IN THE SUPREME COURT OF FLORIDA

JOHN A. TOMASINO
SEP 22 2016
CLERK, SUPREME COURT
BY

DARRYL LEWIS DAVIS,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

_____/

CASE NO.:
DCA No.: 5D15-2507
Lt. No.: 01-CF-13112

PETITIONER'S INITIAL BRIEF ON JURISDICTION

Darryl Lewis Davis #X20295
Franklin Correctional Institution
1760 Hwy. 67 North
Carrabelle, FL 32322-2157

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STATEMENT OF CASE AND FACTS

Petitioner was charged in the Ninth Judicial Circuit Court, Orange County Florida with a single count of robbery (firearm). On May 13, 2003, Petitioner was tried by jury. At trial, the State presented evidence that Petitioner robbed a Circle K store with a firearm. No other weapon was discussed.

The jury found that Petitioner was guilty of robbery with a deadly weapon. The jury also returned a special verdict finding that Petitioner did not carry, display, use, or possess a firearm during commission of the felony. Petitioner was sentenced to life in prison.

Petitioner timely appealed to the Fifth District Court of Appeal. On appeal, appointed counsel filed a brief in accordance with Anders v. California, 366 U.S. 738 (1967). The fifth District Court of Appeal affirmed Petitioners judgment and sentence without comment. See case no. 5D03-1886; Davis v. State, 861 So. 2d 1169 (Fla. 5th DCA 2003).(Table).

On July 17, 2015, Petitioner filed a petition for writ of habeas corpus in the Fifth District Court of Appeal. In that petition, Petitioner argued that he was charged by information with Robbery with a Firearm. Petitioner argued that the information never charged with Robbery with a Deadly Weapon. Petitioner further alleged that the evidence presented at trial was that the suspect was armed with a firearm. No other deadly weapon was argued or alleged. Petitioner maintained that the States failure to charge in the information Robbery with a Deadly Weapon and

the jury's special finding that Petitioner did not possess a firearm foreclosed a conviction for Robbery with a Deadly Weapon and a life sentence.

On July 15, 2016, the Fifth District court of Appeal granted the Petition for Writ of Habeas Corpus stating:[1]

> "Neither the information's nor the evidence presented in [Petitioner's] trials alleged that he used any weapon other than a firearm. Separate juries found [Petitioner] guilty of robbery with a deadly weapon but made special findins that he did not possess a firearm during the commission of the crimes...the verdicts and special findins [are] inconsistent...Failure to correct [Petitioner's] convictions which resulted in consecutive life sentences, would constitute a manifest injustice...we...remand for entry of corrected judgments that adjudicate him guilty of *robbery with a weapon*..." Id. (Emphasis added).

Petitioner timely filed a motion for Rehearing, Clarification, or Certification. In that motion Petitioner requested the Fifth District Court of Appeal to clarify the portion of its decision reducing Petitioners conviction to Robbery with a weapon and not simple Robbery because the jury had acquitted Petitioner of possessing the only weapon alleged, a firearm. Alternatively Petitioner requested certification with the First District Court of Appeals decision in Starling v. State, 152 So. 3d 868-69 (Fla.. 1st DCA 2014).

On August 17, 2016, the Fifth District denied Petitioners motion for Rehearing, Clarification, or Certification. Petitioner timely filed his notice to invoke jurisdiction of this Court. This brief now follows.

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[1] The Fifth District Court of Appeals opinion is attached to this instant brief as "Appendix-A."

SUMMARY OF THE ARGUMENT

Petitioner asserts that the Fifth District Court of Appeals decision in this case to reduce Petitioners conviction to Robbery with a Weapon and not simple Robbery where the jury acquitted Petitioner of carrying the only weapon alleged conflicts with the First District Court of Appeals decision in Starling v. State, 152 So. 3d 868-69 (Fla. 1st DCA 2014) and the Second District Court of Appeals decision in Deleon v. State, 66 So.3d 391 (Fla. 2D DCA 2011), where under similar circumstances, because the jury acquitted the Defendant(s) of possessing the only weapon alleged, the convictions were reduced to simple Robbery.

ISSUE ONE

THIS COURT SHOULD ACCEPT JURIDICTION OF THIS CASE AS THE RESULT CONFLICTS WITH THE DISTRICT COURT OF APPEALS DECISIONS IN STARLING V. STATE, 152 SO. 3D 868-69 (FLA. 1ST DCA 2014) AND DELEON V. STATE, 66 SO.3D 391 (Fla. 2D DCA 2011).

STANDARD OF REVIEW

This court has jurisdiction to review conflicts between district courts of appeal. See Art. V, § 3(b)(3), Fla. Const. Once the supreme court has conflict jurisdiction, it has jurisdiction to decide all issues necessary to a full and final resolution. See Hall v. State, 752 So2d 575 (Fla. 2000).

ARGUMENT & ANALYSIS

The cusp of Petitioners argument below was that his conviction(s) for Robbery with a Deadly Weapon were illegal because the State never charged Petitioner with Robbery with a Deadly Weapon only Robbery with a Firearm. Petitioner further maintained that the jury's special finding that he did not possess a firearm was inconsistent with the juries verdict(s) finding him guilty of Robbery with a Deadly Weapon. The Fifth District Court of Appeal agreed finding "[N]either the information's nor the evidence presented in [Petitioner's] trials alleged that he used any weapon other than a firearm. Separate juries found [Petitioner] guilty of robbery with a deadly weapon but made special findins that he did not possess a firearm during the commission of the crimes...the verdicts and special findins [are] inconsistent...Failure to correct [Petitioner's] convictions which resulted in consecutive life sentences, would constitute a manifest injustice...we...remand for entry of corrected judgments that adjudicate him guilty of robbery with a weapon..." Id. (Emphasis added).

Petitioner now asserts that the Fifth District Court of Appeals decision to reduce Petitioners convictions to Robbery with a Weapon and not simple Robbery after the jury acquitted Petitioner of possessing the only weapon alleged (a firearm) conflicts with the Second District Court of Appeals decision in Deleon v. State, 66 So.3d 391 (Fla. 2D DCA 2011) and the First District Court of Appeals decision in Starling v. State, 152 So. 3d 868-69 (Fla. 1st DCA 2014).

In *Deleon*, the Defendant was charged with Carjacking with a firearm, but convicted of Carjacking with a Deadly Weapon, an offense not charged in the information. In reversing, the Second District Court of Appeal held that: "[t]he trial court committed fundamental error in instructing the jury on an offense-carjacking with a deadly weapon-that was not charged in the information. The improper instruction clearly had an effect on the jury's verdict as evidenced by the special verdict form finding him guilty of carjacking with a deadly weapon. Not only was the jury instructed on a theory of the offense that was not charged in the information, but the jury was instructed on a theory of the offense that was unsupported by the evidence; the victim testified that Deleon carried a gun, and there was no evidence that he carried any other weapon during the commission of the offense." Id. at 394. Because the jury acquitted Deleon of possessing the only weapon charged (the firearm) the Second District ordered Deleon's conviction reduced to Simple carjacking. Id. at 395.

Similarly, in Starling v. State, 152 So. 3d 868-69 (Fla. 1st DCA 2014), the jury found Starling guilty of robbery with a firearm, but made a separate finding that Starling did not "actually possess a firearm" during the commission of the offense. Recognizing the verdict's inconsistency, the trial court reduced Starling's conviction to the lesser included offense of robbery with a weapon. On appeal the First District Court of Appeal held that: "Th[e] inclination to reduce the offense was correct. The problem is, however, that the only weapon referenced in the

record as being involved in the crime was the firearm allegedly wielded by Appellant, which the jury affirmatively concluded Appellant did not possess. We cannot reconcile Appellant's reduced conviction for robbery with a weapon with the jury's specific finding that he did not possess the only weapon referenced in the record." The First District Court of Appeal ordered Starlings conviction reduced to simple Robbery. Id at 869.

In the instant case, because the jury a affirmatively concluded that Petitioner did not possess the only weapon alleged (the firearm) the Fifth Districts Court of Appeals decision to reduce Petitioners conviction to Robbery with a Weapon and not simple Robbery is in direct conflict with *Starling* and *Deleon*.

CONCLUSION

This Court should accept jurisdiction of this case as the decision rendered by the Fifth District Court of Appeal conflicts with decisions rendered by the First and Second District Court of Appeal.

Respectfully submitted,

/s/

Darryl Lewis Davis #X20295

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I placed this document in the hands of Mailroom Personnel, at Franklin Correctional Institution for mailing via U.S. mail to the Office of the Attorney General at 444 Seabreeze Blvd. suite 500, Daytona Beach, Fl. 32118 on this 19 day of September 2016.

/s/ Darryl Lewis Davis #X20295

CERTIFICATE OF FONT SIZE

I hereby certify that this brief has been prepared using Times Roman 14 point font in compliance with the font requirements of Florida Rule of Appellate Procedure 9.210 (a) (2).

/s/ Darryl Lewis Davis #X20295
Franklin Correction institution
1760 Hwy 67 North
Carrabelle, Florida 32322

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INMATE INITIALS D.D

APPENDIX-A

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED

DARRYL LEWIS DAVIS,

Petitioner,

v. Case No. 5D15-2509

STATE OF FLORIDA,

Respondent.

_____/

Opinion filed July 15, 2016

Petition for Writ of Habeas Corpus, A Case of Original Jurisdiction.

Darryl Lewis Davis, Carrabelle, pro se.

Pamela Jo Bondi, Attorney General, Tallahassee, and Rebecca Rock McGuigan, Assistant Attorney General, Daytona Beach, for Respondent.

PER CURIAM.

Darryl Lewis Davis petitions this court for writ of habeas corpus regarding his convictions and life sentences in two cases. Davis was charged in both cases with robbery with a firearm. Neither the informations nor the evidence presented in Davis's trials alleged that he used any weapon other than a firearm. Separate juries found Davis

guilty of robbery with a deadly weapon but made special findings that he did not possess a firearm during the commission of the crimes.

We hold that it was error to list robbery with a deadly weapon as a lesser-included offense on the verdict forms in these cases. See Growden v. State, 372 So. 2d 930, 931 (Fla. 1979); Stephens v. State, 396 So. 2d 741, 742 (Fla. 5th DCA 1981); Deleon v. State, 66 So. 3d 391, 394-95 (Fla. 2d DCA 2011). Furthermore, the verdicts and special findings were inconsistent. See Starling v. State, 152 So. 3d 868, 868 (Fla. 1st DCA 2014); Nettles v. State, 112 So. 3d 782, 783 (Fla. 1st DCA 2013). Failure to correct Davis's convictions, which resulted in consecutive life sentences, would constitute a manifest injustice.

Accordingly, we grant Davis's petitions for writ of habeas corpus and remand for entry of corrected judgments that adjudicate him guilty of robbery with a weapon and resentencing according to a revised Criminal Punishment Code scoresheet.

PETITIONS GRANTED.

SAWAYA, ORFINGER and EDWARDS, JJ., concur.

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

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