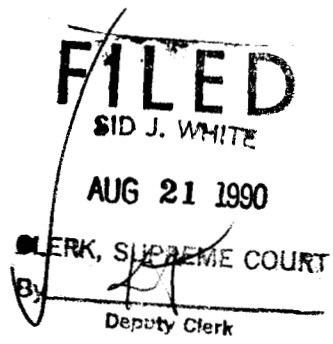
IN THE SUPREME COURT OF FLORIDA

CASE NO. 76,474



JAMES BARNES,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

ON APPLICATION FOR DISCRETIONARY REVIEW

BRIEF OF PETITIONER ON JURISDICTION

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INTRODUCTION

This is the petitioner James Barnes's brief on jurisdiction on this petition for discretionary review based on conflict on two separate issues contained in the decision of the Third District Court of Appeal.

STATEMENT OF THE CASE AND FACTS

The petitioner was convicted of attempted first degree murder of his wife and the unlawful possession of a firearm while engaged in a criminal offense. (A: 1)[1] The petitioner raised several issues on appeal, only two of which are pertinent for this petition for conflict review.

During the trial, the prosecutor introduced evidence of prior criminal acts to prove intent and lack of mistake under Williams v. State, 110 So.2d 654 (Fla. 1959). (A: 1-2) When this evidence was first introduced, the petitioner requested the shortened form of the Williams Rule instruction pursuant to §90.404(2)(b)2, Florida Statutes (1987). (A: 2) The court refused to give the shortened instruction and prepared to give the full instruction pointing out the limited purpose for which the evidence was being admitted. (A: 2) The petitioner did not want the full instruction and waived his request for the instruction. (A: 2) Later, during the jury instruction charge conference, the petitioner did not specifically request the Williams Rule instruction and the trial court did not give the

[1] Citations are to the appendix attached hereto containing the decision from the Third District Court of Appeal.

instruction to the jury. (A: 2) The decision of the Third District held that the petitioner could not complain on appeal of the trial court's failure to give that instruction to the jury, citing to Skipper v. State, 420 So.2d 877 (Fla. 1982), for the proposition that a request is necessary in order to preserve for appellate review the right to receive an instruction. (A: 2)

The petitioner also alleged on appeal the trial court erred in departing upward from the presumptive guidelines sentence for the reason the defendant used familial trust to effectuate the crime. (A: 2) The Third District in its decision held that the use of familial trust to effectuate the crime justified a departure sentence, citing Turner v. State, 510 So.2d 920 (Fla. 1st DCA 1987). (A: 2)

SUMMARY OF ARGUMENT

The petitioner submits that conflict jurisdiction exists on two separate issues.

First, conflict exists with the decision of the First District in Wills v. State, 494 So.2d 530 (Fla. 1st DCA 1986), which stated that §90.404(2)(b)2, Florida Statutes (1987), requires the judge to give a special instruction to prevent the jury's misapplication of evidence relating to collateral crimes, and the decision of this Court in Franklin v. State, 403 So.2d 975 (Fla. 1981), holding that counsel's failure to specifically request instructions does not relieve the trial court of the duty to give all charges necessary to a fair trial of the issues. The decision of the Third District here held that counsel's failure to request a Williams Rule instruction at the close of the evidence waived the issue for appellate review.

Second, conflict exists with the decisions of this Court in Davis v. State, 517 So.2d 670 (Fla. 1987), and Hall v. State, 517 So.2d 692 (Fla. 1988), and the decisions of other district courts of appeal in Laberge v. State, 508 So.2d 416 (Fla. 5th DCA 1987), and Lettman v. State, 526 So.2d 207 (Fla. 4th DCA 1988), which held that a departure sentence could not be sustained in a family situation on the basis of abuse or breach of family trust or familial authority. In this case, under a nearly identical factual situation, the Third District found that abuse of familial authority could justify a departure sentence.

ARGUMENT

THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL IN THIS CASE IS IN EXPRESS AND DIRECT CONFLICT WITH THE DECISIONS OF WILLS V. STATE, 494 SO.2D 530 (FLA. 1ST DCA 1986), AND FRANKLIN V. STATE, 403 SO.2D 975 (FLA. 1981), ON THE WILLIAMS RULE INSTRUCTION ISSUE, AND WITH THE DECISIONS OF DAVIS V. STATE, 517 SO.2D 670 (FLA. 1987); HALL V. STATE, 517 SO.2D 692 (FLA. 1988); LABERGE V. STATE, 508 SO.2D 416 (FLA. 5TH DCA 1987), AND LETTMAN V. STATE, 526 SO.2D 207 (FLA. 4TH DCA 1988), ON THE GUIDELINES DEPARTURE ISSUE.

The petitioner submits that conflict jurisdiction exists in this case on two separate issues.

A. WILLIAMS RULE JURY INSTRUCTION

In its decision, the Third District held that the petitioner had waived for appellate review the right to challenge the failure of the trial court to give the Williams Rule instruction to the jury during the jury instructions. Specifically, the district court found that although the petitioner had initially requested a limited Williams Rule instruction at the time the collateral evidence was introduced, when the court refused to give the limited instruction and instead prepared to give the full instruction, the petitioner then waived the reading of the full instruction at that time and this waiver essentially carried over to the instructions to the jury at the close of the case. Moreover, the district court found that since petitioner did not request a Williams Rule instruction at the close of the case when the jury was given the jury instructions, he had waived the issue for appellate review.

This decision by the district court conflicts with the decision of the First District in Wills v. State, 494 So.2d 530 (Fla. 1st DCA 1986). The Williams Rule jury instruction, §90.404(2)(b)2, states as follows:

> 2. When the evidence is admitted, the court shall, if requested, charge the jury on the limited purpose for which the evidence is received and is to be considered. After the close of the evidence, the jury shall be instructed on the limited purpose for which the evidence was received and that the defendant cannot be convicted for a charge not included in the indictment or information.

Thus, under this statute, at the time the collateral crimes evidence is introduced, the trial judge must give the jury the limiting insruction when requested by the defendant. But at the close of the evidence when the judge instructs the jury on the law, the court must give the limiting instruction, whether or not requested by the defendant. In Wills, the First District stated that this section "requires the judge to give a special instruction to prevent the jury's misapplication of evidence relating to crimes not charged." Id., at 531.

Therefore, the decision of the Third District in this case, holding that the petitioner waived the issue of failure to give the limiting instruction at the close of the evidence when he withdrew his request for a limiting instruction at the time the evidence was admitted, is in conflict with Wills which states that the judge is required to give the limiting instruction.

Moreover, the decision of the Third District in this case conflicts with the decision of this Court in Franklin v. State, 403 So.2d 975 (Fla. 1981), which holds that counsel's failure to

specifically request, during the charge conference at the close of the evidence, an instruction on an underlying felony did not relieve the trial court of the duty to give all charges necessary to a fair trial of the issues. In the present case, the trial judge had the duty imposed by the unambiguous terms of §90.404(2)(b)2, to instruct the jury on the limited purpose for which the very damaging collateral crimes evidence was introduced into evidence and any failure on the part of defense counsel to specifically request such an instruction did not relieve the trial court of its mandatory duty to give all charges necessary to a fair trial of the issues. This decision conflicts with Franklin and discretionary review should be granted.

B. BREACH OR ABUSE OF FAMILIAL TRUST

The decision of the Third District also held that the petitioner's departure sentence was justified by the reason the petitioner used familial trust to effectuate the crime, citing to Turner v. State, 510 So.2d 920 (Fla. 1st DCA 1987). In Turner, the First District held that the fact the defendant took advantage of his position of familial authority and trust over the victim, his daughter, is a valid reson for departure. The present decision of the Third District conflicts with the decisions from this Court in Davis v. State, 517 So.2d 670 (Fla. 1987), and Hall v. State, 517 So.2d 692 (Fla. 1988), and with the decisions from other district courts of appeal in Laberge v. State, 508 So.2d 416 (Fla. 5th DCA 1987), and Lettman v. State, 526 So.2d 207 (Fla. 4th DCA 1988).

In Davis v. State, 517 So.2d 670 (Fla. 1987), the defendant was convicted of the second degree murder of her husband and the trial court departed from the recommended guidelines range on the ground the defendant had abused the trust of the family relationship. The district court upheld this reason for departure. This Court reversed the district court and held that a departure sentence could not be justified due to an abuse of the trust of a family relationship because "it would serve as authority to do the same in most cases involving the killing of a spouse or other family member." Id., at 674. A month later, this Court again found abuse of familial authority an impermissible reason, this time in a child abuse case, in Hall v. State, 517 So.2d 692 (Fla. 1988). In Hall, this Court stated that since the use of familial authority exists in so many child abuse cases, a departure sentence in such a situation could not be sustained on the basis of a breach or abuse of trust within the family unit.

In Lettman v. State, 526 So.2d 207 (Fla. 4th DCA 1988), the defendant was convicted of the third degree murder of his daughter and the trial court departed on the basis of abuse of family trust. The Fourth District held that this reason was impermissible, citing to this Court's decisions in Davis and Hall. In Laberge v. State, 508 So.2d 416 (Fla. 5th DCA 1987), the First District held that a breach of trust in a child abuse case was not a valid reason to depart from the guidelines because it is a factor common to all child abuse cases and to permit departure on that basis would permit departures in almost all

child abuse cases. See also Graham v. State, 557 So.2d 669 (Fla. 5th DCA 1990) (same); Odom v. State, 561 So.2d 443 (Fla. 5th DCA 1990 (same).

The present case is nearly identical to Davis, Hall, and Lettman, and is very similar to Laberge. Here, the defendant was convicted of the attempted first degree murder of his wife and the trial court departed from the guidelines on the ground the defendant used familial trust to effectuate the crime. The Third District upheld this reason, producing a different result in a substantially similar case, and thereby creating express and direct conflict with Davis, Hall, Lettman and Laberge.[2]

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[2] The issue of whether abuse of a position of familial authority may be a valid reason for departure in a child abuse case is presently before this Court in the case of Wilson v. State, Case No: 74,872.

CONCLUSION

For the foregoing reasons, the petitioner submits that conflict jurisdiction exists in this case on both issues presented here and requests this Court to accept discretionary review jurisdiction based upon this conflict.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed to the Office of the Attorney General, 401 NW 2nd Avenue, Miami, Florida 33128, this 17th day of August 1990.

By: Marti Rothenberg
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Assistant Public Defender

(PER CURIAM.) We affirm the summary judgment without prejudice to Minnehoma Automobile Association, Inc., to amend its pleadings to name the real party in interest and to establish that party's actual damages. *See Allen v. Port Everglades Authority*, 553 So. 2d 1341 (Fla. 4th DCA 1989); *Gulotty v. Estate of Wilkie*, 532 So. 2d 1335 (Fla. 3d DCA 1988); *Forte v. Tripp & Skrip*, 339 So. 2d 698 (Fla. 3d DCA 1976).

Our decision does not conflict with the holding of the Florida Supreme Court in *Dober v. Worrell*, 401 So. 2d 1322 (Fla. 1981) (appellate court not permitted to rule on merits of trial court judgment and then permit losing party to amend initial pleadings to assert matter not previously raised), or with *Arky, Freed, et al. v. Bowmar Instrument Corp.*, 537 So. 2d 561 (Fla. 1988) (same). The issues and facts alleged in the initial complaint are the same ones the appellee would confront on remand in defending against an amended complaint naming the real party in interest. It is also apparent that appellee knew who was the proper real party in interest in this case. Specifically, at the hearing on the motion for summary judgment, Seidle's Nissan argued that Minnehoma Automobile Association, Inc., did not have standing to sue because it was Minnehoma Insurance, the parent company, which actually paid Seidle Nissan's claims. Clearly, therefore, the appellee will not be prejudiced by our decision today. *See Wackenhut Protective Systems v. Key Biscayne Commodore Club, Condominium I, Inc.*, 350 So. 2d 1150 (Fla. 3d DCA 1977) (where issues and facts alleged in amended complaint are same ones appellee confronted in defending against original complaint, appellee would suffer, at most, only slight prejudice, and certainly not substantial prejudice as a result of the amended complaint); *Rubenstein v. Burleigh House, Inc.*, 305 So. 2d 311 (Fla. 3d DCA 1974) (amended complaint which added new party plaintiffs did not create new cause of action and no prejudice resulted where appellee knew who the real parties in interest were).

Affirmed and remanded with directions.

* * *

Criminal law—Evidence—Collateral crimes—Testimony of eyewitness to instant murder that defendant had previously purchased drugs from witness—Evidence of collateral crimes admissible to demonstrate defendant's knowledge of area and motive for murder—Any error in admitting testimony harmless in view of overwhelming evidence of guilt

SHAUN DELONTE MINICK, Appellant, vs. THE STATE OF FLORIDA, Appellee. 3rd District. Case No. 89-2266. Opinion filed May 1, 1990. An Appeal from the Circuit Court for Dade County, Sidney B. Shapiro, Judge. Bennett H. Brummer, Public Defender, and N. Joseph Durant, Jr., Assistant Public Defender, for appellant. Robert A. Butterworth, Attorney General, and Angelica D. Zayas, Assistant Attorney General, for appellee.

(Before BASKIN, FERGUSON, and GERSTEN, JJ.)

(PER CURIAM.) Appellant, Shaun Delonte Minick, appeals his conviction and sentence for second degree murder with a firearm. Appellant contends that admitted testimony, concerning appellant's previous purchase of drugs from the eyewitness to the murder, constituted fundamental error, thus depriving him of a fair trial. We affirm.

Appellee, State, asserts that this testimony showed that the appellant was familiar with the neighborhood, having previously purchased cocaine there from the witness, and that the victim had stolen a VCR from appellant. Therefore, the State contends, the testimony was probative and relevant to demonstrate the appellant's knowledge of the area and his motive for the murder.

The test for admissibility of evidence of collateral crimes is relevancy. *Heiney v. State*, 447 So.2d 210 (Fla. 1984). Evidence of other crimes is relevant if it casts light on the character of the crime for which the accused is being prosecuted, such as when it shows either motive, intent, absence of mistake, or identity. *Ruffin v. State*, 397 So.2d 277 (Fla.), *cert. denied*, 454 U.S. 882, 102 S.Ct. 368, 70 L.Ed.2d 194 (1981) (citing *Williams v. State*, 110 So.2d 654 (Fla. 1959)).

Further, because the evidence against appellant was overwhelming, any error in allowing the eyewitness to testify to prior dealings with appellant was harmless. *See State v. Diguilio*, 491 So.2d 1129 (Fla. 1986).

Affirmed.

* * *

Jurisdiction—Dismissal for lack of jurisdiction proper where defendants, by affidavit, controverted plaintiffs' sole jurisdictional allegation

AMELIA SAEZ and AUGUSTIN SAEZ, her husband, Appellants, vs. LIABILITY RISK CONSULTANTS, LTD., Appellee. 3rd District. Case No. 89-1821. Opinion filed May 1, 1990. An Appeal from the Circuit Court for Dade County, Gerald T. Wetherington, Judge. Adams, Hunter, Angones, Adams, Adams & McClure, and Christopher Lynch, for appellants. Mandler & Silver, and Scott M. Bernstein, for appellee.

(Before BASKIN, FERGUSON, and GERSTEN, JJ.)

(PER CURIAM.) Appellants, Amelia Saez and Augustin Saez, appeal a final order dismissing their complaint against appellee, Liability Risk Consultants, Ltd., for lack of personal jurisdiction. We affirm the order of dismissal based upon the finding that appellee by affidavit, controverted appellants' sole jurisdictional allegation. *W.C.T.U. Railway Company v. Szilagyi*, 511 So.2d 727 (Fla. 3d DCA 1987); *Investors Associates, Inc. v. Moss*, 441 So.2d 1144 (Fla. 3d DCA 1983); *Newton v. Bryan*, 433 So.2d 577 (Fla. 5th DCA 1983).

Affirmed.

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* * *

Criminal law—Separate conviction for possession of firearm while engaged in criminal offense improper where attempted first degree murder conviction was enhanced to life felony by reason of defendant's use of firearm—Evidence of prior acts properly admitted to prove intent and lack of mistake—Defendant waived right to appeal trial court's failure to give *Williams* rule instruction—Sentencing—Guidelines—Departure justified on basis of defendant's use of familial trust to effectuate crime

JAMES BARNES, Appellant, vs. THE STATE OF FLORIDA, Appellee. 3rd District. Case No. 88-1360. Opinion filed May 1, 1990. An Appeal from the Circuit Court for Dade County, George Orr, Judge. Bennett H. Brummer, Public Defender, and William D. Matthewman, Special Assistant Public Defender, for appellant. Robert A. Butterworth, Attorney General, and Jacqueline M. Valdespino, Assistant Attorney General, for appellee.

(Before BARKDULL, NESBITT, and BASKIN, JJ.)

(PER CURIAM.) Appellant seeks reversal of his convictions for attempted murder first-degree and unlawful possession of a firearm while engaged in a criminal offense. Defendant's conviction for attempted murder first-degree was enhanced from a first-degree felony to a life felony by reason of his use of a firearm. Therefore, as the state concedes, defendant's conviction and sentence for possession of a firearm while engaged in a criminal offense must be vacated. *See Carawan v. State*, 515 So.2d 161 (Fla. 1987); *see also Hall v. State*, 517 So.2d 678 (Fla. 1988); *Brown v. State*, 538 So.2d 116 (Fla. 5th DCA), *review denied*, 545 So.2d 1366 (Fla. 1989); *Burgess v. State*, 524 So.2d 1132 (Fla. 1st DCA 1988).

All other errors raised by the defendant are without merit. Evidence of prior acts proved intent and lack of mistake, both

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cts at issue. *See Goldstein v. State*, 214 So.2d 903 (Fla. 1st CA 1984). When this evidence was first introduced, defendant requested a shortened form of the *Williams* Rule instruction. *See Williams v. State*, 110 So.2d 654 (Fla.), *cert. denied*, 361 U.S. 47, 80 S.Ct. 102, 4 L.Ed.2d 86 (1959); § 90.404(2), Fla. Stat. 1989). When this request was denied, defendant waived the reading of the full instruction which the court was prepared to give in order to point out the limited purpose for which the evidence was being admitted. Thereafter, during the jury conference, the defendant did not request a *Williams* Rule instruction. Therefore, the defendant cannot now complain of the trial court's failure to give that instruction. *See Skipper v. State*, 420 So.2d 77 (Fla. 1982) (a request is necessary in order to preserve for appellate review the right to receive an instruction). Also, defendant used familial trust to effectuate the crime, thus justifying a departure sentence. *See Turner v. State*, 510 So.2d 920 (Fla. 1st DCA 1987).

Accordingly, defendant's conviction for unlawful possession of a firearm while engaged in a criminal offense is reversed and his sentence as to that conviction is vacated. Defendant's conviction and sentence for attempted murder first-degree is affirmed.

* * *

Dependent children—Termination of parental rights—Statute prohibiting termination of parental rights when inability to comply with performance agreement is result of condition beyond parent's control does not prevent trial court from terminating parental rights where parent's inability to comply with performance agreement was due to chronic mental illness

IN THE INTEREST OF J.A., a child. 3rd District. Case No. 89-1739. Opinion filed May 1, 1990. An Appeal from a non-final order from the Circuit Court for Dade County, D. Bruce Levy, Judge. Nancy Schleifer, for appellants, Linda Winder, Guardian Ad Litem, on behalf of J.A., a child, and The Department of Health and Rehabilitative Services, State of Florida. Diana H. Kelly, for appellee/Mother.

(Before BASKIN, FERGUSON and COPE, JJ.)

(PER CURIAM.) The guardian ad litem for J.A., and the Department of Health and Rehabilitative Services (HRS), appeal the trial court's denial of HRS' petition to terminate parental rights. The trial court concluded that it was in the best interest of the child to grant the motion, but concluded that paragraph 39.467(2)(c), Florida Statutes (1989), prevented termination of parental rights where the inability to comply with the performance agreement was because of chronic mental illness. The trial court certified the following questions to be of great public importance:

> 1. § 39.467(2)(c) states that the failure to comply with a performance agreement "because of conditions beyond the parent's or parents' control shall not be used as a ground for termination of parental rights." Does this statute mean that a Court cannot ever terminate the parental rights of a severely and chronically mentally ill person who abused, neglected, or abandoned the child and who, in all probability, cannot be expected in the foreseeable future to be safely reunited with the child?
>
> 2. If the answer to question 1 is "yes", whether abused, neglected or abandoned children of seriously and chronically mentally ill parents are being deprived of equal protection under the law in that they may never be eligible for permanent placement with their own adoptive family?

We answer the first question in the negative, do not reach the second question, and reverse the order under review.[1]

J.A. was found to be abused and neglected, and was placed in foster care.[2] The mother suffers from chronic mental illness, and it is highly unlikely that the mother will ever be in a condition to be safely reunited with her son. On two occasions during the period of foster care she kidnapped the child from HRS custody. On a third, she armed herself and planned to take an HRS worker hostage in order to again kidnap the child. Fortunately, the plan was thwarted and the mother was hospitalized for treatment.

HRS entered into a performance agreement with the mother. The trial court found that the mother complied with certain of her obligations under the agreement but

> her compliance with therapy and medication was often spotty. However, the Court does not feel that [the mother] had the mental capacity to comply with the performance agreement. [The mother] was unable to stabilize her mental illness in order to ensure that the "circumstances that caused the placement of the child have been remedied to the extent that the well being and safety of the child would not be endangered if the child was returned to her."

The court also found that the child is himself severely emotionally disturbed and requires much more attention than an ordinary child of his age. The court found that the mother, "because of her mental condition cannot now, and may never be able to meet this child's needs." The court concluded that it would be in the best interest of the child to terminate parental rights so that the child can be adopted, but that paragraph 39.467(2)(e), Florida Statutes (1989) prevents such a disposition, as the mother's inability to comply with the performance agreement is a result of a condition beyond her control, her mental illness.

We conclude that, reading chapter 39 as a whole, the legislature did not intend to preclude a termination of parental rights in the circumstances presented here. Instead the matter is remitted to the sound discretion of the trial court to do what is in the best interest of the child, a conclusion which is consistent with the weight of Florida authority on the point. *See Burk v. Department of Health & Rehabilitative Services*, 476 So.2d 1275, 1278 (Fla. 1985).

Chapter 39 contains important safeguards for both children and parents. In interpreting the statute, however, it must be borne in mind that "parental rights are 'subject to the overriding principle that it is the ultimate welfare or best interest of the child which must prevail.' *In re Camm*, 294 So.2d 318, 320 (Fla. 1974) [, *cert. denied*, 419 U.S. 866, 95 S.Ct. 121, 42 L.Ed.2d 103 (1974)]." *In the Interest of J.L.P.*, 416 So.2d 1250, 1252 (Fla. 4th DCA 1982); *see also* § 39.001(2)(b), Fla. Stat. (1989) (purposes of chapter 39 include "[t]o assure to all children . . . the care . . . which will best serve the . . . welfare of the child . . . ."). Additionally, "in construing legislation, we must avoid any construction that would produce an unreasonable . . . consequence." *In the Interest of J.L.P.*, 416 So.2d at 1252.

In 1987 the legislature enacted extensive statutory provisions pertaining to children who, like J.A., are in foster care. Ch. 87-289 §9, Laws of Fla. In so doing, the legislature placed a high priority on finding a permanent, stable placement for such children. Section 39.45, Florida Statutes (1989) provides:

> (1) The Legislature finds that 7 out of 10 children placed in foster care do not return to their biological families after the first year and that permanent homes could be found for many of these children if their status were reviewed periodically and they were found eligible for adoption.
>
> 2) It is the intent of the Legislature that each child be assured the care, guidance, and control in a permanent home which will serve the best interests of the child's moral, emotional, mental, and physical welfare and that such home preferably be the child's own home or, *if that is not possible, an adoptive home*. It is the further intent of the Legislature that, if neither of those options is achievable, other options for the

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