Filing # 125931571 E-Filed 04/30/2021 12:06:57 PM

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC20-506
Lower Tribunal Nos. 3D18-165;
132014CF0129410001XX

RECEIVED, 04/30/2021 12:07:34 PM, Clerk, Supreme Court

ROBERT VELAZCO,

Petitioner,

STATE OF FLORIDA,

Respondent,

ON REVIEW FROM THE DISTRICT COURT OF APPEAL
THIRD DISTRICT, STATE OF FLORIDA

PETITIONER'S JURISDICTIONAL BRIEF

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STATEMENT OF THE ISSUES[1]

ISSUE I

PETITIONER'S CONVICTIONS AND SENTENCES FOR BOTH DUI CAUSING SERIOUS BODILY INJURY AND DUI CAUSING PROPERTY DAMAGE VIOLATED DOUBLE JEOPARDY AND THE THIRD DISTRICT COURT'S DECISION THAT THEY DO NOT IS CERTIFIED TO BE IN DIRECT CONFLICT WITH THE FOURTH DISTRICT COURT'S DECISION IN *ANGUILLE V. STATE*, 243 SO. 3D 410 (FLA. 4TH DCA 2018)

ISSUE II

THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DETERMINED A STATE'S WITNESS WAS UNAVAILABLE AND PERMITTED THE STATE TO PLAY HER VIDEOTAPED DEPOSITION TESTIMONY OVER VELAZCO'S OBJECTION

[1]This Court's jurisdiction is invoked based on Issue I. Should this Court grant review, Petitioner also intends to raise Issue II which was raised and argued before the Third District Court. *Green v. Cottrell*, 204 So. 3d 22, 29 (Fla. 2016) ("[O]nce this Court accepts jurisdiction over a case to resolve a legal issue in conflict, it may consider any other issue that is properly raised and argued").

STATEMENT OF THE CASE AND FACTS

Petitioner was charged by Amended Information with leaving the scene of an accident involving serious bodily injury in violation of Florida Statute § 316.027(2)(b) (Count 1); driving under the influence causing serious bodily injury in violation of Florida Statute § 316.193(3)(c)(2) (Count 2); driving under the influence with damage to property or person in violation of Florida Statute § 316.193(3)(a)(b)(c)(1) (Count 3); and failure to obey a traffic control device (Count 4). The alleged victim charged in Count 2 - DUI causing serious bodily injury - was Alexander Rodas. Count 3 charged Petitioner with DUI causing damage to Rodas' scooter. *Velazco v. State*, 3D18-1065, slip opinion at 2; 3 (Fla. 3d DCA Feb. 19, 2020).

More than a year prior to trial the State sought to perpetuate the testimony of Leticia Suri. According to the State, Suri was an essential witness who may become unavailable because she undergoes dialysis three times a week and had been hospitalized. *Id*. at 4. On the morning of trial the State moved *in limine* to introduce the videotaped deposition of Suri arguing she was unavailable. The trial court granted the State's motion finding Suri was unavailable. *Id*. at 4. Petitioner was convicted of leaving the scene of an accident with serious bodily injury, DUI causing serious bodily injury *to Rodas*,

and DUI causing damage to *Rodas*' property. *Id*. at 4.

Petitioner appealed to the Third District Court of Appeal. He raised two issues. Petitioner argued the trial court abused its discretion when it determined Suri was unavailable. Petitioner argued that while Suri had ongoing health issues, the State proffered only that Suri was "sick" on the day of the trial. Suri was the only person who testified Petitioner was driving (and she was in the passenger seat) of the vehicle that struck the victim. *Id*. at 3. Petitioner argued any error in permitting the State to play the video of her deposition instead of requiring live testimony was not harmless and required a new trial. The Third District Court of Appeal affirmed finding the State sufficiently demonstrated Suri's unavailability at the time of trial. *Id*. at 16.

Relying on *Anguille v. State*, 243 So. 3d 410 (Fla. 4th DCA 2018), Petitioner also argued that his convictions for both DUI causing serious bodily injury to victim Rodas in violation of § 316.193(3)(c)(2) and DUI causing damage to Rodas' property in violation of § 316.193(3)(c)(1) could not stand. In that case the Fourth District Court of Appeals reviewed the propriety of convictions for "both DUI and reckless driving with serious bodily injury, DUI and reckless driving with property damage, DUI with serious bodily injury and property damage as to the same victim, and reckless driving with serious

bodily injury and property damage to the same victim." *Id*. at 412. The *Anguille* Court determined that because convictions for DUI with serious bodily injury and DUI with property damage to the same victim are degrees of the same offense, convictions for both violate double jeopardy. Although Petitioner's facts are identical to those in *Anguille* on this issue, the Third District Court determined that Petitioner's convictions for both DUI with serious bodily injury and DUI with damage to the same victim's property does not violate double jeopardy. It certified conflict with *Anguille*.

JURISDICTIONAL STATEMENT

This Court has discretionary jurisdiction to review a decision of a district court of appeal that expressly and directly conflicts with a decision of the supreme court or another district court of appeal. Fla. R. App. P. 9.030(a)(2)(A)(iv); Fla. Const. Art. V, § 3(b)(3).

ARGUMENT

PETITIONER'S CONVICTIONS AND SENTENCES FOR BOTH DUI CAUSING SERIOUS BODILY INJURY AND DUI CAUSING PROPERTY DAMAGE VIOLATED DOUBLE JEOPARDY AND THE THIRD DISTRICT COURT'S DECISION THAT THEY DO NOT IS CERTIFIED TO BE IN DIRECT CONFLICT WITH THE FOURTH DISTRICT COURT'S DECISION IN *ANGUILLE V. STATE*, 243 SO. 3D 410 (FLA. 4TH DCA 2018)

The Third District Court of Appeal determined that Petitioner's convictions for DUI serious bodily injury and DUI property damage, arising out of the same criminal incident, do not violate double jeopardy. Although the Third District Court noted that § 775.021(4)(b) sets forth exceptions to "the intent to 'convict and sentence [separately] for each criminal offense committed in the course of one criminal episode or transaction,' " it nonetheless found that none of the exceptions apply. In doing so, the Third District Court applied this Court's analysis in *Valdes v. State*, 3 So. 3d 1067 (Fla. 2009) (adopting Justice Cantero's opinion in *State v. Paul*, 934 So.2d 1167 (Fla.2006) which set forth examples of degree-variants) to conclude that DUI with serious bodily injury and DUI with property damage are not degree variants of the same offense. *Id*. at 10-15. Notably, Chief Judge Emas, also relying on *Valdes* and *Paul* came to the exact opposite conclusion in his dissent. *Id.* at 21-32.

As the Third District Court concedes, and expressed, its decision in this case directly conflicts with the decision from the Fourth District Court that holds that "since the offenses of DUI with serious bodily injury and DUI with property damage as they relate to one victim are degrees of the same offense as provided by statute, the convictions for both cannot stand." *Anguille*, 243 So. at 415. The Fourth District Court properly applied this Court's decision in *Valdes* when it analyzed whether the two are degrees of the same offense and thus fall under the § 775.021(4)(b)(2) exception. Thus, this Court should affirm the Fourth District Court's decision by accepting discretionary review and quashing the contrary decision of the District Court below.

CONCLUSION

This Court has discretionary jurisdiction to review the decision below. Petitioner respectfully requests that this Court exercise this discretion, quash the Third District Court's decision and vacate Petitioner's conviction for DUI with property damage.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed electronically and provided via the ePortal to Assistant Attorney General Rachel Kamoutsas, PL-01, The Capitol, Tallahassee, Florida 32399, at crimappmia@myfloridalegal.com, this 30th day of April, 2021.

/s/ Michael Mirer
MICHAEL MIRER, ESQ.

CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENT

I HEREBY CERTIFY that the foregoing computer-generated motion is in Arial 14-point font in compliance and contains 984 words.

/s/ Michael Mirer
MICHAEL MIRER, ESQ.