IN THE DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

DENEAL O. BROWN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC16-1031
DCA Case No. 2D14-1166

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

JURISDICTIONAL BRIEF OF RESPONDENT

PAMELA JO BONDI
ATTORNEY GENERAL

GILLIAN N. LEYTHAM
Assistant Attorney General
Florida Bar No. 100758
Concourse Center 4
3507 E. Frontage Road, Suite 200
Tampa, Florida 33607-7013
Telephone: (813)287-7900
Facsimile: (813)281-5500
CrimAppTPA@myfloridalegal.com
GillianLeytham@myfloridalegal.com

COUNSEL FOR RESPONDENT

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STATEMENT OF THE CASE AND FACTS

The instant case arises out of the Second District Court of Appeal's decision in Brown v. State, --- So. 3d ----, 41 Fla. L. Weekly D788, 2016 WL 1235520 (Fla. 2d DCA March 30, 2016). In its decision, the Second District set forth the pertinent facts regarding Petitioner's conviction for second-degree murder:

> Mr. Brown was charged with second-degree murder. His counsel told the jury in his opening statement: "I believe that the evidence is going to show that this was self-defense, that what turned into a verbal confrontation then turned into gun play, ... but the person who shot [the victim] was just quicker than he was." Mr. Brown testified at trial that as he was driving out of the victim's apartment complex, the victim engaged him in a verbal altercation. Mr. Brown started to drive away but returned when the victim challenged him and his friend, who was a passenger in the car, to a fight. Mr. Brown testified that his friend shot the victim when the victim reached for his gun. Nevertheless, Mr. Brown's counsel argued in closing, "I told you this was a case about self-defense, and I told you that's what the evidence is going to show. This is a case of self-defense."
>
> The State disputed the presence of Mr. Brown's friend and Mr. Brown's argument that the shooting was in self-defense, arguing that Mr. Brown's acts of driving back to the victim and then shooting him in the torso demonstrated a depraved mind without regard for human life. The jury found Mr. Brown guilty as charged, and the trial court sentenced him to life in prison with a twenty-five-year mandatory minimum term in accordance with the jury's findings that Mr. Brown discharged a firearm during the commission of the offense and that the

discharge caused the victim's death.

Id. at *1.

SUMMARY OF THE ARGUMENT

In Brown, the Second District held that an erroneous instruction on manslaughter by act was not fundamental error because, under the facts of that case, the element of intent was not in dispute at trial. This holding does not expressly and directly conflict with any cases from this Court or any other district court. Therefore, this Court may not exercise its jurisdiction to review the opinion of the Second District.

ARGUMENT

ISSUE

DOES THIS COURT HAVE SUBJECT MATTER JURISDCTION, WHERE NO EXPRESS AND DIRECT CONFLICT EXISTS BETWEEN THE SECOND DISTRICT'S OPINION IN BROWN AND ANY CASES FROM THIS COURT OR ANY OTHER DISTRICT COURTS OF APPEAL? [Restated by Respondent]

This Court is a court of limited jurisdiction; it is empowered to hear only those cases that fit the categories set out in article V, section 3(b) of the Florida Constitution. Article V, section 3(b)(3) provides that this Court may 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*." (emphasis added). In order for this Court to exercise its

jurisdiction under this provision, the conflict must be express and direct and contained within the four corners of the opinion sought for review. Reaves v. State, 485 So. 2d 829 (Fla. 1986).

Here, Petitioner first asserts that Brown expressly and directly conflicts with the following cases: Griffin v. State, 160 So. 3d 63 (Fla. 2015); Haygood v. State, 109 So. 3d 735 (Fla. 2013); State v. Montgomery, 39 So. 3d 252 (Fla. 2010); Dowe v. State, 162 So. 3d 35 (Fla. 4th DCA 2014); Ward v. State, 12 So. 3d 920 (Fla. 1st DCA 2009); and Stinson v. State, 69 So. 3d 291 (Fla. 1st DCA 2009). However, as Respondent will demonstrate below, no conflict exists between Brown and the cases upon which Petitioner relies, and this Court should decline review accordingly.

From the outset, Brown does not expressly and directly conflict with this Court's decisions in Montgomery and Haygood. In Montgomery, this Court held that the use of the erroneous 2006 standard jury instruction on manslaughter by act was fundamental error in that case because Montgomery was convicted of a crime no more than one step removed from manslaughter and the erroneous instruction "was 'pertinent or material to what the jury must consider in order to convict.'" 39 So. 3d at 258-59 (*quoting* State v. Delva, 575 So. 2d 642, 644-45 (Fla. 1991)). This Court also explained in Montgomery that:

"fundamental error occurs only when the

> omission is pertinent or material to what the jury must consider in order to convict." Failing to instruct on an element of the crime over which the record reflects there was no dispute is not fundamental error and there must be an objection to preserve the issue for appeal.

Id. at 258 (*quoting* Delva, 575 So. 2d at 644-45).

In Haygood, this Court held (in pertinent part) that based on the facts and circumstances in that case, the giving of the erroneous manslaughter by act jury instruction was fundamental error because "[t]he elements of the offense were disputed and the instructions were pertinent and material to what the jury must consider in order to convict Haygood of any of the offenses." 109 So. 3d at 742.

Unlike this Court's decisions in Montgomery and Haygood, the Second District held in Brown that, under the facts of that case, the element of intent was *not* in dispute at trial and, thus, the defect in the manslaughter by act instruction was not fundamental error in Petitioner's case because the erroneous instruction was not pertinent and material to what the jury had to consider in order to convict. 2016 WL 1235520 at *1. More specifically, the Second District held that "[b]y arguing without qualification that he or his friend acted in self-defense, Mr. Brown necessarily conceded that either intentionally caused the victim's death"; therefore, the erroneous manslaughter by act instruction was not fundamental

error "because it did not prevent the jury from considering whether the evidence fit the elements of manslaughter." Id.

Based on the four corners of the Second District's opinion, Brown does not announce a rule of law which conflicts with the rules announced by this Court in Montgomery and Haygood. Likewise, Brown does not apply the rules of law announced in Montgomery and Haygood to produce a different result based on substantially the same facts. Therefore, this Court's conflict jurisdiction to review the Second District's decision in Brown cannot be invoked.

There is also no express and direct conflict between Brown and this Court's decision in Griffin. In Griffin, this Court held "that sole defense of misidentification does not concede or fail to place in dispute intent or any other element of the crime charged except identity when the offense charged is an unlawful homicide." 160 So. 3d at 67. The Second District's decision in Brown did not misapply Griffin, as this Court expressly limited its holding in that case to the narrow issue of "whether the giving of an erroneous manslaughter by act jury instruction cannot be found to be fundamental error if the defendant's sole defense is misidentification." Id. at 65.

Thus, there is no express and direct conflict between Brown and Griffin because those cases concern two *different* questions of law. In Brown, the Second District expressly held that the

giving of the erroneous manslaughter by act jury instruction was not fundamental error because Petitioner presented the theory of defense at trial that, "without qualification", either "he or his friend acted in self-defense." 2016 WL 1235520 at *1. As such, it cannot be said that the Second District articulated a holding, within the four corners of Brown, that expressly and directly conflicts with this Court's decision in Griffin.

Moreover, in the "argument" portion of his jurisdictional brief, Petitioner relies heavily on Griffin to support his assertion that the Second District erroneously concluded that his specific claim of self-defense necessarily conceded the element of intent; however, Petitioner presents no argument whatsoever regarding how the Second District's opinion expressly and directly conflicts with Griffin on *the same question of law.* In this regard, Petitioner's brief functions only as an attempt to re-litigate claims that the Second District has already rejected. This is entirely insufficient to invoke this Court's conflict jurisdiction under article V, section 3(b)(3).

In any event, the State notes that a claim of self-defense both admits and seeks to excuse criminal action. Martinez v. State, 981 So. 2d 449 (Fla. 2008); Bolin v. State, 297 So. 2d 317. By pursuing his specific theory defense that without qualification he or his friend acted in self-defense, Petitioner necessarily conceded that either he or his friend intentionally

shot the victim in the torso with deadly force. As such, the Second District correctly concluded that the material issue of intent was not in dispute at trial. 2016 WL 1235520 at *1.

Based on the facts and circumstances found within the four corners of the Second District's opinion, Brown does not expressly and directly conflict with this Court's decision in Griffin on the same question of law. Moreover, this Court's "jurisdiction cannot be invoked merely because [this Court] might disagree with the decision of the district court nor because [this Court] might have made a [different] factual determination if [it] had been the trier of fact." Mancini v. State, 312 So. 2d 732, 733 (Fla. 1975)(*citing* Kincaid v. World Insurance Co., 157 So. 2d 517 (Fla. 1963)).

Additionally, Brown does not expressly and directly conflict with the Fourth District's decision in Dowe. In fact, this Court will not strain to recognize that that Dowe is readily distinguishable from Brown and, therefore, it does not offer a basis for conflict jurisdiction. In Dowe, the Fourth District held that the trial court fundamentally erred in giving the standard jury instruction on manslaughter by act because "the evidence presented at trial did not reasonably support a finding that the victim's death occurred due to the defendant's culpable negligence." 162 So. 3d at 36.

Dowe never addresses the issue of whether the giving of an

erroneous manslaughter by act jury instruction is fundamental error where the element of intent is not a disputed issue at trial, much less the issue of whether an unqualified claim of self-defense concedes the element of intent in a second-degree murder case. As such, Dowe is entirely irrelevant to the specific issues addressed in Brown.

As to the First District's opinions in Ward and Stinson, those cases are also readily distinguishable from Brown. In Ward, the First District held that "fundamental error occurred in this case when the trial court gave the standard jury instruction for the lesser included offense of manslaughter by act, which improperly imposed the additional element of intent to kill." 12 So. 3d at 920 (*citing* Montgomery v. State, 70 So. 3d 603 (Fla. 1st DCA 2009)). In Stinson, the First District similarly held that the trial court fundamentally erred in instructing the jury on the lesser included offense of manslaughter by act because the "court stated that the State was required to prove that 'Noni Jamil Stinson intentionally caused the death of Solomon Stinson.'" 69 So. 3d at 292 (*citing* Montgomery, 70 So. 2d 603).

In both Ward and Stinson, the First District engaged in absolutely no analysis of whether and how intent was disputed in those cases as it related to the manslaughter by act instruction. Without such analyses, there is no parallel

between those two decisions and Brown. Isolated, out-of-context statements from various opinions do not qualify as the express and direct conflict required for jurisdiction in this case. Ward and Stinson contain no facts or language from which this Court can extrapolate disagreement on any point of law. Moreover, "implied" conflict cannot serve as a basis to invoke this Court's jurisdiction. Dep't of Health & Rehab. Serv. v. Nat'l, 498 So. 2d 888 (Fla. 1986).

Finally, Petitioner also asserts that because "this Court has granted review on the same issue in Richards v. State, 128 So. 3d 959, 962 (Fla. 2d DCA 2013), review granted, No. SC14-184 (Fla. May 26, 2016), this Court had jurisdiction and should exercise that jurisdiction." (Initial brief, p. 9). In support, Petitioner cites Jollie v. State, 405 So. 2d 418 (Fla. 1981).

Petitioner is incorrect, and his reliance on Jollie is misplaced. In Jollie, this Court held that it has discretionary jurisdiction to review decisions of the district court which cite as controlling authority a decision that is pending review in this Court. 405 So. 2d at 420. Although Richards is presently pending in this Court, that decision was *not* cited by the Second District in Brown. As such, the mere fact that Richards is pending before this Court does not "constitute prima facie express conflict and allow[] this Court to exercise its jurisdiction." Jollie, 405 So. 2d at 420.

CONCLUSION

For all of the foregoing reasons, this Court should decline to exercise its discretion to review the Second District's opinion in Brown because the four corners of that opinion "establishes no point of law contrary to a decision of this Court or another district court." The Florida Star v. B.J.F., 530 So.2d 286, 288-89 (Fla. 1988).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing document has been furnished electronically to Dane K. Chase, counsel for Petitioner, 111 2nd Avenue NE, Suite 334, St. Petersburg, FL 33701, at dane@chaselawfloridapa.com on July 7, 2016.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New.

Respectfully submitted,

PAMELA JO BONDI
ATTORNEY GENERAL

/s/GILLIAN N. LEYTHAM
Assistant Attorney General
Florida Bar No. 100758
Concourse Center 4
3507 E. Frontage Road, Suite 200
Tampa, Florida 33607-7013
Telephone: (813)287-7900
Facsimile: (813)281-5500
CrimAppTPA@myfloridalegal.com
GillianLeytham@myfloridalegal.com

COUNSEL FOR RESPONDENT