Nova Law Review

Volume 6, *Issue* 1 1981 *Article* 6

The District Courts of Appeal-After The 1980 Jurisdictional Amendment: A New Obligation TowardDecisional Harmony

Victor Lance*

*

The District Courts of Appeal-After The 1980 Jurisdictional Amendment: A New Obligation TowardDecisional Harmony

Victor Lance

Abstract

The purpose of this note is to explore the effect that a per curiam affirmance by a Florida District Court of Appeal might have on decisional harmony in the State of Florida.

KEYWORDS: courts, appeal, district

The District Courts of Appeal—After The 1980 Jurisdictional Amendment: A New Obligation Toward Decisional Harmony

The purpose of this note is to explore the effect that a per curiam affirmance by a Florida District Court of Appeal might have on decisional harmony in the State of Florida. This examination focuses on concerns raised by the new constitutional jurisdiction[1] of the Supreme Court of Florida. While each of the sections of the amendment presents special problems, specific emphasis will be placed on that portion of Article V, section 3(b)(3) of the Florida Constitution which allows discretionary review of district court decisions which are in conflict.[2]

Effective April 11, 1980, the Florida Supreme Court's jurisdiction was restructured to drastically reduce the volume of cases requiring its review.[3] Now, the decisions of the various district courts of appeal are final in all but a few well delineated situations. However, in at least one specific area, the district courts have discretionary authority to determine whether their decisions will be truly final by precluding further appellate review in Florida, or are capable of being heard in the Florida Supreme Court. This specific area is commonly known as "conflict certiorari"[4] and the discretion involved is whether to write an opinion.

If a litigant finds an adverse decision at the district court "expressly and directly conflicts with a decision of another district court of appeal, or of the supreme court on the same question of law,"[5] further

1. FLA. CONST. art. V, sec. (3)(b).

2. Art. V, sec. 3(b)(3) reads in part: "(3) May 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."

3. "The impetus for these modifications was a burgeoning caseload and the attendant need to make more efficient use of limited resources." FLA. R. APP. P. 9.030, Committee Notes.

4. FLA. CONST. art. V, sec. 3(b)(3). While the amendment specifically deletes the words "by certiorari," conflict certiorari merely refers to the Florida Supreme Court's discretionary jurisdiction to review conflicts of decision. *Id.*

5. FLA. CONST. art. V. sec. 3(b)(3).

appellate review is available through the discretionary certiorari power of the supreme court. However, when the district court of appeal decision is merely a per curiam affirmance without written opinion, the appellate process is halted.[6] This occurs even if the reasoning behind that particular decison would otherwise be in direct conflict with another district court of appeal. Under the old jurisdictional standards, the case must merely be "in direct conflict"[7] with another case regardless of whether the decision was rendered with a full written opinion. In at least one instance,[8] conflict was founded in a dissenting opinion to a per curiam decision. However, since the new standard has been imposed requiring an "express" conflict, review by the Florida Supreme Court requires a written opinion.[9]

Granting certiorari in cases where particular points of law have been decided differently in the various districts allows the Supreme Court of Florida to prevent inconsistency in the lower courts.[10] Thus, "conflict certiorari" serves as an important tool in establishing uniform justice. However, a decision without opinion hampers this ability to provide a uniform application of the laws of Florida. The architect of the new amendment, Justice Arthur England,[11] has recognized the significance per curiam affirmances have under the new rules of discretionary conflict jurisdiction:

> A decision not to write an opinion in any particular case may be dispositive of the litigation. Therefore, district court judges will play a significant role in the state's justice system by the exercise of their judgment in this regard. No one questions the desirability of some dispositions without opinion at the district court level, for example, in cases which involve a straightforward application of ex-

6. *See* Jenkins v. State, 385 So. 2d 1356 (Fla. 1980).

7. FLA. CONST. art. V. sec. 3(b)(3).

8. Commerce Nat'l Bank in Lake Worth v. Safeco Ins. Co. of America, 284 So. 2d 205 (Fla. 1973); *See also* Huguley v. Hall, 157 So. 2d 417 (Fla. 1963) (using case citations accompanying the "affirmed" decision along with an exhaustive dissenting opinion).

9. *See* 385 So. 2d 1356 (Fla. 1980).

10. *Id.*

11. For a complete discussion of the features of the amendment see England, Hunter & Williams, *Constitutional Jurisdiction of the Supreme Court of Florida: 1980 Reform,* 32 U. FLA. L. REV. 147 (1980).

> isting law to individual and non-unique fact situations. On the other hand, the responsibility for articulating decisions on questions of law which might have statewide importance, or which might be in conflict with other appellate decisions, now rests more heavily on the district courts' judges. Perhaps greater precision will also be required of counsel to isolate, identify, and discuss the issues of law which they present to the district courts.[12]

Thus, the obligation toward the appellate decision-making process is two-fold: the responsibility of district court judges to issue opinions where conflict would otherwise exist, and the responsibility of counsel to assist in delineating these conflicts.

Discussion

The basis for invoking conflict certiorari jurisdiction arises when there is a "real and embarrassing" conflict between the decisions of the appellate courts.[13] However, the question has always been, to what extent can the Florida Supreme Court search for such a conflict? Soon after the creation of the district courts, the court recognized that

> [t]here may be exceptions to the rule that this court will not go behind a judgment per curiam, consisting only of the word 'affirmed'. . . . Conceivably it could appear from the restricted examination required in proceedings in certiorari that a conflict had arisen with resulting injustice to the immediate litigant.[14]

The general rule referred to was overruled in effect by the decision in *Foley v. Weaver Drugs,*[15] which allowed the Court to examine the "record proper" to ascertain if a conflict had arisen. Although the "record proper" analysis was never defined,[16] *Foley* described it as "scrutiny on

---

12. *Id.* at 198.
13. *See* Ansin v. Thurston, 101 So. 2d 808, 811 (Fla. 1958).
14. Lake v. Lake, 103 So. 2d 639, 643 (Fla. 1958).
15. 177 So. 2d 221 (Fla. 1965).
16. *See* Gibson v. Maloney, 231 So. 2d 823, 832 (Fla. 1970) (Thornal, J., dissenting):

> The majority is out-Foleying *Foley*. . . . Just once, it would be helpful if my colleagues who follow the Foley majority would actually define what is meant by "record proper" and "transcript of testimony." There is no clear

. . . the written record of the proceedings in the court under review except the report of the testimony. . . . "[17] This type of analysis merely allowed the Florida Supreme Court to inquire whether its own decisions, or decisions of the various districts, would have decided the case differently.[18]

The new jurisdictional amendment "abolishes the *Foley* doctrine by requiring an 'express' as well as a 'direct' conflict of district court decisions as a prerequisite to supreme court review."[19] Consequently, the Florida Supreme Court will no longer look behind decisions without written opinions.

The majority opinion of *Jenkins v. State,*[20] the major case after the new amendment, squarely disposes of this issue:

> Accordingly, we hold that from and after April 1, 1980, the Supreme Court of Florida lacks jurisdiction to review per curiam decisions of the several district courts of appeal of this state rendered without opinion, regardless of whether they are accompanied by a dissenting or concurring opinion, when the basis for such review is an alléged conflict of that decision with a decision of another district court of appeal or of the Supreme Court of Florida.[21]

It leaves no doubt as to the posture of the Supreme Court in this issue. Justice England's concurring opinion wholly supports and extends this result, while providing a historical overview of the jurisdictional amendment.[22]

The dissenting opinion,[23] however, forewarns of the problems with such a position:

> We are embarking on a course which limits our jurisdiction to matters concerning deep questions of law, while the great bulk of liti-

---

cut definition in the books and I think our cases on the subject are extremely confusing.

17. 177 So. 2d at 223.
18. *Id.*
19. FLA. R. APP. P. 9.030, Committee Notes.
20. 385 So. 2d 1356 (Fla. 1980).
21. *Id.* at 1359.
22. *Id.* at 1360-63.
23. *Id.* at 1363-66 (Adkins, J., dissenting).

> gants are allowed to founder on rocks of uncertainty and trial judges steer their course over a chaotic reef as they attempt to apply 'Per Curiam affirmed' decisions.[24]

Noting the potential chaos in a system in which the Florida Supreme Court is precluded from harmonizing the district court decisions, Justice Adkins wrote that "[u]nder the construction proposed by the majority we will have well-written *opinions,* but the *decisions* of the five district courts of appeal will be in hopeless conflict."[25] In the interest of reducing a "burgeoning caseload,"[26] the amendment denies the supreme court any chance of reconciling this conflict. This was precisely the thrust of the arguments against the amendment before its passage into law.[27] The burden of providing this opportunity for unformity now rests with the district courts. Writing opinions in marginally conflicting cases gives the Florida Supreme Court the *choice* of invoking their harmonizing power.[28]

Obviously there is a place for decisions without opinion. However, this method should be exercised only in circumstances when the case below requires the "application of well settled rules of law,"[29] and the use of a written opinion would not add anything to the general body of law in the particular area at issue. Cases which would otherwise conflict but for the per curiam affirmance, do not fall into this category. A decision that might conflict with another appellate court would surely add something to the law, albeit if only to allow the Florida Supreme Court to harmonize the decisions. The large number of cases in which certiorari was granted both pre and post *Foley,* illustrates this proposition.[30]

Moreover, in at least twenty cases, the Florida Supreme Court re-

---

24. *Id.* at 1363.
25. *Id.* at 1364.
26. FLA. R. APP. P. 9.030, Committee Notes.
27. *See* England, Hunter & Williams, *supra* note 11, at 159.
28. Conflict jurisdiction lies within the discretionary portion of the supreme court's jurisdiction. FLA. CONST. art. V. sec. 3(b)(3)-(9).
29. Newmons v. Lake Worth Drainage Dist., 87 So. 2d 49 (Fla. 1956).
30. The Committee Notes to Fla. R. App. P. 9.030 characterized conflict petitions as comprising "the overwhelming bulk of the Court's caseload and gave rise to an intricate body of case law interpreting the requirements for discretionary conflict review." *Id.* at 311. *See* Grant v. State, 390 So. 2d 341 (Fla. 1980).

viewed the "record proper" after a per curiam decision and quashed or reversed the decision of the district.[31] *Carmen Bank of Miami Beach v. R.G. Wolff & Co.*[32] is an extreme example where after a per curiam affirmance by the Third District, the court reviewed the "record proper" and *reversed per curiam.*[33] It is ironic that a case that once would have been summarily reversed, would now be allowed to stand without review. Recently, the Fifth Circuit Court of Appeal affirmed a United States District Court grant of federal habeas corpus to a petitioner whose conviction had been per curiam affirmed by the Second District of Florida.[34] These problems of silent questionable decisions can be avoided by the district courts choosing to write opinions, however terse, in even marginally conflicting cases. This approach does not conflict with the supreme court's goal of reducing its caseload; petitions of review from these cases would, nonetheless, remain within the court's discretionary jurisdiction[35] and could be rejected unless clear conflict is shown. Little district court labor would be expended outlining the reasons for the decision in a short paragraph accompanying the affirmance.

The underlying rationale in denying review to affirmances without opinion is that the decision merely affects the individual litigants, having little, if any, effect on the overall jurisprudence in the state, regard-

31. *See* City of Pompano Beach v. Big Daddy's, Inc., 375 So. 2d 281 (Fla. 1979); Wills v. Sears, Roebuck & Co., 351 So. 2d 29 (Fla. 1977); Carmen Bank of Miami Beach v. R.G. Wolff & Co., 329 So. 2d 298 (Fla. 1976); AB CTC v. Morejon, 324 So. 2d 625 (Fla. 1976); Baycol, Inc. v. Downtown Dev. Auth., 315 So. 2d 451 (Fla. 1975); D'Agostino v. State, 310 So. 2d 12 (Fla. 1975); De La Portilla v. De La Portilla, 304 So. 2d 116 (Fla. 1974); In re Estate of McCartney, 299 So. 2d 5 (Fla. 1974); Manufacturers Life Ins. Co. v. Cave, 295 So. 2d 103 (Fla. 1974); Adams v. Whitfield, 290 So. 2d 49 (Fla. 1974); Lake Killarney Apts., Inc. v. Estate of Thomson, 283 So. 2d 102 (Fla. 1973); Dyer v. Nationwide Mut. Fire Co., 276 So. 2d 6 (Fla. 1973); Fountainbleau Hotel Corp. v. Walters, 246 So. 2d 563 (Fla. 1971); Walden v. Borden Co., 235 So. 2d 300 (Fla. 1970); Gibson v. Maloney, 231 So. 2d 823 (Fla. 1970); Balbontin v. Pirias, 215 So. 2d 732 (Fla. 1968); SAF-T-CLEAN, Inc. v. Martin-Marietta Corp., 197 So. 2d 8 (Fla. 1967); Coleman v. Coleman, 190 So. 2d 332 (Fla. 1966); Kennedy v. Vandine, 185 So. 2d 693 (Fla. 1966); Young Spring & Wire Corp. v. Smith, 176 So. 2d 903 (Fla. 1965).

32. 329 So. 2d 298 (Fla. 1976).

33. Roberts, Acting C.J., Adkins, Boyd, England and Sundberg concurred.

34. Hicks v. Wainwright, 633 F.2d 1146 (5th Cir. 1981).

35. FLA. CONST. art. V, sec. 3(b)(3)-(9).

less of the *ratio decidendi*. Unquestionably, this theory fails in two respects. First, the affirmance settles the particular point of law for both the district court and the trial courts below. Second, it was precisely this perceived injustice to the individual litigant which paved the way to the *Foley*[36] era of "record proper" analysis.[37]

As to the first point, while an affirmance without opinion has no precedential value in the sense that it will not be cited or used by future courts, it does reflect the attitudes of the appellate court on those specific points of law. Whether they are precedent, these decisions will be the model for future appellate decisions. Concerning the trial courts, a summary affirmance merely encourages a trial judge to believe his or her application of the law was proper. *Foley* recognized this theme: "Nor can we escape that in common parlance, an affirmance without opinion of a trial court by a district is generally deemed to be an approval of the judgment of the trial court, and becomes a precedent, certainly in the trial court rendering the judgment."[38] The law thus settled becomes subject to straight-forward application resulting in further per curiam affirmances. A particular type of case could become subject to peculiar treatment in one district, while the other districts or the Supreme Court of Florida could decide the same type of case in a different fashion. Notwithstanding the *Hoffman v. Jones*[39] prohibition against the districts rendering decisions which conflict with the settled law of the Supreme Court of Florida, many cases have been granted certiorari for just such a conflict.[40] It is poor policy for the supreme court to be precluded from protecting its own decisions.

Secondly, even though a per curiam affirmance only directly af-

36. 177 So. 2d at 223.

37. *See* Lake v. Lake, 103 So. 2d 639, 641 (Fla. 1958).

38. 177 So. 2d at 225-26.

39. 280 So. 2d 431 (Fla. 1973).

40. *See* Wills v. Sears, Roebuck & Co., 351 So. 2d 29 (Fla. 1977); Courtelis v. Lewis, 348 So. 2d 1147 (Fla. 1977); Williams v. State, 340 So. 2d 113 (Fla. 1976); De La Portilla v. De La Portilla, 304 So. 2d 113 (Fla. 1974); In re Estate of McCartney, 299 So. 2d 5 (Fla. 1974); Manufacturers Life Ins. Co. v. Cave, 295 So. 2d 103 (Fla. 1974); Adams v. Whitfield, 290 So. 2d 49 (Fla. 1974); Lake Killaney Apts., Inc. v. Estate, 283 So. 2d 102 (Fla. 1973); Escobar v. Bill Currie Ford, Inc., 247 So. 2d 311 (Fla. 1971); Walden v. Borden, 235 So. 2d 300 (Fla. 1970); SAF-T-CLEAN, Inc. v. Martin-Marietta Corp., 197 So. 2d 8 (Fla. 1967); Coleman v. Coleman, 190 So. 2d 332 (Fla. 1966).

fects the individual litigant, it was this type of "resulting injustice to the immediate litigant" that prompted the supreme court to begin "record proper" analysis. Originally it took nine years after the advent of the district courts for the *Foley* type of exception to arise. A system such as the present one may pave the way to its own exception to the strict rule of no review without a written opinion.

In order to protect against loose use of per curiam decisionmaking, briefing and argument by counsel at the district court level should not only address the merits of their case, but also the possible conflicts that may arise from a decision on these merits.[41] This would help to promote "reckonability of result"[42] by alerting appellate judges to the possible conflicts which may arise, and ease the burden of fruitless appeals from the trial courts. Moreover, it is generally recognized that petitions for rehearing or clarification should now be more freely granted in the district courts, thus providing another avenue for full written review.[43] For example, if a case originally disposed of by per curiam affirmance is granted either rehearing en banc[44] of given clarification,[45] the written opinion, if any, flowing from such a procedure might support conflict jurisdiction. This, of course, would require the written opinion to be "express" in its reasoning.[46] It may also be argued that as an alternative to conflict certiorari jurisdiction, a litigant might seek to invoke the extraordinary writ jurisdiction of the Florida Supreme Court.[47]

Conclusion

As a matter of policy, the courts of Florida should strive to obtain decisional harmony at the district court level. Although the new jurisdictional amendment was a hard fought battle, access to the Florida

41. Lake v. Lake, 103 So. 2d 639, 643 (Fla. 1958).

42. *See* LLEWELLYN, THE COMMON LAW TRADITION—DECIDING APPEALS 26 (1960).

43. *See* England, Hunter & Williams, *supra* note 11, at 198.

44. FLA. R. APP. P. 9.330.

45. *Id.*

46. FLA. CONST. art. V, sec. 3(b)(3).

47. FLA. CONST. art. V, sec. 3(b)(7)-(9). *But see* St. Paul Title Ins. Corp. v. Davis, 392 So. 2d 1304 (Fla. 1980) (holding that petitioner seeking review of per curiam affirmance with our opinion, cannot invoke "all writs" provision of art. V, sec. 3(b)(7)).

Supreme Court should still be available in all deserving cases. Justice England rightly describes this aspect of the process as an obligation:

> Section 3(b)(3) now places an increased obligation on district court judges who again have some ability to control a party's right to supreme court review. Now, as was originally intended, these judges must keep a wary eye on the broad import of their decisions before issuing an affirmance without opinion. It goes without saying that the press and the public will keep a wary eye on them.[48]

Karl Llewellyn in *The Common Law Tradition*[49] saw "recognition of doubt"[50] as an important aspect of an appellate judge's responsibility in formulating opinions. Under the new Florida constitutional scheme, district court judges should consider "recognition of doubt" in determining whether to use per curiam affirmances. If there is any doubt regarding the potential for conflict, the courts should discard the option of a per curiam decision without opinion, and write an opinion, no matter how brief, which permits Florida Supreme Court resolution of honestly arguable conflicts.[51]

Victor Lance

---

48. England, Hunter & Williams, *supra* note 11, at 181.

49. *See* LLEWELLYN, *supra* note 42.

50. *Id.* at 12.

51. In a recent article, Justice England reviews the percentages of per curiam affirmances without opinion following the adoption of the jurisdictional amendment. Finding them substantially unchanged with respect to statistics of earlier years, he makes this observation: "The district courts apparently did not seize upon the amendment to expand the percentage of their dispositions without opinions during calendar 1980." England, A. & Williams, R., *Florida Appellate Reform One Year Later,* 9 FLA. ST. U. L. REV. 223, 256 (1981). This seems to be an attempt at providing ad hoc evidentiary support to an observation made in Florida Greyhound Owners & Breeders Ass'n Inc. v. West Fowler Assoc., 347 So. 2d 408 (Fla. 1977): "The foul assumption which underlies any review is that the district court perpetrated an injustice which it could not explain away in an opinion. I refuse to indulge that assumption." *Id.* at 411 (concurring opinion). However, both observations miss the mark. It would be ludicrious to assert that district court judges would ever attempt to "hide their mistakes". Yet, because of the complexity of the issues in various cases, conflicts arise all too often. This is aptly demonstrated by the unintentionally created conflicts reviewed during the *Foley* era. *See* notes 31 & 40 *supra.*

Nonetheless, the thrust of this article is merely to point out the need for careful

consideration by the district courts of possible unstated conflicts. Inasmuch as Justice England finds that the rate of per curiam affirmances has remained virtually unchanged, it may be argued that the district courts have not recognized their "obligation" in this respect. It can be asserted that the percentage of per curiam affirmances should *decrease* in proportion to the rate that review was formerly granted by the Supreme Court for review of per curiam affirmances during the *Foley* era.