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Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. Case No.: 81,544

FELICE JOHN VEACH,

Respondent.

______________________/

PETITIONER'S BRIEF ON JURISDICTION

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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. Case No.: 81,544

FELICE JOHN VEACH,

Respondent.

_____________________/

PETITIONER'S BRIEF ON JURISDICTION

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, FELICE JOHN VEACH, the defendant in the trial court and appellant below, will be referred to in this brief as respondent. References to the attached appendices will be noted by the symbols "A" through "D," and followed by the appropriate page number(s) in parentheses.

STATEMENT OF THE CASE AND FACTS

The state seeks review of the First District's decision in Veach v. State, 18 Fla. L. Weekly D637 (Fla. 1st DCA March 4, 1993).

In Case No. 90-2027, Respondent was charged with committing a lewd and lascivious act in the presence of, and on, a child, and sexual battery on a child less than 12 years of age, committed when he was 17. In Case No. 90-1963, Respondent was charged with grand theft, burglary and dealing in stolen property, all committed when he was 18. Pursuant to an agreement with the state, Respondent pled nolo contendere to all the charges, and received concurrent 5-year terms of probation, conditioned on 2 years of community control. The plea agreement did not mention Respondent's juvenile status and the trial court did not make any findings of the factors set forth in section 39.059(7)(c), Florida Statutes. Respondent did not appeal. Id. at D637.

In February 1991, Respondent pled nolo contendere to violation of community control. The trial court revoked probation, and sentenced respondent to 20 years for the first-degree felony (90-2027), 15 years for each second-degree felony (two in 90-1963, two in 90-2027) and 5 years for each third-degree felony (90-19630, all concurrent. Id. at D637-638.

Respondent appealed to the First District, arguing that the sentences in 90-2027 must be reversed because the trial court

initially imposed sentence without making the findings set forth in section 39.059(7)(c). The First District agreed with Respondent, reversed the sentences in Case No. 90-2027, and remanded for resentencing. The court recognized that a juvenile can waive his right to findings under section 39.059(7)(c), but stated that such waiver must be knowing, intelligent and manifest on the record. Id. at D638. The Court noted that this decision did not follow Preston v. State, 411 So. 2d 297 (Fla. 3d DCA 1982), review denied 418 So. 2d 1280 (Fla. 1982). Id. at D638 n.1.

The state filed a motion for certification of conflict, which was denied (B,C), and then timely filed a notice to invoke the discretionary jurisdiction of this court. This brief on jurisdiction 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 the following decision from the Third District Court of Appeal:

> Preston v. State, 411 So. 2d 297 (Fla. 3rd DCA 1982), review denied, 418 So. 2d 1280 (Fla. 1982).

In Preston, the Third District held that where a defendant never sought designation as a youthful offender and was not sentenced to a period of incarceration, but was placed on probation, he waived the right to question the legality of a probation which he has enjoyed and violated. The very same issue was decided in this case with opposite results.

Because the decision of this case expressly and directly conflicts with the decision in Preston this Court should grant discretionary jurisdiction.

ARGUMENT

Issue

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

The instant decision directly and expressly conflicts with the following decision from the Third District Court of Appeal:

> Preston v. State, 411 So. 2d 297 (Fla. 3d DCA 1982), review denied, 418 So. 2d 1280 (Fla. 1982).

The Third District's holding in Preston follows:

> Where, however, a defendant never sought designation as a youthful offender and was not sentenced to a period of incarceration, but was placed on probation, the terms of which he fully accepted, we hold that the defendant has waived his right to question the legality of a probation which he has enjoyed and violated.

411 So. 2d at 298-299. The instant decision is in express and direct conflict with the Preston holding. In the instant decision, the First District held that, although Respondent requested community control, never sought designation as a youthful offender, and did not appeal until after he had been sentenced for violating community control, he did not waive his right to question the validity of the original sentence.

The First and Third Districts are clearly in conflict on this issue because Preston is still controlling law in the Third District. Preston was recently cited as controlling authority in Novation v. State, 18 Fla. L. Weekly D119 (Fla. 3d DCA 1992). See also Madrigal v. State, 545 So. 2d 392, 394 (Fla. 3d DCA 1989).

The First District attempted to distinguish Preston from the instant case in a footnote:

> In the Preston case cited by the state, the court effectively held that the defendant implicitly waived the right to sentencing as a youthful offender by not seeking that designation and accepting the benefits of probation. However, the courts have since held that such implicit waivers are insufficient, and must rather be "knowing, intelligent and manifest on the record. Therefore, we do not follow Preston.

Veach at D638 n.1. (emphasis omitted). The First District's attempt to distinguish Preston is unpersuasive. The fact that a waiver of the right to youthful offender considerations should be manifest on the record is irrelevant. In Preston, the crucial issue was not whether the original sentencing was flawed, but was whether the defendant argued that he was still entitled to appeal his sentence after he had violated probation. In Preston the defendant was originally entitled to be sentenced under the youthful offender act, and if he had objected and appealed immediately, he probably would have been entitled to resentencing.[1]

---

[1] Respondent has not even made any showing that if the section 39.059(7)(c) findings had been made, the original result might have been different.

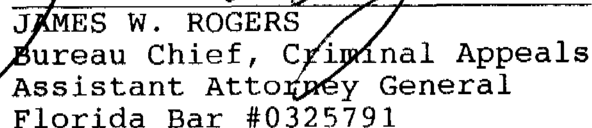
The instant opinion does not cite a single case where an appellate court held that a juvenile is entitled to resentencing after he bargains for probation instead of incarceration, and waits to appeal until after he has been caught in violation. Since Preston is indistinguishable, express and direct conflict exists.

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,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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Bureau Chief, Criminal Appeals
Assistant Attorney General
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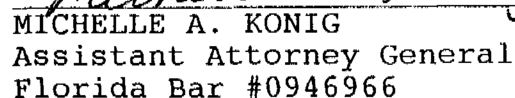

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COUNSELS FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by U.S. Mail to JAMES C. BANKS, Esq., 217 North Franklin Blvd., Tallahassee, Florida 32301, this 15th day of April, 1993.

Michelle Konig
MICHELLE A. KONIG
Assistant Attorney General

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

Case No.: 81,544
1st DCA Case No.: 92-1506

FELICE JOHN VEACH,

Respondent.
_________________________/

APPENDICES

Opinion of First District	A
Motion for Certification	B
Order Denying Certification	C
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Preston v. State, 411 So. 2d 297 (Fla. 3rd DCA 1982)

92-110806-TCR
H

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

FELICE JOHN VEACH,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED.

CASE NO. 92-1506

RECEIVED
MAR 04 1993
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Dept. of Legal Affairs

Opinion filed March 4, 1993.

An Appeal from the Circuit Court for Escambia County.
T. Michael Jones, Judge.

James C. Banks, Special Asst. Public Defender, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General, and Gypsy Bailey and Michelle Konig, Asst. Attorneys General, Tallahassee, for Appellee.

Docketed
3.5.93
Florida Attorney General

PER CURIAM.

Felice John Veach has appealed from the imposition of adult sanctions after his plea of nolo contendere to crimes committed when he was a juvenile. We reverse and remand for re-sentencing.

In May 1990, Veach was charged in Case No. 90-1963 with grand theft, burglary and dealing in stolen property, all committed when he was 18. In June 1990, Veach was charged in Case No. 90-2027 with committing a lewd and lascivious act in the presence of, and on, a child, and sexual battery on a child less than 12 years of age, committed when he was 17. Veach pled nolo contendere to all charges, and received concurrent 5-year terms of probation, conditioned on 2 years of community control. The plea agreement did not mention Veach's juvenile status in 90-2027, nor did the trial court determine the suitability of adult sanctions as to that case with reference to the factors set forth at section 39.059(7)(c), Florida Statutes. Veach did not appeal.

In February 1991, an affidavit of violation of community control was filed, to which Veach pled nolo contendere. The trial court revoked community control, and sentenced Veach to 20 years for the 1st-degree felony (90-2027), 15 years for each 2d-degree felony (two in 90-1963, two in 90-2027) and 5 years for each 3d-degree felony (90-1963), all concurrent. Veach argues that the sentences in 90-2027 must be reversed based on the trial court's initial imposition of sentence without making the findings required by section 39.059(7)(c).

The state does not dispute that the findings were initially required, or argue that Veach waived the issue by failing to appeal. Rather, the state maintains that Veach waived his entitlement to those findings, citing Preston v. State, 411 So.2d 297 (Fla. 3d DCA 1982) (where a defendant never sought

designation as a youthful offender and was not sentenced to a period of incarceration, but was placed on probation, he waives the right to question the legality of a probation which he has enjoyed and violated). Veach responds that, absent a manifest knowing and intelligent waiver of the right to the findings, it is reversible error to sentence a juvenile as an adult, even in the absence of objection and even though sanctions were imposed pursuant to a negotiated plea omitting any reference to Chapter 39. Walker v. State, 605 So.2d 1341, 1341-42 (Fla. 1st DCA 1992).

Failure to follow the provisions of section 39.059(7)(c) in sentencing a juvenile as an adult requires remand for resentencing, regardless of objection. State v. Rhoden, 448 So.2d 1013, 1016 (Fla. 1984). While a juvenile can waive his right to findings under section 39.059(7)(c)(1-6) before being sentenced as an adult, Rhoden, that waiver must be knowing, intelligent and manifest on the record.[1] Hill v. State, 596 So.2d 1210, 1211 (Fla. 1st DCA 1992). Without such a waiver, it is reversible error for a trial court to impose adult sanctions

---

[1] In the Preston case cited by the state, the court effectively held that the defendant implicitly waived the right to sentencing as a youthful offender by not seeking that designation and accepting the benefits of probation. However, the courts have since held that such implicit waivers are insufficient, and must rather be "knowing, intelligent and manifest on the record." Therefore, we do not follow Preston. As for Goldsmith v. State, 18 F.L.W. D268 (Fla. 1st DCA December 31, 1992), we note that the case did not involve a juvenile as to whom the trial court failed to make the findings required by section 39.059(7)(c) at the time of the initial imposition of community control.

upon a juvenile without making the required findings, even though sanctions were imposed pursuant to a negotiated plea agreement which omitted any reference to the statute. Walker at 1341-42.

Here, there was no waiver by Veach, either at the original sentencing proceeding or in the written plea agreement, of his right to section 39.059(7)(c) findings prior to adult sentencing in Case No. 90-2027. Therefore, as to that case only, we reverse the sentence imposed herein, and remand for resentencing. Reimposition of adult sanctions is permitted, upon compliance with the statute. Walker at 1342.

JOANOS, C.J., MINER and ALLEN, JJ., CONCUR.

92-110806 TCR

H/ME 3/12/93

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

FELICE JOHN VEACH,

Appellant,

v. CASE NO. 92-1506

STATE OF FLORIDA,

Appellee.

_______________________/

Docketed 3-15-93

MOTION FOR CERTIFICATION

In accordance with the provisions of Fla.R.App.P. 9.330(a), the appellee, State of Florida, respectfully moves the court for certification of conflict. As grounds for this motion, appellee submits that the instant decision directly and expressly conflicts with the following decision from the Third District Court of Appeal:

> Preston v. State, 411 So. 2d 297 (Fla. 3rd DCA 1982).

1) In Preston the Third District held:

> Where, however, a defendant never sought designation as a youthful offender and was not sentenced to a period of incarceration, but was placed on probation, the terms of which he fully accepted, we hold that the defendant has waived his right to question the legality of a probation which he has enjoyed and violated. King v. State, 373 So. 2d 78 (Fla. 3rd DCA 1979).

411 So. 2d at 298-299.

2) The issue presented in this case is identical to the issue in Preston. However, this court stated that it did not follow Preston because of State v. Rhoden, 448 So. 2d 1013, 1016 (Fla. 1984). slip opinion at 3, n.1. In Rhoden, the Court held that a waiver of section 39.059(7)(c)(1-6) must be knowing, intelligent and manifest on the record. Rhoden did not involve a plea bargain, acceptance of probation, or a delayed appeal.

4) Both Madrigal v. State, 545 So. 2d 392, 394 (Fla. 3rd DCA 1989) and Novation v. State, 18 Fla. L. Weekly D119 (Fla. 3rd DCA Dec. 8, 1992), were decided after Rhoden and cited Preston as controlling authority. Therefore, Preston is still controlling law in the Third District and conflicts with the decision here.

Wherefore, the appellee respectfully moves this court for certification of conflict pursuant to Fla.R.App.P. 9.330(a).

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

Michelle Konig
MICHELLE A. KONIG
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0946966

DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
TALLAHASSEE, FL 32399-1050
904/488-0600

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to James C. Banks, Esq., 217 North Franklin Blvd., Tallahassee, Florida 32301, this 12th day of March, 1993.

Michelle Konig
Michelle Konig
Assistant Attorney General

M

Konig
AAG

DISTRICT COURT OF APPEAL, FIRST DISTRICT

Tallahassee, Florida 32399
Telephone No. (904)488-6151

April 1, 1993

CASE NO: 92-01506

92-110806TCR
H

L.T. CASE NO. 90-1963

Felice John Veach v. State of Florida

Appellant(s), Appellee(s).

RECEIVED
APR 5 1993
Criminal Appeals
Dept. of Legal Affairs

BY ORDER OF THE COURT:

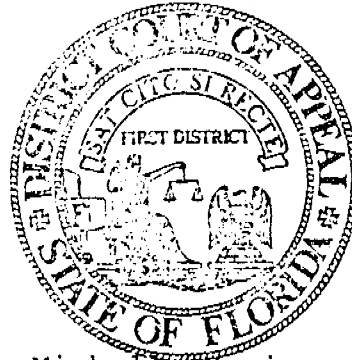
Motion for certification, filed March 12, 1993, is DENIED.

I HEREBY CERTIFY that the foregoing is (a true copy of) the original court order.

Jon S. Wheeler

JON S. WHEELER, CLERK

By: Sondra Joyner
Deputy Clerk



Copies:

James C. Banks

Michelle Konig

Docketed
4-6-93
Florida Attorney General

APP. C

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:apon in it, and felt it
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d to be some kind of
:ed appellee to remove
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it contends the search
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iestion as to the validi-
but contends Jempson
search the jacket. We

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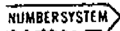
appellant picked it up,
ie residence which was
irsuant to the warrant.
iaqualone) were validly
he warrant.

SHAW, JJ., con-



JACKSON, Appellant,

v.

f Florida, Appellee.

79-1422.

of Appeal of Florida,
d District.

n 23, 1982.

cuit Court, Dade County;
lge.

mmer, Public Defender
ser, Sp. Asst. Public De-
nt.

and Paul Mendel-
appellee.

Before HENDRY, SCHWARTZ and BASKIN, JJ.

PER CURIAM.

Affirmed. *Boshears v. State*, 371 So.2d 725 (Fla. 1st DCA 1979); *Jefferson v. State*, 298 So.2d 465 (Fla. 3d DCA 1974); *Maycock v. State*, 284 So.2d 411 (Fla. 3d DCA 1973).

1

Luis Migel RUIZ, Appellant,

v.

The STATE of Florida, Appellee.

No. 79-1987.

District Court of Appeal of Florida, Third District.

March 23, 1982.

Appeal from Circuit Court, Dade County; Richard S. Fuller, Judge.

Bennett H. Brummer, Public Defender, and Robert C. Gross, Sp. Asst. Public Defender, for appellant.

Jim Smith, Atty. Gen., and Paul Mendelson, Asst. Atty. Gen., for appellee.

Before HENDRY, NESBITT and FERGUSON, JJ.

PER CURIAM.

Affirmed. *In the Interest of M. E.*, 370 So.2d 795 (Fla.1979); *Sullivan v. State*, 303 So.2d 632 (Fla.1974), *cert. denied*, 428 U.S. 911, 96 S.Ct. 3226, 49 L.Ed.2d 1220 (1976); *Adirim v. State*, 350 So.2d 1082 (Fla. 3d DCA 1977), *cert. denied*, 365 So.2d 709 (Fla. 1978).

2

Freddie LONDON, Appellant,

v.

The STATE of Florida, Appellee.

No. 80-784.

District Court of Appeal of Florida, Third District.

March 23, 1982.

Appeal from Circuit Court, Dade County; Lenore Nesbitt, Judge.

Bennett H. Brummer, Public Defender and Elliot H. Scherker, Asst. Public Defender, for appellant.

Jim Smith, Atty. Gen. and Paul Mendelson and John F. Robenalt, Asst. Attys. Gen., for appellee.

Before HUBBART, C. J., BASKIN, J., and BERANEK, JOHN R., Associate Judge.

PER CURIAM.

Affirmed. *Studnick v. State*, 341 So.2d 808 (Fla. 3d DCA), *cert. denied*, 348 So.2d 954 (Fla.1977).

3

David PRESTON, Appellant,

v.

The STATE of Florida, Appellee.

No. 80-1332.

District Court of Appeal of Florida, Third District.

March 23, 1982.

Appeal was taken from an order of the Circuit Court, Dade County, John A. Tanksley, J., denying motion to correct sentence imposed pursuant to determination of pro-

bation violation. The District Court of Appeal, Ferguson, J., held that where defendant never sought designation as a youthful offender and was not sentenced to a period of incarceration, but was placed on probation, terms of which he fully accepted, including term that if he violated probation he could be sentenced for life, defendant waived his right to question legality of probation and, upon violation, could not contend that he was entitled to be sentenced under the Youthful Offender Act because he was originally entitled to designation as a youthful offender.

Affirmed.

Infants 🔑69(7)

Where defendant never sought designation as a youthful offender and was not sentenced to a period of incarceration, but was placed on probation, terms of which he fully accepted, including condition that if he violated probation he could be sentenced for life, defendant waived his right to question legality of probation and, upon violation, could not contend that he was entitled to be sentenced under the Youthful Offender Act because he was originally entitled to designation as a youthful offender. West's F.S.A. §§ 958.04(1), 958.05.

Bennett H. Brummer, Public Defender and Deborah Whisnant and Elliot H. Scherker, Asst. Public Defenders, for appellant.

Jim Smith, Atty. Gen. and Paul Mendelson, Asst. Atty. Gen., for appellee.

Before HUBBART, C. J., FERGUSON, J., and MELVIN, WOODROW M. (Ret.) Associate Judge.

FERGUSON, Judge.

David Preston appeals from a court order denying his motion to correct the sentence imposed pursuant to a determination of probation violation. Preston claims that because he was originally entitled to designation as a youthful offender, he must be sentenced in accordance with the provisions of the Youthful Offender Act, Section 958.05, Florida Statutes (1979) upon revocation of probation imposed in adult court. We disagree.

After being transferred from juvenile court to circuit court, Preston pled guilty to the charge of robbery with use of a deadly weapon. During the plea colloquy, the trial court emphasized to Preston that it was giving him a second chance and that if Preston violated his probation, he would be sent away for a long time, possibly for life. In addition, the court requested Preston's mother to impress on Preston that if he violated probation he could be sentenced for life.

> The Court: I'm trying to tell you in no uncertain terms that I mean business. This is not the juvenile court remember that. . . .
>
> I have no hesitation in sentencing him. I have sentenced the young people to the state penitentiary before, and I'll do it again. I take no pleasure, but it's my job, and I will do it.
>
> I just sent a fifteen-year-old girl over for life imprisonment on a murder charge. I sentenced a fourteen-year-old boy for life imprisonment. I don't want to do it in your case. Don't make me.

Preston's argument on appeal is essentially that because he met the requirements entitling him to be designated as a youthful offender and because sentencing under the Youthful Offender Act is mandatory if a defendant meets the requirements of Section 958.04(1), Florida Statutes (1979), *State v. Goodson*, 403 So.2d 1337 (Fla.1981), the rule that a youthful offender who has violated probation may only be sentenced within the limitations of the Youthful Offender Act, *Brandle v. State*, 406 So.2d 1221 (Fla. 4th DCA 1981); *Greene v. State*, 398 So.2d 1011 (Fla. 1st DCA 1981), should apply to him. Where, however, a defendant never sought designation as a youthful offender and was not sentenced to a period of incarceration, but was placed on probation, the terms of which he fully accepted, we hold that the defendant has waived his

right to question the legality of a probation which he has enjoyed and violated. *King v. State*, 373 So.2d 78 (Fla. 3d DCA 1979).

Accordingly the order of the trial court is affirmed.

Sullivan VACCARO, Appellant,

v.

The STATE of Florida, Appellee.

No. 80–1744.

District Court of Appeal of Florida, Third District.

March 23, 1982.

Appeal from Circuit Court, Dade County; David L. Levy, Judge.

Jerome Bill Ullman, Miami, for appellant.

Jim Smith, Atty. Gen., and Anthony C. Musto, Asst. Atty. Gen., for appellee.

Before BARKDULL and DANIEL S. PEARSON and FERGUSON, JJ.

PER CURIAM.

Affirmed. *Login v. State*, 394 So.2d 183 (Fla. 3d DCA 1981); *State v. Grant*, 392 So.2d 1362 (Fla. 4th DCA 1981); *Shapiro v. State*, 390 So.2d 344 (Fla.1980).

FERGUSON, Judge (dissenting).

See dissent in *Laurenzano v. State*, 402 So.2d 1304 (Fla. 3d DCA 1981).

Sandra Sue MILLER, Kathleen Louise Mitchell and Lynda Lee Pryor, Petitioners,

v.

The STATE of Florida, Respondent.

No. 80–2283.

District Court of Appeal of Florida, Third District.

March 23, 1982.

The county court convicted defendants of violating Miami's "B–Girl" ordinance, and defendants appealed. The Circuit Court, Dade County, Arden M. Siegendorf, David L. Levy and James R. Jorgenson, JJ., affirmed. On certiorari, the District Court of Appeal, Barkdull, J., held that the ordinance is constitutionally valid on its face and adequately apprises an employee of the proscribed conduct, i.e., that the employee is not to mingle or fraternize with patrons, and it does not mean that an employee cannot respond to an order placed by a patron for food or beverages as it prohibits conduct which is social in nature.

Relief denied.

Daniel S. Pearson, J., filed dissenting opinion.

1. Criminal Law ⇐1134(7)

On certiorari to review action of circuit court, sitting in its appellate capacity on appeal from conviction by county court, it is incumbent on the District Court of Appeal to examine the record to determine if the circuit court exceeded its jurisdiction or departed from established principles of law.

2. Intoxicating Liquors ⇐15

Miami's "B–Girl" ordinance making it unlawful for employees or entertainers in places dispensing alcoholic beverages for consumption on the premises to mingle or fraternize with customers or patrons is constitutionally valid on its face and adequately apprises the employee of the proscribed conduct; ordinance does not mean that an employee cannot respond to an order placed by a patron for food or beverage but proscribes conduct which is social in nature.