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IN THE SUPREME COURT OF FLORIDA

ROBERT LUNDBERG,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC13-66

ON DISCRETIONARY REVIEW FROM THE
THE DISTRICT COURT OF APPEAL,
FOURTH DISTRICT OF FLORIDA

JURISDICTIONAL BRIEF OF RESPONDENT

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PRELIMINARY STATEMENT

Respondent, the State of Florida, the appellee in the District Court of Appeal (DCA) and the prosecuting authority in the trial court, will be referenced in this brief as Respondent, the prosecution, or the State. Petitioner, Lundberg, the appellant in the DCA and the defendant in the trial court, will be referenced in this brief as Petitioner or by proper name.

"IB" will designate Petitioner's Initial Brief on Jurisdiction. That symbol is followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's statement of the case and facts but notes that the pertinent history and facts are also set out in the decision of the lower tribunal, attached herein. Lundberg v. State, __ So. 3d __, 2012 WL 5870104, 37 Fla. L. Weekly D2684 (Fla. 4th DCA November 12, 2012).

SUMMARY OF ARGUMENT

A careful reading of the Fourth District's opinion in the instant case and the cases cited by Petitioner reveals no express and direct conflict with this Court on the same point of

law. Therefore, this Court must dismiss this case for lack of jurisdiction.

ARGUMENT

THE FOURTH DISTRICT'S OPINION IN THE INSTANT CASE IS NOT IN EXPRESS AND DIRECT CONFLICT WITH ANY DECISION OF THIS COURT CITED BY PETITIONER. (RESTATED)

Petitioner seeks to invoke the jurisdiction of this Court pursuant to Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv), and Article V, §3(b)(3), of the Florida Constitution which provide that "The supreme court ... [m]ay review any decision of a district court of appeal ... that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law."

The conflict between decisions "must be express and direct" and "must appear within the four corners of the majority decision." Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986). Accord Dept. of Health and Rehabilitative Services v. Nat'l Adoption Counseling Service, Inc., 498 So. 2d 888, 889 (Fla. 1986)(rejected "inherent" or "implied" conflict; dismissed petition). Neither the record, nor a concurring opinion, nor a dissenting opinion can be used to establish jurisdiction. Reaves; Jenkins v. State, 385 So. 2d 1356, 1359 (Fla. 1980)("regardless of whether they are accompanied by a

dissenting or concurring opinion"). Thus, conflict cannot be based upon "unelaborated per curiam denials of relief," Stallworth v. Moore, 827 So.2d 974 (Fla. 2002). In addition, it is the "conflict of decisions, not conflict of opinions or reasons that supplies jurisdiction for review by certiorari." Jenkins, 385 So.2d at 1359.

In Ansin v. Thurston, 101 So. 2d 808, 810 (Fla. 1958), this Court explained:

> It was never intended that the district courts of appeal should be intermediate courts. The revision and modernization of the Florida judicial system at the appellate level was prompted by the great volume of cases reaching the Supreme Court and the consequent delay in the administration of justice. The new article embodies throughout its terms the idea of a Supreme Court which functions as a supervisory body in the judicial system for the State, exercising appellate power in certain specified areas essential to the settlement of issues of public importance and the preservation of uniformity of principle and practice, with review by the district courts in most instances being final and absolute.

Here, the decision below is not in "express and direct" conflict with any of the cases cited by Petitioner. Therefore, there is no expressed and direct conflict, and this Court must dismiss this case for lack of jurisdiction.

Petitioner first asserts the opinion in this case is in conflict with the decision of this Court in Allen v. State, 636 So. 2d 494, 496-97 (Fla. 1994), on the same point of law. (IB 4-5) It is not. Petitioner emphasizes the statement in Allen that "police impropriety would exist if police deliberately fostered

an expectation of privacy in the inmates' conversation, as happened in State v. Calhoun, 479 So.2d 241 (Fla. 4th DCA 1985), especially where the obvious purpose was to circumvent a defendant's assertion of the right to remain silent." Id. (IB 5)

But the Fourth District did not disregard or contradict this statement of law in the opinion below. Rather, the appellate court specifically acknowledged this statement of law several times in the opinion below and simply ruled that the facts of this case showed that 1) the police did not deliberately foster an expectation of privacy and 2) the police did not intend to, in fact did not need to, circumvent the right to remain silent, given that Petitioner **had already waived his rights** and made a statement on tape which, incidentally, was almost identical to what he told his girlfriend. Instead, as the trial and appellate courts recognized, the officer was merely being polite, and even cutting Petitioner a little break, in leaving Petitioner physically alone with his girlfriend to break to her the distressing and emotional news that he had sexually battered a little girl and was being arrested for it. There is no conflict with Allen.

Despite Petitioner's assertions otherwise, there is also no conflict with the decisions of this Court regarding when an evidentiary hearing is required on a motion for post conviction relief. (IB 5) Petitioner cites Freeman v. State, 761 So. 2d

1055, 1064, (Fla. 2000), and cases cited therein, for the proposition that "[a] defendant is entitled to an evidentiary hearing on an ineffective assistance of counsel claims unless the claim is legally insufficient or the record conclusively refutes the factual allegations." Petitioner also cites Thompson v. State, 759 So. 2d 650, 663 (Fla. 2000), for the proposition that "[w]hen reviewing a trial court's summary denial, this Court must accept as true the defendant's factual allegations to the extent they are not rebutted by the record."

But Petitioner fails to sufficiently acknowledge that, although the trial court initially summarily denied this claim, it is clear that the trial court subsequently permitted the introduction of evidence on this claim at the evidentiary hearing. Therefore, Petitioner did have an evidentiary hearing on this claim and Freeman and the cases cited therein, as well as Thompson, are not applicable. Moreover, it is clear from the district court's opinion which relies mostly on the summary record that the summary record refuted Petitioner's claim. Therefore, no evidentiary hearing was required and the opinion of the district court is not in conflict with the opinions of this Court in Thompson and Freeman.

To the extent that Petitioner characterizes as odd that the Fourth District's conclusion that letting Petitioner and his girlfriend "talk 'out of the public eye - to save embarrassment

to them both' is somehow different from fostering a sense of privacy" (IB 7), Petitioner fails to acknowledge that it is indeed different, because it is the **deliberate** fostering of a sense of privacy merely to circumvent a defendant's **invocation of the right to silence** that is problematic. It is not, as here, the officer's simple politeness in leaving Petitioner physically alone with his girlfriend to break to her the distressing and emotional news that he had sexually battered a little girl and was being arrested for it.

Moreover, Petitioner has not demonstrated that the face of the opinion shows that the Fourth District made any factual findings. Rather, as the Fourth District noted, the trial court was the one who first "concluded that the surreptitious taping of the conversation in this case was not employed to circumvent the exercise of the defendant's right to remain silent, as he had already relinquished that right when interviewed with the detective." Lundberg, at *4. Instead, the Fourth District simply analyzed the facts which were already in the summary record before the trial court when it made its ruling.

Petitioner also asserts that the Fourth District's opinion is contrary to this Court's decisions as to the standard for determining an ineffective assistance claim. (IB 7) He essentially relies on Hurst v. State, 18 So. 3d 975, 1009 (Fla. 2009), regarding whether counsel has made a reasonable

"strategic decision." Specifically, he cites Hurst for the proposition that "to determine an ineffectiveness claim, a court must determine (1) whether counsel acted 'outside the broad range of reasonably competent performance under prevailing professional standards,' and (2) whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" (IB 8)

Admittedly, counsel testified at the evidentiary hearing that he did not move to suppress as a matter of trial strategy. But, it was irrelevant whether counsel performed deficiently or made a reasonable strategic decision not to move to suppress. The trial court never revisited its summary ruling prior to the evidentiary hearing to the effect that Petitioner could not show prejudice regardless because Petitioner did not have a reasonable expectation of privacy which had been violated. Lundberg, at *4.

As this Court has pointed out, but Petitioner fails to acknowledge, the seminal case for ineffective counsel claims, Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), says that a court considering a claim of ineffectiveness of counsel need not make a specific ruling on the performance component of the test when it is clear that the prejudice component is not satisfied. Ferrell v. State, 29 So. 3d 959, 969 (Fla. 2010). Therefore, despite Petitioner's

suggestions otherwise, the Fourth District did not need to give any consideration as to whether counsel had made a reasonably thorough investigation.

The fact that the Fourth District noted what counsel said at the evidentiary hearing in their opinion below was irrelevant to their decision since a careful reading of the opinion shows the appellate court did not uphold the trial court's summary denial based on what counsel said but, rather, based on the fact that Petitioner did not show prejudice. As a result, the opinion of the district court is not in conflict with the decisions of this Court in Hurst or in any of the other cases cited by Petitioner on this ground.

CONCLUSION

Based on the foregoing reasons, the State respectfully requests this Honorable Court decline to exercise jurisdiction.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to the following by E-MAIL on March 20, 2013: Gary Caldwell at gcaldwel@pd15.state.fl.us, cgload@pd15.state.fl.us, and appeals@pd15.state.fl.us.

CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Courier New 12 point font.

Respectfully submitted and certified,
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