

IN THE SUPREME COURT OF FLORIDA

DOMINIQUE WRIGHT,

Petitioner,

v.

Case No. SC16-1534

STATE OF FLORIDA,

Respondent.

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, Wright, the Appellant in the DCA and the defendant in the trial court, will be referenced in this brief as Petitioner or by 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 are set out in the decision of the lower tribunal, attached and referred to as Appendix. Respondent relies on the following facts in this brief:

On remand from this court, the Fourth District withdrew its original opinion and substituted it with a new opinion (A. 1).

The court summarized that that the appellant was arguing that the trial court erred in excluding portions of victim one's deposition (A. 1). It determined, however, that the defense had sufficient opportunity to cross-examine the victim at the hearing on the motion to suppress, which was admitted into evidence (A. 2).

SUMMARY OF ARGUMENT

Petitioner waived the opportunity to have the opinion with regard to the conviction reviewed. This opinion is the exact same opinion that the Fourth District rendered prior to this court remanding this case on the sentencing issue. Petitioner failed to challenge the Fourth District's opinion at the time it was rendered, and should not be permitted a second bite at the apple based on the Fourth District's issuing a new opinion containing the same language with regard to the conviction, but changing its ruling with regard to the sentencing based on this court's opinion on discretionary review.

The decision of the district court is not in direct and express conflict with the decisions cited by Petitioner. Petitioner has failed to show that this court has jurisdiction to review the opinion of the district court. This court should decline to review this cause on the merits.

ARGUMENT

PETITIONER WAIVED THE OPPORTUNITY FOR REVIEW OF THE OPINION WITH REGARD TO THE CONVICTION; THE DECISION OF THE FOURTH DISTRICT IS NOT IN EXPRESS AND DIRECT CONFLICT WITH THE OPINIONS OF THIS COURT CITED BY PETITIONER.

Initially, Respondent maintains that Petitioner seeks review from an exact decision that was made in the original opinion, for which he did not timely challenge. See Wright v. State, 143 So. 3d 995 (Fla. 4th DCA 2014). Petitioner did not move for rehearing from the original opinion.

Instead, Petitioner filed a notice of discretionary jurisdiction. Respondent agreed that this court had jurisdiction pursuant to Jollie v. State, 405 So.2d 418 (Fla. 1981) because this court at that time was reviewing Williams v. State, 125 So. 3d 879 (Fla. 4th DCA 2013) (SC13-1080) regarding whether section 775.087(d), Florida Statutes, requires consecutive sentences when the sentences arise from the same criminal episode. Consequently, when this court remanded the case, it did so "for reconsideration upon application of our decision in *Williams v. State*, 41 Fla. L. Weekly S73 (Fla. Mar. 3, 2016)." See Wright v. State, 2016 WL 2593909 (Fla. May 5, 2016).

Respondent asserts, therefore, that since the remand was limited to the sentencing issue, and since the language now challenged in the Fourth District's opinion on remand is the same exact language that was in the original opinion, Petitioner waived any opportunity for review of that language. Petitioner is not entitled to a second bite of the apple just because this court remanded this case to the Fourth District on a limited issue. The remand, and the review, was limited to sentencing, and did not extend to the conviction itself.

This Honorable Court has authority pursuant to Article V, Section 3(b)(3) of the Florida Constitution (1980) to review a decision of a district court of appeal that expressly and directly conflicts with a decision of another district court of appeal or

the Supreme Court on the same question of law. See The Florida Bar v. B.J.F., 530 So. 2d 286, 288 (Fla. 1988). This Court in Mancini v. State, 312 So. 2d 732, 733 (Fla. 1975) made it clear that its "jurisdiction to review decisions of courts of appeal because of alleged conflicts is invoked by (1) the announcement of a rule of law to produce a different result in a case which conflicts with a rule previously announced by this court or another district, or (2) the application of a rule of law to produce a different result in a case which involves substantially the same facts as a prior case. In this second situation, the facts of the case are of the utmost importance." [emphasis added]. See also Department of Revenue v. Johnston, 442 So. 2d 950 (Fla. 1983) ("cases which are cited for conflict that are distinguishable on their facts will not vest this Court with jurisdiction").

The State maintains that the opinion of the Fourth District in this case is not in direct and express conflict with decisions cited by Petitioner. Therefore, jurisdiction should not be accepted.

Petitioner cites to Fitzpatrick v. State, 900 So. 2d 495, 515 (Fla. 2005) and argues that this court's opinion is contrary to it and section 90.806(1), Florida Statutes. However, while this court in Fitzpatrick looked at the ability to impeach an excited utterance with later statements by the declarant, this court in this case looked at the defendant's ability to impeach former

testimony, for which the defense already cross-examined the declarant, and for which this cross-examination was presented to the jury in the former testimony.

Petitioner also points to Reaves v. State, 639 So. 2d 1, 4 (Fla. 1994). In Reaves, this court held that it was error not to allow the defense to introduce prior inconsistent testimony to impeach the former trial testimony that was read to the jury because the witness was unavailable. This court did not indicate from where the prior inconsistent statements were taken, or whether the witness was previously asked about them in the former testimony. Here, though, the Fourth District expressly stated that the defense had sufficient opportunity to cross-examine the victim at the hearing on the motion to suppress (A. 2).

CONCLUSION

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

CERTIFICATE OF SERVICE

I certify that a copy hereof has been e-filed, and served to Gary Caldwell, Assistant Public Defender, via the Florida e-filing Portal, on September 1st, 2016.

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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