

IN THE SUPREME COURT OF FLORIDA

ANTONIO GARRETT,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC14-2110

JURISDICTIONAL BRIEF OF RESPONDENT

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PRELIMINARY STATEMENT

Respondent, the State of Florida, the appellant 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, Antonio Garrett, the appellee in the DCA and the defendant in the trial court, will be referenced in this brief as Petitioner or proper name.

"PJB" will designate Petitioner's Jurisdictional Brief. That symbol is followed by the appropriate page number.

A bold typeface will be used to add emphasis. Italics appeared in original quotations, unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

The pertinent history and facts for jurisdictional purposes are only those contained within the lower court's opinion, and consequently are set out in such opinion, attached in the State's Appendix.

SUMMARY OF ARGUMENT

No express and direct conflict exists between the First District's decision and *Rios v. State*, 143 So.3d 1167 (Fla. 4th DCA 2014), and *Dorsey v. State*, 149 So.3d 144 (Fla. 4th DCA 2014). *Rios* and the instant case involve different facts, and *Dorsey's* rationale adds nothing to that of *Rios*. Given that different facts drove the fundamental error analyses, it cannot be said that they are in express and direct conflict.

ARGUMENT

ISSUE: WHETHER THIS COURT HAS EXPRESS AND DIRECT CONFLICT JURISDICTION TO REVIEW THE FIRST DISTRICT'S DECISION IN GARRETT V. STATE (RESTATED)?

1. Jurisdictional Criteria

Petitioner contends that this Court has jurisdiction pursuant to Fla. R. App. P. 9.030(a)(2)(A)(iv), which parallels Article V, § 3(b)(3), Fla. Const. The constitution provides:

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). A district court must address the legal principles it relies upon to reach its decision. *See Ford Motor Co. v. Kikis*, 401 So.2d 1341, 1342 (Fla. 1981). Neither the record, nor a concurring opinion, nor a dissenting opinion can be used to establish jurisdiction. *Reaves*, 485 So. 2d at 830; *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 *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.

Accordingly, the determination of conflict jurisdiction distills to whether the District Court's decision reached a result opposite *Harrell v. State*, 894 So.2d 935 (Fla. 2005).

2. The decision below is not in "express and direct" conflict with *Rios v. State*, 143 So.3d 1167 (Fla. 4th DCA 2014), and *Dorsey v. State*, 149 So.3d 144 (Fla. 4th DCA 2014).

Petitioner claims that the decision in the instant case expressly and directly conflicts with the decisions in *Rios v. State*, 143 So.3d 1167 (Fla. 4th DCA 2014), and *Dorsey v. State*, 149 So.3d 144 (Fla. 4th DCA 2014). Petitioner is mistaken, as different facts drove the fundamental error analyses, rendering them distinguishable.

In the instant case, the First District held that it was error for the jury to be instructed, as part of the law on justifiable use of force, that a defendant has a duty to retreat prior to using force if they are engaged in unlawful activity. (Slip op. at 11). However, the First District also considered the instruction that Petitioner did not have a duty to retreat if faced with an imminent danger of death or great bodily harm and retreating would have increased his danger, as well as the evidence which

could have indicated Petitioner faced such a danger and obviated any duty to retreat. (Slip op. at 12). The First District held that, "in the context of the other instructions given, along with the evidence adduced in the case," the instructions still allowed the jury to consider Petitioner's self-defense claim. (Slip op. at 12). Such a holding is inherently specific to the interplay between the specific facts and instructions in a case.

In *Rios*, 143 So.3d 1167 at 1170, the Fourth District also held that it was error for the jury to be instructed that a defendant has a duty to retreat if they are engaged in unlawful activity. As to whether such an error was fundamental, the court analyzed the evidence that the defendant had an opportunity to escape, the instruction that the defendant had no duty to retreat if that increased his danger, and the prosecution's mention that the defendant could have left with his friends. *Id.* at 1170-1171. The court concluded that all those factors rendered the error fundamental. *Id.*

Dorsey, 149 So.3d 144, also involves a jury being erroneously instructed that a defendant who is engaged in an unlawful activity has a duty to retreat. In reaching the conclusion that this error was fundamental, the court relied on its prior holding in *Rios*, stating that, "[a]s in *Rios*, the instruction's reference to the defendant's 'duty to retreat' was 'not necessary because Defendant did not have a duty to retreat under Florida's Stand Your Ground law,' and it 'effectively eliminated Defendant's sole affirmative defense.'" *Id.* at 147. By

stating, “[a]s in *Rios*,” without any other application of the law to the facts, the court did nothing more than adopt the rationale of *Rios* for the holding of *Dorsey*. *Dorsey*, therefore, adds nothing to the holding of *Rios*.

The determination of fundamental error in the instant case turns on facts that did not exist in *Rios*, and so is distinguishable from *Rios*. Specifically, the instant case lacks an obvious opportunity for Petitioner to have escaped. (Slip op. at 12). Additionally, the decision in the instant case, unlike that in *Rios*, makes no mention of a closing argument aggravating the erroneous jury instruction. (Slip op. at 12).

Given such a lack of parity in the relevant facts, *Rios* and the instant case are not irreconcilable, and so cannot be in express and direct conflict. Similarly, given that *Dorsey* provided no fundamental error analysis other than a blanket comparison to *Rios*, it cannot be said that an express and direct conflict exists between *Dorsey* and the instant case when such a conflict is lacking with *Rios*. Without an express and direct conflict, this Court does not have jurisdiction to hear the instant case.

It is worth noting that Petitioner’s argument in favor of jurisdiction is based on a misapprehension of the First District’s decision. Petitioner represents the decision as holding that since the evidence “belied an imminent threat” the jury could not have acquitted Petitioner. (PJB 7-8). The opposite is actually true, as the First District specifically stated that, “[u]nder the complete set of instructions given, the jury could have found that Garrett’s use of deadly force was justified and he had no duty to retreat because retreating would be futile given the ‘imminence’ of the

danger he faced." (Slip op. at 12). Based on this misapprehension, Petitioner argues that conflict exists because the First District decided for itself that there was no imminent threat. (PJB 8). Given that this claim of express and direct conflict is entirely based on a misreading of the decision in the instant case, it cannot support a claim of jurisdiction.

CONCLUSION

Based on the foregoing discussions, the State respectfully requests this Honorable Court determine that it does not have jurisdiction.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to the following by electronic mail on December 31, 2014: Glen Gifford, Esq., at glen.gifford@flpd2.com.

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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