IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

JOHNNY BOOTH,

Respondent.
_____/

CASE NO. 85,661
5DCA CASE NO. 94-1268

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 resisting an officer with violence. 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). Booth v. State, 20 Fla. L. Weekly D858 (Fla. 5th DCA April 7, 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,

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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 11th day of May, 1995.

Bonnie Jean Parrish
Of Counsel

adjudication was withheld and she was placed on community control.

S.L.R. urges that the trial court erred in admitting the cocaine because the consensual stop became a "seizure" based on the conduct of the officers. It appears to be her position that when the officer stated that he would like her to give him any controlled substance that she might have, it was "a show of authority" which restrained her freedom of movement. She maintains that the she turned over the cocaine only because she thought she had to comply with his request.

The issue before us is whether the evidence supports the trial court's finding that S.L.R. voluntarily agreed to comply with the officer's request that she turn over any "controlled substance" that she might have in her possession. In *Florida v. Bostick*, 501 U.S. 429, 435, 111 S.Ct. 2382, 2386, 115 L.Ed.2d 389 (1991), the Supreme Court stated:

> [E]ven when officers have no basis for suspecting an individual, they may generally ask questions of that individual . . . and request consent to search . . . as long as the police do not convey a message that compliance with their request is required.

In the instant case, the officers' initial contact with the appellant when they approached her in the parking lot and asked if they could speak with her was consensual. Their actions and her agreement to answer their questions was an appropriate police/citizen encounter. Moreover, defense counsel conceded at trial that there was nothing wrong with the initial stop. But did the officer's subsequent request that S.L.R. turn over any controlled substance cross the line?

The United States Supreme Court faced a similar issue in *Bostick* and defined "the appropriate inquiry" as "whether a reasonable person would feel free to decline the officer's request or otherwise terminate the encounter." *Bostick*, 501 U.S. at 429. In discussing whether a defendant's cooperation with the police is voluntary, the court stated:

> "Consent" that is the product of official intimidation or harassment is not consent at all. Citizens do not forfeit their constitutional rights when they are coerced to comply with a request that they would prefer to refuse.

Id. at 438. In the instant case, S.L.R. does not contend that her path was blocked or that she was in any way prevented from merely walking away. So where is the intimidation, the harassment, or the coercion in this case?

The court in *Thames v. State*, 592 So. 2d 733, 735-36 (Fla. 1st DCA), *rev. denied*, 599 So. 2d 1280 (Fla. 1992), made the analysis most applicable to the facts of our case:

> [T]he record reflects that this initial stop was consensual. The dispute pertains to whether appellant consented to accompany the officers to the sheriff's office or whether his conduct constituted a mere submission to authority. As the trier of fact, it was the trial court's prerogative to determine this question, *Wade v. State*, 589 So. 2d 322 (Fla. 1st DCA 1991), and the court's resolution of such matters should not be disturbed on appeal unless clearly erroneous. *Jordon v. State*, 384 So. 2d 277, 279 (Fla. 4th DCA 1980). Upon application of the foregoing principles, together with the presumption of correctness due a trial court's ruling on a motion to suppress *Medina v. State*, 466 So. 2d 1046, 1049 (Fla. 1985); *State v. Pye*, 551 So. 2d 1237 (Fla. 1st DCA 1989), we conclude the trial court could find that appellant consented to accompany officers to the sheriff's office.[1]

By the same analysis, we conclude that, based on the testimony presented and on the court's unique ability to view the maturity and intelligence of S.L.R., an opportunity this court does not enjoy, the evidence supported the trial judge's finding that S.L.R.'s relinquishment of the cocaine was consensual.

AFFIRMED. (DAUKSCH and GOSHORN, JJ., concur.)

[1]The *Thames* court went on to say:

> The test for seizure of the person for fourth amendment purposes was set forth in *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S. Ct. 1870, 1877, 64 L. Ed. 2d 497 (1980), and was reaffirmed in *California v. Hodari D.*, __ U. S. __, 111 S. Ct. 1547, 113 L. Ed. 2d 690 (1991), as follows: "*Mendenhall* establishes that the test for existence of a 'show of authority' is an objective one: not whether the citizen perceived that he was being ordered to restrict his movement, but whether the officer's words and actions would have conveyed that to a reasonable person." Here, the trial court accepted the officer's version relating to the voluntariness of appellant's consent to go to the sheriff's office which, as trier of fact, the court was entitled to do. Under the officers' account of events, a reasonable person would not have considered his movement restricted.

* * *

Criminal law—Sentencing—Correction—Where guidelines departure sentence was previously affirmed on direct appeal, the legal sufficiency of reasons for departure has been established as law of the case, and the issue could not be raised in collateral attack on the sentence by using rule 3.850 or rule 3.800—Summary denial of rule 3.800(a) motion affirmed

WAYNE PULA, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 94-2904. Opinion filed April 7, 1995. 3.800 Appeal from the Circuit Court for Volusia County, Edwin P.B. Sanders, Judge. Counsel: Wayne Allen Pula, Punta Gorda, pro se. Robert A. Butterworth, Attorney General, Tallahassee, and Carmen F. Corrente, Assistant Attorney General, Daytona Beach, for Appellee.

(SHARP, W., J.) Pula appeals from the summary denial of his motion filed pursuant to Florida Rule of Criminal Procedure 3.800(a). He asserts that the departure reasons given by the trial judge for his sentence, which exceeds the permissible range, were legally insufficient. We affirm.

Pula previously filed a direct appeal in this court after he was convicted of second degree murder and sentenced to life in prison. The judgment and sentence were affirmed. *See Pula v. State*, 578 So. 2d 1115 (Fla. 5th DCA 1991). Pula also collaterally attacked the judgment by filing a motion pursuant to Florida Rule of Criminal Procedure 3.850. The trial court's denial was also affirmed by this court. *See Pula v. State*, 624 So. 2d 737 (Fla. 5th DCA 1993).

The validity of written reasons to support an upward departure from the permissible guidelines sentence is an issue that should and must be raised in the context of the direct appeal. Whether Pula challenged the departure reasons on direct appeal, the legal sufficiency of the reasons has been established as the "law of the case" and this issue cannot be raised in a collateral attack on the sentence by using rule 3.850 or rule 3.800. *Sanders v. State*, 621 So. 2d 723 (Fla. 5th DCA), *rev. denied*, 629 So. 2d 135 (Fla. 1993). *See also Gartrell v. State*, 626 So. 2d 1364 (Fla. 1993); *Blount v. State*, 627 So. 2d 576 (Fla. 2d DCA 1993).

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

* * *

Criminal law—Sentencing—Habitual offender—Notice in plea agreement that possibility exists that defendant may be sentenced as habitual offender was not sufficient to meet requirement that defendant be notified prior to plea of state's or court's intent to impose such sentence

JOHNNY BOOTH, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 94-1268. Opinion filed April 7, 1995. Appeal from the Circuit Court for Volusia County, William C. Johnson, Jr., Judge. Counsel: James B. Gibson, Public Defender, and M.A. Lucas, Assistant Public Defender, Daytona Beach, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Michael D. Crotty, Assistant Attorney General, Daytona Beach, for Appellee.

(SHARP, W., J.) Booth appeals from a judgment and sentence for resisting an officer with violence.[1] He pled guilty after entering into a plea agreement and entering into a dialogue with the trial judge. Subsequently, the court served notice on Booth that it intended to hold a hearing to sentence Booth as an habitual offender. Booth moved to withdraw his plea, which the trial judge denied. He adjudicated Booth guilty and sentenced him as an habitual felony offender. We vacate the sentence and remand for further proceedings.

The plea agreement in this case simply raised the possibility that Booth might be sentenced as an habitual offender. It provided:

> e. That a hearing may hereafter be set and conducted in this case to determine if I qualify to be classified as a Habitual Felony Offender or a Violent Habitual Felony offender, and:
>
> (1) That should I be determined by the Judge to be a Violent Habitual Felony Offender, and should the Judge sentence me as such, I could receive up to a maximum sentence of 10 years imprisonment and a mandatory minimum of 5 years imprisonment and that as to any habitual offender sentence I would not be entitled to receive any basic gain time.
>
> (2) That should I be determined by the Judge to be a Non-Violent Habitual Felony Offender, and should the Judge sentence me as such, I could receive up to a maximum sentence of 10 years imprisonment and a mandatory minimum of __ years imprisonment and that as to any habitual offender sentence I would not be entitled to receive any basic gain time.

Further, at the plea hearing, the judge asked Booth if he understood he could receive a sentence up to those maximum set forth in paragraphs 4(a) through (c) of the agreement, if Booth were found to be an habitual offender. Booth replied, "Yes." However, there was never any indication that the trial judge or the prosecution intended to pursue an habitual offender sentence.

A hearing was held on Booth's motion to withdraw his plea. He testified he did not think he would be sentenced as an habitual offender and that he entered his plea based on that understanding. He admitted he knew it was possible he could be found to be an habitual offender, but at the time he entered his plea, he did not think a hearing on that issue would be held.

This court has interpreted *Ashley v. State,* 614 So. 2d 486 (Fla. 1993) as requiring that a defendant be made aware, prior to entering a plea, either that the state intends to seek habitual offender treatment, or that the court intends to do so. *Thomspon v. State,* 638 So. 2d 116 (Fla. 5th DCA 1994). Giving notice that the possibility exists that a defendant may be sentenced as an habitual offender is not sufficient. *Santoro v. State,* 644 So. 2d 585 (Fla. 5th DCA 1994); *Jones v. State,* 639 So. 2d 147 (Fla. 5th DCA 1994); *Blackwell v. State,* 638 So. 2d 119 (Fla. 5th DCA 1994); *Thompson v. State,* 638 So. 2d 116 (Fla. 5th DCA 1994). We may not be correct in this interpretation of *Ashley* but as a court we are committed to it.

Accordingly, we vacate Booth's sentence in this case and remand to the trial court. At resentencing, the trial court should either sentence Booth pursuant to the guidelines (including a departure sentence), or, if the court believes a more severe sentence is necessary, it should allow Booth to withdraw his guilty plea and proceed to trial.

Judgment AFFIRMED; Sentence VACATED; REMANDED. (HARRIS, C.J., concurs. GOSHORN, J., dissents with opinion.)

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[1]§ 843.01, Fla. Stat. (1993).

(GOSHORN, J., dissenting.) I respectfully dissent for the reasons set forth in my dissent in *Thompson v. State*, 638 So. 2d 116 (Fla. 5th DCA 1994).

* * *

Torts—Limitation of actions—Error to dismiss, based on statute of limitations, action alleging federal civil rights violations, tortious interference with business relationship, and promissory estoppel—Complaint did not conclusively show when applicable statute of limitations began to run

RICHARD KHALAF, Appellant, v. CITY OF HOLLY HILL, a Florida municipal corporation, Appellee. 5th District. Case No. 94-0433. Opinion filed April 7, 1995. Appeal from the Circuit Court for Volusia County, William C. Johnson, Jr., Judge. Counsel: Eric A. Latinsky, Daytona Beach, for Appellant. David A. Vukelja, P.A., Ormond Beach, for Appellee.

(PER CURIAM.) Richard Khalaf appeals the trial court's order dismissing this action with prejudice. We respectfully disagree with the trial court's application of the statute of limitations to bar this action and, therefore, reverse and remand for further proceedings.

Rigby v. Liles, 505 So. 2d 598 (Fla. 1st DCA 1987), sets forth the applicable principles:

> . . . [T]he statute of limitations and laches are affirmative defenses which should be raised by answer rather than by a motion to dismiss the complaint; and only in extraordinary circumstances where the facts constituting the defense affirmatively appear on the face of the complaint and establish conclusively that the statute of limitations bars the action as a matter of law, should a motion to dismiss on this ground be granted.

Id. at 601. Because the instant complaint does not conclusively show when the applicable statute of limitations began to run on Khalaf's causes of action for (1) violation of 42 U.S.C. §§ 1983-1988, (2) tortious interference with a business relationship, and (3) promissory estoppel, it was error to dismiss this action.

Accordingly, we reverse the trial court's order and remand for further proceedings.[1]

REVERSED and REMANDED. (DAUKSCH and PETERSON, JJ., concur. SHARP, W., J., concurs without participation in oral argument.)

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[1]Although the City of Holly Hill raised several additional issues in its motion to dismiss, we decline to expand our review to those issues because they have not yet been addressed by the trial court. *See State v. Rawlins*, 623 So. 2d 598, 601 (Fla. 5th DCA 1993).

* * *

Criminal law—Habeas corpus petitioner who has previously challenged conviction and sentence several times is prohibited from filing any further pro se pleadings concerning that conviction and sentence

RICARDO LOPEZ JOHNSON, Petitioner, v. STATE OF FLORIDA, Respondent. 5th District. Case No. 95-572. Opinion filed April 7, 1995. Petition for Writ of Habeas Corpus. A Case of Original Jurisdiction. Counsel: Ricardo Lopez Johnson, Punta Gorda, pro se. No Appearance for Respondent.

(PER CURIAM.) The number thirteen proves unlucky for petitioner. That is the number of times he has attempted to attack in this court his 1989 conviction and sentence for attempted murder. "Enough is enough." *Isley v. State,* 20 Fla. L. Weekly D547 (Fla. 5th DCA Mar. 3, 1995). The petition for writ of habeas corpus is denied. In order to protect the limited judicial resources available to our citizens, we further prohibit petitioner from filing any further *pro se* pleadings with this court concerning his 1989 conviction and sentence. *In Re Anderson*, __ U.S. __, 114 S. Ct. 2671, 129 L. Ed. 2d 807 (1994).

WRIT DENIED. (SHARP, W., GRIFFIN and THOMPSON, JJ., concur.)

* * *

Criminal law—Consolidation—No error to consolidate misdemeanors and felony charge where all charges arose from single criminal episode—Sentencing—No error in sentencing defendant to consecutive terms in county jail for misdemeanor offenses

RICKY J. GOODLOE, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 94-1738. Opinion filed April 7, 1995. Appeal from the Circuit Court for Orange County, Richard F. Conrad, Judge. Counsel: James B. Gibson, Public Defender, and Kenneth Witts, Assistant Public Defender, Daytona Beach, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Mark S. Dunn, Assistant Attorney General, Daytona Beach, for Appellee.

(GOSHORN, J.) Ricky Goodloe appeals from the judgments and sentences entered for three misdemeanors arising from a high speed chase. We find his contention that the trial court abused its discretion by consolidating the misdemeanors with a related felony charge to be without merit because all charges arose from a single criminal episode. *See* Fla. R. Crim. P. 3.150(a).