

IN THE SUPREME COURT OF FLORIDA

EVANS JOSHUA OWENS, :

Petitioner, :

vs. :

Case No. SC21-943

DCA No. 2D20-537

STATE OF FLORIDA, :

Respondent. :

_____ :

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

BRIEF OF PETITIONER ON JURISDICTION

HOWARD "REX" DIMMIG, II
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

RICHARD P. ALBERTINE, JR.
Assistant Public Defender
FLORIDA BAR NUMBER 0365610

Public Defender's Office
Polk County Courthouse
P.O. Box 9000--Drawer PD
Bartow, FL 33831
(863) 534-4200

ATTORNEYS FOR PETITIONER

RECEIVED, 06/28/2021 08:15:27 AM, Clerk, Supreme Court

TOPICAL INDEX TO BRIEF

PAGE NO.

PRELIMINARY STATEMENT I

STATEMENT OF ISSUES 1

STATEMENT OF THE CASE AND FACTS 2

SUMMARY OF THE ARGUMENT 4

ARGUMENT..... 4

ISSUE I

WHETHER DISCRETIONARY JURISDICTION EXISTS TO REVIEW THE SECOND DISTRICT COURT OWENS DECISION WHICH MISAPPLIED THE FACTS OF DECISIONS OF ANOTHER DISTRICT COURT AND THIS COURT AS TO THE ODOR OF BURNT MARIJUANA PROVIDING PROBABLE CAUSE FOR A WARRANTLESS SEARCH OF A VEHICLE? 4

CONCLUSION..... 10

CERTIFICATE OF SERVICE 11

CERTIFICATE OF FONT SIZE AND WORD COUNT 11

APPENDIX filed separately

TABLE OF CITATIONS

PAGE NO.

Cases:

Johnson v. State,
275 So. 3d 800 (Fla. 1st DCA 2019) passim

Owens v. State, 46 Fla. L. Weekly D699, slip op.1 (Fla. 2d DCA Mar.
31, 2021), reh'g, reh'g en banc, certified question denied (Fla. 2d
DCA June 2, 2021) passim

State v. Betz,
815 So. 2d 627 (Fla. 2002) passim

State v. Brookins,
290 So. 3d 1100 (Fla. 2d DCA 2020) 4, 5, 7

State v. Nord, 28 Fla. L. Weekly Supp. 511 (Fla. 20th Cir. Ct. Aug.
8, 2020) 1

State v. Ruise, 28 Fla. L. Weekly Supp. 122 (Fla. 9th Cir. Ct. Mar.
20, 2020) 1

Other Authorities

Art. V, § 3(b)(3), Fla. Const. 2

Fla. R. App. P. 9.030(a)(2)(A)(iv) 2

Fla. R. App. P. 9.045(e) 11

§ 316.193(1)(a), Fla. Stat. (2018) 3, 5

Gerald Kogan&Robert Craig Waters, The Operation and Jurisdiction
of the Florida Supreme Court, 18 Nova L. Rev. 1151 (1994) 6, 7

PRELIMINARY STATEMENT

Petitioner, EVANS JOSHUA OWENS, Appellant in the Second District Court of Appeal, shall be referred to as Petitioner herein. State of Florida, represented by the Attorney General in the Second District Court of Appeal, shall be referred to as Respondent herein.

STATEMENT OF ISSUES

ISSUE I

WHETHER DISCRETIONARY JURISDICTION EXISTS TO REVIEW THE SECOND DISTRICT COURT OWENS DECISION WHICH MISAPPLIED THE FACTS OF DECISIONS OF ANOTHER DISTRICT COURT AND THIS COURT AS TO THE ODOR OF BURNT MARIJUANA PROVIDING PROBABLE CAUSE FOR A WARRANTLESS SEARCH OF A VEHICLE?

ISSUE II

WHETHER THE COURT ERRED BY HOLDING THE ODOR OF MARIJUANA ALONE COMING FROM A VEHICLE GIVES PROBABLE CAUSE FOR A WARRANTLESS SEARCH EVEN THOUGH PROBABLE CAUSE IN OWENS AROSE FROM THE ODOR OF FRESH UNBURNT MARIJUANA PLUS OTHER FACTORS, ANALOGOUS TO ODOR-PLUS, UNDER THE TOTALITY OF CIRCUMSTANCES STANDARD USED BY TRIAL COURT IN DENYING PETITIONER'S MOTION TO SUPPRESS?

ISSUE III

WHETHER THE COURT ERRED BY HOLDING THE ODOR OF MARIJUANA GIVES AN OFFICER PROBABLE CAUSE TO BELIEVE THE ODOR INDICATED ILLEGAL USE OF MARIJUANA, ADOPTING STATE V. RUISE (SMELL OF MARIJUANA PROVIDED PROBABLE CAUSE FOR WARRANTLESS SEARCH OF VEHICLE); DISAPPROVING STATE V. NORD (ODOR OF MARIJUANA ALONE CANNOT PROVIDE PROBABLE CAUSE FOR WARRANTLESS SEARCH OF VEHICLE)?

STATEMENT OF THE CASE AND FACTS

The Second District Court of Appeal, in Owens v. State, 46 Fla. L. Weekly D699 (Fla. 2d DCA Mar. 31, 2021), reh’g, reh’g en banc, certified question denied (Fla. 2d DCA June 2, 2021), affirmed the trial court’s ruling denying Petitioner’s dispositive motion to suppress:

Evans Joshua Owens challenges his judgment and sentence following his guilty plea to the offense of possession of methamphetamine. He argues that the trial court erred in denying his preserved, dispositive motion to suppress. Owens argues, in pertinent part, that the search of his vehicle was based solely on the odor of marijuana and that because possession of marijuana in some instances, and hemp in all instances, has been legalized in Florida, the odor of marijuana can no longer serve as the basis for probable cause to search a vehicle because the odor of marijuana cannot be distinguished from that of hemp. We reject this argument and affirm Owens’ judgment and sentence.

. . . .

We also note that, in this case, the officer was responding to a complaint of reckless and erratic driving; and Owens’ odd and erratic responses to the officer’s attempts to communicate with him, coupled with the smell, caused the officer to reasonably conclude that Owens should not be “behind the wheel of a vehicle.” Thus, the circumstances supported the officer’s conclusion that he had probable cause to detain Owens and to search his vehicle. [fn.1].

Owens at slip op. 1 (footnote 1 omitted). See Appendix at 3-5. Notice to Invoke Discretionary Jurisdiction, pursuant to Art. V, § 3(b)3, Fla. Const. and Fla. R. App. P. 9.030(a)(2)(A)(iv), was filed June 21, 2021.

Officer Snyder’s actions in searching Petitioner’s car were based on more than the odor of marijuana, a probable cause standard to search a vehicle and its occupant analogous to “odor-plus,” which the Second District Court, in Owens, recognized had occurred but failed to characterize as such. The Second District Court noted “that even if marijuana was legalized for recreational use, such use while driving would still support the offense of driving while intoxicated; thus, regardless of whether marijuana becomes decriminalized for recreational use, the smell of the burning substance will continue to provide probable cause for a search of a vehicle.” Id. at slip op. 2 (citing Johnson v. State, 275 So. 3d 800, 802 (Fla. 1st DCA 2019) (noting “even if smoking marijuana were legal altogether, the officers would have probable cause based on the fact that Johnson was operating a car” (citing § 316.193(1)(a), Fla. Stat. (2018))). Id. (footnote 2 omitted). See Appendix at 5.

The Second District Court concluded “the recent legalization of hemp, and under certain circumstances marijuana, does not serve as a sea change undoing existing precedent, and we hold that regardless of whether the smell of marijuana is indistinguishable from that of hemp, the smell of marijuana emanating from a vehicle continues to

provide probable cause for a warrantless search of the vehicle.” Id. at slip op. 2 (citing State v. Brookins, 290 So. 3d 1100, 1104 (Fla. 2d DCA 2020)(quoting State v. Betz, 815 So. 2d 627, 633 (Fla. 2002) (“[o]ur supreme court has observed that the odor of burnt marijuana emanating from a vehicle—like we have here—provides probable cause to search each of the vehicle’s occupants”); accord Johnson, 275 So. 3d at 802). See Appendix at 6.

SUMMARY OF THE ARGUMENT

This Court should exercise discretionary jurisdiction to review the Second District Court decision in Owens based on express and direct misapplication conflict arising from erroneous extension and erroneous use of facts of a decision of another district court, Johnson, or of the supreme court, Betz, to the facts of Owens on same question of law.

ARGUMENT

ISSUE I

WHETHER DISCRETIONARY JURISDICTION EXISTS TO REVIEW THE SECOND DISTRICT COURT OWENS DECISION WHICH MISAPPLIED THE FACTS OF DECISIONS OF ANOTHER DISTRICT COURT AND THIS COURT AS TO THE ODOR OF BURNT MARIJUANA PROVIDING PROBABLE CAUSE FOR A WARRANTLESS SEARCH OF A VEHICLE?

Yes. The Second District Court, in Owens, denied Petitioner’s direct appeal by written opinion affirming the trial court’s denial of his

dispositive motion to suppress. In so doing, the Second District Court, in Owens, misapplied facts in Johnson and Betz, each of which found probable cause to support a warrantless search of a vehicle based on the odor of burnt marijuana unlike Petitioner's case which, on the face of the opinion, involved probable cause for warrantless search of Petitioner's vehicle and Petitioner based, in part, on the odor of marijuana, plus other factors, without specifying whether the odor of marijuana came from fresh, unburnt marijuana or burnt marijuana. See State v. Betz, 815 So. 2d at 633; Johnson, 275 So. 3d at 801.

Jurisdiction for discretionary review by this Court exists since the Second District Court, in Owens, expressly and directly cited the First District Court of Appeal's decision in Johnson, 275 So. 3d at 802 (citing § 316.193(1)(a), Fla. Stat. (2018)) (“[E]ven if smoking marijuana were legal altogether, the officers would have probable cause based on the fact that Johnson was operating a car”), and cited State v. Brookins, 290 So. 3d at 1104, quoting this Court's decision in State v. Betz, 815 So. 2d at 633 (noting “[o]ur supreme court has observed that the odor of burnt marijuana emanating from a vehicle—like we have here—provides probable cause to search each of the vehicle's occupants”); accord Johnson, 275 So. 3d at 802). See

Owens at slip op. 1-2. See also Appendix at 5-6.

Discretion for discretionary review by this Court exists since the Second District Court created express and direct misapplication conflict by the erroneous extension and the erroneous use of the First District Court's decision in Johnson and this Court's decision in Betz which both found probable cause for warrantless search the vehicle based on the odor of burnt marijuana; not on the odor of marijuana unspecified as fresh or burnt on the face of the opinion, which along with other factors, provided the officer with probable cause for the warrantless search of Petitioner's vehicle and Petitioner. See Owens at slip op. 1-2; State v. Betz at 633; Johnson at 802; Appendix at 5-6.

Misapplication conflict occurs when the decision of the district court misapplies controlling precedent as the Second District Court in Owens. See Gerald Kogan & Robert Craig Waters, The Operation and Jurisdiction of the Florida Supreme Court, 18 Nova L. Rev. 1151, 1232 (1994). Misapplication conflict arises where the district court failed to distinguish the cases properly as the Second District Court did. See id. Misapplication conflict includes "erroneous extension" of precedent, and "erroneous use" of facts. Id. "Erroneous extension" cases are those in which the district court correctly states a rule of

law but then proceeds to apply the rule to a set of facts for which it was not intended.” Id. “In other words, the district court stated the law correctly and framed the facts accurately, but it should never have linked the two.” Id. “‘Erroneous use’ cases are those in which the district court misapplies a rule of law based on its own misperception of the facts.” Id. “The discretion to review such cases really is only justifiable where the factual error is apparent within the four corners of the opinion being reviewed.” Id. at 1233.

After concluding “the recent legalization of hemp, and under certain circumstances marijuana, did not serve as a sea change undoing existing precedent,” the Second District Court held “that regardless of whether the smell of marijuana is indistinguishable from that of hemp, the smell of marijuana emanating from a vehicle continues to provide probable cause for a warrantless search of the vehicle.” Owens at slip op. 2 (citing State v. Brookins, 290 So. 3d at 1104 (quoting State v. Betz, 815 So. 2d at 633 (noting “[o]ur supreme court has observed that the odor of burnt marijuana emanating from a vehicle—like we have here—provides probable cause to search each of the vehicle’s occupants”)); accord Johnson, 275 So. 3d at 802). See Appendix at 6. The Second District Court’s conclusion and holding in

Owens, relying on Johnson and Betz, legal precedent finding the odor of burnt marijuana by itself provided probable cause for warrantless search of a vehicle and occupant, are not supported by the facts on the face of the Owens opinion which fail to distinguish whether the odor of marijuana which provided probable cause for the officer's warrantless search came from the odor fresh or burnt marijuana. Instead, the Second District Court's holding refers generally to the smell of marijuana which includes both fresh unburnt marijuana and burnt marijuana. Whether the odor of marijuana at issue in Owens came from burnt marijuana or from fresh unburnt marijuana cannot be discerned from the facts on the face of the Owen opinion. The Second District Court reliance on Johnson and Betz was misapplied by the erroneous extension or by the erroneous use of the facts in Johnson and Betz, creating misapplication conflict and discretion.

In holding "that an officer smelling the odor of marijuana has probable cause to believe that the odor indicates the illegal use of marijuana," the Second District Court, in Owens, misapplied the legal precedent and facts in Johnson and Betz to the facts of Petitioner's case which on the face of the opinion do not specify whether the odor of marijuana that the officer smelled coming from Petitioner's vehicle

was the odor of burnt marijuana. Owens at slip op. 1. See also Appendix at 4. By misapplying the legal precedent in Johnson and Betz which found probable cause to support the warrantless search of a vehicle and its occupant based on the odor of burnt marijuana, the Second District Court, in Owens, created misapplication conflict by the erroneous extension of precedent in Johnson and Betz to the facts of Petitioner's case and by the erroneous use of Johnson and Betz based on the Second District Court's misperception of the facts of Petitioner's case. The facts and legal precedent in Johnson and Betz apply to Owens only if the odor of marijuana at issue came from burnt marijuana but the facts in the Owens opinion do not support that conclusion, particularly, since the Second District Court also held "the smell of marijuana emanating from a vehicle continues to provide probable cause for a warrantless search of the vehicle." Owens at slip op. 2. See also Appendix at 6.

Finally, the express and direct misapplication conflict resulting from the erroneous extension and the erroneous use of facts of the First District Court's decision in Johnson and of this Court's decision in Betz by the Second District Court, in Owens, is significant and must be clarified on whether probable cause to support a warrantless

search of Petitioner's vehicle and Petitioner was based on the odor of burnt marijuana alone emanating from Petitioner's vehicle which is not supported by or cannot be discerned from the facts on the face of the Owens opinion. The Second District Court's opinion does not state that the odor of marijuana smelled by the officer that provided probable cause for the warrantless search of Petitioner's vehicle and Petitioner had come from burnt marijuana which it would have had to have done for the Second District Court's reliance on Johnson and Betz to have been proper extension and use of the facts of those legal precedents. Johnson and Betz do not support the Second District Court's holding that the odor of marijuana, fresh unburnt marijuana or burnt marijuana, emanating from a vehicle continues to provide probable cause for a warrantless search of a vehicle and its occupant.

CONCLUSION

This Court should exercise discretionary jurisdiction to review the Second District Court decision in Owens v. State, 46 Fla. L. Weekly D699 (Fla. 2d DCA Mar. 31, 2021), reh'g, reh'g en banc, certified question denied (Fla. 2d DCA June 2, 2021), which expressly and directly conflicts with the decision of another district court or of the supreme court on the same question of law.

CERTIFICATE OF SERVICE

I certify that a copy has been e-served electronically via the Florida Courts E-filing Portal on the Office of Attorney General at CrimappTPA@myfloridalegal.com; and Elba Caridad Martin at Elba.Martin@myfloridalegal.com, on this 28th day of June, 2021.

CERTIFICATE OF FONT SIZE AND WORD COUNT

I certify that this document was generated by a computer using Microsoft Word with Bookman Old Style 14-point font and complies with applicable font requirements and word count limits in compliance with Fla. R. App. P. 9.045(e).

Respectfully submitted,

HOWARD L. "REX" DIMMIG, II
Public Defender
Tenth Judicial Circuit
(863) 534-4200

/s/Richard P. Albertine, Jr.
RICHARD P. ALBERTINE, JR.
Assistant Public Defender
Florida Bar Number 0365610
P.O. Box 9000 - Drawer PD
Bartow, FL 33831
appealfilings@pd10.org
ralbertine@pd10.org
cclark@pd10.org

rpa/cc