

IN THE SUPREME COURT OF FLORIDA

CASE NO. 64640

FELIPE RUIZ,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

FILED

SID J. WHITE

DEC 20 1983

CLERK, SUPREME COURT

By *[Signature]*
Chief Deputy Clerk

ON APPLICATION FOR DISCRETIONARY REVIEW

BRIEF OF PETITIONER ON JURISDICTION

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TABLE OF CONTENTS

| | <u>PAGES</u> |
|---|--------------|
| INTRODUCTION..... | 1 |
| STATEMENT OF THE CASE..... | 2 |
| QUESTION PRESENTED..... | 2 |
| <p>THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL UPHOLDING THE REVOCATION OF PETITIONER'S PROBATION BASED SOLELY ON HIS CONVICTION RESULTING FROM A PLEA OF NOLO CONTENDERE, IS IN EXPRESS AND DIRECT CONFLICT WITH THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL IN <u>DONALDSON V. STATE</u>, 407 SO.2D 263 (FLA. 5TH DCA 1981), WHICH CONFLICT WAS EXPRESSLY RECOGNIZED BY THE THIRD DISTRICT COURT OF APPEAL IN THE DECISION AT BAR, AND THE MERITS OF WHICH IS CURRENTLY BEING REVIEWED BY THIS COURT IN <u>MASELLI V. STATE</u>, S.CT. CASE NO. 63,183.</p> | |
| STATEMENT OF THE FACTS..... | 2 |
| ARGUMENT | 3 |
| CONCLUSION..... | 6 |
| CERTIFICATE OF SERVICE..... | 7 |

TABLE OF CITATIONS

CASES

PAGE(S)

BRADFORD v. STATE
435 So.2d 962 (Fla. 1st DCA 1983).....3, 4

DONALDSON v. STATE
407 So.2d 623 (Fla. 5th DCA 1981).....3

MASELLI v. STATE
425 So.2d 176 (Fla. 2d DCA 1983).....3, 4

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INTRODUCTION

The petitioner, Felipe Ruiz, was the appellant in the District Court of Appeal of Florida, Third District, and the defendant in the trial court. The respondent, the State of Florida, was the appellee in the District Court of Appeal and the prosecution in the trial court.

The symbol "A" will be utilized to designate the appendix to this brief. All emphasis is supplied unless the contrary is indicated.

STATEMENT OF THE CASE

The defendant's probation was revoked following a probation violation hearing. (A. 1). A timely appeal was taken to the District Court of Appeal of Florida, Third District, which issued its decision affirming the judgment of the trial court on November 22, 1983. (A. 1). A notice invoking the discretionary review jurisdiction of this Court was filed on December 9, 1983.

QUESTION PRESENTED

WHETHER THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL UPHOLDING THE REVOCATION OF PETITIONER'S PROBATION BASED SOLELY ON HIS CONVICTION RESULTING FROM A PLEA OF NOLO CONTENDERE, IS IN EXPRESS AND DIRECT CONFLICT WITH THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL IN DONALDSON V. STATE, 407 SO.2D 263 (FLA. 5TH DCA 1981), WHICH CONFLICT WAS EXPRESSLY RECOGNIZED BY THE THIRD DISTRICT COURT OF APPEAL IN THE DECISION AT BAR, AND THE MERITS OF WHICH IS CURRENTLY BEING REVIEWED BY THIS COURT IN MASELLI V. STATE, S.CT. CASE NO. 63,183.

STATEMENT OF THE FACTS

At petitioner's probation violation hearing, the state relied exclusively upon his conviction of simple battery, which conviction was entered pursuant to his nolo contendere plea. (A. 1, 2 at 1-3).

On appeal, petitioner asserted that in the absence of additional evidence, the nolo contendere-conviction constituted insufficient basis for the probation revocation.

The Third District Court of Appeal, expressly recognizing that its decision conflicted with the Fifth District's decision

in Donaldson v. State, 407 So.2d 623 (Fla. 5th DCA 1981), rejected that claim and relied upon the decisions of the First and Second District Courts of Appeal in Bradford v. State, 435 So.2d 962 (Fla. 1st DCA 1983) and Maselli v. State, 425 So.2d 176 (Fla. 2d DCA 1983), respectively:

We affirm the revocation of a probation upon the state showing of a subsequent unrelated conviction entered pursuant to a nolo contendere plea relying upon the reasoning contained in Bradford v. State, 435 So.2d 962 (Fla. 1st DCA 1983); and Maselli v. State, 425 So.2d 176 (Fla. 2nd DCA 1983), recognizing that these opinions are in conflict with Donaldson v. State, 407 So.2d 623 (Fla. 5th DCA 1981).

(A. 1). (Emphasis added).

The decision of Maselli v. State, 425 So.2d 176 (Fla. 2d DCA 1983) upon which the district court relied, is currently being reviewed on the merits by this Court in S.Ct. Case No. 63,183, based on its conflict with Donaldson v. State, 407 So.2d 623 (Fla. 5th DCA 1981).

ARGUMENT

THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL UPHOLDING THE REVOCATION OF PETITIONER'S PROBATION BASED SOLELY ON HIS CONVICTION RESULTING FROM A PLEA OF NOLO CONTENDERE, IS IN EXPRESS AND DIRECT CONFLICT WITH THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL IN DONALDSON V. STATE, 407 SO.2D 263 (FLA. 5TH DCA 1981), WHICH CONFLICT WAS EXPRESSLY RECOGNIZED BY THE THIRD DISTRICT COURT OF APPEAL IN THE DECISION AT BAR, AND THE MERITS OF WHICH IS CURRENTLY BEING REVIEWED BY THIS COURT IN MASELLI V. STATE, S.CT. CASE NO. 63,183.

In Donaldson v. State, 407 So.2d 623 (Fla. 5th DCA 1981),

the Fifth District Court of Appeal held that where a conviction entered pursuant to a nolo contendere plea is sought to be relied upon as proof of a probation violation, and the defendant asserts his innocence in regard to that plea, the state must elicit additional evidence to support the finding of probation violation.

In Maselli v. State, 425 So.2d 176 (Fla. 2d DCA 1983), the Second District Court of Appeal disagreed with the Donaldson decision and held that a conviction arising from a nolo contendere plea constituted sufficient basis for probation revocation. In Bradford v. State, 435 So.2d 962 (Fla. 1st DCA 1983), the First District Court of Appeal aligned itself with Maselli. The Maselli decision is currently being reviewed on the merits by this Court based upon its conflict with Donaldson, supra.

In the instant case, petitioner's probation was revoked solely on the basis of a misdemeanor battery conviction to which the defendant had entered a nolo contendere plea, and in regard to which the defendant maintained his innocence. (A. 1, 2 at 1-3). The Third District affirmed the probation revocation order based on its adoption of the reasoning in Maselli and Bradford. (A. 1). The Court's decision expressly recognized that its holding conflicted with Donaldson. (A. 1).

In light of the Third District's recognition of the existence of express decisional conflict in this case, and the fact that, due to that same decisional conflict, this Court is currently reviewing the merits of the exact issue in Maselli v.

State, S.Ct. Case No. 63,183, it is manifest that the jurisdictional basis for this Court's discretionary review is present and, concomitantly, that exercise of that review jurisdiction by this Court is most appropriate.

CONCLUSION

Based upon the foregoing, petitioner requests this Court to grant discretionary review in this cause.


Respectfully submitted,

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BY: Beth C. Weitzner
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail to the Office of the Attorney General, 401 Northwest Second Avenue, Miami, Florida this 13th day of December, 1983.


Beth C. Weitzner
Assistant Public Defender