OA 9/6/90

IN THE SUPREME COURT OF FLORIDA

CASE NO: **75,302**

THE STATE OF FLORIDA,

Petitioner,

vs.

NARCISCO RODRIGUEZ,

Respondent.

Original

FILED

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ON PETITION FOR DISCRETIONARY REVIEW

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BRIEF OF RESPONDENT ON THE MERITS


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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 this brief as the **"State."** Respondent will be referred to as the "Defendant."

For purposes of brevity, District Courts of Appeal will be referred to in a shortened form with the "court of appeal" portion of the title deleted. (E.g. First District, Third District).

All emphasis is supplied unless otherwise indicated.

The following symbols will be used:

| | | |
|---|---|---|
| "R" | - | Record on appeal |
| **"T"** | - | Trial transcript |
| **"S.T."** | - | Supplemental transcript |

## STATEMENT REGARDING CASE AND FACTS

The Defendant accepts the statement of the case and facts contained in the State's brief except for the following:

1. The Defendant did not acknowledge prior convictions at his arraignment as alleged by the State. The statement concerning prior convictions was made by the Defendant's court-appointed counsel. Read in proper context, it is clear that Defendant's counsel was merely explaining to the court the State's alleged basis for filing a driving under the influence charge in the circuit court. Counsel's statement was not meant to be a stipulation or "acknowledgement" on behalf of the Defendant that the prior convictions existed.

2. Defendant's counsel did not refuse an offer by the court to order a bill of particulars as the State asserts in its brief. At arraignment, the court stated in connection with the Defendant's motion to dismiss or transfer the case to county court that what the Defendant was "...really asking for is a bill of particulars to set forth this is the fourth conviction." (S.T. 6-7). In response, Defense counsel clarified his position and advised the court that, because of the failure of the information to charge a felony, the Defendant was challenging the court's jurisdiction to proceed in the matter.

The court stated that it was going to deny the Defendant's motion "...at this point" but suggested that the State amend its information to allege that the Defendant had been convicted on three prior occasions as required for a felony prosecution. (S.T. *7-8*). After such an amendment by the State, the court indicated it would order a "...bill of particulars as to other matters..." (S.T. *8*). The State

never amended its information as suggested by the trial court.

3. In addition to the facts provided by the State in its brief the court should also take note of the following:

a. The Defendant never received notice of the prior convictions the State intended to rely upon at trial.

b. The trial court did not hold a proceeding to determine whether the Defendant had previously been convicted of violating Section 316.193 (1), Florida Statutes (1988) prior to adjudicating the Defendant guilty of violating Section 316.193 (2)(b), Florida Statutes (1988) and sentencing him for a felony.

## SUMMARY OF THE ARGUMENT

The Third District correctly decided that the information in this case failed to charge a felony offense and that the circuit court erred in proceeding to adjudicate the matter over the Defendant's objection and timely motion to dismiss.

The State's argument that citation to the number of a felony statute is sufficient to adequately charge a felony offense is not supported by prior decisions of this court. The Third District appropriately refused to follow an opinion of the First District which is inconsistent with the well-established principle that an information must allege all of the essential elements of the crime charged.

This court has established a procedure to insure that the accused will not be unfairly prejudiced in a jury trial when the charge is a felony offense based, in part, upon prior misdemeanor convictions. Given the existence of this procedure, a continuing requirement that the prosecution allege the prior convictions relied upon to support the felony charge will serve the ends of justice and protect the defendant's constitutionally protected right to adequate notice of the charges against him.

## ARGUMENT

THE THIRD DISTRICT COURT OF APPEAL CORRECTLY DETERMINED THAT THE ALLEGATIONS IN THE INFORMATION WERE INSUFFICIENT TO INVOKE THE FELONY JURISDICTION OF THE CIRCUIT COURT.

The Information is the instant case stated that the Defendant:

. . .

> did unlawfully drive or be in the actual physical control of a motor vehicle in Dade County while under the influence of alcoholic beverages, any chemical substance set forth in Florida Statute 877.111, or any substance controlled under Chapter 893, Florida Statutes, when affected to the extent that hs (sic) normal faculties were impaired and/or while having a blood alcohol level of 0.10 percent or higher, being in violation of 316.193(1) (a),(b); (2)(b) Florida Statutes
>
> . . .
>
> (R. 1)

Based solely upon these allegations, the State convinced the circuit court to accept jurisdiction of the case. After tendering proof limited to these allegations, the State persuaded the trial court to adjudge the Defendant guilty of a felony and impose a sentence of 4 1/2 years in the State Prison. (R. 44-46).

Except for its reference to Section 316.193(2)(b), Florida Statutes (1988), the information in the instant case was identical to one alleging that the Defendant committed misdemeanor D.U.I. The information did not state that the Defendant was accused of committing a felony. It did not identify or specify any prior convictions of the Defendant for violating section 316.193(1), Florida statutes (1988). Indeed, it did not even allege the ultimate fact that the Defendant had been previously convicted of violating Section 316.193(1), Florida

Statutes (1988) on three or more occasions.

This court has previously explained the nature of a recidivist statute which allows for enhancement of a misdemeanor to a felony after a specified number of prior convictions for the same offense. In State v. Harris, 356 So.2d 315 (Fla, 1978) it was held that the statute making a third conviction for petit larceny (now theft) a felony created a "substantive offense" which is distinguishable from enhanced sentencing laws such a5 the habitual offender statute (Section 775.084, Florida Statutes). Prior convictions of the specified number are essential elements of the substantive offense created by such a recidivist statute. These prior convictions must be alleged and proved in a felony prosecution.

The State asserts that referring to prior 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." This argument simply ignores the significance of the Harris case in which this court established a procedure expressly for the purpose of avoiding unfair prejudice to the accused in a jury trial. As outlined by the court, the present offense should be tried "...without bringing to the attention of the jury the fact of prior convictions as an element of the new charge." Harris at 317. Following a conviction by the jury, the trial court is to hold a separate proceeding to determine if the accused has been previously convicted. The procedure to be followed in this separate proceeding is the same as that detailed in the habitual offender statute.

This court has repeatedly held that an information must allege each essential element of a crime and that no essential element should be left to inference. State v. Gray, 435 So.2d 816 (Fla. 1983); State v. Dye, 346 So.2d 538 (Fla. 1977). Since Harris identifies prior convictions as "an element of the new charge" under a recidivist statute, it follows that prior convictions must be alleged in an information which attempts to charge such a felony offense.

Before Harris, this court had consistently held that prior convictions were an element to be included in the information charging any crime with increased punishment based upon these prior offenses. See, e.g., Sparkman v. State, 18 So.2d 772 (Fla. 1944); Ex Parte Reed, 135 So 302, 101 Fla. 800 (1931); State ex rel. Lockmiller v. Mayo, 101 So. 228, 88 Fla. 96 (1924); Smith v. State, 78 So. 530, 75 Fla. 468 (1918); State v. Fernandez, 156 So.2d 400, (Fla. 2d DCA 1963). Harris departed from these previous decisions only in fashioning a procedure for trial which would avoid unfair prejudice to the accused before a jury. It did not change the requirements for a valid and sufficient charge.

In State v. Phillips, 463 So.2d 1136 (Fla. 1985) this court was asked to determine whether an information which was labeled felony petit theft and contained a citation to the statute making a third conviction of petit theft a felony was fundamentally defective. Before the trial court, the defendant in Phillips never objected to the adequacy of the information, never moved to dismiss it, and never challenged the circuit court's jurisdiction over the matter. To the contrary, it was found that "...both parties were willing and able to

proceed to trial in circuit court on the charge of felony petit theft." Phillips at 1138. Moreover, at Phillips' arraignment, the State filed a notice of intent to rely upon two prior petit theft convictions in order to support the felony charge. On appeal, it was conceded that the accused had adequate notice of both the current charge and the prior convictions relied upon by the State to secure a felony conviction. However, Phillips argued on appeal that it was fundamental error for the trial court to proceed to trial and ultimately adjudge her guilty of a felony on the defective information. This court held that, in the circumstances of that case, labeling of the information as a felony together with citation to the felony section of the statute was "...adequate notice of the facts absent a timely objection or motion to dismiss." Phillips at 1138.

The instant case is substantially different than Phillips. The information in this case was not labeled a felony. The Defendant in this case did not receive notice of any kind concerning the prior convictions upon which the State intended to rely. In fact, the State never submitted proof of any prior convictions during proceedings below. Consequently, to this day the Defendant has not been informed of the prior convictions upon which the State supposedly relied in securing a felony conviction, nor of the previous offenses used by the Court to justify a felony adjudication and a 4 1/2 year prison sentence.

Rule 3.140(b) of the Florida Rules of Criminal Procedure requires that the information be "...a plain, concise and definite written statement of the essential facts constituting the offense charged."

An accused must look to this document to determine those elements of the offense which must be established by the State in order to secure a conviction. The Defendant has a constitutional right to have each of these elements proven beyond a reasonable doubt. In Re Weinship, 397 U.S. 358, 90 S.Ct. 1068 (1970). However, proof of every word stated in the information in this case, beyond a reasonable doubt, shows nothing more than a violation of Section 316.193(1), Florida Statutes (1988) - a misdemeanor. An appellate court may not uphold a conviction on a charge which was never made. Dunn v. United States, 442 U.S. 100, 99 S.Ct. 2190 (1979); Thornhill v. Alabama, 310 U.S. 88, 60 S.Ct. 736 (1940).

Because the information in this case was not labeled a felony, it failed to meet even the minimal requirements stated in Phillips to avoid challenge on the grounds of fundamental error. However, unlike Phillips, defense counsel moved to dismiss this information at arraignment and specifically raised the failure of the State to allege prior convictions and the insufficiency of the information to vest jurisdiction in the circuit court. (R. 4, S.T. 5-9). The Defendant continued to object to proceeding on the information through the date of sentencing when the court told defense counsel to "...let the appellates (sic) argue it, we have argued it enough." (T. 230).

The State concedes in its brief that jurisdiction is to be determined solely from the face of the information. Allen v. State, 463 So.2d 351 (Fla. 1st DCA 1985); Pope v. State, 268 So.2d 173 (Fla. 2d DCA 1972). However, the State maintains that its reference to a felony statutory subsection should be accepted as a sufficient

statement of the felony charge in this case. Pritchard v. State, 528 So.2d 1272 (Fla. 1st DCA 1988) is the only authority cited to support the State's argument. Pritchard does not discuss the significance of the holding in Harris that a recidivist statute such as felony petit theft creates a substantive offense. Indeed, it appears that the court in Pritchard overlooked that portion of the Harris opinion which identifies prior convictions as an essential element in charging a felony pursuant to such a recidivist statute. Otherwise, the Pritchard decision represents a drastic departure from decades of jurisprudence requiring allegations concerning every essential element of the crime charged in the information. Courts in this state have never sanctioned incorporating the terms of a statutory provision into a charging document by mere reference to the statute number.

The Third District considered the Pritchard case and unanimously concluded that it was incorrectly decided. The decision below that the information failed to properly charge a felony offense in this case was consistent with prior opinions of the Third District in State v. Gayety Theatres, Inc., 521 So.2d 231 (Fla. 3d DCA 1988) and Brehm v. State, 427 So.2d 825 (Fla. 3d DCA 1983). In light of the fact that Harris identifies prior convictions as elements of a recidivist crime, the holding below does nothing more than apply the familiar rule that all essential elements of a crime must be alleged in an information. State v. Gray, supra; State v. Dye, supra. See also, State v. Beasley, 317 So.2d 750 (Fla. 1975); Gibbs v. Mayo, 81 So.2d 739 (Fla. 1955); Pittman v. State, 47 So.2d 691 (Fla. 1950); Dowling v. State, 124 So. 12, 98 Fla. 523 (1929).

In order to endorse the holding in Pritchard, this court would have to carve a special exception for recidivist crimes, making the proper pleading of such offenses substantially different than in other cases. Such exception may then have to be applied to other offenses such as the possession of a firearm by a convicted felon. Section 790.23, Florida Statutes (1990). Only in such cases would the accused be deprived of having a complete statement of the alleged crime provided in the charging document. This court should consider the implications of such a reduced notice requirement to the constitutionally guaranteed right of an accused to due process of law.

It is in the interests of justice to maintain a procedure whereby prior convictions of the accused are alleged in an information which charges a recidivist felony. The commencement of a felony prosecution is a significant event. The conditions for pre-trial release of a defendant facing a felony charge may be much more restrictive than in a misdemeanor case. The cost and availability of private counsel is invariably influenced by the nature of the formal charge filed by the prosecution. Whether ultimately convicted or acquitted, the fact that a person was once formally charged with a felony may affect future opportunities for employment, licensing, qualification for a position of trust, and the like.

In recognition of the importance of filing a felony information, Rule 3.140(g) of the Florida Rules of Criminal Procedure requires the following:

> An information charging the commission of a felony shall be signed by the state attorney, or a designated assistant state attorney, under oath stating his good faith in instituting the

> prosecution and certifying that he has received testimony under oath from the material witness or witnesses for the offense.
>
> . . .

Before filing a felony information in a D.U.I. case, the prosecution should be required to verify the existence of prior valid convictions and that the defendant before the court is in fact the person previously convicted. Like any other element of the charged offense, this should be based on credible evidence received and reviewed prior to filing the information. If there is no requirement that the State allege the required number of prior convictions in the information, there will be no need or incentive to verify prior convictions prior to filing the charging document. This may lead to the commencement of erroneous prosecutions and needless harm to the accused.

The information should contain a statement of all facts essential to the charge so that the defendant can immediately begin preparing his defense. The defendant may wish to show that he was not the person convicted in prior proceedings or that the conviction was not for a qualifying offense. He may intend to challenge the use of certain prior convictions for enhancement purposes, pursuant to Baldasar v. Illinois, 446 U.S. 222, 1008 S.Ct. 1158 (1979) and Burgett v. Texas, 389 U.S. 109, 88 S.Ct. 258 (1967), on grounds that he did not have or validly waive counsel when the convictions took place. See, e.g., Allen v. State, 463 So.2d 351 (Fla. 1st DCA 1985). The defendant may be able to establish that a particular conviction is not final and cannot lawfully be used for enhancement purposes. Joyner v. State, 30 So.2d 304 (Fla. 1947); State v. Villafane, 444 So.2d 71

(Fla. 4th DCA 1984); Garrett v. State, 335 So.2d 876 (Fla. 4th DCA 1976).

However, the defendant cannot promptly begin to prepare his defense, on these or other grounds, if the information does not identify the prior convictions which the State intends to prove at trial. If certain records indicate that the defendant may have more than the minimum number of prior convictions required for felony prosecution (as is alleged by the State in this case), the defendant can only guess as to those to be used in supporting the prior convictions element of the crime. The defendant may find himself investigating, researching or gathering evidence on a prior offense which the State never intends to rely upon. When an information is so vague and indefinite that the possibility exists for the accused to be misled in this way, Rule 3.140(o) of the Florida Rules of Criminal Procedure would authorize its dismissal, notwithstanding the lack of any jurisdictional defect. Indeed, this would seem to be the type of potential embarrassment to the accused in the preparation of his defense which Rule 3.140(o) expressly prohibits.

The accused should not be forced to invoke discovery provisions or wait for receipt of discovery disclosures in order to obtain a complete statement of the charge against him. Similarly, the defendant should not have to demand or await a bill of particulars, in order to obtain a clear statement of an essential element of the crime charged. The defendant is called to plead to the charges at arraignment. Except those permitted by court order or fundamental grounds, the defendant waives all objections to the information not

raised at this time. Fla.R.Crim.P. 3.190(c). It is clearly the intent of this rule that the accused should have a complete statement of the charge against him by the time the arraignment takes place. There is no reason why this rule, and all other principles of pleading previously established by this court, should not be applicable in this case.

The Third District correctly decided that the circuit court did not have jurisdiction to adjudicate this case and the Defendant's timely motion to dismiss should have been granted. To the extent that Pritchard v. State, supra, would require a different result, this court should disapprove the holding in that case.

## CONCLUSION

Based upon th foregoing arguments and the authorities cited, it is respectfully submitted that this court should affirm the decision of the Third District Court of Appeal in this case.

Respectfully submitted,

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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 on this 25th day of June, 1990.

BY: _____
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