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IN THE SUPREME COURT OF FLORIDA

CASE NO. 75,302

THE STATE OF FLORIDA,

Petitioner,

vs.

NARCISCO RODRIGUEZ,

Respondent.

****

ON PETITION FOR DISCRETIONARY REVIEW

.....

BRIEF OF PETITIONER ON THE MERITS

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INTRODUCTION

Petitioner, the State of Florida, was the Appellee in the District Court of Appeal, Third District, and the prosecution in the trial court, the Circuit Court of the Eleventh Judicial Circuit, in and for Dade County, Florida. Respondent, Narcisco Rodriguez, was the Defendant/Appellant.

All parties will be referred to as they appear before this Honorable Court. Petitioner may also be referred to as the State and Respondent may also be referred to as Defendant.

The following symbols will be used:

"R" Record on Appeal

"T" Trial Transcript

"ST" Supplemental Transcript.

All emphasis is supplied unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Respondent, Narcisco Rodriguez, was charged by information in the Circuit Court with driving under the influence of an alcoholic beverage in violation of Section 316.193(2)(b), Fla. Stat. (1987), which makes a fourth or subsequent DUI charge a felony offense. Specific reference to the actual number of Respondent's prior DUI violations was not included in the information. (R.1).

Respondent was also charged with unlawfully attaching a registration license plate or revalidation sticker to the license plate which was not issued, assigned or transferred to the car he was driving in violation of § 320.261, Fla. Stat. (1987), and with driving with a suspended driver's license in violation of § 322.34(1), Fla. Stat. (1987). (R.2-3).

At his arraignment, Respondent acknowledged that he had at least six prior convictions but sought to dismiss the information by claiming that the information failed to allege a felony. (ST.3, **5**). When told that the information cited the appropriate subsection of § 316.193(2), Respondent argued that "the numbers are irrelevant, the information has to inform the defendant what he's accused of." (ST. 6). The State argued that the information sufficiently tracked the statute and that where the information tracks the statute, specific allegations are unnecessary. (ST.6).

The trial court denied Respondent's motion to dismiss and offered to enter an order requiring the State to file a bill of particulars listing Respondent's previous DUI convictions. (ST.6, 8). Respondent refused the offer and insisted that the court was without the jurisdiction to hear the case since the information failed to allege a felony. (ST.7).

Respondent's case was called for jury trial on March 6, 1989, in the Circuit court before the Honorable Roy T. Gelber. (R.5). At that time, Respondent withdrew his prior plea, entered a plea of no contest to the misdemeanor charges, and sentencing was deferred until the end of Respondent's trial on DUI charges. (R.5; T.4-7).

At the conclusion of the trial, the jury found Respondent guilt of driving under the influence or driving with an unlawful blood alcohol level as charged in count one of the information. (R.43; T.225).

At the sentencing hearing, the State informed the trial judge that the printout of Respondent's driving record showed that Respondent had seven prior DUI convictions. (T.228). When asked if defense counsel had anything to say concerning sentencing, defense counsel renewed his claim that the trial court was without jurisdiction to hear the case based upon the alleged deficiency in the Information. (T.230). The trial court ruled that if the prior DUI convictions were listed in the

Information, it would have a prejudicial impact on the jury and denied Respondent's renewed motion to dismiss the Information. (T.230).

Respondent filed a Notice of Appeal on April 6, 1989, and subsequently challenged his conviction and sentence on various grounds. (R.52). On December 13, 1989, the Third District Court of Appeal held that the trial court erred in denying Respondent's motion to dismiss the Information and reversed Respondent's convictions without reaching the merits of Respondent's other claims. Rodriguez v. State, 15 F.L.W. D4 (Fla. 3d DCA January 5, 1990). The Third District Court ruled that the proper procedure to be followed when alleging felony DUI in violation of § 316.193(2)(b), Fla. Stat. is to include indentifiable prior convictions in the charging document and expressly declined to follow Pritchard v. State, 528 So.2d 1272 (Fla. 1st DCA 1988). Rodriguez, 15 F.L.W. at D4.

On or about January 3, 1990, Petitioner filed a notice to invoke the discretionary jurisdiction of the Florida Supreme court on the basis of conflict and a jurisdictional brief was filed on or about February 1, 1990. An order accepting jurisdiction and setting oral argument was issued on April 16, 1990.

This brief follows.

QUESTION PRESENTED

WHETHER THE CIRCUIT COURT PROPERLY EXERCISED ITS JURISDICTION WHERE THE INFORMATION CHARGING THE DEFENDANT WITH FELONY DUI TRACKED THE DUI STATUTE AND SEPARATELY CITED THE SUBSECTION DEFINING FELONY DUI.

SUMMARY OF THE ARGUMENT

The information properly invoked the jurisdiction of the circuit court inasmuch as it recited facts sufficient to support a conviction for misdemeanor **DUI** and cited the statute defining felony **DUI** which provides that felony **DUI** can be established only by evidence that the accused was driving under the influence in the instant case and that he has previously been convicted of the offense at least three times. Specific references to the prior **DUI** convictions in the information would unduly prejudice the accused in a jury trial and would essentially destroy the accused's constitutionally protected presumption of innocence. Thus the circuit court properly exercised its jurisdiction in the instant case.

ARGUMENT

THE CIRCUIT COURT PROPERLY EXERCISED ITS JURISDICTION WHERE THE INFORMATION CHARGING THE DEFENDANT WITH FELONY DUI TRACKED THE DUI STATUTE AND SEPARATELY CITED THE SUBSECTION DEFINING FELONY DUI.

The jurisdiction of the circuit court in a criminal case is invoked by filing an information which properly and in good faith charges the commission of a crime cognizable in that court, and jurisdiction is to be determine solely from the face of the information. Allen v. State, 463 So.2d 351 (Fla. 1st DCA 1985). Where an information recites facts that will support a conviction under the statute and cites the applicable statute, the information adequately invokes the jurisdiction of the court and will not be held fundamentally defective, not withstanding failure to specifically allege prior convictions, especially where the defendant will not be misled or be exposed to double jeopardy. State v. Phillips, 463 So.2d 1136 (Fla. 1985).

In Phillips, the defendant was charged with the theft of less than one hundred dollars by information filed in the circuit court. The heading of the information read "Felony Petit Theft" and cited the statute providing that the crime charged could be proved only by evidence of a misdemeanor theft and two prior convictions for misdemeanor theft. The facts alleged in the information, if proved, would support a conviction of misdemeanor petit theft. No objection to the information or to the jurisdiction of the circuit court was

raised before the circuit court and Phillips was tried and convicted pursuant to the information. On appeal, Phillips challenged, inter alia, the jurisdiction of the circuit court and the district court agreed that the information was fatally defective for failure to allege jurisdiction of the circuit court. Phillips, 463 So.2d at 1137.

On a motion for rehearing, the district court certified as a question of great public importance "whether, absent objection or motion to dismiss in the circuit court, the defect found in the charging instrument should be noticed on appeal as jurisdictional." The Florida Supreme Court held that "[T]he narrow issue before [the Court] is whether the information filed in this case sufficiently alleged commission of a felony and thus properly invoked the jurisdiction of the circuit court." Phillips, 463 So.2d at 1137.

Phillips argued that, in order to allege felony petit theft, the State was required to allege the two prior theft convictions as essential elements of the crime charged. The State argued that the heading, coupled with the reference to the statute defining that crime fulfilled the constitutional requirements of a charging a document charging the felony and that the jurisdiction of the circuit court was properly invoked. The Florida Supreme Court agreed and held that the defects in the information was one of form, not substance, and that because the defendant was not misled or exposed to double jeopardy, the

information was sufficient to support a conviction for felony petit theft. Because the charging documents clearly labeled the crime charged as a felony and cited the statute providing that the crime charged could be proved only by evidence of a misdemeanor theft, and two prior convictions for misdemeanor theft the information was held to have adequately invoked the jurisdiction of the circuit court. Phillips, 463 So.2d at 1138.

Section 316.193(2)(b), Fla. Stat. provides that felony DUI may be proved only by evidence of a misdemeanor DUI and three prior convictions for misdemeanor DUI. Compare, § 812.014(2)(d), Fla. Stat.

The information charging Respondent with felony DUI cited § 316.193(2)(b), Fla. Stat. in the heading and in the body of the document. The information also contained sufficient factual allegations which, if proven, would support a conviction of misdemeanor DUI. (R.1). The fact that the felony DUI charge was not titled a felony does not render the information fatally defective since the title of an information does not constitute a part thereof. State v. Gayety Theatres, 521 So.2d 231 (Fla. 3d DCA 1988).

Because the information in the instant case, like the information in Phillips, contained sufficient facts to support the misdemeanor offense if proved, and cited the portion of the statute defining the felony offense, the information properly invoked the jurisdiction of the circuit court.

When moving to dismiss the information in the circuit court, Respondent argued that the information was defective because of the state's failure to specifically allege prior convictions in the information. (ST. 3, 5, 6). Respondent made this same argument during sentencing. (T.230). The circuit court denied Respondent's renewed objection by stating that the jury would be prejudiced if the prior convictions were listed in the information. (T.230).

In State v. Harris, 356 So.2d 315 (Fla. 1978), this Honorable Court held that the State may not buttress a current charge with a simultaneous allegation that the accused had previously been convicted of another crime.

In Harris the defendants were charged with petit larceny, having twice been convicted of petit larceny in violation of § 812.021, Fla. Stat. (repealed Ch. 77-342, §16, Laws of Florida). Section 812.021(3) provided that a third or subsequent conviction for petit larceny would be treated as a felony offense rather than a misdemeanor offense. The circuit court held the statute unconstitutional in that it deprived defendants of due process and equal protection of the law and destroyed the historical presumption of innocence by the inclusion of prior convictions in the charging information. Harris, 356 So.2d at 316.

This Court construed the felony petit larceny statute as constitutional by analogizing the statute to the habitual offender statute, § 775.084, Fla. Stat., which required the state to proceed against the defendant in a separate proceeding following conviction or adjudication of guilt. Because prior convictions would be presented at a separate hearing, no evidence of a defendant's prior convictions would be presented at trial and there would be no possibility of prejudice. This Court rejected the state's argument in Harris that the felony petit larceny state required the state to specifically allege and prove the fact of a prior conviction in the information, reasoning that the jury would then be faced with evidence of the defendant's prior criminal activity and the presumption of innocence would be destroyed. To protect defendants this court held §812.021(3) created a substantive offense to be tried in the circuit court when felony petit larceny is charged, without bringing to the attention of the jury the fact of prior conviction as an element of the new charge. Upon conviction of the third petit larceny, the circuit court is required to determine the historical fact of prior convictions and questions regarding identity in a separate proceeding following the procedure used under the habitual offender statute. Harris, 356 So.2d at 316-317.

In Pritchard v. State, 528 So.2d 1272 (Fla. 1st DCA 1988), the First District Court applied the reasoning set forth in Harris and State v. Crocker, 519 So.2d 32 (Fla. 2nd DCA 1987)

(prior petit theft convictions should not be brought to the attention of the jury because of possible prejudice to the accused; instead, the court should determine the historical fact of the prior convictions and questions regarding identity in a separate proceeding) to the felony DUI statute, i.e. §316.193(2)(b), and held that a post-trial habitual offender-type proceeding was to be followed in establishing prior DUI convictions. Pritchard, 528 So.2d at 1274.

In Pritchard, felony DUI was charged in the information by merely referring to § 316.193(2)(b); there was no mention of any specific prior DUI convictions. Prior to trial Pritchard moved to dismiss the information for failing to allege the three prior convictions for DUI. The trial court found the information sufficient and denied Pritchard's motion to dismiss, noting that it would be prejudicial in a jury trial to have past convictions in the information. This ruling was affirmed by the district court on appeal. Pritchard, 528 So.2d at 1272.

Like the information in Pritchard, the information in the instant case charged felony DUI in the circuit court without specific reference to prior convictions for DUI. Instead, the information referred to § 316.193(2)(b) which defines the offense of felony DUI and stated sufficient facts which, if proved, would support a DUI conviction. See, Phillips, 463 So.2d at 1137.

The district court in Pritchard and the circuit court in the instant clearly recognized that specific reference to prior convictions in the information would result in prejudice to a defendant charged with felony DUI and would effectively destroy the presumption of innocence to be accorded to all defendants in criminal proceedings. Therefore the trial court properly exercised its discretion and denied Respondent's motion to dismiss. See, Harris, 356 So.2d at 316.

In holding that the information failed to properly invoke the jurisdiction of the circuit court, the Third District Court of Appeal relied on State v. Gayety Theatres, Inc., 521 So.2d 231 (Fla. 3d DCA 1988) and Brehm v. State, 427 So.2d 828 (Fla. 3d DCA 1983). Rodriquez, 15 F.L.W. at D4. Both cases, however are easily distinguished.

In Brehm, the defendant was charged in the circuit court with tampering with parking meters in violation of Section 877.08(3), Florida Statutes. The information in Brehm failed to allege that the defendant had previously been convicted for the same offense and failed to even cite Section 877.08(4) which makes a second conviction pursuant to Section 877.08(3) a felony offense. Brehm, 427 So.2d at 826.

In Gayety Theatres, Inc., the defendant was charged with violating Section 847.011(1)(a), Florida Statutes. Subsection (1)(a) of the statute both defines the offense and provides that

subsequent convictions under the statute result in a felony conviction rather than the misdemeanor conviction provided for first offenses. The information in Gayety Theatres failed to allege prior convictions as required by the statute. The Third District Court of Appeal held that although the statute allowed prosecution for a felony offense within the Circuit Court's jurisdiction, the information failed to properly allege a felony, thus precluding jurisdiction in that particular case. Gayety Theatres, Inc., 521 So.2d at 232.

The information in Brehm failed to cite the felony provision of Section 877.08, Florida Statutes. The information in Gayety Theatres, Inc., while citing the applicable statute, failed to specifically allege a prior conviction, an allegation necessary to invoke the jurisdiction of the Circuit Court in the face of a statute and subsection which provides for both a felony and misdemeanor prosecution. See, Sections 877.08(3), (4) and 847.011(1)(a), Florida Statutes.

The information in the instant case specifically refers to Section 316.193(2)(b), Florida Statutes. (R.1). Unlike the statute cited in Gayety Theatres, Inc. subsection (2)(b), cited in the instant case, refers only to felony prosecutions. Unlike the situation in Brehm, the information in the instant case gave Appellant notice of intent to rely on previous convictions and invoked the felony jurisdiction of the circuit court. Thus the circuit court properly exercised subject matter jurisdiction and

denied Appellant's motion to dismiss the charge in the circuit court.

CONCLUSION

WHEREFORE, based upon the foregoing reasons and authorities cited herein, Appellee respectfully requests that this Honorable Court find that the Circuit Court properly exercised its jurisdiction and reverse the Third District Court opinion dated, December 13, 1989.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **BRIEF OF PETITIONER** was furnished by mail to **L. MICHAEL ROFFINO,** 550 Biltmore Way, Suite 830, Coral Gables, Florida 33134 on this 10th day of May, 1990.

ANGELICA D. ZAYAS
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