IN THE SUPREME COURT OF FLORIDA

DARREN KEITH DAVIS,

Petitioner,

VS. CASE NO. 84,155

STATE OF FLORIDA,

Respondent.
_____/

PETITIONER'S BRIEF ON THE JURISDICTION

LEO A. THOMAS (ATTY. #149502)
Levin, Middlebrooks, Mabie,
Thomas, Mayes & Mitchell, P.A.
226 South Palafox Street
Pensacola, FL 32501
(904)435-7169
Attorney for Petitioner

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PRELIMINARY STATEMENT

The parties will be referred to herein as they stand before this Court. Petitioner Darren Keith Davis was the appellee in the First District Court of Appeal and defendant in the trial court; the Respondent State of Florida was the appellant in the First District Court of Appeal and plaintiff in the trial court.

References to the transcript of the record on appeal will be designated "(TR___)" followed by the appropriate page number.

STATEMENT OF CONFLICT

Petitioner asserts that the decision of the district court of appeal below and reported at 19 Fla.L.Weekly D1519 (1st DCA, opinion filed July 12, 1994), is in direct conflict with the decision of the same district court of appeal in Jones v. State, 599 So. 2d 769 (Fla. 1st DCA 1992) and with the Fourth District Court of Appeal in Braddy v. State, 520 So. 2d 660 (Fla. 4th DCA 1988), rev. denied, 528 So. 2d 1183 (Fla. 1988).

STATEMENT OF THE CASE AND FACTS

The decision of the lower tribunal sets out the relevant facts. On April 6, 1989, petitioner was sentenced to three concurrent life terms and one concurrent 30 year term. This sentence constituted a upward departure. Eight days later, he filed a notice of appeal and on May 6, 1989, during the pendency of the appeal, the trial court finally filed its written reasons for guideline departure.

In his direct appeal, petitioner only raised errors allegedly occurring during trial and did not raise as an issue on appeal the trial court's failure to reduce its departure reasons to writing at the time of sentencing.

Before petitioner's appeal was terminated, the Florida Supreme Court decided Ree v. State, 565 So. 2d 1329 (Fla. 1990) but, of course, limited its application to cases arising prospectively. Subsequent to the decision in Ree, the First District Court of Appeal affirmed Davis' appeal and mandate was issued on July 12, 1991. Davis v. State, 582 So. 2d 695 (Fla. 1st DCA 1991). Thereafter, the Florida Supreme Court issued several opinions relating to the types of cases that were affected by the prospective application of Ree. One in particular, Smith v. State, 598 So. 2d 1063 (Fla. 1992), commented that Ree applied to all cases not yet final when mandate issued after rehearing in Ree, which was July 19, 1990. Davis' appeal was not finally decided until June 26, 1991. On March 24, 1993, petitioner filed the instant motion to vacate and set aside his

sentence pursuant to Fla.R.Crim.P. 3.800 and/or 3.850 based on the trial court's failure to reduce its departure reasons to writing contemporaneously with sentencing. Petitioner also amended that motion to add as a basis for vacating the sentence, that the trial court had no jurisdiction to enter written reasons for departure after the notice of appeal was filed.

The trial court granted the motion to vacate and only addressed the point raised on the Ree ground and did not decide the jurisdictional issue.

The First District Court of Appeal held that the lower court erroneously vacated the departure sentence based on Ree because on the same day the Florida Supreme Court decided Smith v. State which, as stated, held Ree inapplicable to all cases not final when mandate issued in Ree it also decided Blair v. State, 598 So. 2d 1068 (Fla. 1992). In Blair, the court explained that Ree's prospectivity requirement applied "to all cases not final where the issue was raised." (Id at 1060, emp. added). Although Davis' case on appeal was not final at the time mandate issued in Ree, his appeal raised no point regarding the trial court's failure to enter contemporaneous written reasons for departure.

SUMMARY OF ARGUMENT

ISSUE I

THE DECISION OF THE LOWER TRIBUNAL EXPRESSLY AND DIRECTLY CONFLICTS WITH OTHER DECISIONS OF THE FIRST DISTRICT COURT OF APPEAL.

The First District Court of Appeal erroneously held that since petitioner had not raised the Ree matter on appeal, that he was foreclosed from later raising it in a Rule 3.800 or 3.850 motion. This, of course, conflicts with the decision of the same First District Court of Appeal in Jones v. State, 599 So. 2d 769 (Fla. 1st DCA 1992), wherein the defendant's appeal was dismissed for failure to pay a filing fee and by 3.850 motion, raised the same issue. Notwithstanding the fact that it was not raised in his direct appeal, the First District Court of Appeal reversed the trial court's denial of the motion to vacate and set aside the sentence.

The decision below also conflicts with the decision of the Fourth District Court of Appeal in Braddy v. State, 520 So. 2d 660 (Fla. 4th DCA 1988), rev. denied, 528 So. 2d 1183 (Fla. 1988), wherein it was held that a sentencing error which causes one to be confined for a period of time longer than allowed by law is fundamental error and can be heard in any and every legal manner possible.

ARGUMENT ON ISSUE I

THE DECISION OF THE LOWER TRIBUNAL EXPRESSLY AND DIRECTLY CONFLICTS WITH OTHER DECISIONS OF THE FIRST DISTRICT COURT OF APPEAL.

The decision of the First District Court of Appeal expressly and directly conflicts with other decisions of the same First District Court of Appeal.

The fundamental prerequisite for discretionary review, pursuant to Fla.R.App.P. 9.030(a)(2) and Article V, §3 of the Florida Constitution, is the existence of direct and express conflict between the decisions of district courts of appeal, or, between the decisions of the district court and the decisions of this Court on the same question of law. Reaves v. State, 485 So. 2d 829 (Fla. 1986); Jenkins v. State, 385 So. 2d 1356 (Fla. 1980).

In Reaves, this Court defined the type of conflict which must exist to accept a petition for discretionary review. It said:

> "Conflict between decisions must be express and direct, id, it must appear within the four corners of the majority decision. Neither a dissenting opinion nor the record itself can be used to establish jurisdiction."

In order for conflict to suffice as a basis for this Court's jurisdiction, the conflict must be on the same point of law. For conflict jurisdiction can be invoked only when different principles of law are applied to indistinguishable facts. Department of Revenue v. Johnson, 422 So. 2d 950 (Fla. 1983).

In the instant case, all the criteria for the exercise of this Court's jurisdiction have been met. In the opinion below, the

district court of appeal held that because petitioner did not raise in his direct appeal the issue as to whether or not it was error for the trial court to fail to render written reasons for departure contemporaneously with the sentence, he was forclosed from later raising that issue in a post-conviction motion.

Expressly conflicting with that decision is the decision of the same district court of appeal in Jones v. State, 599 So. 2d 769 (Fla. 1st DCA 1992), where the defendant there filed a notice of appeal but because of a failure to pay the filing fee the notice was "closed prior to consideration on its merits" (at p. 770). The defendant then filed a Rule 3.850 claiming that the sentence was illegal because the trial court failed to provide written reasons for the departure and the trial court agreed with the state that because it had not been raised in the defendant's direct appeal, he was foreclosed from raising it at that time.

In reversing, the First District Court of Appeal held:

> "In the absence of valid reasons for departure, defendant's confinement in excess of the recommended guidelines sentence would be longer than lawfully permitted. A sentencing error which causes an individual to be restrained for a time longer than that allowed by law is fundamental, and can be heard in any and every legal manner possible....Therefore, the trial court erred in finding that Jones was barred from raising the absence of departure reasons by his failure to raise the issue on direct appeal, and we reverse and remand for further consideration of the motion." (at p. 770, cites omitted)

Accordingly, the decision of the First District Court of Appeal below directly and expressly conflicts with the decision of

the same district court of appeal in Jones v. State, 599 So. 2d 769 (Fla. 1st DCA 1992), as well as the decision of the Fourth District Court of Appeal in Braddy v. State, 520 So. 2d 660 (Fla. 4th DCA 1988), rev. denied, 528 So. 2d 1183 (Fla. 1988), which held that a sentencing error which causes an individual to be restrained for a time longer than that allowed by law is fundamental error and can be heard in any and every legal manner possible.

CONCLUSION

WHEREFORE, petitioner prays this Court will accept jurisdiction and reverse and remand the decision of the First District Court of Appeal below.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Robert Butterworth, Attorney General, The Capitol, Tallahassee, FL 32399-1050 by regular U.S. Mail on this the 12th day of August, 1994.

LEO A. THOMAS (ATTY. #149502), of
Levin, Middlebrooks, Mabie, Thomas,
Mayes & Mitchell, P.A.
226 South Palafox Street
Pensacola, FL 32501
(904)435-7169
Attorney for Petitioner