IN THE SUPREME COURT OF FLORIDA

FRANCISCO RODRIGUEZ,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.
_____/

Case No. SC17-805

ON DISCRETIONARY REVIEW FROM THE
THE DISTRICT COURT OF APPEAL,
THIRD DISTRICT OF FLORIDA

JURISDICTIONAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

PAGE#

TABLE OF CITATIONS

Cases

Statutes

Rules

Other Authorities

STATEMENT OF THE CASE AND FACTS

Petitioner, Francisco Rodriguez, seeks this seeks discretionary review of the Third District Court of Appeal opinion in Rodriguez v. State, 42 Fla. L. Weekly D789 (Fla. 3d DCA Apr. 5, 2017)(3D15-2339). The opinion, in its entirety, states:

> Any error by the trial court in admitting the hearsay statements at issue was, at best, harmless. See § 59.041, Fla. Stat. (2015) ("No judgment shall be set aside or reversed ... on the ground of ... the improper admission or rejection of evidence ... unless in the opinion of the court to which application is made, after an examination of the entire case it shall appear that the error complained of has resulted in a miscarriage of justice.")

Rodriguez v. State, 42 Fla. L. Weekly D789 (Fla. 3d DCA Apr. 5, 2017).

Petitioner did not file for rehearing in the district court of appeal and instead choose to file for discretionary review in this Court. Respondent, the State of Florida, answer follows.

SUMMARY OF ARGUMENT

While the Court retains the authority to determine when an error is harmless and what the analysis to be used in making the determination; the authority of the legislature to enact harmless error statutes is unquestioned. Here, the opinion states that any error was harmless. The opinion in this matter was brief and does not explain the analysis in which the court engaged. The fact that the Third District found that the error was harmless and cited to Florida Statute Section 59.041 does not negate whether the district court applied the DiGuilio test. In the instant case, the opinion lacks the operative facts and a review of the record beyond what is in the opinion would be inappropriate.

Second, even if there is conflict of decisions, this Court noted that even when a form of discretionary jurisdiction is established, the discretion of the Court to act is not always boundless. This is an issue that could have been easily resolved if Petitioner filed a motion for rehearing in the district court of appeal. Instead, Petitioner filed a notice to invoke discretionary jurisdiction. This Court has noted that the district courts of appeal are courts of primary final appellate jurisdiction. They are not meant to be intermediate courts of appeal. Accordingly, because there is no conflict of decisions this Court must dismiss this case for lack of jurisdiction.

ARGUMENT

WHETHER THE THIRD DISTRICT'S OPINION IS IN EXPRESS AND DIRECT CONFLICT WITH THIS COURT AND THE OTHER DISTRICT COURT'S OF APPEAL?

Petitioner contends that this Court has jurisdiction pursuant to Florida Rule of Appellate Procedure 9.030(a) (2) (A) (iv), which parallels Article V, section 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). Neither the record, nor a concurring opinion, nor a dissenting opinion can be used to establish jurisdiction. Reaves, supra; 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 addition, it is the "conflict of decisions, not conflict of opinions or reasons that supplies jurisdiction for review by certiorari." Jenkins, 385 So. 2d at 1359.

On review, Petitioner argues that the Third District Court of Appeal utilized the incorrect harmless error analysis because the district court applied a miscarriage of justice standard; rather than the standard set forth in State v. DiGuilio, 491 So.2d 1129 (Fla.1986). The opinion below cited to Florida Statute Section 59.041. This section states:

> No judgment shall be set aside or reversed, or new trial granted by any court of the state in any cause, civil or criminal, on the ground of misdirection of the jury or the improper admission or rejection of evidence or for error as to any matter of pleading or procedure, unless in the opinion of the court to which application is made, after an examination of the entire case it shall appear that the error complained of has resulted in a miscarriage of justice. This section shall be liberally construed.

§ 59.041, Fla. Stat. This Court has "recognized that the 'authority of the legislature to enact harmless error statutes is unquestioned. . . . The Court retains the authority, however, to determine when an error is harmless and the analysis to be used in making the determination." State v. Lee, 531 So. 2d 133, 137 n.1 (Fla. 1988). Thus, no judgment shall be reversed unless the appellate court is of the opinion, after an examination of all the appeal papers, that error was committed that injuriously affected the substantial rights of the appellant. It shall not be presumed that error injuriously affected the substantial rights of the appellant.

In the case at bar, Petitioner complains that the Third District applied the incorrect standard for determining whether or not an error was harmless. In State v. DiGuilio,491 So.2d 1129, 1135 (Fla.1986), this Court required the State to prove

beyond a reasonable doubt that the error complained of did not contribute to the verdict or there was no reasonable possibility the error contributed to the verdict. In State v. Lee, 531 So.2d 133 (Fla. 1988), this Court answered the question as to whether a conviction could stand if erroneously admitted evidence did not result in a miscarriage of justice but the State could not establish that the erroneously admitted evidence did not contribute to the verdict. The Court, stated that it could not, and reaffirmed the DiGuilio standard. Lastly, in Goodwin v. State,751 So.2d 537, 546 (Fla. 1999), this Court discussed Sections 924.051(7) and 924.33, Florida Statutes, which discuss prejudicial error and reaffirmed its "our inherent authority to determine when an error is harmless and the analysis to be used in making the determination[]"' and concluded that "once the defendant has satisfied the burden of demonstrating that error has occurred, the DiGuilio standard of harmless error remains the applicable analysis to be employed in determining whether the error requires a reversal on direct appeal." Id. at 546. However, this Court also noted that the "use of a harmless error analysis under DiGuilio, is not necessary where ... the trial court recognized the error, sustained the objection and gave a curative instruction." 751 So.2d at 547.

In the case at bar, petitioner complains that the Third District applied the incorrect standard for determining whether or not an error was harmless because the Third District cited to Florida Statute Section 59.041. He argues that the Court

applied the "miscarriage of justice" standard rather than applying the standard set forth in DiGuilio. The opinion in this matter was brief and does not explain the analysis in which the court engaged. The fact that the Third District found that the error was harmless and cited to Florida Statute Section 59.041 does not negate whether the district court actually applied the DiGuilio test. In the instant case, the opinion lacks the operative facts and a review of the record beyond what is in the opinion would be inappropriate. It is impossible to determine on the four corners of the opinion if it conflicts with DiGuilio and its progeny. Endeavor

Second, and equally as important, is the question of whether (even if there is an actual conflict of decisions) if this Court ***should*** exercise its discretionary jurisdiction. In Florida Star v. B.J.F., 530 So. 2d 286, 288(Fla. 1988), this Court noted that even when a form of discretionary jurisdiction is established, the discretion of the Court to act is not always boundless.

> even when discretion is not limited by the law, the Court still can refuse to exercise its discretion to hear any case falling within a discretionary category. Typically, this may occur if the Court determines that the case does not present a significant issue or the result was essentially correct. For this reason, jurisdictional briefs in discretionary cases should always demonstrate that the case is significant enough to be heard. It is not enough to establish that jurisdiction exists and that discretion is unrestricted for present purposes, except in the rare case perhaps where the importance is obvious.

Harry Lee Anstead et. al., The Operation and Jurisdiction of the Supreme Court of Florida, 29 Nova L. Rev. 431, 485 (2005).

Here, Petitioner argues that the Third District failed to apply the correct harmless error standard. This position is based on the fact the opinion cites to the Florida harmless error statute and did not include an additional citation to DiGulio. Even if this somehow means that Petitioner is correct and the district court did not engage in a DiGulio analysis, this is an issue that could have been easily resolved if Petitioner filed a motion for rehearing in the district court of appeal. Instead, Petitioner filed a notice to invoke discretionary jurisdiction. 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.
>
> To fail to recognize that these are courts primarily of final appellate jurisdiction and to allow such courts to become intermediate courts of appeal would result in a condition far more detrimental to the general welfare and the speedy and efficient administration of justice than that which the system was designed to remedy.

Ansin v. Thurston, 101 So. 2d 808, 810 (Fla. 1958). See e.g. State v. Wells, 539 So. 2d 464 at n. 4 (Fla. 1989) (noting that issue waived by failing to raise it in lower court); see also Mack v. State, 823 So. 2d 746, 749 (Fla. 2002) (declining to address issue raised for first time in petition for review); Trushin v. State, 425 So. 2d 1126, 1130 (Fla. 1982) ("since Trushin failed to raise issue 6 before either the trial court or the district court, we decline to address that claim when presented for the first time to this Court.");

Here, the opinion states that any error was harmless. Accordingly, because there is no conflict of decisions this Court must dismiss this case for lack of jurisdiction. Further, even if there is a conflict of decisions, this Court should decline to exercise its discretion to hear this case because it does not resent a significant issue and the result was essentially correct.

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 furnished to the following by email to Natasha Baker-Bradley, Assistant Public Defender, counsel for Petitioner, at appellatedefender@pdmiami.com and NZB@pdmiami.com on June 6, 2017.

CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Times New Roman14-point font.

Respectfully submitted and certified,
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