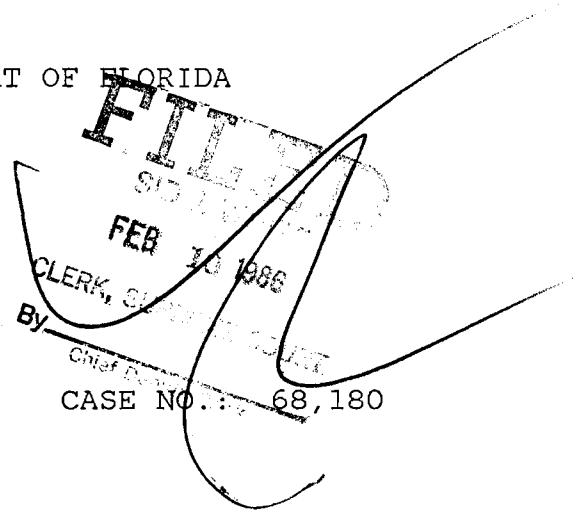
IN THE SUPREME COURT OF FLORIDA



RICKY JARADE PAYNE,	)	
Appellant,	)	
vs.	)	CASE NO.: 68,180
STATE OF FLORIDA,	)	
Appellee.	)	

RESPONDENT'S BRIEF ON JURISDICTION

JIM SMITH
ATTORNEY GENERAL
Tallahassee, Florida

Barbara Ann Butler
Assistant Attorney General
Suite 521
Duval County Courthouse
Jacksonville, Florida 32202
(904) 633-3117

COUNSEL FOR RESPONDENT

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PRELIMINARY STATEMENT

The parties will be referred to in this brief as follows: The STATE OF FLORIDA, the prosecution in the Circuit Court of the Fourth Judicial Circuit, in and for Duval County, Florida, and the Appellee in the District Court of Appeal, First District, is now referred to as the RESPONDENT; RICKY JARADE PAYNE, the defendant in the trial court and Appellant before the First District Court of Appeal, will be referred to therein as the PETITIONER.

The opinion of the District Court is reported as follows:

> Payne v. State, No. BA-314 (Fla. 1st DCA September 18, 1985) [10 FLW 2157] on rehearing (December 19, 1985) [11 FLW 26].

STATEMENT OF THE CASE AND FACTS

Respondent agrees with Petitioner that the statement of fact set forth in the district court's opinion is adequate for the purpose of discussion and for the issues raised on application for discretionary jurisdiction. See, Slip Opinion on Rehearing at pp. 2-3.

SUMMARY OF ARGUMENT

Reasonable suspicion to suspect criminal activity is dependent upon facts adduced in each case which are observed and interpretated by the detaining officer in light of that officer's knowledge. The legal concept cannot be reduced to an abbreviated formula comprised of a few relevant facts such as those set forth by the Petitioner.

Likewise where the sentencing judge follows procedures to declare a defendant a habitual offender, but elects to use the finding as aggravation for a departure sentence of 21 years rather than to impose the mandatory habitual offender sentence of life imprisonment, the finding cannot be challenged as an impermissible reweighing of prior convictions already factored into the guidelines recommendation.

POINT INVOLVED

> THE DECISION OF THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, DOES NOT DIRECTLY AND EXPRESSLY CONFLICT ON THE ISSUE OF REASONABLE SUSPICION TO JUSTIFY A STOP AS SET FORTH IN WITH MULLINS v. STATE, So.2d 1162 (FLA. 1978); COLODONATO v. STATE, 348 So.2d 326 (FLA. 1977).

Petitioner maintains that the decision of the First District Court of Appeal in the instant cause conflicts with the opinions in Mullins v. State, 366 So.2d 1162 (Fla. 1978); and Colodonato v. State, 348 So.2d 326 (Fla. 1977). Petitioner alleges express and direct conflict with the same point of law.

Initially, Respondent emphasizes the oft-stated role of the Court in conflict certiorari jurisdiction. This role:

> is to establish the law by review of decisions which form patently irreconcilable precedence.

Florida Power & Light Co. v. Bell, 113 So.2d 697, 699 (Fla. 1959). Thus it is clear that only conflict between decisions, not conflict between opinions, or rationale can supply jurisdiction for review by certiorari. Gibson v. Maloney, 231 So.2d 823 (Fla. 1970); Jenkins v. State, 385 So.2d 1356, 1358 (Fla. 1980); St. Paul Title Insurance Corp. v. Davis, 392 So.2d 1304 (Fla. 1981).

If jurisdiction exists in this Court because of a conflict of decisions, that conflict must adhere to a

formulated series of well established rules whereby such conflict is determined. The principle situations justifying exercise of conflict certiorari jurisdiction include:

> (1) The announcement of a rule of law which conflicts with a rule of law previously announced by the Supreme Court of Florida or the district court of appeal;
>
> (2) The application of a rule of law to produce a different result in a case which involves substantially the same controlling facts as a prior case; or
>
> (3) Upon the ground that the decision in this case creates a conflict by expressly accepting an earlier decision as controlling precedent in a situation materially at variance with the case relied upon.

Neilson v. City of Sarasota, 117 So.2d 731, 734 (Fla. 1960); McBurnette v. Playground Corp., 137 So.2d 563, 565 (Fla. 1962). Petitioner's request for review is premised upon the first category. However contrary to Petitioner's assertion, the rule of law does not conflict, it is merely applied to differing factual circumstances which produce untoward results.

Under Florida's Stop and Frisk Law, a law enforcement officer must have a well-founded suspicion of the presence of criminal activity. Section 901.151, Florida Statutes. The legality of each stop is dependent upon the facts within the detaining officer's knowledge which reasonably suggest the possible commission of a crime, existing or

imminent, on the part of the suspect(s). A well-founded suspicion is one which has some factual foundation in the circumstances observed by the officer, when those circumstances are interpreted in light of the officer's knowledge. The opinion of the First District does not conflict with these legal principles.

Additionally, the opinion does not conflict when the instant facts are applied to the controlling legal principle. It is true that being on the public street during late or unusual hours cannot constitute a valid basis to temporarily detain and/or frisk an individual under the stop and frisk law. However there were considerably more factors here which indicate the presence of criminal activity than the presence of a U-Haul truck in a business district late at night[1] or the mere riding of a bicycle slowly through a residential area at night[2] or leaning into the passenger side of a vehicle parked at a service station and walking briskly away upon noticing the police[3] or the presence of two black males outside of an open

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1 Colodonato v. State.

2 Mullins v. State.

3 Kearse v. State, 384 So.2d 272 (Fla. 4th DCA 1980).

convenience store in an all white neighborhood[4]. Petitioner refuses to discuss the totality of the factual circumstances. When the facts are evaluated fully as was done by the trial and appellate courts, it is apparent that reasonable suspicion to suspect criminal activity existed.

Based on the dissimilar factual circumstances of Mullins, Colodonato, and the instant case, the State submits that a direct and express conflict between application of an established legal principle has not been established. This Court should not exercise its discretionary jurisdiction in this matter. Quevedo v. State, 436 So.2d 87, 88 (Fla. 1983).

THE DECISION OF THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, DOES NOT DIRECTLY AND EXPRESSLY CONFLICT WITH CASELAW INTERPRETING THE HABITUAL OFFENDER STATUTE.

The foregoing is equally true of the second allegation of conflict. Petitioner's statement of fact neglects to point out the circuit court's full compliance with the procedures required to declare Petitioner a habitual

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[4] Petitioner's summarization in brief of the facts giving rise to reasonable suspicion in this case.

offender pursuant to Section 775.084. While fulfilling the requirements, the trial court elected not to declare Petitioner a habitual offender since the classification carried a mandatory life imprisonment sentence. Section 775.084(4)(a)(1), Florida Statutes. The sentence imposed was twenty-one (21) years, more than the recommended guidelines range, but substantially less than the mandatory sentence. As previously pointed out, Petitioner's quarrel with the use of the finding as aggravation is likely to result in a more lengthy sentence upon remand.

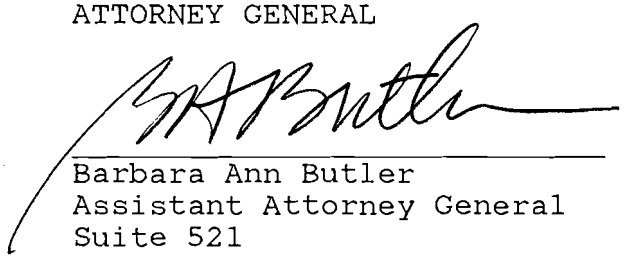
Express and direct conflict with Hendrix v. State, 475 So.2d 1218 (Fla. 1985) and Albritton v. State, 476 So.2d 158 (Fla. 1985) has not been established. Hendrix sets forth a general principle that prior convictions factored into the recommended guidelines score cannot be reweighed as a basis for departing from the presumptive sentence. Albritton is not in conflict because it is apparent beyond a reasonable doubt that the instant departure is not predicated upon convictions already weighed in the guidelines calculation. The concept of a habitual offender does not rise from the number of convictions, but from a non-rehabilitative nature, an escalating pattern of conduct and a need to protect society. The decision to declare a defendant a habitual offender is not predicated upon a mere tally of prior convictions.

CONCLUSION

Article V, Section 3(b)(2), of the Florida Constitution (1980) permits discretionary jurisdiction for review of opinions of the District Court of Appeal that expressly and directly conflict with an opinion of this Court or of another district court of appeal. No such conflict has been demonstrated in the instant cause and the discretionary jurisdiction of this Court should not be invoked.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL



Barbara Ann Butler
Assistant Attorney General
Suite 521
Duval County Courthouse
Jacksonville, Florida 32202
(904) 633-3117

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail to P. Douglas Brinkmeyer, Assistant Public Defender, Post Office Box 671, Tallahassee, Florida, this 7th day of February, 1986.

Barbara Ann Butler
Assistant Attorney General

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