

013

IN THE SUPREME COURT OF FLORIDA

CASE NO.: 75,302

THE STATE OF FLORIDA,

Petitioner,

vs.

NARCISCO RODRIGUEZ,

Respondent.

FILED
 SID J. WHITE
 FEB 26 1990
 CLERK, SUPREME COURT
 By *[Signature]*
 Deputy Clerk

ON PETITION FOR DISCRETIONARY REVIEW

RESPONDENT'S BRIEF ON JURISDICTION

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INTRODUCTION

Petitioner, the State of Florida, was the Appellee in the Third District Court of Appeal and the prosecuting authority in trial court proceedings before the Circuit Court of the Eleventh Judicial Circuit, in and for Dade County, Florida. Respondent, Narcisco Rodriguez, was the defendant before the Circuit Court and Appellant to the District Court of Appeal.

Petitioner will be referenced in the brief as "Petitioner" or the "State." Respondent will be referenced as "Respondent" or "Defendant."

All emphasis is supplied unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

The Respondent generally agrees with the statement of the case and facts submitted by the Petitioner herein. However, Respondent disputes the statement that he only raised the failure of the State to allege specific prior convictions for the same offense in the information. The Respondent argued the failure of the State to allege *any* prior violations of the statute and the additional failure to state in the information that the offense charged was a felony. Moreover, additional facts are relevant to the court's decision herein.

Respondent was charged by Information with several traffic offenses, including driving under the influence of alcohol. At his arraignment before the Circuit Court of the 11th Judicial Circuit of Florida his counsel moved to dismiss or transfer the case to County

Court upon the grounds that no felony was charged in the Information. The Circuit Court denied this motion and subsequently proceeded to trial on the DUI charge over Respondent's objection.

On appeal before the Third District Court of Appeal the Respondent argued that the trial court erred in denying the Respondent's motion to dismiss and in proceeding to trial when the trial court lacked jurisdiction over the subject matter. In a unanimous Per Curiam decision the Third District held that reference in the Information to Section 316.193(2)(b) of the Florida Statutes was insufficient to charge a felony where the information failed to allege the three prior convictions of the defendant for the same offense which are prerequisites to a felony prosecution under the statute. Since this holding was dispositive, the District Court did not address other errors raised by Respondent on appeal such as the failure of the trial court to read any elements of the offense charged in the final instructions to the jury, and the failure of the trial court to conduct a separate proceeding to determine whether the defendant had previously been convicted of the same offense.

In its opinion the District Court expressly refused to follow a decision of the First District Court of Appeal in Pritchard v. State, 528 So.2d 1272 (Fla. 1st DCA 1988).

SUMMARY OF THE ARGUMENT

The court below refused to follow a decision of the First District Court of Appeal which is inconsistent with principles of law established in prior Supreme Court opinions. The incorrect decision of the First District does not justify review of the instant case which follows the precedent set by previous opinions of this court.

ARGUMENT

THIS COURT SHOULD DECLINE TO REVIEW THE INSTANT CASE BECAUSE THE DECISION OF THE COURT BELOW FOLLOWS PRIOR OPINIONS OF THE SUPREME COURT ON THE PRINCIPLE OF THE LAW INVOLVED.

In State v. Harris, 356 So.2d 315 (Fla. 1978) this court found that a statute which enhanced petit theft from a misdemeanor to a felony, upon a showing that the accused had twice previously been convicted of the same crime, created a substantive offense to which the requisite prior convictions were essential elements. A separate trial outside the jury's presence to determine whether the defendant had been twice previously convicted of the same offense was established as the proper procedure to follow in such cases.

In State v. Phillips, 463 So.2d 1136 (Fla. 1985) this court held that an information which failed to allege prior convictions of the defendant but clearly labeled the crime charged as felony petit theft and cited the statute making a third conviction of petit theft a felony was not so "fundamentally defective" that a challenge to the adequacy of the information to support a felony conviction could be successfully raised for the first time on appeal. Because Phillips conceded receiving at her arraignment proper and sufficient notice of the prior offenses upon which the prosecution intended to rely in the case, this court found the information to be "...adequate notice of the facts absent a timely objection or motion to dismiss." Phillips at 1138.

In the instant case the information was not labeled as a felony and the defendant never received notice of the alleged prior

convictions upon which the State intended to rely. Moreover, the defense made a timely motion to dismiss at arraignment and protested both before trial and sentencing that the trial court lacked jurisdiction over the subject matter. Thus, the decision of the court below, that the defendant's motion to dismiss should have been granted because the information failed to allege the essential element of prior convictions of the defendant for the same offense clearly conformed to the applicable principles of law announced by this court in Harris and Phillips.

The fact that the Third District correctly declined the State's invitation to follow a First District case which conflicts with Harris and Phillips should not provide the State with an avenue for further review before this court. The opinion in Pritchard v. State, 528 So.2d 1272 (Fla. 1st DCA 1988) does not discuss or even mention Phillips. Rather, the court cites State v. Crocker, 519 So.2d 32 (Fla. 2d DCA 1987) for the proposition that the State is never required to allege prior convictions in the charging document because of possible prejudice to the accused in the event prior convictions were brought to a jury's attention. Crocker, however, does not support this proposition.

The defendant in Crocker was charged with grand theft and convicted by the jury of petit theft. The court held that the State could seek to enhance this petit theft conviction to a felony in a separate proceeding where proof of the defendant's prior convictions was provided. However, the court specifically stated that, where felony petit theft is the only offense charged, prior convictions must

be alleged because "...the charging document must make clear that felony petit theft is being charged in order to invoke the jurisdiction of the circuit court." Crocker at 33 (citing Phillips).

In light of Harris, Phillips, and Crocker, it would seem that the Pritchard v. State was incorrectly decided. However, this should not result in a review of the instant case which conforms with the controlling precedent from this court. As evidenced by the decision of the Third District in this case and of the Second District in Crocker the appellate and trial courts of this State have received sufficient guidance on the necessity of alleging prior convictions in order to invoke the jurisdiction of the circuit court for a misdemeanor or traffic offense which may be enhanced to a felony. Pursuant to Article V, Section 3(b)(3) of the Florida Constitution (1980) and Rule 9.030(a)(2)(A)(iv) of the Florida Rules of Appellate Procedure, this court has discretion as to whether to exercise jurisdiction in this matter. It is respectfully submitted that review should be denied.

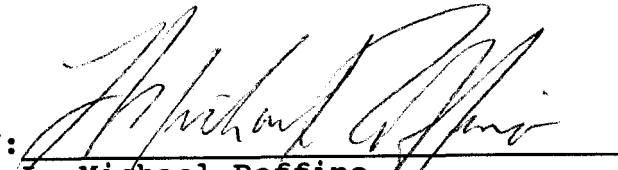
CONCLUSION

Based on the foregoing argument and authorities, the Respondent respectfully requests that this Court deny the petition for discretionary review. Alternatively, the decision below should be affirmed in all respects.

Respectfully submitted

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit
of Florida

BY:

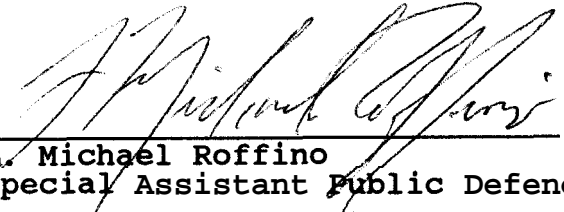


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to the Office of the Attorney General, 401 Northwest 2nd Avenue, Miami, Florida, this 23rd day of February, 1990.

BY:



L. Michael Roffino
Special Assistant Public Defender