ORIGINAL

OCT 20 REC'D
By
Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

SOLOMON WISE,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

FILED
DEBBIE CAUSSEAUX
OCT 20 1999
CLERK, SUPREME COURT
BY

CASE NO. 96760

FIFTH DCA CASE NO. 98-3 123

**ON DISCRETIONARY REVIEW FROM THE FIFTH DISTRICT COURT OF APPEAL**

PETITIONER'S BRIEF ON JURISDICTION

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

SUSAN A. FAGAN
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 0845566
112 Orange Ave.
Daytona Beach, FL 32114
**(904) 252-3367**

ATTORNEY FOR PETITIONER

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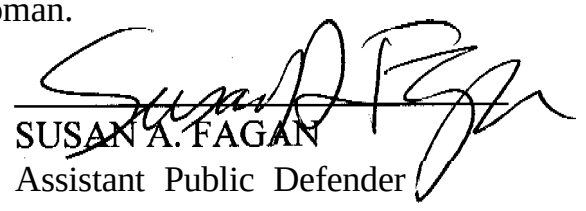
CERTIFICATE OF FONT

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



SUSAN A. FAGAN
Assistant Public Defender

# TABLE OF CITATIONS

IN THE SUPREME COURT OF FLORIDA

| | | |
|---|---|---|
| SOLOMON WISE, | ) | |
| | ) | |
| Petitioner, | ) | |
| | ) | |
| vs. | ) | CASE NO. |
| | ) | |
| STATE OF FLORIDA, | ) | FIFTH DCA CASE NO. 98-3 123 |
| | ) | |
| Respondent. | ) | |
| | ) | |

## STATEMENT OF THE CASE

The Petitioner, Solomon Wise, was charged by the state, in an information filed on February 27, 1998, with possession of cocaine and driving with a suspended or revoked license. (R 55) On May 6, 1998, the Petitioner filed a motion to suppress certain evidence seized by the police as a result of an illegal detention and seizure of the Petitioner by the police. (R 81) A hearing was held on the motion to suppress on August 24, 1998, before Circuit Judge Warren Burk. (R 48-53) At the conclusion of the hearing, the trial court denied the Petitioner's motion to suppress. (R 52-53, 99)

The Petitioner entered a plea of no contest to both of the charged offenses, specifically reserving his right to appeal the trial court's ruling on the motion to suppress. (R 1-8, 1 00- 10 1) The Petitioner received two concurrent sentences of 18 months probation for the charged offenses. (R 14- 16, 109- 116)

The Petitioner timely filed a notice of appeal on November 16, 1998. (R 118) The office of the Public Defender was appointed to represent the Petitioner in this appeal on November 17, 1998. (R 124- 125)

The Fifth District Court of Appeal affirmed the Petitioner's judgments and sentences in Wise v. State, 24 Fla. L. Weekly D 2113 (Fla. 5th DCA September 10, 1999) [Appendix A] Petitioner filed a notice to seek this Court's discretionary jurisdiction on October 7, 1999.

## STATEMENT OF THE FACTS

Deputy Clifton Singleton testified that at approximately 1:30 in the morning he and another deputy investigated a small red Nissan vehicle parked in front of an empty residence. (R 22-23) According to Deputy Singleton, when he and another deputy began to look through the window of the vehicle with a flashlight, the Petitioner came out of a residence next to the empty residence and approached the deputies. (R 23) Deputy Singleton further testified that the Petitioner explained he did not know how the vehicle got there and had not had any contact with the vehicle. (R 24) Subsequent to this, Deputy Singleton spoke with the owner of the vehicle, Christina Mick, and who did not have a driver's license. (R 24)

Deputy Singleton next testified that, at approximately 5:30 that same morning, he saw what he thought was the same red Nissan traveling around in another area in Merritt Island which prompted him to stop the vehicle in order to determine if Ms. Mick was driving. (R 24-25) This could not be determined from viewing the vehicle, according to Deputy Singleton, because of the vehicle having tinted windows. (R 25) Deputy Singleton additionally testified that, upon stopping the vehicle, he discovered the Petitioner was actually the driver of the vehicle, who he had also previously learned had a suspended driver's license. (R 25-26) Upon arresting the Petitioner and searching the vehicle, Deputy Singleton discovered a small white tissue under the driver's seat containing crack cocaine. (R 26-27)

## SUMMARY OF THE ARGUMENT

This Honorable Court has discretionary jurisdiction, pursuant to Jollie v. State, 405 So. 2d 4 18 (Fla. 198 1), to review the instant case where the Fifth District Court of Appeal cited in its opinion to a case which is currently pending review with this Court.

## ARGUMENT

THIS COURT HAS JURISDICTION TO REVIEW THE INSTANT CASE PURSUANT TO JOLLIE V. STATE, 405 So. 2d 418 (Fla. 1981).

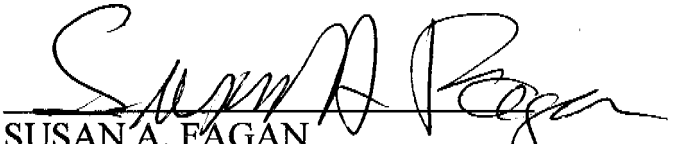
On appeal to the Fifth District Court of Appeal, Petitioner argued that the trial court erred by imposing a sentence, beyond the statutory maximum for the misdemeanor offense of driving with a suspended license, and that certain special conditions of the Petitioner's written probation orders should be stricken since they were not orally pronounced by the trial court at sentencing. On September 10, 1999, the Fifth District issued its opinion affirming Petitioner's sentences. See, Wise v. State, 24 Fla. L. Weekly D 2113 (Fla. 5th DCA September 10, 1999) [See Appendix A] The District Court directly cited the decision in Maddox v. State, 708 So.2d 6 17 (Fla. 5th DCA 1998), which is currently pending for review with this Court in case number 95, 805, rev. granted 718 So.2d 169 (Fla. 1998). This Honorable Court has discretionary jurisdiction to accept the instant case pursuant to Jollie v. State, 405 So.2d 4 18 (Fla. 198 1).

## CONCLUSION

Petitioner respectfully requests this Honorable Court to exercise its discretionary jurisdiction and accept the instant case for review.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT



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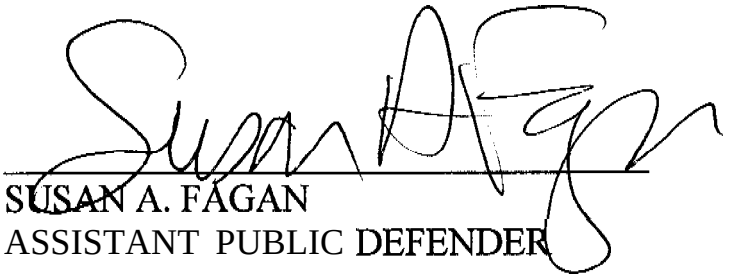
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to: The Honorable Robert A. Butter-worth, Attorney General, 444 Seabreeze Blvd., Fifth Floor, Daytona Beach, FL 32 118 via his basket at the Fifth District Court of Appeal and mailed to: Solomon Wise, P. 0. Box 1 1 13, Cape Canaveral, FL 32920, this 18th day of October, 1999.



SUSAN A. FAGAN
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF FLORIDA

| | | |
|---|---|---|
| WILLIE SANDERS, | ) | |
| | ) | |
| Petitioner, | ) | |
| | ) | |
| vs. | ) | CASE NO. 96,398 |
| | ) | |
| STATE OF FLORIDA, | ) | |
| | ) | |
| Respondent. | ) | |

**JURISDICTIONAL BRIEF OF PETITIONER**

APPENDIX

APPENDIX A --Wise v. State, 24 Fla. L. Weekly D 2113 (Fla. 5th DCA September 10, 1999)

JAMES B. GIBSON
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shelves evidencing a struggle; a bruise and bite mark on the victim mother; the distraught appearance of both mother and daughter; and the belligerent attitude of the defendant at the scene.

In the instant case the hearsay testimony was supported by the officer's description of the distraught appearance of the victim when the officer responded to a 911 call; the officer described the physical appearance of the victim's wounds to her arm and mouth; and photographs of the victim's wounds were introduced into evidence. Morris is directly on point and is dispositive.

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

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'The state also argues that the officer's testimonv as to what White had told her constituted an exception to the hearsay rule as an "excited utterance" pursuant to section 90.803(2), Florida Statutes (1997). The trial court made no such finding. however, and we therefore reject this argument by the state.

* * *

Criminal **law-Where in initial trial jury acquitted defendant of charge of burglary with assault or battery while** armed with a **firearm and could not reach a verdict on charge of** first **degree murder, and subsequent information charged defendant with second degree murder and carrying concealed firearm, court should have dismissed charge of carrying concealed firearm because of defendant's prior acquittal of related offense of burglary while armed with a firearm**

ROBERT FIELDS, Appellant. v. STATE OF FLORIDA. Appellee. 5th District. Case No. 98-2762. Opinion filed September 10, 1999. Appeal from the Circuit Court for Seminole County, Kenneth R. Lester, Judge. Counsel: James B, Gibson, Public Defender, and A. S. Rogers, Assistant Public-Defender. Daytona Beach, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Carmen F. Corrente, Assistant Attorney General, Daytona Beach. for Appellee.

(COBB, J.) Fields was charged with first degree murder and burglary with an assault or battery while armed with a firearm. A jury acquitted Fields of the latter count but could not reach a verdict in respect to the murder count.

After the first trial the state filed an information charging Fields with second degree murder and added a second count: carrying a concealed firearm. Fields moved to dismiss the second count. His motion was denied, and at a second trial he was convicted of both counts. The issue on appeal is whether the concealment charge should have beendismissedbecause of Fields' prior acquittal of the related offense of burglary while armed with a firearm.

Florida Rule of Criminal Procedure 3.15 l(c) provides:

> When a defendant has been tried on a charge of 1 of 2 or more related offenses, the charge of every other related offense shall be dismissed on the defendant's motion unless a motion by the defendant for consolidation of the charges has been previously denied, or unless the defendant has waived the right to consolidation, or unless the prosecution has been unable, by due diligence, to obtain sufficient evidence to warrant charging the other offense or offenses.

Fields relies on the opinion in *Franklin* v. *State, 7* 19 So. 2d 938 (Fla. 1st DCA 1998). In that case the defendant was originally charged with DUI manslaughter and leaving the scene of an accident resulting in death. At his first trial, he was acquitted of the leaving-the-scene charge and the jury was unable to reach a verdict on the DUI manslaughter charge. The state subsequently filed an information charging the defendant with the reiterated charge DUI manslaughter and with the new charge of leaving the scene of an accident with injuries (in addition to a person being killed in the accident, another person was injured). The First District held that the trial court erred in failing to dismiss the charge of leaving the scene of an accident with injuries based on the authority of Florida Rule of Criminal Procedure 3.15 1 (c). The court held:

> This case fits squarely under rule 3.15 1 (c). The arrest and booking reports and informations clearly show that appellant was unaware of the charges of leaving the scene of an accident involving injury until after the first trial when he was acquitted of leaving the scene of an accident resulting in death. There can be no argument that the charges are not "related offenses," because they arise from the same automobile accident and could be tried in the same court. See Fla. R. Crim. P. 3.151(a). Moreover, it isundisputed that appellant did not file a previous motion for consolidation; nor did he waive his right to consolidation, and there is no showing that the prosecution was unable, by due diligence, to obtain sufficient evidence to warrantcharging the other offense. See Fla. R. Crim. P. 3.151(c).

*Id.* at 940. The *Franklin* court noted the Fourth District's discussion of Rule 3.151 in *State v. Harris, 357 So.* 2d 758 (Fla. 4th DCA 1978); including the fact that the purpose of the Rule is to protect defendants fromsuccessive prosecutions based upon essentially the same conduct. *Franklin* at *940; See Harris* at 759.

We agree with Fields that this case fits squarely within the rule. Clearly, the concealment charge and the burglary while armed with a firearm are related offenses: no motion for consolidation or waiver is present here; and there has been no showing that the prosecution, by due diligence, was unable to obtain sufficient evidence to bring the concealment charge against Fields prior to the first trial . Indeed, there was testimony at that trial by a state witness in regard to such concealment .

We reverse the judgment and sentence in regard to the concealmentcount and remand for resentencing with a revised scoresheet.

REVERSED AND REMANDED. (DAUKSCH and GOSHORN, JJ., concur.)

* * *

HARDY v. STATE. 5th District. #99-2317. September 10, 1999. 3.800 Appeal from the Circuit Court for St. Johns County. See Stevens v. *State*, 65 1 So. 2d 1298 (Fla. 5th DCA 1995).

AFFIRMED.

BIRKHEAD v. BOARD OF ADJUSTMENT OF CITY OF COCOA BEACH. 5th District. #99-1569. September 10, 1999. Petition for Certiorari Review of Decision from the Circuit Court for Brevard County. DENIED. *Ammons v. Okeechobee County, 710 So.* 2d 641 (Fla. 4th DCA 1998).

JONES v. STATE. 5th District. #99-1158. September 10, 1999. Appeal from the Circuit Court for Seminole County. AFFIRMED. See *Smith* v. *State*, 683 So. 2d 577 (Fla. 5th DCA 1996), *rev.* dismissed, 691 So. 2d 1081 (Fla. 1997).

TONEY v. STATE. 5th District. #98-3234. September 10, 1999. Appeal from the Circuit Court for Brevard County. AFFIRMED. See *Holmes v. State, 374* So.2d 944 (Fla. 1979); *Blackshear v. State, 480* So.2d 207 (Fla. 1st DCA 1985).

WISE v. STATE. 5th District. #98-3123. September 10, 1999. Appeal from the Circuit Court for Brevard County. AFFIRMED. *Maddox v. State, 708 So.* 2d 617 (Fla. 5th DCA), review *granted*, 718 So. 2d 169 (Fla. 1998).

GREENE v. STATE. 5th District. #98-2843. Septembe 10, 1999. Appeal from the Circuit Court for Volusia County. AFFIRMED. See *State* v. *Law*, 559 So. 2d 187 (Fla. 1989).

HILLYER v. STATE. 5th District. #98-2249. September 10, 1999. Appeal from the Circuit Court for Volusia County. AFFIRMED. See *Speed v. State, 732* So.2d 17 (Fla. 5th DCA 1999).

BURNSIDE v. STATE. 5th District. #97-2884. September 10, 1999. Appeal from the Circuit Court for Citrus County. AFFIRMED. See *Lovette* v. *State*, 636 So. 2d 1304 (Fla. 1994).

* * *

JERRAME HOESTEINE, Petitioner, v. STATE OF FLORIDA, Respondent. 5th District. Case No. 99-1664. Opinion filed September 3, 1999. Petition for Writ of Prohibition, William T. Swigert, Respondent Judge. Counsel: Tania Z. Alavi of Alavi & Bird, P.A., Ocala for Petitioner. Robert A. Butterworth, Attorney General, Tallahassee, and Wesley Heidt, Assistant Attorney General, Daytona Beach, for Respondent.

CORRECTED OPINION

[Original Opinion at 24 Fla. L. Weekly D2059b]

[Editor's note: The first name of the Petitioner has been corrected.]

* * *

IMBEAU v. STATE, 4th District. #99-2087. September 8, 1999. Appeal of order denying rule 3.800(a) motion from the Circuit Court for the Seventeenth Judicial Circuit, Broward County. Affirmed. See § 921.001(5), Fla. Stat. (1997).

LAKES v. STATE. 4th District. #s 98-2321, 98-2322 & 98-2323. September 8. 1999, Consolidated appeals from the Circuit Court for the Seventeenth Judicial Circuit, Broward County. Affirmed. *Nix v. William. 467 U.S.* 431 (1984); *Maulden* v. *State*, 617 So. 2d 298. 301 (Fla. 1993).