

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC11-768

VINCENT J. PUGLISI,
Petitioner,

- versus -

STATE OF FLORIDA,
Respondent.

ON APPEAL FROM THE FOURTH DISTRICT COURT OF APPEAL
CASE NO. 4D08-3056

RESPONDENT'S BRIEF ON JURISDICTION

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Preliminary Statement

Petitioner was the Defendant in the trial court and the Appellant in the Fourth District Court of Appeal, and will be referred to herein as “Petitioner” and “Puglisi.” Respondent, the State of Florida, was the Appellee in the Fourth District Court of Appeal and will be referred to herein as “Respondent” or “the State.”

Reference to Petitioner’s brief shall be (PB), followed by the appropriate page number.

A copy of the opinion issued by the Fourth District Court of Appeal on December 22, 2010 and on rehearing March 30, 2011, is attached as an Appendix.

Statement Of The Case and Facts

When determining jurisdiction, this Court is limited to the facts apparent on the face of the opinion. Hardee v. State, 534 So. 2d 706, 708 n.1 (Fla. 1998). Petitioner seeks review of the December 22, 2010 opinion affirming his convictions and the March 30, 2011 order denying rehearing and certifying conflict with Cain v. State, 565 So. 2d 875 (Fla. 5th DCA 1990). Puglisi v. State, 56 So. 3d 787 (Fla. 4th DCA 2010). Respondent accepts Petitioner's statement of facts to the extent it is not argumentative and appears within the four corners of the opinion at issue subject to the following additions:

The record indicated that between October 2007 and the time of trial, Ditto had repeatedly changed his version of events. Prior to entering a plea of guilty, Ditto stated that he was completely to blame for the murder and that Puglisi was not involved. That information was provided to Puglisi's defense counsel at that time. Ditto later told the State he had lied in his previous statement, and that if he was called to testify he would explain that both he and Puglisi participated in significant acts which caused the death of Shalleck. The State did not call Ditto because he was not credible. The State argued that defense counsel had access to Ditto and knew of his change in story long before trial—if defense counsel wanted to call him as a witness, they did so at their own risk.

Defense counsel informed the court that Zimmerman had stated that Ditto made like statements back in 2006. Counsel acknowledged that Ditto made various statements, but wanted to focus on the fact that Ditto had explained that his prior statements implicating Puglisi

were made in an effort to avoid the death penalty. The State responded that Ditto implicated Puglisi to the police before he ever knew the death penalty was a possibility in his case. The court denied the motion for mistrial but allowed defense counsel to depose Ditto once more before deciding whether to call him as a witness.

Following Ditto's deposition, defense counsel renewed its motion for mistrial and advised the court that Ditto had taken all the blame for the murder and maintained that Puglisi was merely present

Puglisi, at 791-792. Ultimately defense counsel decided not to call Ditto as a witness. Id., at 792. Respondent disagreed with his attorney's decision and desired to call Ditto to testify. Id. The trial "court ultimately refused to allow Puglisi to call Ditto as a witness and explained to Puglisi that he had excellent attorneys who had discussed at length the issue of whether to call Ditto." Id.

Petitioner seeks review of this decision, alleging the Fourth District Court of Appeal's opinion at bar expressly and directly conflicts with the Fifth District Court of Appeal's interpretation in Cain of this Court's holding in Blanco v. State, 452 So. 2d 520 (Fla. 1984). (PB 8).

Summary of the Argument

Conflict jurisdiction requires express and direct conflict, on the same point of law, between this decision and that of either another district court or this Court. There is no conflict jurisdiction available here, where the opinion at issue is not in direct and express conflict with Cain. Further, this Court should decline to exercise jurisdiction despite certification of conflict because no conflict exists between the instant opinion and Cain.

Argument

THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL IN THE INSTANT CASE IS NOT IN CONFLICT WITH THE FIFTH DISTRICT COURT OF APPEAL'S OPINION IN CAIN v. STATE, 565 So. 2d 875 (Fla. 5th DCA 1990). (Restated)

Petitioner alleges that the Fourth District Court of Appeal's decision in the present case expressly and directly conflicts with Cain v. State, 565 So. 2d 875 (Fla. 5th DCA 1990) in its interpretation of Blanco v. State, 452 So. 2d 520 (Fla. 1984). (PB 6-9).

The only argument presented by Petitioner is that conflict jurisdiction exists pursuant to Art. V, § 3(b)(3), Fla. Const. (1980). (PB 6). Respondent asserts that no direct and express conflict exists, thus jurisdiction does not exist pursuant to

this provision. However, Respondent recognizes that jurisdiction exists pursuant to Art. V, § 3(b)(4), Fla. Const. because the district court “certified conflict” with Cain. This Court has explained that, “a certification of conflict provides us with jurisdiction per se.” State v. Vickery, 961 So.2d 309, 312 (Fla. 2007). Although jurisdiction may exist, this Court should decline to exercise its jurisdiction.

It is well settled that in order to establish conflict jurisdiction, the decision sought to be reviewed must expressly and directly create conflict with a decision of another District Court of Appeal or of the Supreme Court on the same question of law. Article 5, Section 3(b)(3) Fla. Const.; Jenkins v. State, 385 So. 2d 1356 (Fla. 1980). Thus, conflict jurisdiction is properly invoked only when the district court announces a rule of law which conflicts with another court’s pronouncement, or when the district court applies a rule of law to produce a different result in a case which involves substantially the same facts of another case. Mancini v. State, 312 So. 2d 732, 733 (Fla. 1975). This is because “two cases can not be in conflict if they can be validly distinguished.” Morningstar v. State, 405 So. 2d 778, 783 (Fla. 4th DCA 1981), Anstead J. concurring; affirmed, 428 So. 2d 220 (Fla. 1982). See also, Department of Revenue v. Johnston, 442 So. 2d 950 (Fla. 1983).

In both Cain and Blanco the courts held it was not reversible error for a trial court to grant a defendant’s requested course of action which was contrary to

counsel's advice. In Cain the appellate court held the trial court did not err in allowing the defendant to decide the final composition of the jury against his attorney's advice. In Blanco this Court held the trial court did not err in allowing the defendant to call a witness against his attorney's advice. Neither court held that the ultimate decision whether to call a particular witness rests solely with the defendant. Rather, these decisions merely reflect that a trial court's ruling allowing a defendant's decision to prevail over his attorney's advice is not error. This is not the same as holding that a defendant's decision regarding trial strategy must always trump that of his attorney. Because the issue at bar involves trial strategy and not the fundamental decision whether to enter a plea or proceed to trial, no conflict exists with Milligan v. State, 177 So. 2d 75 (Fla. 2nd DCA 1965).

Petitioner's argument for this Court to accept jurisdiction pursuant to Art. V, § 3(b)(3), Fla. Const., must fail because he has not demonstrated that there is an express or direct conflict between the instant case and Cain. Although the District Court did certify conflict with Cain, due to the lack of express and direct conflict, this Court should also decline to accept jurisdiction pursuant to Art. V, § 3(b)(4), Fla. Const.

Conclusion

Consequently, this Court should DECLINE to accept jurisdiction in this cause as no conflict exists between the underlying opinion and the decision in Cain.

Respectfully submitted,
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Certificate Of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to **MELANIE L. CASPER, ESQUIRE**, Office of Criminal Conflict and Civil Regional Counsel, Fourth District, 605 North Olive Avenue, Second Floor, West Palm Beach, Florida 33401 on this ____ day of May, 2011 and electronically transmitted to mcasper@rc-4.com

_ /s/ _____
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Certificate of Font Compliance

I HEREBY CERTIFY that this document, in accordance with Rule 9.210 of the Florida Rules of Appellate Procedure, has been prepared with Times New Roman 14-point font.

_ /s/ _____
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