ORIGINAL

IN THE

SUPREME COURT OF FLORIDA

WILLIE JOHNSON,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 88,664
DCA Case No. 95-1346

PETITIONER'S BRIEF ON JURISDICTION

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit
Criminal Justice Building
421 Third Street/6th Floor
West Palm Beach, Florida 33401
(407) 355-7600

Paul E. Petillo
Assistant Public Defender
Florida Bar No. 508438

Attorney for Willie Johnson

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FLORIDA CONSTITUTION

PRELIMINARY STATEMENT

Petitioner was the defendant in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, In and For Broward County, Florida, and the appellant in the District Court of Appeal, Fourth District. Respondent was the prosecution and appellee in the lower courts.

STATEMENT OF THE CASE AND FACTS

Petitioner was convicted of armed trespassing and grand theft of a firearm. He appealed to the Fourth District Court of Appeal and argued that these dual convictions violate double jeopardy.

On July 17, 1996, the Fourth District Court of Appeal affirmed Petitioner's dual convictions, stating in pertinent part:

> Neither are we persuaded that there was a double jeopardy violation occasioned by appellant's convictions for both armed trespassing and grand theft. Gaber v. State, 662 So. 2d 422 (Fla. 3d DCA 1995), rev. granted, ___ So. 2d ___ (Fla. Apr. 20, 1996). We acknowledge conflict on this issue with Marrow v. State, 656 So. 2d 579 (Fla. 1st DCA), rev. denied, 664 So. 2d 249 (1995).

Johnson v. State, Case No. 95-1346 (Fla. 4th DCA July 17, 1996).

Petitioner filed his notice of appeal July 26, 1996.

SUMMARY OF THE ARGUMENT

The Fourth District Court of Appeal's decision expressly and directly conflicts with Marrow v. State, 656 So. 2d 579 (Fla. 1st DCA), rev. denied, 664 So. 2d 249 (1995). Moreover, the Fourth District Court of Appeal affirmed on the authority of Gaber v. State, 662 So. 2d 422 (Fla. 3d DCA 1995), which is pending review in this Court. Either of these two factors establish conflict jurisdiction. Article V, § 3(b)(3), Fla. Const. See Jollie v. State, 405 So. 2d 418 (Fla. 1981).

ARGUMENT

THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH A DECISION OF ANOTHER DISTRICT COURT

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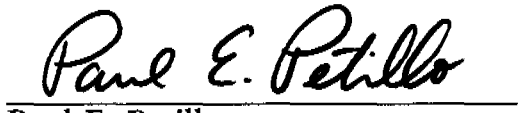
CONCLUSION

This Court should accept jurisdiction and order briefs on the merits from both parties.

Respectfully submitted,

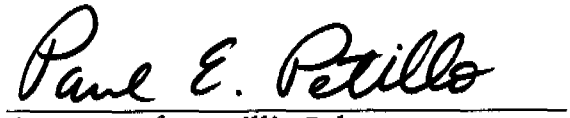
RICHARD JORANDBY
Public Defender
15th Judicial Circuit of Florida
Criminal Justice Building
421 Third Street\6th Floor
West Palm Beach, Florida 33401
(407) 355-7600



Paul E. Petillo
Assistant Public Defender
Florida Bar No. 0508438

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Aubin Wade Robinson, Assistant Attorney General, 1655 Palm Beach Lakes Blvd, Suite 300, West Palm Beach, Florida 33401 by courier this 26th day of July, 1996.



Attorney for Willie Johnson

IN THE

SUPREME COURT OF FLORIDA

WILLIE JOHNSON,

Appellant

vs.

STATE OF FLORIDA,

Appellee.

CASE NO.
DCA Case No. 95-1346

APPENDIX

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT JULY TERM 1996

WILLIE JOHNSON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 95-1346

Opinion filed July 17, 1996

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Robert J. Fogan, Judge; L.T. Case No. 93-19503CF10.

Richard L. Jorandby, Public Defender, and Paul E. Petillo, Assistant Public Defender, West Palm Beach, for appellant.

Robert A. Butterworth, Attorney General, Tallahassee; and Aubin Wade Robinson, Assistant Attorney General, West Palm Beach, for appellee.

POLEN, J.

Willie Johnson appeals his convictions and sentences for armed trespass, aggravated assault, and grand theft of a firearm. We affirm his convictions, but reverse on a sentencing issue.

On November 8, 1993, Kathy Thomas and Willie Johnson were discussing the possibility of their reunification. Thomas and Johnson were involved in the past, but Johnson had been in jail on charges unrelated to this appeal just prior to the night in question. About 10:00 p.m. that same evening, Jeffrey O'Connor arrived in his car. According to the testimony, O'Connor and Thomas had been romantically involved while Johnson was in prison. Upon his arrival, Thomas got into O'Connor's car and the two of them drove around the block.

Thomas and O'Connor returned and Johnson approached the car. Words were exchanged and Johnson reached inside the car and pulled out O'Connor's gun. According to Thomas, Johnson ordered both of them out of the car. Johnson ran to a nearby house and O'Connor ran down the street. Thomas stated that Johnson was pointing the gun at O'Connor.

The police arrived shortly thereafter and Johnson was arrested. He was tried and convicted of the above crimes, and this appeal ensued.

Johnson argues on appeal it was error to deny a requested instruction on voluntary intoxication. Yet at trial, he denied that he had been drinking. We find no error in the trial court's refusal to give the requested instruction.

Neither are we persuaded that there was a double jeopardy violation occasioned by appellant's convictions for both armed trespassing and grand theft of the same firearm. Gaber v. State, 662 So. 2d 422 (Fla. 3d DCA 1995), rev. granted, ___ So. 2d ___ (Fla. Apr. 20, 1996). We acknowledge conflict on this issue with Marrow v. State, 656 So. 2d 579 (Fla. 1st DCA), rev. denied, 664 So. 2d 249 (1995).

The only issue that requires reversal is the trial court's decision to impose a three-year firearm mandatory minimum sentence for armed trespass and grand theft. Under section 775.087(2)(a), Florida Statutes (1993), mandatory minimum sentencing does not apply to the offenses of grand theft or armed trespassing. As these two offenses are not specifically enumerated under the statute, it was error for the judge to use them as a basis for a mandatory three-year sentence, a point conceded by the state. Accordingly, we affirm the convictions, but remand for resentencing to delete the three-year mandatory minimum sentences.

GLICKSTEIN and SHAHOOD, JJ., concur.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy the Appendix has been furnished by courier to Aubin Wade Robinson, Assistant Attorney General, 1655 Palm Beach Lakes Blvd., Third Floor, West Palm Beach, Florida 33401 this 26th day of July, 1996.

Paul E. Petillo

Attorney for Willie Johnson