

IN THE SUPREME COURT OF THE STATE OF FLORIDA

DUNCAN JASON SMITH)
)
 Petitioner,)
)
 vs.)
)
 STATE OF FLORIDA,)
)
 Respondent.)
)
 _____)

CASE No. SC15-782
 L.T. No. 4D14-438

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PETITIONER’S BRIEF ON JURISDICTION

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On Petition for Discretionary Review from the District Court of Appeal
 Fourth District of Florida

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RECEIVED, 05/01/2015 01:58:31 PM, Clerk, Supreme Court

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PRELIMINARY STATEMENT

Petitioner was the appellant below. He was a defendant in the trial court. Respondent, State of Florida, was the appellee below and was the prosecution in the trial court.

In this brief, the parties will be referred to as they appear in this Court. Additionally the Petitioner may be referred to by name as Duncan Smith.

References to the Opinion issued by the district court of appeal will be to the pages of the slip opinion contained in the Appendix to Petitioner's Brief on Jurisdiction filed herewith.

STATEMENT OF THE CASE AND THE FACTS

Petitioner, Duncan Smith, initially entered a plea of guilty in August 2011, in the Fifteenth Judicial Circuit in Palm Beach County, to twenty counts of transmission of child pornography in violation of section 847.0137, Fla. Stat. (2010). He subsequently filed a motion for post-conviction relief asserting, inter alia, that the conviction violated his right to due process of law by having been convicted of a crime that did not encompass the acts he was accused of committing. Smith relied on a decision, issued after his plea was entered, by the Fifth District Court of Appeal in Biller v. State, 109 So. 3d 1240 (Fla. 5th DCA 2013), holding that allowing access to files contained in a file sharing program, without further an additional affirmative act by the accused to cause files to be sent or delivered, did not constitute transmission that is defined in section 847.0137(1)(b), Fla. Stat. (2010). The statute defines transmission as:

[T]he act of sending and causing to be delivered any image, information, or data from one or more persons or places to one or more other persons or places over or through any medium, including the Internet, by use of any electronic equipment of device.

The Fourth District Court of Appeal in the present case “disagree[d] with *Biller’s* interpretation of the statute.” See Appendix, p. 4 of slip opinion. The Court certified “conflict with Biller” and affirmed the denial of the motion to vacate. Appendix, p. 5 of slip opinion. A timely notice of review was filed.

SUMMARY OF THE ARGUMENT

The decision below was certified to conflict with a decision of another district court of appeal on a question of law. Jurisdiction is thereby vested in this Court to decide the issue.

ISSUE PRESENTED

THE DECISION BELOW WAS CERTIFIED TO CONFLICT WITH A DECISION OF ANOTHER DISTRICT COURT OF APPEAL THEREBY VESTING DISCRETIONARY JURISDICTION IN THIS COURT TO RESOLVE THE CONFLICT.

Jurisdiction to review the decision below

Jurisdiction of this Court to review a decision of a district court of appeal may be based on a certification of direct conflict with a decision of another district court of appeal. Article V section 3(b)(4), Fla. Const.; Rule 9.030(a)(2)(A)(vi), Fla. R. App. P.

The decision below concluded that “use of a file-sharing program violation, where the originator affirmatively grants the receiver access to his files, who can then download the pornographic images over the internet through an electronic device, constitutes ‘transmission’ of pornography.” Appendix, p. 4 of slip opinion. The Court below determined that the Fifth District’s decision in Biller had “focused only on the word ‘send’ in construing the statute” while the decision below found “the second phrase in the statute is equally important.” Appendix, p. 4 of slip opinion.

The court below certified that its ultimate conclusion conflicted with the decision of another district court of appeal. No other courts of appeal are known to have construed this section pertaining to the type of act involved in these two cases. The decisions in these cases constitute an existing conflict in the law.

CONCLUSION

WHEREFORE, the Court has discretionary jurisdiction to review the decision below and settle the question of statutory construction involved.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of Petitioner's Brief on Jurisdiction, and the Appendix filed herewith, has been furnished to counsel for Respondent, Angela E. Noble, Esq., Assistant Attorney General, Office of the Attorney General, 1515 North

Flagler Drive, Ninth Floor, West Palm Beach, Florida 33401-3432, by E-Mail service
at: CrimAppWPB@MyFloridaLegal.com this 1st day of May 2015.

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CERTIFICATE OF FONT COMPLIANCE

Counsel hereby certifies that the instant brief has been prepared with Times
New Roman 14-point font.

/s/ Louis G. Carres
Attorney