

IN THE SUPREME COURT OF FLORIDA

GABRIEL BRIAN NOCK,
Petitioner,

vs.

Case number SC17-472
DCA number 4D14-1240

STATE OF FLORIDA,
Respondent.

_____ /

PETITIONER'S BRIEF ON JURISDICTION

On review from the Fourth District Court of Appeal

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ARGUMENT

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PRELIMINARY STATEMENT

Petitioner was the defendant in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida, and Appellant in the Fourth District Court of Appeal. Respondent was Appellee, below.

In the brief, the parties will be referred to as they appear before this Honorable Court.

Invocation of this Court's jurisdiction is based on the direct and expressed conflict between Nock v. State, Case no. 4D14-1240 (Fla. 4th DCA February 15, 2017), and Foster v. State, 182 So. 3d 3 (Fla. 2d DCA 2015).

STATEMENT OF THE CASE AND FACTS

The Facts

The State of Florida charged Petitioner, Gabriel Nock, by way of an indictment, with first degree murder while engaged in the commission of a robbery and tampering with physical evidence. Petitioner went to trial and was convicted as charged. During the police investigation, detectives made an audio and video recording of their interrogation of Petitioner. Both before and during trial, Petitioner sought to compel the State to admit all relevant, in-context statements he made to detectives concerning his interactions with the victim under the rule of completeness, § 90.108(1), Fla. Stat. (2014), in that it provides that,

"([W])hen a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him or her at that time to introduce any other part of any other writing or recorded statement that in fairness ought to be considered contemporaneously. An adverse party is not bound by evidence introduced under this section."

Id [emphasis added]. At trial, the State did not admit the recording; instead, it elicited direct-examination testimony from the interrogating detective as to what Petitioner stated during the recorded interrogation and, in so doing, omitted the portions of Petitioner's statement in which he explained that the victim's death was an accident.

The trial court denied Petitioner's motions to compel, finding that the rule of completeness did not apply, because the State did not offer the recording of the interrogation into evidence. It also warned Petitioner that if he were to elicit omitted portions of his interrogation statement when cross-examining the detective, the State would be allowed, pursuant to section 90.806(1), Florida Statutes (2014), to impeach him by means of his prior convictions. At trial, Mr. Nock cross-examined the detective and elicited what the State refused to elicit on direct-examination; that the victim's death was an accident.

The trial evidence showed that Petitioner, who was in his late 20's, met the victim, who was in his late 60's, at a beach and the victim brought Appellant to his home. On direct-examination, the interrogating detective testified that Mr. Nock initially denied knowing the victim; but later, he admitted to knowing him and "put

his head down and shook his head and said, he wasn't suppose[d] to die, it wasn't suppose[d] to happen this way.'" The detective then testified Petitioner told him that he and the victim left the beach together, as the victim was going to pay him for sex. In the upstairs bedroom of the victim's home, the victim asked that Petitioner engage him in "'wrestling moves,'" because the victim had a "wrestling fetish." Petitioner obliged and put the victim in a headlock until the victim "'tap[pped] out;'" indicating the wrestling move was too forceful. While in the bedroom, Petitioner took the victim's wallet and credit card and then went downstairs.

According to the detective's direct-examination testimony, Petitioner told him that while in the kitchen he again put the victim in a headlock, but the victim collapsed and that the victim "never tapped out." Petitioner became scared when he was unable to awaken the victim; he poured bleach around the kitchen and the living room to cover his presence; grabbed several items from the victim's home; and left the residence in the victim's car. On cross-examination, Petitioner elicited the omitted portions of his statement to the detective; that the victim's death was an accident, which supported his legal defense. At the State's behest, the trial court admitted evidence of Petitioner's nine prior convictions for felonies or crimes involving dishonesty.

The Case

Before the District Court, Petitioner argued that the trial

court abused its discretion and erred in denying his pretrial and trial motions to compel the State to admit, or not omit, the relevant, in-context statements concerning the accidental nature of the victims death. He maintained that the rule of completeness applied to the detective's oral testimony about the content of his recorded interrogation statement; and that the trial court erred in permitting the State to impeach his credibility with evidence of his prior convictions after he was forced to elicit the omitted, relevant, in-context evidence when he cross-examined the detective. The Fourth District Court of Appeal affirmed Petitioner's conviction, holding that the rule of completeness, §90.108(1) applied exclusively to written or recorded statements and when a statement is admitted into evidence that is neither in a writing nor a recording the rule of completeness is inapplicable. Nock v. State, supra. It further held when Appellant elicited the omitted portions of the detective's testimony on cross-examination, the trial court properly admitted evidence of Petitioner's prior felony and dishonesty crimes, per section 90.806(1), Florida Statutes. Id. In so doing, the Fourth District certified conflict between its decision, sub judice, and the decision of the Second District Court of Appeal, in Foster v. State, supra.

Petitioner, at bar, did not move for rehearing. On March 16, 2017, Petitioner filed his notice to invoke this Court's discretionary jurisdiction with the Fourth District Court of Appeal.

SUMMARY OF THE ARGUMENT

This court has jurisdiction over the instant cause. The opinion of the Fourth District Court of Appeal at bar holds that the rule of completeness, § 90.108(1), Fla. Stat., does not apply to non-written or non-recorded admissions of a party opponent, even when cross-examination reveals the party opponent's complete story of a transaction was only partly explained by the direct examination of the witness to the admission. It also held that if the party opponents elicit the omitted relevant, in-context portions of their admissions on cross-examination, they expose themselves to impeachment by prior conviction. §90.806(1), Fla. Stat. These holdings are expressly and directly in conflicts with the decision of the Second District Court of Appeal, in Foster v. State, supra.

ARGUMENT

THIS COURT SHOULD EXERCISE ITS DISCRETIONARY JURISDICTION TO REVIEW THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL CONCERNING ITS HOLDING THAT THE RULE OF COMPLETENESS IS INAPPLICABLE WHEN A STATEMENT OF A PARTY OPPONENT IS ADMITTED INTO EVIDENCE IN A FORM THAT IS NEITHER WRITTEN NOR RECORDED.

Conflict Jurisdiction

Under Article V, Section 3(b)(3) of the Florida Constitution, this Court may 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. "Conflict" jurisdiction is properly invoked when: 1) the district

court announced a rule of law which conflicts with a rule previously announced by the Supreme Court or by another district, or 2) the district court applies a rule of law to produce a different result in a case which involves substantially the same facts as another case. Mancini v. State, 312 So. 2d 732, 733 (Fla. 1975). Thus, in order for two court decisions to be in express and direct conflict for purposes of invoking this Court's discretionary jurisdiction under Fla. R. App. P. 9.030(a)(2)(A)(iv), the decision should speak to the same point of law, in factual contexts of sufficient similarity to compel the conclusion that the results in each case would have been different had the deciding court employed the reasoning of the other court. See Mancini, supra.

Nock Directly and Expressly Conflicts with Foster

The issue addressed by the Second District Court of Appeal in Foster v. State, supra, is identical to that of the instant case. In Foster, a police officer saw the defendant behaving suspiciously near a parked car at 2:00 a.m. At trial, the officer testified on direct-examination that he asked the defendant what he was doing in the area and he replied that his sister resided in the neighborhood. The defendant then walked to a nearby residence, knocked on its door and, when a porch light came, walked away. The officer exited his car, obtained the defendant's consent, and searched his pockets. Inside, he found a wallet containing a Social Security card in the name of a person who had reported his wallet stolen. The defendant

told the officer that he had found the wallet. The officer arrested the defendant for burglary of a conveyance, petit theft, and loitering or prowling. Id. On cross-examination, the officer admitted that the defendant also told him that he found the wallet in a garbage can and intended to surrender it to police as found property. Id. at 4.

After the defendant elicited the omitted portions of his statement to the officer, the State sought to impeach his credibility by his prior felony conviction. Id. The defendant argued that the State's direct examination elicited only a part of his conversation with police and he was entitled to cross-examine the officer about other legally relevant statements made during the conversation. The trial court agreed with the State and admitted Foster's prior convictions to impeach his credibility. Id.

On appeal, the Second District recognized that, "[g]enerally, a defendant's out-of-court self-serving exculpatory statements are inadmissible hearsay." But it held, "'[H]owever, where the state has 'opened the door' by eliciting testimony as to part of the conversation, [the] defendant is entitled to cross-examine the witness about other relevant statements made during the conversation.'" Noting that, "'opening the door' concept is based on considerations of fairness and the truth-seeking function of a trial, where cross-examination reveals the whole story of a transaction only partly explained in direct examination,'" the

Second District ruled that the defendant was "entitled to have the jury hear the remainder of his statement without fear of placing his credibility in issue," and the trial judge erred in finding the contrary and allowing the defendant to be impeached by his prior convictions. Foster v. State, supra at 5. Foster is in-line with similar decisions of this Court, Calloway v. State, Case No. SC10-2170, 2017 WL 372058 (Fla. January 26, 2017); Reese v. State, 694 So. 2d 678, 683 (Fla. 1997), citing Christopher v. State, 583 So. 2d 642, 645-6 (Fla. 1991)("Although that rule is defined at section 90.108, Florida Statutes (1995), to include only written or recorded statements," the supreme court has "allowed the policy to apply to testimony as well"), and the First District Court of Appeal, Eberhardt v. State, 550 So. 2d 102, 105 (Fla. 1st DCA 1989).

While the Fourth District, in Nock, rejected the Second District's Foster decision, it recognized that these decisions were in conflict. The conflict is an expressed and direct. Had the Fourth District applied the Foster holding, it would have had to conclude that the trial court erred by either (1) not compelling the State to admit, in its case-in-chief, the omitted, relevant, in-context portions of Petitioner's interrogation statement concerning the accidental nature of the victim's death; or (2) by binding Petitioner to the admission of the omitted portions elicited on cross-examination and allowing Appellant's credibility to be impeached by his prior felony and dishonesty-crime convictions.

Mancini v. State, supra at 733.

This Court should exercise its discretionary jurisdiction to resolve the conflict. The Fourth District's Nock decision provides prosecutors with a blessing to game the rules of evidence in a manner contrary to the fundamental principles of procedural due process. A trial cannot be fair when one party can manipulate the evidence to distort facts and present half-truths concerning an admission of a party opponent, by purposefully omitting relevant, in-context portions of the statement, done as a subterfuge to admit evidence of the opponent's prior felony convictions when the opponent is compelled to set the record straight regarding the true nature of the out-of-court statement. Section 90.108(1) forbids such a practice with written or recorded statements and the practice is equally improper when the statement is testified to orally; especially when a recording exists of the original, in-context statement.

CONCLUSION

This court should accept jurisdiction pursuant to Article V, § 3(b)(3), Fla. Const. and order briefs on the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Asst. Attorney General Celia Terenzio crimappwpb@myfloridalegal.com, 1515 N. Flagler Dr., West Palm Beach, FL 33401, this 22nd day of March, 2017.

S/ Ian Seldin

Of Counsel

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY this brief is written in 12 point Courier New.

S/ Ian Seldin

Of Counsel