

IN THE SUPREME COURT OF FLORIDA

CHRISTOPHER PRYOR,

Petitioner,

CASE NO. SC23-593

v.

STATE OF FLORIDA,

Respondent.

**ON DISCRETIONARY REVIEW FROM THE
DISTRICT COURT OF APPEAL
SECOND DISTRICT OF FLORIDA**

BRIEF OF RESPONDENT ON JURISDICTION

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TABLE OF CONTENTS

	<u>PAGE NO.</u>
TABLE OF CONTENTS.....	1
TABLE OF CITATIONS	2
STATEMENT OF THE ISSUE	3
STATEMENT OF THE CASE AND FACTS	3
ARGUMENT	4
PETITIONER HAS FAILED TO ASSERT ANY GROUNDS WHICH ESTABLISH A BASIS FOR THE COURT’S EXERCISE OF JURISDICTION.....	4
CONCLUSION.....	14
CERTIFICATE OF COMPLIANCE.....	15

TABLE OF CITATIONS

Cases

<u>Bybee v. State</u> , 295 So. 3d 1229, 1232 (Fla. 2d DCA 2020)	6
<u>Castillo v. State</u> , 217 So. 3d 1110 (Fla. 3d DCA 2017)	6
<u>Dresner v. City of Tallahassee</u> , 164 So. 2d 208, 212 (Fla. 1964)	5
<u>F.B. v. State</u> , 852 So. 2d 226, 230 n.2 (Fla. 2003)	1
<u>Florida Ins. Guar. Ass'n, Inc. v. Devon Neighborhood Ass'n, Inc.</u> , 67 So. 3d 187, 189 (Fla. 2011)	5
<u>Hamilton v. State</u> , 71 So. 3d 247 (Fla. 4th DCA 2011)	6
<u>Hoffman v. Jones</u> , 280 So. 2d 431, 439 (Fla. 1973)	12
<u>Matthews v. State</u> , 363 So. 2d 1066, 1067–68 (Fla. 1978)	4
<u>Mullins v. State</u> , 974 So. 2d 1135, 1137 (Fla. 3d DCA 2008)	2
<u>Pryor v. State</u> , 2023 WL 2777195, at *4-6 (Fla. 2d DCA Apr. 5, 2023)	1
<u>Sanders v. State</u> , 765 So. 2d 778 (Fla. 1st DCA 2000)	2
<u>Spencer v. State</u> , 216 So. 3d 11, 14 (Fla. 1st DCA 2015)	2
<u>Stanford v. State</u> , 833 So. 2d 174, 176 (Fla. 3d DCA 2002)	10
<u>State v. Barnum</u> , 921 So. 2d 513, 523 (Fla. 2005), as revised on denial of reh'g (Feb. 9, 2006)	11
<u>Steiger v. State</u> , 328 So. 3d 926, 929 (Fla. 2021)	8
<u>T.E.B. v. State</u> , 338 So. 3d 290 (Fla. 4th DCA 2022)	6
<u>Wallace v. Dean</u> , 3 So. 3d 1035, 1039 (Fla. 2009)	4
<u>Wheeler v. State</u> , 296 So. 3d 895, 897 (Fla. 2020)	4

Other Authorities

§775.084, Florida Statutes	8
§790.23(1)(a), Fla. Stat. (2019)	8
Art. V, § 3(b)(3), Florida Constitution	4
Fla. R. App. P. 9.045(b)	16

STATEMENT OF THE ISSUE

The sole issue presented is whether the Second District Court of Appeal's application of this Court's precedent directly and expressly conflicts with decisions from sister courts. Pryor v. State, 48 Fla. L. Weekly D678 (Fla. 2d DCA Apr. 5, 2023); F.B. v. State, 852 So. 2d 226, 230 n.2 (Fla. 2003). In F.B., the Court addressed the limited circumstances in which an Appellant can directly appeal an unpreserved claim under a fundamental error theory. F.B., 852 So. 2d at 230. Petitioner challenges the Second District's application of this precedent to his case. As discussed below, no other issue is properly before the Court.

STATEMENT OF THE CASE AND FACTS

Petitioner stands convicted for possession of a firearm by a Violent Career Criminal (VCC). On appeal, the district court affirmed the conviction and sentence, despite finding that the juvenile escape conviction upon which the State relied to support Pryor's VCC status was "not a qualifying offense under section 775.084(1)(d)1." Pryor, 48 Fla. L. Weekly at D678. The court concluded that Pryor did not satisfy the fundamental error standard governing unpreserved "sufficiency of the evidence" claims. Pryor, 48 Fla. L. Weekly at D678. Pryor failed to establish that "the evidence was

insufficient to prove that he committed any crime at all,” as discussed in Spencer v. State, 216 So. 3d 11, 14 (Fla. 1st DCA 2015), which itself quoted Sanders v. State, 765 So. 2d 778 (Fla. 1st DCA 2000) and F.B., 852 So. 2d at 230. Pryor, 48 Fla. L. Weekly at D678. Accordingly, the court found that Pryor did not satisfy the exception to the contemporaneous objection rule and could not obtain relief on direct review from an unpreserved “sufficiency of the evidence” claim. Pryor, 48 Fla. L. Weekly at D678. This ruling did not analyze the F.B. decision or otherwise comment on the decision’s viability, logic, clarity, reasoning or holding.

ARGUMENT

PETITIONER HAS FAILED TO ASSERT ANY GROUNDS WHICH ESTABLISH A BASIS FOR THE COURT’S EXERCISE OF JURISDICTION.

“[T]he Florida Supreme Court is a court of limited jurisdiction, with authority to hear only those matters specified in Florida's Constitution.” Mullins v. State, 974 So. 2d 1135, 1137 (Fla. 3d DCA 2008). Pursuant to Florida’s Constitution, this Court has jurisdiction to review a decision of a District Court of Appeal under certain, narrowly defined, circumstances. Among these limited bases is a decision which “expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law.” Art. V, § 3(b)(3), Florida Constitution.

Absent satisfaction of an enumerated basis under Article V, a claim is not cognizable and provides no basis for this Court's exercise of its jurisdiction.

Petitioner seeks to bypass this stricture and have this Court exercise its jurisdiction in the present case. Petitioner challenges the Second District's opinion affirming his judgment and sentence. He argues that the State's evidence was insufficient to establish possession of a firearm by a VCC, because that offense requires three qualifying prior offenses and the State only succeeded in proving two. The ruling under review in this case did not expressly validate a Florida statute, construe a constitutional provision, or "affect a class of constitutional or state officers." Art. V, § 3(b)(3), Florida Constitution. The only potential basis for this Court to exercise jurisdiction would be conflict between the lower courts or with this Court's precedent. However, no such conflict exists.

Preservation & Scope of Jurisdictional Claim

As argued below, nothing in this case supports review under a theory of express and direct conflict. However, in advance of its response to the conflict claim, Respondent seeks to clarify the scope of the question before the Court.

In addition to the conflict claim raised herein, Petitioner directly challenges the reasoning and validity of the F.B. decision itself and invites

this Court to reconsider its ruling. The argument attacking the F.B. opinion is barred for lack of preservation, sheds no light on the conflict issue before the Court and warrants no consideration.

The challenge to the F.B. ruling asserted by Petitioner was not presented to the court of appeal. The Second District's opinion did not analyze or interpret the F.B. decision, or otherwise announce a rule of law. Wallace v. Dean, 3 So. 3d 1035, 1039 (Fla. 2009)(identifying circumstances where district court opinion "announce[s] a rule of law that conflicts with the Court's precedent as one of "two principle circumstances that support [Court's] jurisdiction to review district-court decisions based upon alleged express-and-direct conflict."). To the contrary, the Second District merely appended the citation to those from the First District Court of Appeal cases addressing the fundamental error issue upon which the court relied.

Florida's constitution makes clear that "the basis for jurisdiction be 'expressed' in the district court's decision." Wheeler v. State, 296 So. 3d 895, 897 (Fla. 2020). This is not the type of "unusual" case where an unpreserved argument is properly raised before the Court. Matthews v. State, 363 So. 2d 1066, 1067–68 (Fla. 1978)(argument which was unpreserved in the trial court, but argued and ruled upon by the appellate

court, could be raised in the Supreme Court). Instead, it is a circumstance where the highest court in Florida with authority to consider the question, did not do so. Dresner v. City of Tallahassee, 164 So. 2d 208, 212 (Fla. 1964)(discussing requirement to “exhaust Florida's available appellate remedies” and obtain ruling “rendered by the highest court in Florida in which such a decision could have been had.”).

While this Court’s jurisdiction can be based on a conflicting application of its’ own precedent, conflict jurisdiction cannot rest on a challenge to the continued viability of the Supreme Court decision itself. Florida Ins. Guar. Ass'n, Inc. v. Devon Neighborhood Ass'n, Inc., 67 So. 3d 187, 189 (Fla. 2011)(“Misapplication of our precedent provides a basis for express and direct conflict jurisdiction.”). Thus, Petitioner’s argument challenging F.B. on its face is not a recognized basis for the Court’s exercise of its jurisdiction, is irrelevant to the question before the Court and should not be considered in deciding Petitioner’s conflict claim.

Lack of Conflict with Fundamental Error Precedent

The conflict issue before the Court arises from a VCC sentence imposed for Petitioner’s unlawful possession of a firearm. To establish one of the three prior offenses necessary to support a VCC enhancement, the State relied on an escape offense committed when Petitioner was a

juvenile. Under 790.235, Florida Statutes, both adult and juvenile offenses that qualify under 775.084, Florida Statutes, can support a VCC designation. The Second District concluded that the specific juvenile offense upon which the State relied did not correlate with those enumerated in section 775.084, Florida Statutes. However, Petitioner did not preserve this claim at trial. Consequently, the District Court conducted its review under a fundamental error standard.

Relying on Bybee v. State, 295 So. 3d 1229, 1232 (Fla. 2d DCA 2020) and Spencer, 216 So. 3d at 14, which both quoted F.B., the Second District concluded that “in the context of fundamental error. . .the appellant must show that the evidence was insufficient to prove that he committed any crime at all.” Pryor, 48 Fla. L. Weekly at D678. Citing section 790.23, Florida Statutes, the Second District determined that “[o]n this record, Mr. Pryor fail[ed] to demonstrate that he committed no crime.” Pryor, 48 Fla. L. Weekly at D678; §790.23(1)(a), Fla. Stat. (2019)(“It is unlawful for any person to own or to have in his or her care, custody, possession, or control any firearm[or], ammunition ... if that person has been ... [c]onvicted of a felony in the courts of this state”). Petitioner submits that this decision expressly and directly conflicts with T.E.B. v. State, 338 So. 3d 290 (Fla. 4th DCA 2022), Castillo v. State, 217 So. 3d 1110 (Fla. 3d DCA 2017) and

Hamilton v. State, 71 So. 3d 247 (Fla. 4th DCA 2011). This claim fails to state a basis for the Court's exercise of its jurisdiction.

Alleged Conflict Cases

Petitioner cites two cases out of the Fourth District Court of Appeal as being in express and direct conflict with the present case. Neither of these cases present a conflict upon which to predicate review. In T.E.B., a juvenile appealed two felony battery convictions, citing defense counsel's erroneous concession that "prior juvenile withhold of adjudication for battery could [] serve as a predicate prior conviction for felony battery." T.E.B., 338 So. 3d at 295. "[S]ince the prior delinquency could not 'be deemed a conviction'" for purposes of enhancing a simple battery charge to felony battery, the court found that "there was no plausible justification or strategic reason for trial counsel to agree that the withhold of adjudication for battery served as a predicate for felony battery." T.E.B., 338 So. 3d at 295. Thus, the T.E.B. court ruled that counsel's error prejudiced T.E.B. who "was adjudicated guilty of two counts of felony battery rather than two counts of simple battery." T.E.B., 338 So. 3d at 295. Finding that "it was fundamental error to convict of a greater crime where there was no proof of underlying elements," the Fourth District reversed the felony battery convictions and "remand[ed] for the trial court to adjudicate appellant guilty

of two counts of simple battery.” T.E.B., 338 So. 3d at 291. T.E.B. cited F.B. for the proposition that “an argument that the evidence is totally insufficient as a matter of law to establish the commission of a crime need not be preserved.” T.E.B., 338 So. 3d at 295.

Critically, T.E.B.’s analysis considered, on direct appeal, the question of counsel’s ineffectiveness. T.E.B., 338 So. 3d at 294 (“Appellant also argues. . .that defense counsel was ineffective. . .The state agrees that if this court finds ineffective assistance, it should reverse and remand for entry of simple battery.”). The Fourth District released T.E.B. six months after this Court ruled in Steiger v. State, that questions of ineffectiveness should not be considered on direct appeal absent fundamental error. Steiger v. State, 328 So. 3d 926, 929 (Fla. 2021).

Finding fundamental error arising from counsel’s ineffectiveness, the Fourth District remanded for judgment on the lesser charges. In this case, Appellant did not raise, and the Second District did not consider, an ineffectiveness claim on direct appeal. Accordingly, it affirmed the convictions, because the evidence established that a crime had been committed, “without prejudice to his challenging the possession of a firearm by a VCC conviction on collateral review. See Fla. R. Crim. P. 3.850.” Pryor, 48 Fla. L. Weekly at D678. Differences in the questions presented

between T.E.B. and Pryor prevent the conclusion that the decisions expressly and directly conflict.

A decade earlier, the Fourth District also addressed a fundamental error claim by remanding for entry of a judgment on the lesser included offense. Hamilton, 71 So. 3d at 248. There, the State charged Hamilton, who brandished a toy gun, with armed robbery. The court held that it was “compelled to reverse,” quoting F.B.’s finding that “evidence [which] is totally insufficient. . .to establish . . .a crime...[is] fundamental error.” Hamilton, 71 So. 3d at 248. Thus, the court remanded for the trial court to enter judgment on the lesser included offense. Hamilton, 71 So. 3d at 248.

The Hamilton decision reflects a focus on the F.B. Court’s second expression of its ruling, rather than its first. In F.B., the Court laid out the two exceptions to the preservation requirement. It identified “[t]he second exception to the requirement that claims of insufficiency of the evidence must be preserved occurs when the evidence is insufficient to show that a crime was committed **at all.**” F.B., 852 So. 2d at 230(emphasis added). The Court cited two decisions as examples of this rule. It then concluded its reasoning, as follows: “Thus, an argument that the evidence is totally insufficient as a matter of law to establish the commission of a crime need not be preserved.” Id.

Both the Second District, here, and the First District's Spencer case, upon which Pryor relies, focus on the Court's assertion that fundamental error occurs when a defendant is convicted, but no crime has been committed "at all." Pryor, 48 Fla. L. Weekly at D678; Spencer, 216 So. 3d at 14. The decisions discussed in F.B. involved convictions for two separate offenses when only one offense occurred. Such a "complete failure of the evidence meets the requirements of fundamental error." F.B., 852 So. 2d at 230. These instances are distinct from circumstances when the State charges a greater offense, and the evidence only establishes a lesser offense. In such cases, "the state's failure to prove all elements of a charged offense does not constitute 'fundamental error' which may be raised for the first time on appeal." Sanders, 765 So. 2d at 778; Spencer, 216 So. 3d at 14 (citing Sanders); Stanford v. State, 833 So. 2d 174, 176 (Fla. 3d DCA 2002)(discussing First District precedent and distinguishing a "challenge to the sufficiency of the evidence" to "a challenge to the state's absolute failure to prove an essential element of the charged offense.").

In the third case upon which Petitioner relies, the State charged second degree murder by "beating and/or striking [the victim] repeatedly with a deadly weapon, to wit: a bat and/or a stick and/or a rock." Castillo, 217 So. 3d at 1112–13). Castillo challenged this sentence enhancement.

Trial testimony from one witness placed Castillo at the attack without a weapon. Castillo, 217 So. 3d at 1112–13. Another admitted to giving a prior inconsistent statement that he saw Castillo “repeatedly hit the victim with a long stick” but recanted at trial. Id. The court reasoned that the prior inconsistent statement to police did not constitute substantive evidence and reversed the sentence reclassification. Id. at 1115. The court affirmed Castillo's conviction.

Relying on F.B., the court found no evidence at all of the sentencing enhancement factor. Thus, it affirmed the judgment, and remanded for an adjusted sentence. Here, the evidence was not absent, rather, arguably insufficient. Petitioner does not challenge that the State established two of the three prior offenses which qualify towards sentencing enhancement. Incomplete evidence is a distinguishing factor between Castillo and Pryor; one that prevents a finding of express and direct conflict.

In Summary

This Court has consistently observed that it “has no jurisdiction to simply and routinely review the district court decisions,” “in the absence of conflict with another district court decision or a decision of this Court. . .or some other Florida constitutional basis.” State v. Barnum, 921 So. 2d 513, 523 (Fla. 2005). The Court “is without power to simply assume jurisdiction

in a case to correct what [it] perceive[s] as error, even if the issue appears to be important. . .” State v. Barnum, 921 So. 2d at 523. Nor it is “the proper function of this Court to decide unripe issues, without the benefit of adequate briefing, not involving an actual controversy, and unrelated to a specific factual situation.” Hoffman v. Jones, 280 So. 2d 431, 439 (Fla. 1973).

The challenged opinion does not reflect any of the jurisdictional bases which authorize Supreme Court review. The distinct circumstances between and among the district court opinions counter any assertion of express and direct conflict which would entitle Petitioner to review by this Court. Accordingly, the Second District Court of Appeal’s ruling is final and not subject to consideration or reversal.

CONCLUSION

Based on the authorities and arguments presented herein, the State respectfully requests this Court reject jurisdiction in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has filed and served to Richard J. Sanders, Esq., Assistant Public Defender, P.O. Box 9000 - Drawer PD, Bartow, FL 33831 appealfilings@pd10.org rsanders@pd10.org and cclark@pd10.org and filed electronically via Florida Court's E-Filing Portal on the 25th day of May 2023.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing is in compliance with the font and word count requirements of Fla. R. App. P. Rules 9.045(b) and 9.210(a)(2). The size and style of type used in this brief is 14-point Arial. This brief contains 2,479 words.

/s/ Cerese Crawford Taylor