IN THE SUPREME COURT OF FLORIDA

STEPHEN MALLET,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

Case No.: SC19-1038
L.T. 1D17-4627, 2011-cf-290

ON DISCRETIONARY REVIEW
FROM THE FIRST DISTRICT COURT OF APPEAL

RESPONDENT STATE OF FLORIDA'S ANSWER BRIEF ON JURISDICTION

ASHLEY MOODY
ATTORNEY GENERAL

TRISHA MEGGS PATE
TALLAHASSEE BUREAU CHIEF,
CRIMINAL APPEALS
FLA BAR NO. 0045489

BARBARA DEBELIUS
ASSISTANT ATTORNEY GENERAL CRIMINAL APPEALS - TALLAHASSEE FLA BAR NO. 0972282
OFFICE OF THE ATTORNEY GENERAL PL-01, THE CAPITOL
TALLAHASSEE, FL 32399-1050
criminalappealsintake@myfloridalegal.com
barbara.debelius@myfloridalegal.com
TEL (850) 414-3300
FAX (850) 922-6674
COUNSEL FOR APPELLEE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGES

CASES

SUMMARY OF ARGUMENT

Petitioner filed a Notice to Invoke Discretionary Jurisdiction asserting that the First District's decision in Mallet v. State, 270 So. 3d 1282 (Fla. 1st DCA 2019), "expressly and directly conflicts with the decision of another district court of appeal or the Florida Supreme Court." In his Jurisdictional Brief, Petitioner fails to cite any cases from any Florida District Court of Appeal or from this Court that might possibly conflict with the First District case in Mallet. Nor does Petitioner set forth any other basis for seeking this Court jurisdiction. Accordingly, this Court should deny the petition seeking review and the case should be dismissed for lack of jurisdiction.

STATEMENT OF THE CASE AND FACTS

As set forth in the First District written opinion:

> An investigation by law enforcement revealed that an IP address linked to Mallet had been used to access an online peer-to-peer file-sharing program. Through the file-sharing program, at least two hundred seventeen images depicting sexual conduct by a child were downloaded to Mallet's computer. Investigators also discovered during two separate searches of Mallet's computer that similar images were uploaded from Mallet's computer to the file-sharing program where other users could download them.
>
> Mallet was charged under section 827.071(5), Florida Statutes (2010), with one hundred seventeen counts of possession of images depicting sexual conduct by a child. He was also charged under 827.071(4), Florida Statutes (2010), with two counts of possession of images with the intent to distribute or promote. Mallet moved to the dismiss the charges brought under section 827.071(4), arguing that he could not be convicted for violating the statute because the images he allegedly possessed with the intent to distribute or promote were intangible, digital photographs. The trial court rejected Mallet's arguments and denied the motion to dismiss.
>
> ***
>
> Mallet entered an open plea to all charges. He did not reserve the right to appeal any issue, including the denial of the motion to dismiss. At the later-scheduled sentencing hearing, defense counsel, recognizing that the issue had not been preserved, tried to reserve the right to appeal the ruling. The trial court advised counsel that it was too late. The court sentenced Mallet to forty years' imprisonment, followed by multiple terms of sex offender probation. Mallet's convictions and sentences were affirmed on direct appeal. Mallet v. State, 173 So. 3d 890 (Fla. 1st DCA 2015).

> Mallet then moved for postconviction relief, alleging that defense counsel was ineffective for failing to timely reserve the right to appeal the order denying his motion to dismiss. The postconviction court held an evidentiary hearing during which Mallet and his defense counsel testified. Mallet testified that he had consistently maintained his innocence with respect to the counts charging possession with intent to distribute or promote and agreed to sign the plea form only with the understanding that he could appeal the denial of his motion to dismiss. Had he known that defense counsel would fail to reserve the right to appeal the ruling, Mallet asserted that he would have elected to proceed to trial.
>
> Defense counsel testified that he did not reserve the right to appeal the order denying the motion to dismiss. He admitted that this failure was based on his misunderstanding of the preservation process. As to Mallet's allegation of prejudice, counsel testified that he explained to Mallet that there were no valid defenses to the charges against him and advised that pleading was in Mallet's best interest. After they discussed the evidence against Mallet, their agreed strategy was to present mitigating evidence to secure a more lenient sentence. Counsel observed that Mallet expressed some interest in going to trial but testified that Mallet was not so interested that he would have rejected a plea offer.
>
> The trial court found that Mallet proved deficient performance by counsel but failed to establish prejudice. The trial court denied the postconviction motion.

Mallet v. State, 270 So. 3d 1282 (Fla. 1st DCA 2019).

In its analysis, the First Direct reviewed the deficient and prejudice prongs that must be found before counsel can be deemed ineffective. Examining the "totality of the circumstances," the First District determined that:

> Here, the totality of the circumstances and consideration of the Grosvenor factors do not support a finding of prejudice. First, Mallet had no viable defenses to the charges against him. Over two hundred images depicting sexual conduct by a child were found on Mallet's computer, and investigators downloaded via an online file-sharing program at least two images depicting sexual conduct by a child that originated from Mallet's computer. Mallet had recently purchased the computer brand new, and there was no evidence that anyone other than Mallet had access to the computer. Simply put, the evidence against Mallet was formidable, and he and his counsel recognized that his chances of acquittal were slim. See generally Griffin v. State, 114 So.3d 890, 899 (Fla. 2013) ("[T]he strength of the government's case against the defendant should be considered in evaluating whether the defendant really would have gone to trial if he had received adequate advice from his counsel.").
>
> Second, the court's plea colloquy was sufficient to apprise Mallet of the rights he was giving up by entering a plea. The court specifically advised Mallet that by pleading, Mallet was waiving his right to appeal "everything other than the legality of the sentence imposed." Mallet agreed and had no further questions for the court or for defense counsel.
>
> Third, at the time he entered the plea, Mallet knew he faced a maximum sentence of six hundred fifteen years in prison. Even if his counsel had reserved the right to appeal, and Mallet had successfully obtained dismissal of the two intent-to-promote counts, he still faced five hundred eighty-five years in prison.
>
> Based on the totality of the circumstances surrounding Mallet's plea, there is no objectively reasonable probability that if he had known defense counsel failed to reserve the right to appeal the order denying his motion to dismiss, Mallet would have elected to go to trial rather than enter a plea. See Hill, 474 U.S. at 60, 106 S. Ct. 366 (emphasizing that this determination should be made objectively, without regard for the "idiosyncrasies of the particular decisionmaker") (internal quotation omitted). The order denying postconviction relief is therefore AFFIRMED.

Mallet v. State, 270 So. 3d 1282 (Fla. 1st DCA 2019).

ARGUMENT

This Court has discretionary jurisdiction to review a decision of a district court of appeal that expressly construes a provision of the state or federal constitution, or one that expressly and directly conflicts with a decision of the supreme court on the same question of law. Art. V, § 3(b)(3), Fla. Const.; Fla. R. App. P. 9.030(a)(2)(A).

To determine whether there is conflict, the Court may only examine "the four corners of the [district court's] majority decision," see Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986), not the underlying record. Further, the conflict must concern the very same point of law. Wainwright v. Taylor, 476 So. 2d 669, 670 (Fla. 1985). This is because the true purpose of conflict review is to eliminate inconsistent views about the same question of law. Id.

Although Petitioner asserts that the decision in Mallet "expressly and directly conflicts with the decision of another district court of appeal or the Florida Supreme Court," he fails to suggest what decisions those might be. While he argues that the First District's decision "may present federal issues," IB, he sets forth no basis for this Court's jurisdiction.

CONCLUSION

Since the First District's decision in Mallet does not expressly and directly conflict with any district court or any of this Court's decisions, this Court should deny review.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail on July 12, 2019, to:

DANIELLE JORDEN
ASSISTANT PUBLIC DEFENDER
LEON COUNTY COURTHOUSE
301 S. MONROE ST., SUITE 401
TALLAHASSEE, FLORIDA 32301
Via danielle.jorden@flpd2.com

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the requirement for computer-generated briefs as set forth in Rule 9.210(b)(8), of the Florida Rules of Appellate Procedure.

Respectfully submitted and served,

ASHLEY MOODY
ATTORNEY GENERAL

/s/ Barbara Debelius
By: BARBARA DEBELIUS
Assistant Attorney General
Florida Bar No. 0972282
criminalappealsintake@myfloridalegal.com
barbara.debelius@myfloridalegal.com
Office of the Attorney General
PL-01, the Capitol
Tallahassee, FL 32399-1050
(850) 414-3300
(850) 922-6674 (Fax)