IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 85,221

RICHARD SMITH,
A/K/A HAROLD YOUELL,

Respondent.
_____/

ON DISCRETIONARY REVIEW OF THE
DISTRICT COURT OF APPEAL,
FIFTH DISTRICT

JURISDICTIONAL BRIEF OF PETITIONER

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STATEMENT OF THE CASE AND FACTS

Respondent was sentenced as a habitual offender after pleading guilty to burglary of a dwelling. Respondent signed a plea form which set forth that a hearing may be held to determine if respondent was a habitual felony offender, what the maximum sentence respondent was facing as a habitual offender and that he would not be eligible for gain time if found to be a habitual offender. The Fifth District Court of Appeal vacated the habitual offender sentence and remanded the case for resentencing. In doing so the court relied on Santoro v. State, 644 So. 2d 585 (Fla. 5th DCA 1994), and Thompson v. State, 638 So. 2d 116 (Fla. 5th DCA 1994). Smith v. State, 20 Fla. L. Weekly D404 (Fla. 5th DCA February 10, 1995). The state timely filed a notice to invoke discretionary jurisdiction of this court.

SUMMARY OF ARGUMENT

This court has accepted jurisdiction in Santoro, supra, and Thompson, supra, and the two cases, as well as several others, are currently pending review by this court. The Fifth district relied on those cases in reaching its decision. This court should accept jurisdiction in this case.

ARGUMENT

POINT ON APPEAL

THE DECISIONS RELIED UPON BY THE DISTRICT COURT IN VACATING THE SENTENCE IMPOSED ARE PENDING REVIEW BEFORE THIS COURT; THERE IS PRIMA FACIE EXPRESS CONFLICT AND THIS COURT SHOULD EXERCISE ITS JURISDICTION.

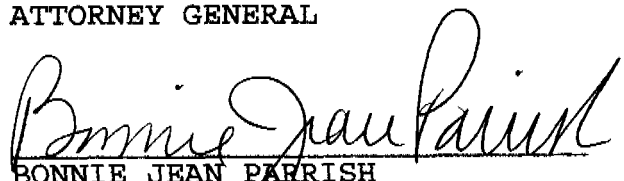
A district court decision that is either pending review in or has been reversed by this court constitutes prima facie express conflict and allows this court to exercise its jurisdiction. Jollie v. State, 405 So. 2d 418, 420 (Fla. 1981). In vacating the habitual offender sentence imposed in this case, the Fifth District relied upon Santoro, supra, and Thompson, supra. Both cases are currently pending review in this court. See case nos. 84,758 and 83,951 respectively. This court should exercise its jurisdiction in this case. Jollie, supra.

CONCLUSION

Based on the arguments and authorities presented herein, petitioner requests this court exercise its jurisdiction in this case.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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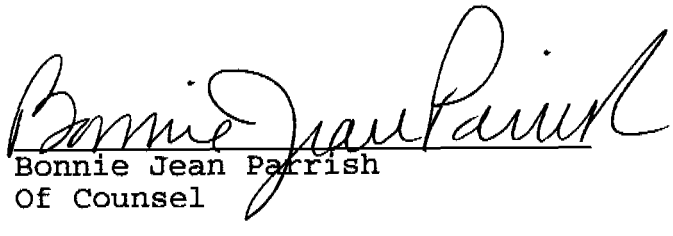
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Jurisdictional Brief of Petitioner has been furnished by delivery to Nancy Ryan, Assistant Public Defender, 112-A Orange Avenue, Daytona Beach, Florida 32114, this 15th day of March, 1995.



Bonnie Jean Parrish
Of Counsel

indictment. Therefore, the indictment charges the defendant with killing the victim simply by premeditated design. The question then becomes whether the unlawful killing of a human being which resulted from the unlawful distribution of a controlled substance, when such drug is the proximate cause of death, which is contained in subsection 3., differs in any substantial way with an unlawful killing resulting from the perpetration of one of the specified felonies contained in subsection 2.

The early legislative history and the theoretical basis of the *Knight* cases suggest there is no substantive difference. Prior to 1982 section 782.04(1)(a), Florida Statutes, contained in the same paragraph a list of underlying felonies including unlawful distribution of opium (a controlled substance). It was not until 1982 that the underlying felony of unlawful distribution of opium was separated into an individual subsection. The defendant's argument that the underlying felony in subsection 3. requires a different element, i.e., that the drug was the proximate cause of death, is without merit. Like the underlying felonies in subsection 2. the death results from the underlying felony of unlawful distribution of a controlled substance which substance is proven to be the proximate cause of death. When the underlying felony in subsection 3. is proven that felony stands in lieu of premeditation and like the felonies in subsection 2. is the legal equivalent to premeditation. Therefore, the legal theory in *Knight* applies and a charging document which charges premeditated murder should be sufficient to support a conviction for felony murder by unlawful distribution of a controlled substance. There is no evidence of a legislative intent to separate and elevate the underlying felony of unlawful distribution of a controlled substance from the other underlying felonies included in the statute. The Florida Supreme Court decided *Knight* in 1976. This decision was issued before the "editorial" change in 1982 and that decision applied to all the underlying felonies included in the 1976 version of section 782.04(1)(a), Florida Statutes, including the underlying felony of unlawful distribution of a controlled substance.

Accordingly, we grant certiorari review and quash the order of the trial court.

CERTIORARI GRANTED; ORDER QUASHED. (SHARP, W., and PETERSON, JJ., concur.)

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[1]The better method of charging the defendant would have been to allege two alternative methods of first degree murder in Count I, i.e., providing cocaine *or* strangulation. This method has been upheld. *King v. State*, 545 So. 2d 375 (Fla. 4th DCA), *rev. denied*, 551 So. 2d 462 (Fla. 1989).

[2]The 1981 version of section 782.04(1)(a), Florida Statutes (1981), contained the following language:

> 782.04 Murder. —
>
> (1)(a) The unlawful killing of a human being, when perpetrated from a premeditated design to effect the death of the person killed or any human being, or when committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any arson, sexual battery, robbery, burglary, kidnaping, aircraft piracy, or unlawful throwing , placing, or discharging of a destructive device or bomb, *or which resulted from the unlawful distribution of opium or any synthetic or natural salt, compound, derivative, or preparation of opium by a person 18 years of age or older, when such drug is proven to be the proximate cause of the death of the user,* shall be murder in the first degree and shall constitute a capital felony, punishable as provided in s. 775.082. (emphasis added).

The 1982 version of section 782.04(1)(a), Florida Statutes (Supp. 1982), contained the following language in a revised version:

> 782.04 Murder.—
>
> (1)(a) The unlawful killing of a human being:
>
> 1. When perpetrated from a premeditated design to effect the death of the person killed or any human being; or
>
> 2. When committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any:
>
> a. Trafficking offense prohibited by s. 893.135(1).
>
> b. Arson,
>
> c. Sexual battery,
>
> d. Robbery,
>
> e. Burglary,
>
> f. Kidnapping,
>
> g. Escape,
>
> h. Aircraft piracy, or
>
> i. Unlawful throwing, placing or discharging of a destructive device or bomb; or
>
> 3. *Which resulted from the unlawful distribution of opium or any synthetic or natural salt, compound, or opium or any synthetic or natural salt, compound derivative, or preparation of opium by a person 18 years of age or older, when such drug is proven to be the proximate cause of death of the user,*
>
> is murder in the first degree and constitutes a capital felony, punishable as provided in s. 775.082. (emphasis added).

[3]It could be argued that the "editorial" revisions in 1982 were adopted and approved by the Florida Legislature pursuant to and under the authority of the legislative direction in section 11.2421, Florida Statutes (1983), which incorporated the Florida Statutes of 1981 with amendments as the official law of the state. Ch. 83-61, § 1, Laws of Fla. *See Keegan v. State*, 553 So. 2d 797 (Fla. 5th DCA 1989), *rev. denied*, 564 So. 2d 487 (Fla. 1990). However, this enactment does not evince a legislative intent to elevate the underlying felony of unlawful distribution of a controlled substance to a separate and distinct category.

[4]*See also Armstrong v. State*, 642 So. 2d 730 (Fla. 1994); *Lovette v. State*, 636 So. 2d 1304 (Fla. 1994); *Young v. State*, 579 So. 2d 721 (Fla. 1991), *cert. denied*, __ U.S. __, 112. S. Ct. 1198, 117 L. Ed. 2d 438 (1992); *O'Callaghan v. State*, 429 So. 2d 691 (Fla. 1983); *Adams v. State*, 412 So. 2d 850 (Fla. 1982), *cert. denied*, 459 U.S. 882, 103 S. Ct. 182, 74 L. Ed. 2d 148 (1982); *Barton v. State*, 193 So. 2d 618 (Fla. 2d DCA 1966), *cert. denied*, 201 So. 2d 459 (Fla. 1967).

* * *

Criminal law—Sentencing—Habitual offender

RICHARD SMITH, a/k/a HAROLD YOUELL, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 94-1706. Opinion filed February 10, 1995. Appeal from the Circuit Court for Volusia County, John W. Watson, III, Judge. Counsel: James B. Gibson, Public Defender, and Lyle Hitchens, Assistant Public Defender, Daytona Beach, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Anthony J. Hall, Certified Legal Intern, and Belle B. Turner, Assistant Attorney General, Daytona Beach, for Appellee.

(PER CURIAM.) We vacate the habitual offender sentence imposed in this case and remand this cause for resentencing. *See Santoro v. State*, 644 So. 2d 585 (Fla. 5th DCA 1994); *Thompson v. State*, 638 So. 2d 116 (Fla. 5th DCA 1994), *rev. granted*, No. 83,951 (Fla. Nov. 23, 1994). *See also Cole v. State*, 640 So. 2d 1194 (Fla. 1st DCA 1994).

Sentence VACATED; cause REMANDED. (SHARP, W., GOSHORN and DIAMANTIS, JJ., concur.)

* * *

Criminal law—Counsel—Appointed—No error to fail to conduct *Nelson* inquiry given procedural posture of case and fact that speedy trial period had expired when defendant lodged complaint about counsel

PAUL TIMOTHY NEWELL, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 93-2872. Opinion Filed February 10, 1995. Appeal from the Circuit Court for Orange County, James C. Hauser, Judge. Counsel: James B. Gibson, Public Defender, and Daniel J. Schafer, Assistant Public Defender, Daytona Beach, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Kristen L. Davenport, Assistant Attorney General, Daytona Beach, for Appellee.

(PER CURIAM.) We affirm the convictions and sentences of defendant, Paul Timothy Newell ["Newell"].[1] The record shows that the lower court deemed Newell's complaints about his counsel at the inception of the trial to have been untimely. Speedy trial had run and the jury had been impaneled. The defendant refused to waive his rights under Florida Rule of Criminal Procedure 3.191. *Dukes v. State*, 503 So. 2d 455 (Fla. 2d DCA 1987). It was not reversible error to fail to conduct a *Nelson*[2] inquiry at the stage in the proceeding that the complaint was lodged. Given the procedural posture of the case and the fact that speedy trial had expired, it was unclear whether the court *could* have given any *Nelson* relief. If, in fact, defendant's counsel had not properly prepared for trial, appellant has recourse to post-conviction remedies for ineffective assistance of counsel.

AFFIRMED. (HARRIS, C.J., GRIFFIN and THOMPSON, JJ., concur.)