

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC12-1050

LOWER TRIBUNAL NO. DCA: 3D10-1028

JAMES WARMINGTON,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

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

BRIEF OF RESPONDENT ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

The Petitioner, James Warmington, is seeking discretionary review in this Court following affirmance of his conviction for grand theft by the Third District Court of Appeal. The pertinent facts, as found by the district court, are as follows:

Taking the facts in the light most favorable to the State, the State established that Christine Pistol, who had been a student in Warmington's real estate class, and her husband, Robert Pistol, approached Warmington, expressing a desire to invest in mortgages. Warmington responded that a friend, Rene Sardina, was interested in borrowing money, secured by a second mortgage on a piece of property he desired to purchase. According to Warmington, Sardina's credit was such that he could not qualify for a second mortgage loan in the marketplace and, therefore, was willing to pay a higher-than-market, nine-percent interest rate on the mortgage. Warmington functioned as the middleman for the transaction.

On September 10, 2002, the Pistols and Sardina met Warmington and his wife at the Warmingtons' house for the purpose of closing the transaction. The closing documents, including a promissory note and mortgage, were prepared by Warmington. The Pistols brought two \$75,000 checks, representing the loan amount. After Sardina signed the promissory note and mortgage, all of the parties travelled together to Warmington's bank, where his wife deposited the two checks into the Warmingtons' personal bank account. Robert Pistol testified that given Warmington's role in the transaction as the middleman, he did not find anything suspicious about the fact the money was deposited into the Warmingtons' bank account.

The Pistols received payments on the loan from October 2002 through 2005. Payments were made from Warmington's bank account. When the Pistols stopped receiving payments, they contacted Sardina, who stated he never received the \$150,000, and was told by Warmington the deal fell through. Warmington testified the mortgage deal fell through, but the Pistols agreed to continue the transaction as a personal loan to Sardina, upon which Sardina simply had defaulted.

Detective Abolsky was assigned as the lead detective to the criminal case, precipitated by the Pistols' complaint to the authorities after the payments to them ceased. After interviewing the Pistols and Sardina, Detective Abolsky approached Warmington and obtained an interview. Detective Abolsky testified:

[Prosecutor]: When you interviewed Mr. Warmington, how far [sic] is it that it came about?

[Detective]: Well, what I believed to be the complete case file, I went to his home to visit with him.

[Prosecutor]: What [wa]s the purpose of your visit?

[Detective]: The purpose of my visit was to allow him to dispel any alarms that I may have or concerns that he did anything wrong.

[Prosecutor]: And was he able to do that?

[Defense Counsel]: Objection. Burden shifting.

The Court: Sustained.

[Defense Counsel]: We have a motion to object, Judge.

The Court: Yes.

[Prosecutor]: When you went and spoke to him, what was the extent of your investigation?

[Detective]: I advised him of the nature of the investigation. We spoke outside his residence. I began explaining to him what the allegations were and I offered him an opportunity to—

[Defense Counsel]: Objection.

The Court: Sustained.

[Prosecutor]: Your Honor.

The Court: Continue on.

[Prosecutor]: And what was the result of that conversation?

[Detective]: Well, Mr. Warmington had indicated to me that a loan had been funded to Mr. Rene Sardina and that Mr. Sardina was no longer paying on the loan. The loan was comprised basically [of] a mortgage or something and as a result he had explained this to the Pistols and subsequently it was a matter he was trying to take care of.

[Prosecutor]: Was the defendant able to produce any documentation?

[Defense Counsel]: Objection. Burden shifting. We reserve—

The Court: Overruled.

[Prosecution]: Was there documentation that day with regards to this explanation he gave you?

[Detective]: No, in fact, he represented that his home was also his office. And when I asked for him to provide any documentation, he couldn't.

[Defense Counsel]: Objection

The Court [sic]: Same objection as previously noted. We reserve the motion.

The Court: Continued objection. Go ahead.

[Prosecution]: When you had that conversation with Mr. Warmington, what happened?

[Detective]: I placed him under arrest.

At the conclusion of Detective Abolsky's testimony, Warmington moved for a mistrial, arguing the State improperly shifted the burden of proof to Warmington. The trial judge denied the motion, finding the State did not shift the burden.

Warmington v. State, 2012 WL 1448128 (Fla. 3d DCA April 27, 2012).

Citing to this Court’s decision in *Gore v. State*, 719 So. 2d 1197, 1200 (Fla. 1998), the majority opinion in *Warmington* explained that “[b]urden shifting occurs when the State ‘invite[s] the jury to convict the defendant for some reason other than that the State has proved its case beyond a reasonable doubt.’” 2012 WL 1448128, at *2. The majority noted:

An investigating officer’s testimony concerning what he saw, observed, or discovered during the course of his investigation does not shift the burden of proof. It is evidence. In this case, the investigating officer discovered that Warmington did not have copies of certain mortgage documents signed by Sardina at the closing of the transaction at his home. The testimony may or may not have been significant; one might argue that Warmington, who, after all, merely was the middleman in the transaction, would have no need to have a set of the mortgage documents. On the other hand, the fact certainly was material for the jury to hear. FN1.

FN1. Warmington seeks to analogize the testimony in this case to a defendant’s pre-arrest refusal to respond to an investigator’s inquiry concerning whether the defendant committed the crime. That question, of course, raises a different concern. *See* U.S. Const. amend. V. The inquiry made in this case is no different than an officer’s testimony of the inability of a defendant to produce his registration during the course of an investigatory stop.

2012 WL 1448128, at *2, 5.

The majority in *Warmington* distinguished the cases cited by the Petitioner – *Hayes v. State*, 660 So. 2d 257 (Fla. 1995); *Ramirez v. State*, 1 So. 3d 383 (Fla. 4th DCA 2009); and *Miele v. State*, 875 So. 2d 812 (Fla. 2d DCA 2004) – as “cases where a prosecutor’s questioning *at trial* resulted in the burden *at trial* being less

than it should be, where the jury is left with the impression that a defendant had an obligation to produce evidence of his innocence *at trial*, or when the burden *at trial*, is less than reasonable doubt.” 2012 WL 1448128, at *3 (emphasis in original). The majority in *Warmington* noted that Detective Abolsky was permitted to testify about the “historical facts” surrounding his investigation. The majority additionally explained:

Finally, we are not moved by the fact Warmington was arrested immediately after he told Detective Abolsky he did not have a copy of the mortgage documents. This again is a matter of historical fact. The testimony, taken as a whole, was prejudicial to Warmington. However, all defendants are arrested at some point, and the fact of arrest regularly makes its way into testimony at trial. The State at all times had the burden to prove the case against Warmington beyond a reasonable doubt. We do not believe this burden was lessened by Detective Abolsky’s testimony.

2012 WL 1448128, at *4.

Judge Ramirez wrote a dissenting opinion, arguing that the prosecution had been impermissibly allowed to elicit statements which shifted the burden at trial and that the majority’s opinion conflicted with the decisions in *Hayes*, *Ramirez*, and *Miele*. 2012 WL 1448128, at *4-5. Relying on the dissent, the Petitioner now seeks discretionary review in this Court. The State has filed this brief in response.

SUMMARY OF ARGUMENT

The majority opinion in *Warmington* does not expressly and directly conflict with this Court's decision in *Hayes* nor does it conflict with the Second and Fourth District's decisions in *Miele* and *Ramirez*. Further, a dissenting opinion cannot be used to establish jurisdiction. As there was no conflict, jurisdiction should be denied.

ARGUMENT

THE HOLDING OF THE THIRD DISTRICT COURT APPEAL DOES NOT CONFLICT WITH THE DECISION OF THIS COURT IN *HAYES V. STATE*, 660 SO. 2D 257 (FLA. 1995), NOR DOES IT CONFLICT WITH *RAMIREZ V. STATE*, 1 SO. 3D 383 (FLA. 4TH DCA 2009) AND *MIELE V. STATE*, 875 SO. 2D 812 (FLA. 2D DCA 2004).

As a general rule, conflict jurisdiction exists when a decision of a court of appeal expressly and directly conflicts with another court of appeal “on the same question of law.” Art. V, § 3(b)(3), Fla. Const.; Fla. R. App. P. 9.030(a)(2)(A)(iv). In this case, however, there was no such conflict, and this Court should decline to exercise its discretionary jurisdiction for the reasons that follow:

The majority's premise in *Warmington* was that Detective Abolsky had testified about matters of historical fact; that his testimony merely provided context for his investigation prior to trial; and that there was no burden shifting. The majority explained that burden shifting occurs when the burden *at trial* is less than

it should be, when the jury is left with the impression that a defendant had an obligation to produce evidence of his innocence *at trial*, or when the burden, *at trial*, is less than a reasonable doubt. 2012 WL 1448128, at *3. This is distinguishable from what an officer may have said or thought, prior to the trial, while talking to a defendant during the course of an investigation. This is also no different from allowing a witness to be questioned about statements made prior to trial, where the testimony was material and would naturally have been mentioned.

In *Hayes*, the prosecution elicited testimony, at trial, that the defense had not asked a crime laboratory to test blood stains. Further, there was testimony that the lab had complied with such requests in the past for other defense attorneys. Similar comments were also made by the prosecutor in closing argument concerning the failure of the defense to test hairs found at the scene of the murder. 660 So. 2d at 265. This Court noted, “The prosecutor’s questions and statements in the instant case may have led the jury to believe that Hayes had an obligation to test the evidence found at the scene of the murder and to prove that the hair and blood samples did not match his own.” *Id.*

In *Ramirez*, the Fourth District reversed a defendant’s conviction for battery on a law enforcement officer. In that case, the defendant was arrested and taken to jail for leaving her baggage unattended at the airport. The charged crime occurred during a female detention deputy’s booking and processing of the defendant. 1 So.

3d at 384. On appeal, the Fourth District reasoned that the trial court abused its discretion when it allowed the State to ask questions and comments that implied the defendant should have produced photographic evidence and medical reports “to refute an element of the crime” – the physical touching or the battery. 1 So. 3d at 385. The court further reasoned that the error was not harmless, as the burden-shifting questions and comments were neither isolated nor negligible in emphasis. *Id.* at 386.

In *Miele*, the State commented on a defendant’s failure to present evidence through the trial testimony of his and his former girlfriend. 875 So. 2d at 814. The defendant had been charged with burglary of a dwelling from which he was alleged to have taken coins and currency from a five-gallon jug. *Id.* at 813-14. His defense was that the money came not from a jug in the victim’s house, but rather from a jug at his father’s house. *Id.* at 814. On cross-examination by the State, the defendant’s girlfriend was asked, over defense objection, whether the defendant’s father was present in the courthouse. The defendant’s sister, in turn, was asked whether she had a camera, and whether she had taken pictures of her father’s jug money. She testified she took some photos after Miele asserted the alternate source of the money to police, but that she gave them to her father. *Id.* The Second District reversed the defendant’s conviction on the ground that the line of questioning was a comment on the defendant’s failure to produce photographs of

his father's money jug. *Id.*

Here, unlike *Hayes*, *Ramirez*, and *Miele*, the testimony at issue concerned a matter of historical fact; the detective's discussion with the Petitioner, *prior to trial*, and the resulting questions provided the context for an inquiry that was conducted *during* a criminal investigation. Further, unlike *Ramirez*, "possession by Warmington (or lack thereof) of the mortgage documents [was] not an element of the crime. The historical fact that Warmington did not have a set of the documents could as well come through a search pursuant to a warrant." 2012 WL 1448128, at *3. Thus, there was no "legal misstep in the trial court permitting the same result through admission into evidence of a voluntarily made statement by the defendant." *Id.*

As both the facts and issues in the cases are different, express and direct conflict does not exist. *See Reaves v. State*, 485 So. 2d 829, 830 (Fla. 1986); *see also The Florida Bar v. B.J.F.*, 530 So. 2d 286, 288 (Fla. 1988) ("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."). As there was no conflict, jurisdiction should be denied.

Accordingly, the Petitioner has failed to assert a basis to invoke this Court's jurisdiction as there is no express and direct conflict. Fla. R. App. P. 9.030 (a)(2)(A)(iv).

CONCLUSION

WHEREFORE, the State respectfully requests this Court to decline discretionary jurisdiction.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of the Respondent on Jurisdiction was mailed to Assistant Public Defender Robert Kalter, Esquire, at Office of the Public Defender, Eleventh Judicial Circuit of Florida, 1320 N.W. 14th Street, Miami, Florida, 33125, this ___ day of June 2012.

NICHOLAS MERLIN
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CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENTS

I HEREBY CERTIFY that this Answer Brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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