In the Supreme Court of Florida

DAVID DEVON BLACKMON,

Appellant,

v. CASE NO. SC11-903

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE
FIRST DISTRICT COURT OF APPEAL

JURISDICTIONAL BRIEF OF APPELLEE

PAMELA BO BONDI
ATTORNEY GENERAL

TRISHA MEGGS PATE
TALLAHASSEE BUREAU CHIEF
CRIMINAL APPEALS
FLORIDA BAR NO. 045489

CHARMAINE M. MILLSAPS
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0989134

OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(850) 414-3300
COUNSEL FOR APPELLEE

TABLE OF CONTENTS

TABLE OF CITATIONS

STATEMENT OF THE CASE AND FACTS

The facts, according to the First District's written opinion, are:

> On November 23, 2009, employees at W.D. Rogers Mechanical Contractor (W.D.Rogers) cut, beveled, and marked approximately 14 steel bars. At 3:30 p.m., the shop closed. When the shop reopened at 7:30 a.m. the next morning, employees discovered that the steel bars were missing. Evidence existed of a burglary: the barbed wire on top of the 6–foot chain-link fence had been pushed down, the bushes below the fence were broken, footprints were on the sides of the metal racks, and the ground showed marks where the bars had been thrown over the fence and stuck in the ground. The steel bars were later found at a local scrap yard. The scrap yard purchased the steel bars from Blackmon on November 24, 2009, at 8:02 a.m. The scrap yard paid Blackmon $61.80 for the bars. Based on the markings on the bars, W.D. Rogers confirmed that the bars sold to the scrap yard were the same bars stolen from the shop.
>
> The state charged Blackmon with burglary, petit theft, and dealing in stolen property. At trial, Blackmon testified that, on his way home from work in the early morning hours of November 24, he saw some steel bars lying on the side of the road; that the bars were still by the road later that morning when he walked his son to the bus stop at 6:00 a.m.; that he picked up the bars and took them to the scrap yard when they opened; and that, although he noticed the markings on the bars, he thought that the bars were simply junk. At the close of the evidence, Blackmon moved for a judgment of acquittal, arguing that the state did not present evidence to rebut this explanation for his possession of the steel bars. The trial court denied the motion.
>
> The trial court did not instruct the jury that it could not return a guilty verdict for both theft and dealing in stolen property pursuant to section 812.025, Florida Statutes (2009), and Blackmon did not request such an instruction. The jury found Blackmon guilty of both petit theft and dealing in stolen property, but acquitted him of burglary. The trial court thereafter adjudicated Blackmon guilty of both offenses. The trial court also found Blackmon in violation of his probation based on the new law offenses of burglary and theft.
>
> The trial court sentenced Blackmon to time served on the petit theft count and five years in prison on the dealing in stolen property count. Blackmon was also given a concurrent five-year sentence for the violation of probation. The prison sentence was based on a Criminal Punishment Code Scoresheet that scored petit theft as an

> additional offense (0.2 points). The lowest permissible prison sentence under the scoresheet was 28.35 months.

Blackmon v. State, - So.3d at -, 2011 WL 1167202 at *1 (Fla. 1st DCA March 31, 2011).

SUMMARY OF ARGUMENT

There is express and direct conflict between the First District's decision in *Blackmon v. State*, - So.3d -, 2011 WL 1167202 (Fla. 1st DCA March 31, 2011), and the Fourth District's decision in *Kiss v. State*, 42 So.3d 810 (Fla. 4th DCA 2010). The decisions are factually indistinguishable. In both cases, the jury convicted the defendant of dealing in stolen property and theft without being instructed that the applicable statute prohibits convictions for both offenses. And the legal issue presented by both cases was the same - what is the proper remedy for a violation of the statute. The First District held the proper remedy was to vacate the conviction for the lesser offense; whereas, the Fourth District held the proper remedy was a new trial. The First District certified conflict and the parties agree that this Court has conflict jurisdiction. This Court should exercise its discretionary jurisdiction because, as both the majority and the concurring opinions in *Kiss* observed, this statute continues to generate appeals. Additionally, a proposed jury instruction regarding this statute is currently being considered by this Court. This Court should exercise its discretionary jurisdiction and resolve the conflict.

ARGUMENT

ISSUE

WHETHER EXPRESS AND DIRECT CONFLICT EXISTS BETWEEN THE FIRST DISTRICT'S DECISION IN *BLACKMON V. STATE*, - So.3d -, 2011 WL 1167202 (Fla. 1st DCA MARCH 31, 2011), AND THE FOURTH DISTRICT'S DECISION IN *KISS V. STATE*, 42 So.3d 810 (Fla. 4th DCA 2010)? (Restated)

The First District's decision in this case conflicts with the Fourth District's decision in *Kiss v. State*, 42 So.3d 810 (Fla. 4th DCA 2010). An express and direct conflict exists between these two decisions. The decisions are factually indistinguishable. In both cases, the juries, which were not instructed otherwise, convicted the defendant of both theft and dealing in stolen property in violation of the statute that prohibits such dual convictions. The legal issue presented by both cases was also the same. The legal issue was what was the proper remedy for a violation of the statute. The Fourth District determined that a new trial was the proper remedy; whereas, in contrast, the First District determined that vacating the conviction for the lesser offense was the proper remedy. The First District certified conflict and the parties agree that the two decisions conflict. This Court should resolve the conflict.

The standard of review

Whether a direct and express conflict exists between decisions of the district courts of appeal is a pure question of law reviewed by this Court *de novo*. This Court does not defer to the district court's determination that conflict exists. *Cf. In re Amendments to*

The Florida Rules of Appellate Procedure, 941 So.2d 352, 353 (Fla. 2006)(concluding that jurisdictional briefing in cases of certified direct conflict would be beneficial to the Court and amending rule 9.120(d), Fla. R. App. P. to require jurisdictional briefs in conflict cases).

Jurisdiction

The jurisdiction of the Supreme Court provision, article V, section 3(b)(4) of Florida's constitution provides:

> The supreme court:
>
> * * *
>
> May review any decision of a district court of appeal that passes upon a question certified by it to be of great public importance, or that is certified by it to be in direct conflict with a decision of another district court of appeal.

The First District, in this case, certified conflict with the Fourth District's opinion in *Kiss* regarding the proper remedy. *Blackmon*, 2011 WL 1167202 at *4 (stating: "We also certify conflict with Kiss regarding the proper remedy when, contrary to section 812.025, the defendant is convicted of both theft and dealing in stolen property.").

For there to be express conflict, the majority opinions of the district courts must conflict, not the concurring opinions, not the dissenting opinions. *Reaves v. State*, 485 So.2d 829 (Fla. 1986)(concluding that conflict must be determined within the four corners of the district court's majority decision.). Conflict exists between the unanimous opinion of the First District and the

majority opinion of the Fourth District.[1] Furthermore, for there to be direct conflict, the majority opinions of the district courts must involve the same facts and decide the same legal issue. *Ortiz v. State*, 963 So.2d 226 (Fla. 2007)(discharging jurisdiction because "the alleged conflict decisions are factually distinguishable."); *Department of Revenue v. Johnston*, 442 So.2d 950 (Fla. 1983)(discharging jurisdiction where the "conflict" decisions were distinguishable on their facts creating only apparent, not actual, conflict).

Blackmon and *Kiss* involve the same facts. In both cases, the defendant was charged with some degree of theft and dealing in stolen property. In both cases, the jury was ***not*** instructed that it was improper under the charging theft and dealing in stolen property statute to convict the defendant of both offenses.[2] And in both cases, the jury convicted the defendant of both crimes. The two

---

[1] Judge Gerber concurred in *Kiss*. *Kiss*, 42 So.3d at 813-814 (Gerber, J., concurring). His concurring opinion, however, discusses ways to avoid the problem in the future. He suggests treating the theft offense as a lesser-included offense in all future prosecutions. His concurring opinion does not disagree with the majority's analysis regarding the proper remedy. So, *Kiss* was really unanimous regarding the proper remedy.

[2] The charging theft and dealing in stolen property statute, § 812.025, Florida Statute (2010), provides:

> Notwithstanding any other provision of law, a single indictment or information may, under proper circumstances, charge theft and dealing in stolen property in connection with one scheme or course of conduct in separate counts that may be consolidated for trial, but the trier of fact may return a guilty verdict on one or the other, but not both, of the counts.

decisions are factually indistinguishable. The two cases involve basically the same facts.

And the same question of law was decided by both district courts. The legal issue presented by both cases was the same, which was what is the proper remedy for a violation of this statute. The First District held that the proper remedy was to vacate the conviction for the lesser offense; whereas, the Fourth District held that the proper remedy was a new trial. The Fourth District in *Kiss* criticized the "cure" of vacating the lesser offense employed by other district courts and then reversed and remanded for a new trial. *Kiss*, 42 So.3d at 812-813. In contrast, the First District, in *Blackmon*, concluded that "the proper remedy is for the conviction of the lesser offense to be vacated." *Blackmon*, 2011 WL 1167202 at 3. The First District noted its disagreement with the *Kiss* Court's conclusion that the proper remedy was a new trial. *Blackmon*, 2011 WL 1167202 at 3. The First District observed that the *Kiss* Court's remedy was contrary to the remedy "routinely imposed under these circumstances" by the other district courts, including the Fourth District prior to its decision in *Kiss*. *Id.* citing *Anderson v. State*, 2 So.3d 303, 304 (Fla. 4th DCA 2008). The First District reasoned that the remedy of vacating the lesser "better respects the jury's determination that the state met its burden to prove the greater offense and also avoids the need to speculate what verdict the jury might have returned had it been required to choose between the greater and lesser offenses." Thus, the actual holdings and conclusions of law of the two district courts conflict with each other.

Actually, the conflict is wider than just a conflict between the First District and the Fourth District. The Fourth District in *Kiss* had certified conflict with *Ridley v. State*, 407 So.2d 1000 (Fla. 5th DCA 1981), but the State did not seek review. *Kiss*, 42 So.3d at 813 (certifying "conflict with *Ridley* and its progenies."). So, there is conflict between the Fourth District and both the First District and the Fifth District regarding the proper remedy.

The First District certified conflict. And the parties agree that the two decisions conflict. Express and direct conflict exists.

Express and direct conflict invokes this Court's discretionary jurisdiction. Art. V, § 3(b)(4), Fla. Const.; *Sims v. State*, 998 So.2d 494, 508 (Fla. 2008)(Cantero, J., dissenting)(explaining that express and direct conflict between the decision below and that of other district courts of appeal on the same issue invokes "our ***discretionary*** jurisdiction to review the case.")(emphasis in original). This Court should exercise its discretionary jurisdiction for two reasons. First, as both the majority and the concurring opinions in *Kiss* observed, this statute continues to generate appeals. As the *Kiss* majority noted, this "statute, which has been in effect for decades, and is not difficult to apply, continues to generate appeals." *Kiss*, 42 So.3d at 811, quoting *Anderson v. State*, 2 So.3d 303 (Fla. 4th DCA 2008)(Klein, J., concurring). Judge Gerber, in his concurring opinion, also noted that this statute "continues to generate appeals and must be addressed to prevent further appeals." *Kiss*, 42 So.3d at 814 (Gerber, J., concurring). Secondly, this is a good opportunity for this Court to address the

proper jury instruction to avoid the problem in future cases. *Anderson v. State*, 2 So.3d 303, 304-305 (Fla. 4th DCA 2008)(Klein, J., concurring)(suggesting that the committee on standard jury instructions in criminal cases develop a standard jury instruction for this statute). A proposed jury instruction regarding this statute is currently pending before this Court. *See* Proposed Jury Instructions for Criminal Cases, Dealing in Stolen Property - 14.2, *The Florida Bar News*, May 15, 2011. For these reasons, this Court should exercise its discretionary jurisdiction.

CONCLUSION

There is express and direct conflict between the First District's decision in *Blackmon* and the Fourth District's decision in *Kiss*. This Court should exercise it discretionary jurisdiction and resolve the conflict.

Respectfully submitted,

PAMELA JO BONDI
ATTORNEY GENERAL

TRISHA MEGGS PATE
TALLAHASSEE BUREAU CHIEF
CRIMINAL APPEALS
FLORIDA BAR NO. 045489

CHARMAINE M. MILLSAPS
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0989134
OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(850) 414-3584
COUNSEL FOR APPELLEE
[AGO# L11-1-14722]

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Jurisdictional Brief has been furnished by U.S. Mail to Gail E. Anderson, Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, this 20th day of May, 2011.

Charmaine M. Millsaps
Attorney for State of Florida

CERTIFICATE OF FONT COMPLIANCE

I certify that this brief, which has been typed using Courier New 12 point, complies with the font requirement of rule 9.210(a)(2), Fla. R. App. Pro.

Charmaine M. Millsaps
Attorney for State of Florida

In the Supreme Court of Florida

DAVID DEVON BLACKMON,

Appellant,

v. CASE NO. SC11-93

STATE OF FLORIDA,

Appellee.

_____/

APPENDIX

Copy of *Blackmon v. State*, - So.3d -, 2011 WL 1167202 (Fla. 1st DCA March 31, 2011).