her license had been suspended, an essential element of the offense....
>
> Appellant pled no contest in two separate cases. She was sentenced to five years in prison, suspended on the condition that she complete two years of community control followed by probation. She was ordered in both cases to pay restitution and entered into a payment plan for that purpose. While under supervision, Appellant reported to her community control officer for a regularly scheduled meeting. It is undisputed that she drove her vehicle to the meeting. It is also undisputed that she had a suspended driver's license at the time. The suspension was for failure to pay restitution in the two underlying cases, pursuant to the payment plan. During the meeting, Appellant's community control officer arrested her for violating Condition 5 of her community control, which required that she live and remain at liberty without violating any law. Appellant told the officer that she did not know her license had been suspended. Appellant was charged with violating Condition 5 of her community

> control by driving while her license was suspended or revoked contrary to section 322.34(2), Florida Statutes (2009).
>
> The only disputed issue at the violation hearing was whether Appellant was knowingly driving with a suspended license. Appellant testified that she did not know her license had been suspended and that she had not received anything from the Department of Highway Safety and Motor Vehicles ("DHSMV") advising her of the suspension. Appellant's mother, who resided at the same address, also testified that she had not seen anything from the DHSMV addressed to Appellant.
>
> The State offered Appellant's driving record into evidence at the hearing. The record included a notation that the DHSMV had mailed a notice of suspension to Appellant's address, pursuant to section 322.251, Florida Statutes. It is undisputed that the address where Appellant lived and the address the DHSMV had on file were the same. After hearing all of the evidence, the trial court found that Appellant knowingly drove while her license was suspended or revoked and, by that law violation, violated Condition 5 of her community control.

Anderson, 48 So. 3d at 1015-1016.

Petitioner filed a notice to invoke the discretionary jurisdiction of this Court. The State's brief on jurisdiction follows.

SUMMARY OF THE ARGUMENT

This Court should decline to accept jurisdiction in the instant case. While the Fifth District Court of Appeals "acknowledged conflict" with Haygood v. State, 17 So. 3d 894 (Fla. 1st DCA 2009), and Brown v. State, 764 So. 2d 741 (Fla. 4th DCA 2000), there is no express and direct conflict with these cases on the face of the decision under review.

ARGUMENT

THIS COURT SHOULD DECLINE TO ACCEPT JURISDICTION.

Petitioner seeks discretionary review with this Honorable Court under Article V, Section 3(b)(3) of the Florida Constitution. See also Fla. R. App. P. 9.030(a)(2)(A)(iv). Article V, Section 3(b)(3) provides that the Florida Supreme Court may review a district court of appeal decision only if it "expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law." In Reaves v. State, 485 So. 2d 829, 830 (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, n.3. Additionally, this Court has held that inherent or so-called "implied" conflict may not serve as a basis for this Court's jurisdiction. DHRS v. National Adoption Counseling Service, Inc., 498 So. 2d 888, 889 (Fla. 1986). Respondent contends no such conflict exists between the cited authority and the instant opinion.

In Anderson v. State, 48 So. 3d 1015 (Florida 5th DCA 2010), the Fifth District Court concluded that:

> Here, Appellant was aware that she was required to pay restitution under a court order and payment plan. She knew that she had failed to pay and knew, or should have known, that there would be consequences for her failure to abide by the court's order. The clerk apparently mailed to her a copy of the request to the DHSMV to suspend her license. The statutory notice from the DHSMV was mailed to Appellant, properly addressed, as evidenced by the entry in the DHSMV's records. The State's evidence, if believed, directly contradicted Appellant's theory of innocence. **It was up to the trial judge, sitting as trier of fact, to decide whether the State proved this element by a preponderance of the evidence, when weighed against Appellant's protestations that she had been unaware of the suspension**. It is not our function to reweigh this conflicting evidence.

Id. at 1019. In closing, the Fifth District Court "acknowledged conflict with Brown and Haygood." Id. However, while Brown and Haygood addressed the proof necessary to establish the element of knowledge for the crime of driving while license suspended, both of those cases addressed this issue in the context of proof beyond and to the exclusion of every reasonable doubt. Haygood, 17 So. 3d at 896 ("we must reverse Appellant's conviction for knowingly driving with a suspended license."); Brown, 764 So. 2d at 744 ("we must reverse Brown's conviction for felony driving with a suspended license.").

In the instant case, however, the Fifth District Court found the evidence sufficient to prove the knowledge element by a preponderance of evidence, a much lower standard of proof that

is applied in violation cases. State v. Carter, 835 So. 2d 259, 263 (Fla. 2002)("The trial court has broad discretion to determine whether there has been a willful and substantial violation of a term of probation and whether such a violation has been demonstrated by the greater weight of the evidence."). This difference in the burden of proof is underscored by cases where the State does not or cannot prove a crime was committed beyond a reasonable doubt but the same evidence can sustain a probation violation. See Gonzales v. State, 780 So. 2d 266, 267 (Fla. 4th DCA 2001)("The fact that appellant was acquitted of aggravated battery by a jury does not mean that his probation could not be revoked based on the same facts."); State v. Jenkins, 762 So. 2d 535, 536 (Fla. 4th DCA 2000)("To meet its burden in a violation of probation proceeding, the state need only demonstrate by a preponderance of the evidence that the defendant committed the subject offense. As that is a lesser standard than is required to prove the criminal charge, the state may still have sufficient evidence to meet its lesser burden."); Morris v. State, 727 So. 2d 975, 977 (Fla. 5th DCA 1999)(acquittal in a criminal case does not preclude the judge from determining that probation violation has occurred based on the same conduct because a criminal case must be proven beyond a reasonable doubt and a probation violation need only be proven by a preponderance of the evidence).

Clearly, then, the legal conclusion that certain evidence can sustain a violation of probation is very different from one which finds that the evidence can sustain a guilty verdict. Since the burden of proof addressed in Anderson and those which allegedly conflict with Anderson are so different, Petitioner has failed to establish that the Fifth District Court's opinion in Anderson expressly and directly conflicts with Haygood and Brown. Jurisdiction should be denied.

CONCLUSION

Based on the arguments and authorities presented herein, Respondent respectfully requests this Honorable Court decline to accept jurisdiction in this case.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Jurisdictional Brief of Respondent has been hand delivered to: Michael S. Becker, counsel for Petitioner, at the Office of the Public Defender, 444 Seabreeze Blvd., Suite 210, Daytona Beach, Florida 32118, this 27th day of January, 2011.

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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