IN THE SUPREME COURT OF FLORIDA

77,122

STATE OF FLORIDA,

Petitioner,

v.

Case No.:
1st DCA Case No.: 89-3236

BOBBY CHARLES OLIVER,

Respondent.
_____/

# PETITIONER'S BRIEF ON JURISDICTION

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Preliminary Statement

Petitioner, the State of Florida, the prosecuting authority in the trial court and appellee below, will be referred to in this brief as the state. Respondent, Bobby Charles Oliver, the defendant in the trial court and appellant below, will be referred to in this brief as respondent. References to the appendix will be noted by the symbol "A" and followed by the appropriate page number(s) in parentheses.

## STATEMENT OF THE CASE AND FACTS

The state appeals the First District's decision in Oliver v. State, 15 F.L.W. D2857 (Fla. 1st DCA 1990).

The trial court adjudicated respondent guilty of two counts of possession with intent to sell cocaine and two counts of the sale of cocaine (A 1). The charges arose from two separate controlled buys of narcotics (A 1).

The First District reversed and remanded to the trial court for vacation of one of the convictions as to each transaction and for appropriate resentencing (A 1), basing its decision solely on its decision in Wheeler v. State, 549 So.2d 687 (Fla. 1st DCA 1989). There, the First District held that separate convictions and punishments for both crimes arising out of a single transaction and involving the same controlled substance violated double jeopardy principles (A 1).

The state timely filed its notice to invoke this Court's discretionary jurisdiction, and this jurisdictional brief follows.

## STATEMENT OF JURISDICTION

The Supreme Court of Florida has jurisdiction to review a decision of a district court of appeal that expressly and directly conflicts with a decision of the Supreme Court or another district court of appeal on the same point of law. **Fla. Const.** art. V, §3(b)(3); Fla. R. App. P. 9.030(a)(2)(A)(iv).

## SUMMARY OF THE ARGUMENT

The instant decision directly and expressly conflicts with decisions of this Court and other district courts of appeal, specifically: Porterfield v. State, 567 So.2d 429 (Fla. 1990); State v. Burton, 555 So.2d 1210 (Fla. 1989); State v. Smith, 547 So.2d 613 (Fla. 1989); Leon v. State, 563 So.2d 825 (Fla. 2d DCA 1990); and Davis v. State, 560 So.2d 1231 (Fla. 5th DCA 1990). For this reason, this Court should exercise its discretionary jurisdiction.

## ARGUMENT

### ISSUE

WHETHER THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER DISTRICT COURTS OF APPEAL.

The decision of the First District in the present case directly and expressly conflicts with decisions of both this Court and other district courts of appeal on the same point of law. These cases include: Porterfield v. State, 567 So.2d 429 (Fla. 1990); State v. Burton, 555 So.2d 1210 (Fla. 1989); State v. Smith, 547 So.2d 613 (Fla. 1989); Leon v. State, 563 So.2d 825 (Fla. 2d DCA 1990); and Davis v. State, 560 So.2d 1231 (Fla. 5th DCA 1990).

Specifically, in the present case, the First District held that respondent could not be convicted of both possession with intent to sell cocaine and the sale of that same cocaine (A 1-2), despite the fact that he committed these offenses on June 29, 1989, and the amendments to Fla. Stat. §775.021(4) (Supp. 1988) took effect on July 1, 1988. Each of the above cited cases concludes otherwise on this point of law, holding that, for offenses committed after the effective date of the amendment to section 775.021(4), Florida's legislature intended the instant offenses to be subject to separate convictions and punishments.

In Porterfield, the defendant was convicted of possession and sale of the same cocaine. This Court observed that, "[b]ecause the convictions at issue here are based upon incidents which occurred prior to July 1, 1988, the effective date of chapter 88-131, separate convictions and sentences are not authorized." 567 So.2d at 429 (footnote omitted). The decision of the First District in this case also conflicts with Porterfield on another point of law. Here, the First District based its decision solely on Wheeler, a case which this Court found to be "at odds" with its decision in Smith. 567 So.2d at 430 n.2.

In Burton, the defendant was convicted of possession and delivery of the same cocaine. This Court again observed that, "[b]ecause the convictions at issue here are based on an incident which occurred prior to July 1, 1988, the effective date of chapter 88-131," the district court properly concluded that the defendant could not be convicted of both offenses. 555 So.2d at 1210.

In Smith, the defendant was convicted of possession with intent to sell cocaine and the sale of that same cocaine. This Court examined the 1988 amendments to section 775.021(4), and concluded that Florida's legislature intended possession with intent to sell cocaine and the sale or delivery of that same cocaine to be separate offenses subject to separate convictions and punishments. However, because the defendant committed his

offenses prior to the effective date of the amendment, this Court concluded that a double jeopardy violation did occur.

In Leon, the defendant was convicted of trafficking in and delivery and possession of the same cocaine. Because his offenses occurred prior to the effective date of the 1988 amendment to section 775.021(4), the Second District concluded that the defendant could not be convicted of all three offenses, citing to both Burton and Smith.

In Davis, the defendant was convicted of possession of cocaine and delivery of that same cocaine. The Fifth District observed that two cases cited by the defendant were inapplicable because "those offenses occurred prior to the effective date of the amendment to section 775.021(4), Florida Statutes." 560 So.2d at 1231 n.1. Thus, that court affirmed the defendant's separate convictions and sentences for these offenses.

Thus, in holding that defendants cannot be separately convicted of and punished for possession with intent to sell cocaine and the sale of that same cocaine, when these offenses were committed before the effective date of the 1988 amendment to section 775.021(4), each of these cases directly conflicts with the decision of the First District in the instant matter. For this reason, this Court should exercise its discretionary jurisdiction.

## CONCLUSION

Based on the above cited legal authorities and arguments, the state respectfully requests this Court to exercise its discretionary jurisdiction in this matter.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by U.S. Mail to P. DOUGLAS BRINKMEYER, Assistant Public Defender, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, Florida 32301, this 28th day of December, 1990.

Gypsy Bailey

GYPSY BAILEY
Assistant Attorney General

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JURISDICTIONAL BRIEF OF PETITIONER

Appendix

agents and assigns on the job site.

9. The foregoing constitutes a material, substantial and continuing breach of Demarest's subcontract.

Further, Biltmore specifically identified the subcontract and bond sued upon in this action and, in fact, attached those documents to the complaint. The subcontract and performance bond clearly identify Demarest I as the party and principal, respectively, to these documents. The record irrefutably demonstrates that Biltmore adequately pleaded the condition precedent to bringing the action.

Both parties agree that Demarest, the principal, is not a necessary or indispensable party to this action by Biltmore, the obligee, against the surety, National Union. *See Ruth v. United States Fidelity & Guaranty Co.*, 83 So.2d 769 (Fla. 1955) (the principal is not a necessary or indispensable party to an obligee's suit against a surety when the bond provides for joint and several liability). The parties, however, failed to address the general rule that a surety is not liable if the principal is not liable. *OBS Co. v. Pace Constr. Corp.*, 558 So.2d 404 (Fla. 1990). An exception to this rule is that a surety may be liable when the principal is not liable because of a defense personal to the principal. *Bear v. Duval Lumber Co.*, 112 Fla. 240, 150 So. 614 (1933). That is the situation that we have here. Demarest may not be liable for breach of the subcontract for lack of personal jurisdiction; however, this defense is not available to National Union. Consequently, National Union may be held liable on the performance bond. We find the trial court's order granting summary judgment was error.

Reversed and remanded. (LEHAN, A.C.J., and FRANK, J., Concur.)

* * *

**Criminal law—Double jeopardy—Separate convictions and sentences for possession of cocaine with intent to sell and sale of cocaine error—Sentencing—Guidelines—Departure—Contemporaneous written reasons**

BOBBY CHARLES OLIVER, Appellant, v. STATE OF FLORIDA, Appellee. 1st District. Case No. 89-3236. Opinion filed November 21, 1990. An appeal from the Circuit Court of Hamilton County; L. Arthur Lawrence, Jr., Judge. Barbara Linthicum, Public Defender; P. Douglas Brinkmeyer, Assistant Public Defender, Tallahassee, for Appellant. Robert A. Butterworth, Attorney General; Gypsy Bailey, Assistant Attorney General, Tallahassee, for Appellee.

(PER CURIAM.) Oliver appeals from his conviction and sentencing for two counts of possession with intent to sell cocaine and two counts of sale of cocaine. The charges arise out of two separate controlled buys of narcotics. For each occurrence, the appellant was charged with both possession with intent to sell and sale. In *Wheeler v. State*, 549 So.2d 687 (Fla. 1st DCA 1989), this court held that separate convictions and punishments for both crimes arising out of a single transaction and involving the same controlled substance violated the principles of double jeopardy. We, therefore, reverse and remand to the trial court for vacation of one of the convictions as to each transaction and for appropriate resentencing.

The appellant also asserts that the trial court erred in imposing a departure sentence without providing contemporaneous written reasons for departing from the sentencing guidelines. In light of recent opinions of this court, including *Brown v. State*, 565 So.2d 369 (Fla. 1st DCA 1990), which holds that *Ree v. State*, 565 So.2d 1329 (Fla. 1990), shall only be applied prospectively, we find that the procedure utilized by the trial judge was not in error. Resentencing in this case, however, will be subject to the requirements of *Ree, supra.*

Reversed and remanded for proceedings consistent with this opinion. (JOANOS, BARFIELD and WOLF, JJ., concur.)

* * *

**Criminal law—Question certified as to whether a double jeopardy violation results from the imposition of a probationary split sentence when the legislature has not explicitly authorized that disposition—Issue of imposition of improper condition of probation not preserved for appellate review by objection—Error to include special conditions of probation in written order where such conditions were not included in oral pronouncement—Written order to be corrected to conform to oral pronouncement—Error to impose costs without notice and opportunity to be heard**

RODNEY SUMTER, Appellant, vs. STATE OF FLORIDA, Appellee. 1st District. Case No. 89-2201. Opinion filed November 21, 1990. An Appeal from the Circuit Court for Bay County. W. Fred Turner, Judge. Barbara M. Linthicum, Public Defender; and Lynn A. Williams, Assistant Public Defender, for Appellant. Robert A. Butterworth, Attorney General; and Virlindia Doss, Assistant Attorney General, for Appellee.

(ERVIN, J.) Appellant, Rodney Sumter, contends on appeal that the probationary split sentence imposed upon him violates double jeopardy, that a condition of his probation prohibiting him from being in certain high-crime areas is invalid, that the written order of probation does not conform to the oral pronouncement, and that the trial court erred by imposing costs without adequate prior notice. We affirm as to the first two issues and reverse and remand on the last two.

The probationary split sentence imposed upon appellant is legal. *Poore v. State*, 531 So.2d 161 (Fla. 1988); *Glass v. State*, 556 So.2d 465 (Fla. 1st DCA 1990), *review granted*, No. 75,600 (Fla. Feb. 27, 1990) (oral argument scheduled Dec. 6, 1990); *Alexander v. State*, 15 F.L.W. D2697 (Fla. 1st DCA Oct. 31, 1990). As in *Glass* and *Alexander*, however, we certify the following question to the supreme court as one of great public importance:

> DOES A DOUBLE JEOPARDY VIOLATION RESULT FROM THE IMPOSITION OF A PROBATIONARY SPLIT SENTENCE WHEN THE LEGISLATURE HAS NOT EXPLICITLY AUTHORIZED THAT DISPOSITION IN THE SENTENCING ALTERNATIVES OF SECTION 921.187, FLORIDA STATUTES?

Appellant's complaint regarding the probation condition was not preserved for appellate review because no objection was lodged thereto. The failure to object to a condition of probation constitutes acceptance of that condition. *Rowland v. State*, 548 So.2d 812, 814 (Fla. 1st DCA 1989). *See also Larson v. State*, 553 So.2d 226, 228 (Fla. 1st DCA 1989), *petition for review filed*, No. 75,085 (Fla. Nov. 22, 1989) (defendant could not appeal condition of probation that he stay out of Tallahassee for five years, because he neither objected nor filed a motion to strike or to correct).

Turning next to the discrepancy between the oral sentencing pronouncement and the written probation order, we agree with appellant that the sentence must be reversed and remanded. The written order provides, in pertinent part, that appellant pay $1.00 per month to First Step, Inc. of Bay County; that he attend drug evaluation and counseling; and that he submit to blood and breathalyzer examinations. Although the trial judge at sentencing referred to this case as a "drug package," he made no mention of the above conditions when he pronounced the terms of appellant's probation. It is axiomatic that a trial court's oral pronouncement controls over its written order, and the inclusion of special conditions of probation in a written order that were not orally pronounced at the sentencing hearing mandates reversal and remand for correction of the written order to conform to the oral pronouncement. *Rowland*, 548 So.2d at 814. *See also Smith v. State*, 558 So.2d 534 (Fla. 1st DCA 1990); *Williams v. State*, 542 So.2d 479 (Fla. 2d DCA 1989).

We also find reversal and remand necessary on the cost issue.