ORIGINAL

IN THE SUPREME COURT OF FLORIDA

DEREK ADSIDE,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

FSC CASE NO. 94,752

FIFTH DCA CASE NO. 97-672

ON DISCRETIONARY REVIEW FROM THE FIFTH DISTRICT COURT OF APPEAL

PETITIONER'S BRIEF ON JURISDICTION

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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CERTIFICATE OF FONT

I HEREBY CERTIFY that the font used in this brief is 14 point proportionally spaced CG Times.

SUSAN A. FAGAN
ASSISTANT PUBLIC DEFENDER

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STATEMENT OF THE CASE AND FACTS

Petitioner's Statement of the Case and Facts are set out in the instant decision as follows:

> (ANTOON,J.) Derek Adside appeals his convictions and sentences which were entered by the trial court after a jury found him guilty on five counts of burglary of a dwelling, one count of possession of burglary tools, and one count of loitering or prowling. He raises six claims of error, two of which merit discussion: (1) the claim that the trial court improperly permitted the state to submit similar fact evidence, and (2) the claim that the trial court improperly imposed a public defender lien and duplicative court costs as part of his sentence. However, we affirm Mr. Adside's convictions and sentences because there has been no showing of

reversible error in this case.

On July 20, 1996, at approximately 1:30 in the morning, a police officer observed Mr. Adside riding his bicycle into a condominium complex. After circling the area three times, Mr. Adside got off his bicycle and pushed it into shrubbery located in the center of the common area. He then walked into the carport of one of the living units, bent down, and looked into the driver's window of a parked automobile. He looked over the fence and into the courtyard area and pushed on the gate. The officer saw Mr. Adside move along the wall of the condominium unit in such a way as to avoid activating the light sensors. The officer lost sight of Mr. Adside for approximately forty-five seconds but, when he reappeared, he again pushed at the gate and jiggled the handle. This conduct formed the basis for the loitering or prowling charge.

During trial, the state called the owner of the condominium unit to testify regarding other uncharged events which had occurred during the two-week period of time prior to Mr. Adside's arrest in this case. The owner testified that the gate to her condominium had been opened during the night, her car had been broken into, and litter had been strewn around her condominium. Defense counsel objected to the admission of this testimony, arguing that the evidence was inadmissible because (1) the evidence was not offered to prove a relevant fact at issue, and (2) the state had failed to file written notice of its intent to use similar fact evidence as required by section 90.404 (2)(b)1, of the Florida Statutes (1995). The trial court overruled the objection and permitted the state to submit this testimony to the jury.

Mr. Adside maintains that the trial court erred in admitting the similar fact evidence. The state

responds by arguing that the testimony was relevant and thus admissible; however, the state fails to respond to the claim that the evidence was inadmissible because the state had failed to comply with the statutory notice requirement. See § 90.404 (2)(b)1., Fla. Stat. (1995). Since the state failed to provide timely notice of its intent to offer similar fact evidence, the trial court should have sustained defense counsel's timely objection. Nevertheless, the error in admitting this testimony was harmless in light of the overwhelming evidence of Mr. Adside's guilt. The evidence of guilt included Mr. Adside's two audio taped confessions in which he admitted in detail to committing all of the crimes charged. Furthermore, eye witnesses testified as to Mr. Adside's actions which gave rise to the loitering or prowling charge. Under these circumstances there is no reasonable possibility that the improper admission of the similar fact evidence contributed to Mr. Adside's convictions. See *Barbee v. State*, 630 So. 2d 655 (Fla. 5th DCA 1994); see also §§59.041, 924.33, Fla. Stat. (1995). Accordingly, we affirm Mr. Adside's convictions.

Mr. Adside next maintains the trial court erred in ordering him to pay court costs in each of the six cases and in imposing a public defender lien. He argues that he was only obligated to pay court costs on one case since the six cases had been consolidated for trial, and that the trial court erred in failing to give him notice and an opportunity to object before entering the public defender lien. These claims of error have been waived for purposes of appellate review because Mr. Adside failed to raise any objection to the imposition of these assessments during the sentencing hearing, and he failed to file a timely motion to correct his sentence pursuant to rule 3.800(b) of the Florida Rules of Criminal Procedure.

> Accordingly, we reject these claims of sentencing error as waived. See §924.051 (1)(b), Fla. Stat. (Supp. 1996).
>
> Having found no merit to any of the claims of reversible error raised by Mr. Adside in this appeal, we affirm his convictions and sentences.
>
> AFFIRMED. (DAUKSCH and HARRIS, JJ., concur.)

Adside v. State, 23 Fla. L. Weekly D2470-2471 (Fla. 5th DCA November 6, 1998) (Footnotes omitted). [Appendix A] Petitioner filed a motion for rehearing and/or certification which was denied by the Fifth District Court of Appeal on December 17, 1998. [See Appendices B and C] Notice to invoke this Court's discretionary jurisdiction was filed on January 19, 1999.

SUMMARY OF ARGUMENT

The instant decision rendered by the Fifth District Court of Appeal is in direct and express conflict the district court decisions of Denson v. State, 711 So. 2d 1225 (Fla. 2d DCA 1998); Nelson v. State, 23 Fla. L. Weekly D2241 (Fla. 1st DCA October 1, 1998); and Dodson v. Smith, 710 So. 2d 159 (Fla. 1st DCA 1998), rev. granted, Fla. S. Ct. Case number 93,077. These decisions permit the appellate court to address on direct appeal the type of patent, fundamental sentencing errors such as those at issue in the instant case, namely, the failure of the trial court to advise the Petitioner of the imposition of a Public Defender lien and the imposition of nonstatutory authorized court costs.

Accordingly, Petitioner would respectfully request that this Court accept jurisdiction in this cause due to the Fifth District panel's decision being in direct and express conflict with the aforementioned decisions.

ARGUMENT

THE INSTANT DECISION OF THE FIFTH DISTRICT COURT OF APPEAL IS IN DIRECT AND EXPRESS CONFLICT WITH DECISIONS OF THE FIRST, AND SECOND DISTRICT COURTS OF APPEAL.

The instant panel decision rendered by the Fifth District Court of Appeal directly and expressly conflicts with decisions of the First District in Dodson v. State, 710 So. 2d 159 (Fla. 1st DCA 1998), and Nelson v. State, 23 Fla. L. Weekly D2241 (Fla. 1st DCA October 1, 1998), and the Second District in Denson v. State, 711 So. 2d 1225 (Fla. 2d DCA 1998). Specifically, the panel decision sub judice held the trial court's imposition of a Public Defender fee and nonstatutory authorized court costs were not addressable on appeal based on the lack of any objection being lodged at the trial level. Adside v. State, 23 Fla. L. Weekly D2470-71 (Fla. 5th DCA November 6, 1998).

As pointed out by the First District in Dodson v. State, 710 So. 2d 159, 161 (Fla. 1st DCA 1998):

> We fail to see how the wrongful imposition of a nominal discretionary attorney's fee lien can be deemed any more fundamental than wrongful incarceration.

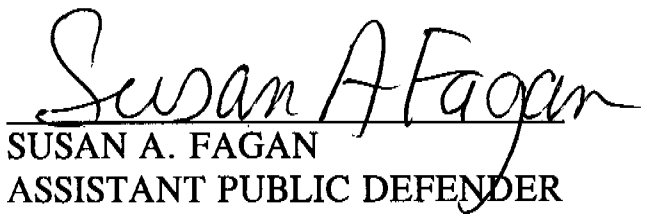
Similarly, the Second District held:

"... the legislature is not authorized to restrict [the Appellate Court's] scope or standard of review in an unreasonable manner that eliminates out judicial discretion to order the correction of illegal sentences and other serious, patent sentencing errors" [Footnote omitted] Denson v. State, 711 So. 2d 1225, 1230 (Fla. 2d DCA 1998). See also Nelson v. State, 23 Fla. L. Weekly D2241 (Fla. 1st DCA October 1, 1998) [Illegal sentences constituting fundamental error addressable for first time on appeal although error not brought to the attention of trial court at the time of sentencing] In sum, based on the aforementioned authorities being in direct and express conflict with the instant decision rendered by the Fifth District, this Court should accept jurisdiction in this cause.

CONCLUSION

For the reasons expressed herein, Petitioner respectfully requests this Honorable Court to exercise its discretionary jurisdiction and grant review of the Fifth District Court of Appeal's decision in this cause.

Respectfully submitted,
JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT



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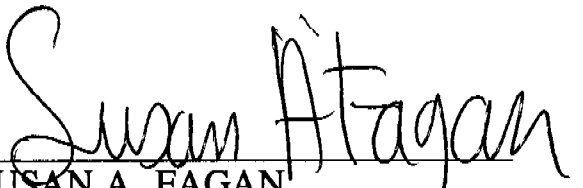
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand-delivered to the Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Boulevard, 5th Floor, Daytona Beach, FL 32118, via his basket at the Fifth District Court of Appeal and mailed to: Mr. Derek Adside, DC# X01968, Madison Correctional Institution, P.O. Box 692, Madison, FL 32341, this 29th day of January 1999.



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