

[Cite as *State v. Monford*, 2010-Ohio-5624.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio, :
 :
 Plaintiff-Appellee, :
 :
 v. : No. 09AP-274
 : (C.P.C. No. 08CR-02-1099)
 Larue A. Monford, :
 : (REGULAR CALENDAR)
 Defendant-Appellant. :

D E C I S I O N

Rendered on November 18, 2010

Ron O'Brien, Prosecuting Attorney, and *Seth L. Gilbert*, for
appellee.

Yeura R. Venters, Public Defender, and *Allen V. Adair*, for
appellant.

ON MOTION TO CERTIFY CONFLICT

CONNOR, J.

{¶1} Pursuant to App.R. 25, defendant-appellant, Larue Monford ("appellant"), moves this court for an order certifying a conflict between our decision in *State v. Monford*, 10th Dist. No. 09AP-274, 2010-Ohio-4732, and the decision rendered by the third district in *State v. Cihonski*, 178 Ohio App.3d 713, 2008-Ohio-5191. The State of Ohio opposes this motion. For the reasons that follow, we deny appellant's motion to certify a conflict.

{¶2} Section 3(B)(4), Article IV, of the Ohio Constitution governs motions seeking an order to certify a conflict. It provides:

Whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination.

See also *Whitelock v. Gilbane Bldg. Co.*, 66 Ohio St.3d 594, 1993-Ohio-223, syllabus, rehearing denied by *Whitelock v. Cleveland Clinic Found.* (1993), 67 Ohio St.3d 1420.

{¶3} In *Whitelock*, the Supreme Court of Ohio held, pursuant to Section 3(B)(4), Article IV, Ohio Constitution and S.Ct.Prac.R. III, "there must be an actual conflict between appellate judicial districts on a rule of law before certification of a case to the Supreme Court for review and final determination is proper." *Id.* at paragraph one of the syllabus. The court further stated:

[A]t least three conditions must be met before and during the certification of a case to this court pursuant to Section 3(B)(4), Article IV of the Ohio Constitution. 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.

(Emphasis sic.) *Id.* at 596

{¶4} Additionally, factual distinctions between cases are not a basis upon which to certify a conflict. *Id.* at 599. "For a court of appeals to certify a case as being in conflict with another case, it is not enough that the reasoning expressed in the opinions of the two

courts of appeals be inconsistent; the judgments of the two courts must be in conflict."

State v. Hankerson (1989), 52 Ohio App.3d 73, paragraph two of the syllabus.

{¶5} Appellant proposes the following questions to be certified:

When a plea of not guilty by reason of insanity has been duly entered, does the complete failure to address such plea at trial constitute structural error?

When a plea of not guilty by reason of insanity has been duly entered by prior counsel, appears in the court file, and has not been withdrawn, does new counsel render ineffective assistance of counsel by totally neglecting to address such plea?

(Motion to Certify Conflict, at 2.)

{¶6} In *Cihonski*, the defendant entered a written plea of not guilty by reason of insanity ("NGRI"). At trial, the trial court failed to notify the jury that the defendant had entered an NGRI plea and also failed to instruct the jury on pleas of NGRI. Neither Cihonski's counsel nor the prosecution mentioned the NGRI plea at trial, and the record did not indicate that the plea was ever withdrawn. On appeal, Cihonski argued that because he had filed an NGRI plea prior to trial and presented evidence that his actions were not voluntary, an insanity defense had been raised and such a defense should have been defined for the jury. As a result, the third district determined the trial court should have informed the jury that Cihonski entered a plea of NGRI and also should have instructed the jury on the plea.

{¶7} Specifically, the third district found that the failure to instruct on the insanity defense violated Cihonski's constitutional right to a trial by jury. The trial court further found there was no evidence that the jury had considered Cihonski's defense, and thus the trial did not reliably serve its function. Accordingly, the third district determined "due

to the *unique facts and circumstances before us*, we find that the trial court's failure to notify the jury that Cihonski entered a plea of NGRI or to instruct the jury on that plea constituted structural error and warrants reversal." (Emphasis added.) *Cihonski* at ¶23. The trial court went on to find that, as a result, Cihonski was denied the effective assistance of counsel.

{¶8} In the instant case, the unique facts and circumstances present in *Cihonski* are not present here. Like Cihonski, appellant entered an NGRI plea prior to trial, which appears to have never been formally withdrawn, yet the jury was never notified of the plea or instructed on the plea. However, unlike Cihonski, appellant neither presented evidence demonstrating that his actions were not voluntary, nor presented any evidence in support of an NGRI defense. In fact, appellant advanced a completely different theory (misidentification) throughout the trial and there was nothing within this misidentification defense that even remotely suggested a theory of insanity. Due to these markedly different factual circumstances, we found the present case to be factually different from *Cihonski*, and thus distinguishable. Because our determination is based upon factual distinctions, and because factual distinctions are not a basis for certification of a conflict (see *Whitelock*), there is no basis here for certifying a conflict.

{¶9} Accordingly, we deny appellant's motion to certify conflict.

Motion to certify conflict denied.

BROWN and McGRATH, JJ., concur.
