

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
FULTON COUNTY

State of Ohio

Court of Appeals No. F-10-001

Appellant

Trial Court No. 09CR000108

v.

Walter Zimbeck

DECISION AND JUDGMENT

Appellee

Decided: July 8, 2011

* * * * *

Scott A. Haselman, Fulton County Prosecuting Attorney, for appellant.

Gregory L. VanGunten and Amber L. VanGunten, for appellee.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} This matter is before the court on the motion of defendant-appellee, Walter Zimbeck, to certify the record of this case to the Supreme Court of Ohio on the ground that the judgment rendered by this court on May 6, 2011, is in conflict with a decision from the Fourth District Court of Appeals. Appellant the state of Ohio has filed a memorandum in opposition.

{¶ 2} Initially we note that certification to the Supreme Court of Ohio is only proper where there is a conflict in a rule of law between appellate districts. R.C. 2501.12; *Whitelock v. Gilbane Bldg. Co.* (1993), 66 Ohio St.3d 594, 598. That is, "[f]actual distinctions are not a basis for certification." *Taylor v. Brocker* (1997), 117 Ohio App.3d 174, 178.

{¶ 3} In our decision of May 6, 2011, we reversed the judgment of the Fulton County Court of Common Pleas which had granted the motion of appellee to dismiss the aggravated murder and murder charges against him on the ground of pre-indictment delay. Specifically, we determined that because appellee had not established actual prejudice because of pre-indictment delay and the state established a justifiable reason for the delay, in the form of newly discovered evidence, the lower court erred in dismissing the charges against appellee. Appellee asserts that our decision is in conflict with the decision of the Fourth District Court of Appeals in *State v. Brown*, 4th Dist. No. 98CA25. A thorough review of *Brown* and the present case, however, reveals that there is no conflict on any rule of law between the two cases. Both cases applied the same controlling authority, *State v. Luck* (1984), 15 Ohio St.3d 150, and the same standard of review for determining whether the accused had established prejudicial pre-indictment delay. In his motion, appellee then compares the facts of both cases and concludes that because the court in *Brown* found prejudice and we did not, there is a conflict between the two cases. This is not the standard by which conflicts are judged.

{¶ 4} The Ohio Supreme Court has set forth three requirements that must be met in order for a case to be certified:

{¶ 5} "First, the certifying court must find that its judgment is in conflict with the judgment of a court of appeals of another district and the asserted conflict *must* be 'upon the same question.' Second, the alleged conflict must be on a rule of law-not facts. Third, the journal entry or opinion of the certifying court must clearly set forth that rule of law which the certifying court contends is in conflict with the judgment on the same question by other district courts of appeals." *Whitelock, supra*, at 596.

{¶ 6} Accordingly, we find that any difference that exists between this case and *Brown*, is factual in nature and is not based on a rule of law. Appellee's motion to certify a conflict is therefore denied.

MOTION DENIED.

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, J.

JUDGE

Thomas J. Osowik, P.J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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