

IN THE SUPREME COURT OF FLORIDA

FILED
THOMAS D. HALL
2012 JUL 20 AM 10:59
CLERK SUPREME COURT
BY _____

JESSICA ANUCINSKI,
Petitioner,

v.

Case No. SC12-1281

STATE OF FLORIDA,
Respondent.

JURISDICTIONAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE AND FACTS

In Anucinski v. State, 37 Fla. L. Weekly D1365 (Fla. 2d DCA June 15, 2012), the Second District determined that Petitioner could not be convicted of dealing in stolen property and grand theft when the two crimes involved one scheme or course of conduct. Petitioner had entered into an open plea on both charges, but section 812.025, Florida Statutes prevented a jury from convicting on both crimes. Id. at D1365. Following the reasoning in Hall v. State, 826 So. 2d 268 (Fla. 2002), the Second District determined that section 812.025 also applied to open pleas and ordered remand. Anucinski, 37 Fla. L. Weekly at D1365-66. The Second District ordered the lower court to vacate the lesser offense, the grand theft. Id. at D1366.

SUMMARY OF THE ARGUMENT

There is no express and direct conflict between the instant case and those cited by Petitioner. The Second District, in Anucinski v. State, 37 Fla. L. Weekly D1365 (Fla. 2d DCA June 8, 2012), determined Petitioner cannot be convicted of both theft and dealing in stolen property when the crimes occurred during the same scheme or course of conduct. The court remanded this case back to the circuit court and asked the court to vacate one of the two crimes, the lesser of the two offenses, the grand theft. The cases from the Fourth District held that a defendant cannot be convicted of both theft and dealing in stolen property when the crimes occurred during the same scheme or course of conduct and remanded back to the trial court for it to vacate one of the crimes. This is a distinction without a difference because the courts reached the same holding and remanded for the same purpose. Because there is no express and direct conflict between the decisions, the State respectfully asks this Honorable Court to deny jurisdiction.

ARGUMENT

WHETHER THE SECOND DISTRICT COURT OF APPEAL'S DECISION IN ANUCINSKI V. STATE, 37 FLA. L. WEEKLY D1365 (FLA. 2D DCA JUNE 8, 2012) EXPRESSLY AND DIRECTLY CONFLICTS WITH HALL V. STATE, 826 SO. 2D 268 (FLA. 2002), GORDON V. STATE, 24 SO. 3D 727 (FLA. 4TH DCA 2009), POMASKI V. STATE, 989 SO. 2D 721 (FLA. 4TH DCA 2008) AND L.O.J. V. STATE, 974 SO. 2D 491 (FLA. 4TH DCA 2008). (restated by Respondent)

The Florida Constitution, article V, section 3(b)(3), authorizes this Court to review a decision of a district court of appeal that expressly and directly conflicts with a decision of this Court or another district court of appeal. This Court has identified two basic forms of express and direct conflict which properly justify the exercise of jurisdiction: 1) where an announced rule of law conflicts with other appellate expressions of law, or 2) where a rule of law is applied to produce a different result in a case which involves "substantially the same controlling facts as a prior case. . . ." Nielsen v. City of Sarasota, 117 So. 2d 731, 734 (Fla. 1960). "Conflict between decisions must be express and direct, i.e., it must appear within the four corners of the majority decision." Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986). No conflict exists on the face of the subject opinion. Accordingly, this Court lacks jurisdiction, and this Petition must be denied.

Petitioner claims that the Second District's decision in

Anucinski v. State, 37 Fla. L. Weekly D1365 (Fla. 2d DCA June 8, 2012) expressly and directly conflicts with a prior Florida Supreme Court cases and three Fourth District Court of Appeal cases on the remedy from a remand on grand theft and dealing in stolen property. The Second District remanded for the trial court to vacate the lesser offense.

The remand by the Second District Court of Appeal is consistent with every district court and this Court. In Victory v. State, 422 So. 2d 67, 68 (Fla. 2d DCA 1982), approved by Hall v. State, 826 So. 2d 268 (Fla. 2002), after a plea to dealing in stolen property and theft of a trailer, the Second District vacated the dealing in stolen property charge. In Ridley v. State, 407 So. 2d 1000, 1002 (Fla. 5th DCA 1981), a case often relied on, after conviction by a jury for dealing in stolen property and theft, the court reversed the lesser conviction because it found the dealing/theft statute analogous to constitutional (or Blockburger) double jeopardy. A similar remedy was found appropriate in Kilmartin v. State, 848 So. 2d 1222, 1225 (Fla. 1st DCA 2003); Blair v. State, 667 So. 2d 834, 841 (Fla. 4th DCA 1996); Thompson v. State, 480 So. 2d 179, 182 (Fla. 3d DCA 1985), rev'd on other grounds, Thompson v. State, 507 So. 2d 1074 (Fla. 1987). And the district courts have consistently held that this remedy was appropriate. Williams v. State, 66 So. 3d 360 (Fla. 2d DCA 2011); Blackmon v. State, 58

So. 3d 343, 347 (Fla. 1st DCA 2011); C.E.C. v. State, 884 So. 2d 421 (Fla. 1st DCA 2004); Toson v. State, 864 So. 2d 552, 556 (Fla. 4th DCA 2004); Newland v. State, 739 So. 2d 168, 169 (Fla. 5th DCA 1999); T.S.R. v. State, 596 So. 2d 766, 767-68 (Fla. 5th DCA 1992); Duncan v. State, 503 So. 2d 443, 444 (Fla. 2d DCA 1987).

When a defendant enters into an open plea, district courts have determined that the appropriate remedy is to follow this Court's decision in Hall and vacate one of the charges. Decisions from district courts have determined that an appropriate remedy would be to vacate the lesser offense, usually the theft. Hinestroza v. State, 867 So. 2d 1279, 1281 (Fla. 5th DCA 2004); Toson v. State, 864 So. 2d 552, 556 (Fla. 4th DCA 2004); Kilmartin v. State, 848 So. 2d 1222, 1225 (Fla. 1st DCA 2003); Dunkle v. State, 841 So. 2d 584 (Fla. 2d DCA 2003). Such a determination is consistent with this Court's decision in Hall and consistent with the Second District's decision in this case.

The Second District properly applied this Court's authority in Hall. The Second District followed a consistent line of cases from every other district court, including the Fourth District. Even so, the cases cited by Petitioner from the Fourth District, Gordon, Pomaski and L.O.J., are not in express and direct conflict because the remedy is similar. All

remand to exclude one of the offenses. In practice, the end result will be the same - the greater offense will remain. This request for discretionary review fails to state a basis for this Court's exercise of its jurisdiction.

CONCLUSION

Respondent respectfully requests that this Court decline to accept jurisdiction in this case.

CERTIFICATE OF SERVICE


I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. mail to Alisa Smith, Assistant Public Defender, P.O. Box 9000–Drawer PD, Bartow, Florida 33831-9000,, this 18 day of July, 2012.

CERTIFICATE OF FONT COMPLIANCE

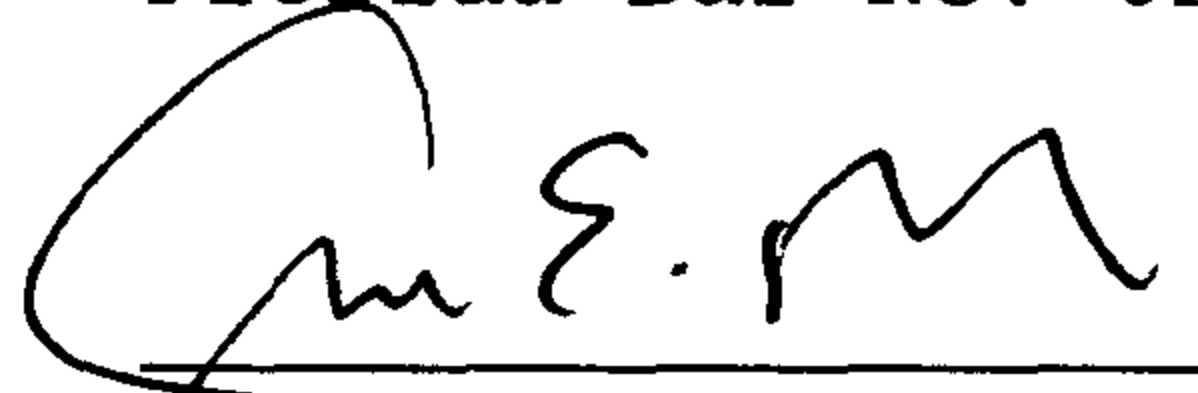
I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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