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IN THE SUPREME COURT OF FLORIDA

DARREN KEITH DAVIS,

Petitioner,

v. CASE NO. 84, 155

THE STATE OF FLORIDA,

Respondent.

_____/

ON PETITION FOR DISCRETIONARY REVIEW

JURISDICTIONAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF CITATIONS

IN THE SUPREME COURT OF FLORIDA

DARREN KEITH DAVIS,

Petitioner,

v. CASE NO. 84,954

THE STATE OF FLORIDA,

Respondent.
_____/

JURISDICTIONAL BRIEF OF RESPONDENT

PRELIMINARY STATEMENT

This is a petition for discretionary review pursuant to Article V, Section 3(B)(3), Florida Constitution, based on a claim that the decision below expressly and directly conflicts with decisions of this Court or of other district courts of appeal.

Express and direct conflict must be based on the decisions themselves, not the opinions, and the only relevant facts are those within the four corners of the majority opinions. Reaves v. State, 485 So. 2d 829 (Fla. 1986).

STATEMENT OF THE CASE AND FACTS

Petitioner's statement of the case and facts are not drawn from the decision below and must be rejected.

The historical facts as established by the July 12, 1994 Opinion of the First District Court of Appeal are as follows:

> On April 6, 1989, Davis was sentenced to three concurrent life terms and on concurrent 30-year term. Eight days later, he filed a notice of appeal, and on May 6, 1989, during the pendency of the appeal, the trial court filed its written reasons for guideline departure. In his direct appeal, Davis raised errors allegedly transpiring during trial, but never raised the issue regarding the trial court's failure to reduce its departure reasons to writing at the time of sentencing. Before his appeal was terminated, the Florida Supreme Court decided Ree v. State, but limited its application to cases arising prospectively. Subsequent to the decision in Ree, the First District 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.[1] As Davis' appeal had remained undecided at such time, Davis, on March 24, 1993, filed a motion to vacate and set aside sentence, pursuant to Florida Rules of Criminal Procedure 3.800 and/or 3.850, alleging the court's failure to reduce its departure reasons to writing during sentencing. He later filed an amended motion, arguing that the departure sentence was illegal, because the court had no jurisdiction to enter written reasons after he filed his notice of appeal. In granting the motion to vacate, the trial court addressed only the point raised in the initial motion, stating that as a result of its disposition of the motion on the Ree ground, it was unnecessary to decide the jurisdictional issue.

The First District Court found that the trial court erroneously vacated the departure order as Ree could not be retroactively applied given the fact that Davis had not raised the trial court's failure to enter contemporaneous written reasons for departure in his direct appeal.

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[1] The date of mandate in Ree was July 19, 1990.

SUMMARY OF ARGUMENT

Petitioner may not properly invoke the powers of discretionary review of this Court as he is unable to show express and direct conflict between this case and another case which is factually on all fours and which applies the same principle of law to yield different results.

ARGUMENT

STANDARD OF REVIEW

Pursuant to Article V, Section 3(b)(3) of the Florida Constitution and Fla. R. App. P. 9.030(2)(A)(iv), this Court may review a decision of a District Court of Appeal which expressly and directly conflicts with a decision of another district court or with a decision of the Supreme Court on the same question of law. In determining whether conflict jurisdiction exists, this Court is limited to the facts as set forth within the four corners of the opinion, Reaves v. State, 485 So. 2d 829 (Fla. 1986), and must look at the decisions involved rather than a conflict in the opinions. Niemann v. Niemann, 312 So. 2d 733 (Fla. 1975). Conflict jurisdiction exists only in those instances in which the same principle of law is applied to identical facts to reach different results. Wilson v. Southern Bell Telephone and Telegraph, 327 So. 2d 220 (Fla. 1976).

ISSUE I

THE DECISION OF THE LOWER COURT DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH JONES AND BRADDY.

The Petitioner contends that he is entitled to invoke the discretionary review of this Court based upon an alleged direct and express conflict between the First District Court's decision in this case and Jones v. State, 599 So. 2d 769 (Fla. 1st DCA 1992) and Braddy v. State, 520 So. 2d 660 (Fla. 4th DCA 1988). A review of these opinions reveals, however, that conflict does not result from the application of the same rule of law to the same facts to yield different results.

Braddy is factually distinguishable from the instant case since it presents the absence of any written reasons to support a guidelines departure on successive motions for post-conviction relief. Jones also does not present a comparable case. In Jones, the defendant's direct appeal was never considered on the merits due to the procedural omission to pay the filing fee. Significantly, nowhere in the Jones opinion does the court discuss, let alone consider, the applicability of the legal principle present in this case, i.e., the prospective applicability of Ree to pipeline cases in which the issue was not raised on direct appeal. See: Blair v. State, 598 So. 2d 1068 (Fla. 1992).

Given the Petitioner's failure to present any case which presents a factual scenario on all fours with this one and the application of the identical rule of law which nevertheless yields

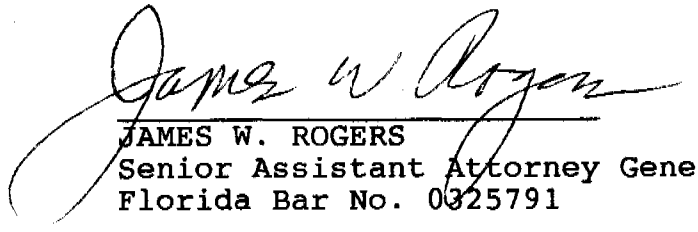
contrary results, he is unable to establish that conflict jurisdiction exists.

CONCLUSION

Based upon the foregoing argument which establishes that petitioner has failed to set forth any case which directly and expressly conflicts with the lower court's decision, the respondent, **THE STATE OF FLORIDA**, respectfully requests that the instant petition for discretionary review be discharged.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail to **LEO A. THOMAS, Levin, Middlebrooks, Mabie, Thomas, Mayes, and Mitchell, P.A.**, 226 South Palafox Street, Pensacola, Florida 33132, this 2d day of September, 1994.

Giselle Lylen Rivera
GISELLE LYLEN RIVERA
Assistant Attorney General

IN THE SUPREME COURT OF FLORIDA

DARREN KEITH DAVIS,

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v. CASE NO. 84, 155

THE STATE OF FLORIDA,

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_____/

APPENDIX TO

JURISDICTIONAL BRIEF OF RESPONDENT

DOCUMENT

Opinion, Davis v. State,
No. 93-2835
(Fla. 1st DCA, July 12, 1994)

IN THE DISTRICT COURT OF APPEAL,

FIRST DISTRICT, STATE OF FLORIDA

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

STATE OF FLORIDA,

Appellant/
Cross-Appellee,

v.

CASE NO. 93-2835

DARREN KEITH DAVIS,

Appellee/
Cross-Appellant.
_____/

Opinion filed July 12, 1994.

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

Robert A. Butterworth, Attorney General, James W. Rogers and Giselle Lylen Rivera, Assistant Attorneys General, Office of the Attorney General, Tallahassee, for Appellant/Cross-Appellee.

Leo A. Thomas of Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A., Pensacola, for Appellee/Cross-Appellant.

ERVIN, J.

The state appeals from an order vacating appellee's guideline departure sentence, arguing that the lower court erred in retroactively applying Ree v. State, 565 So. 2d 1329 (Fla. 1990), which requires a trial court to reduce its reasons for departure to writing at the time of sentencing. Davis cross-appeals, contending that the court erred at resentencing by imposing a three-year

minimum mandatory term for use of a firearm during the commission of robbery, thereby making it a harsher sentence, contrary to North Carolina v. Pearce, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969). We reverse as to the direct appeal and remand for further proceedings, but affirm as to the cross-appeal.

On April 6, 1989, Davis was sentenced to three concurrent life terms and one concurrent 30-year term. Eight days later, he filed a notice of appeal, and on May 6, 1989, during the pendency of the appeal, the trial court filed its written reasons for guideline departure. In his direct appeal, Davis raised errors allegedly transpiring during trial, but never raised the issue regarding the trial court's failure to reduce its departure reasons to writing at the time of sentencing. Before his appeal was terminated, the Florida Supreme Court decided Ree v. State, but limited its application to cases arising prospectively. Subsequent to the decision in Ree, the First District affirmed Davis's 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.[1] As Davis's appeal had remained undecided at such time, Davis, on

[1]The date of mandate in Ree was July 19, 1990.

March 24, 1993, filed a motion to vacate and set aside sentence, pursuant to Florida Rules of Criminal Procedure 3.800 and/or 3.850, alleging the court's failure to reduce its departure reasons to writing during sentencing. He later filed an amended motion, arguing that the departure sentence was illegal, because the court had no jurisdiction to enter written reasons after he had filed his notice of appeal. In granting the motion to vacate, the trial court addressed only the point raised in the initial motion, stating that as a result of its disposition of the motion on the Ree ground, it was unnecessary to decide the jurisdictional issue.

We agree with the state's argument that the lower court erroneously vacated the departure sentence based on Ree. On the same day the supreme court decided Smith v. State, which, as stated, held Ree applicable 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 1069 (emphasis added). Although Davis's 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.[2] Therefore, as Ree could not be retroactively applied to Davis's case, we conclude that the lower court erred in vacating the departure sentences on

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[2]The failure to raise the Ree issue on appeal distinguishes this case from Brown v. State, 634 So. 2d 735 (Fla. 1st DCA 1994), upon which Davis relies.

such ground. Our reversal and remand as to this issue is, however, without prejudice to Davis's right on remand, if he so chooses, to raise again the issue regarding whether the court retained jurisdiction to enter written departure reasons after Davis had filed his notice of appeal.

We affirm the North Carolina v. Pearce issue raised on cross-appeal. Section 775.087(2), Florida Statutes, contains no provision permitting the trial court to exercise its discretion in imposing a three-year minimum mandatory sentence once a defendant is convicted of certain enumerated felonies. See State v. Sesler, 386 So. 2d 293 (Fla. 2d DCA 1980) (imposition of minimum sentence is a matter of legislative prerogative and is nondiscretionary). Moreover, the requirement in Pearce of a showing of judicial vindictiveness is absent in the case before us. In Wemett v. State, 567 So. 2d 882 (Fla. 1990), the court noted that a presumption of vindictiveness may not apply if the later sentence is imposed--as in the case at bar--by a different judge from the one who imposed the original. Accord Thomas v. State, 19 Fla. L. Weekly D1312 (Fla. 1st DCA June 14, 1994). Therefore, we have no reason to assume from this record that the trial court, in later imposing a minimum mandatory sentence, was acting vindictively rather than following the mandatory dictates of the statute.

AFFIRMED in part, REVERSED in part and REMANDED.

ZEHMER, C.J. and SMITH, J., CONCUR.