ORIGINAL

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC00-1646

THE STATE OF FLORIDA,

Petitioner,

-vs-

DARIOUS DAVIS,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

PETITIONER'S BRIEF ON JURISDICTION

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INTRODUCTION

The Petitioner, the State of Florida, (hereinafter referred to as the 'State") was the Appellee below. The Respondent, Darious Davis (herein after referred to as "Defendant") was the Appellant below. The letter "A." will designate the appendix to this brief.

STATEMENT OF TYPE SIZE AND FONT

The size and style of type used in this brief is 12 point Courier New.

STATEMENT OF THE CASE AND FACTS

The Defendant was found guilty of (1) Robbery Using Deadly Weapon or Firearm and (2) Burglary with Assault or Battery therein while Armed. The trial court determined that the Defendant qualified as both a Prison Releasee Reoffender under Fla. Stat. 775.082(8) and a Habitual Violent Offender under Fla. Stat. 775.084(4). The Defendant appealed his conviction and sentence raising four grounds in his Initial Brief. The Defendant claimed that the trial court erred in (1) denying his motion to suppress as to the show-up identification, (2) instructing the jury as to its request to have witness testimony explained, (3) sentencing Defendant as a Prison Releasee Reoffender based on a predicate youthful offender conviction, and (4) sentencing the Defendant as both a Prison Releaseee Reoffender and a Habitual Violent Felony Offender. The Defendant also filed a Supplemental Brief claiming that the notice of intent to seek an enhanced penalty was insufficient as to a Prison Releasee Reoffender Sentence. The Third District Court of Appeal affirmed the Defendant's conviction but reversed his sentence based on ground (4), the Defendant's

allegation that he was sentenced as both a Prison Releasee Reoffender and a Habitual Felony Offender.. (A. 1)

In reversing the Defendant's sentence on this ground the Third District Court of Appeal rejected the State's argument that the Defendant was only sentenced as Prison Releasee Reoffender, and indicated that because the record was not clear as to this point the matter must be remanded for resentencing. In so ruling, the Third District also determined that the State had conceded that it would be error to sentence the Defendant as both a Prison Releasee Reoffender and a Habitual Felony Offender under double jeopardy grounds raised in the Defendant's brief. (A. 1)

The State filed a Motion for Rehearing claiming that it had not conceded that such dual enhanced sentences would be a violation of double jeopardy when it acknowledged contrary authority from Fourth District Court of Appeal. Adams v. State, 750 So.2d 659 (Fla. 4th DCA 1999). Also in its Motion for Rehearing, the State pointed to authority from the First and Second District Courts of Appeal which held that it would not be a violation of double jeopardy to sentence a defendant under two enhancement statutes. Finally, the State argued that the Third District's opinion in this case was in direct conflict with its own recent decision in Alfonso v. State, 2000 WL 485049, Case No. 3D99-618 (Fla. 3d DCA April 26,

2000) (rejecting the Fourth District's holding in Adams and certifying conflict). The Third District denied the State's request for a rehearing.

QUESTIONS PRESENTED

WHETHER THE DECISION OF THE LOWER COURT EXPRESSLY AND DIRECTLY CONFLICTS WITH THE FIRST DISTRICT'S DECISION IN SMITH V. STATE, 754 So.2d 100 (Fla. 1st DCA 2000) AND THE SECOND DISTRICT'S DECISION IN GRANT V. STATE, 745 So. 2d 519 (Fla. 2nd DCA 1999), review granted, (Fla. Apr. 12, 2000)?

SUMMARY OF THE ARGUMENT

In the present case, the Third District Court of Appeal acknowledged that it is error for a defendant who qualifies for sentencing under both statutes to be sentenced as both a Prison Releasee Reoffender under Fla. Stat. 775.082(8) and a Habitual Violent Offender under Fla. Stat. 775.084(4).

This decision is in express and direct conflict with Grant v. State, 745 So.2d 519 (Fla. 2nd DCA 1999), review granted, (Fla. Apr. 12, 2000) and Smith v. State, 754 So.2d 100 (Fla. 1st DCA 2000). Both the First and Second District Courts of Appeal held that a defendant could be sentenced as both a prison release re-offender and as a habitual felony offender without violating double jeopardy concerns.

ARGUMENT

THE DECISION OF THE LOWER COURT EXPRESSLY AND DIRECTLY CONFLICTS WITH THE FIRST DISTRICT'S DECISION IN SMITH V. STATE, 754 So.2d 100 (Fla. 1st DCA 2000) AND THE SECOND DISTRICT'S DECISION IN GRANT V. STATE, 745 So. 2d 519 (Fla. 2nd DCA 1999), review granted, (Fla. Apr. 12, 2000).

In the instant case, the Third District ruled that it would be error for the trial court to have sentenced the Defendant as both a Prison Releasee Reoffender under Fla. Stat. 775.082(8) and a Habitual Violent Offender under Fla. Stat. 775.084(4). In so ruling, the Third District created an express and direct conflict with Grant v. State, 745 So.2d 519 (Fla. 2nd DCA 1999), review granted, (Fla. Apr. 12, 2000) and Smith v. State, 754 So.2d 100 (Fla. 1st DCA 2000).

In Grant, the Second District Court of Appeal held that the defendant's separate sentences as a prison release re-offender and as a habitual felony offender did not violate double jeopardy concerns. Similarly in Smith, the First District Court of Appeal held that the defendant's sentences as both a habitual felony offender and a prison release re-offender did not violate double jeopardy concerns.

Based on this conflict, this Court should exercise its discretionary jurisdiction and accept this case for review.

CONCLUSION

WHEREFORE, based on the preceding authorities and arguments, the State respectfully requests that the Court exercise its discretionary jurisdiction to review this cause.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing PETITIONER'S BRIEF ON JURISDICTION was furnished by mail to KENNETH **WEISMAN,** Esq. and PHILIP L. REIZENSTEIN, Attorneys for Appellee, **1471** N.W. 14th Street, Miami, Florida, 33125, on this 8th day of August, 2000.

GARY K. MILLIGAN
Assistant Attorney General

APPENDIX 1

NOT FINAL UNTIL TIME EXPIRES
TO **FILE REHEARING MOTION**
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JANUARY TERM, A.D. 2000

DARIOUS DAVIS, **

Appellant, **

vs. ** CASE NO. 3D98-3286

THE STATE OF FLORIDA, ** **LOWER TRIBUNAL NO.** 98-1417

Appellee. **

Opinion filed May 17, 2000.

An Appeal from the Circuit Court for Miami-Dade County, Leonard E. Glick, Judge.

Philip L. Reizenstein and Kenneth L. Weisman, for appellant.

Robert A. Butterworth, Attorney General, and Gary K. Milligan, Assistant Attorney General, for appellee.

Before **LEVY, FLETCHER,** and RAMIREZ, **JJ.**

PER CURIAM.

Appellant Darious Davis appeals his conviction and sentence for armed robbery. We affirm the conviction, but reverse and remand on the sentencing point.

On January 13, 1998, a seventy-one year old woman was robbed

at gunpoint upon entering her parked vehicle. Approximately two hours after the robbery, a show-up identification was conducted in the street near the home where Davis and the co-defendant were arrested after the victim identified Davis as her assailant. Davis' motion to suppress the victim's identification of him was denied. We find no merit in Davis' motion to suppress the show-up identification and affirm the trial court's denial of suppression.

Davis also challenges a portion of the trial judge's instructions given to the jury prior to deliberations. After giving the standard jury instructions, the judge stated:

> There are some times when jurors say: "[w]ell, what did witness number 3 say when they said this or what did they mean when they said that?" You're basically asking us to tell you again what somebody said or to interpret what somebody said in the courtroom. The law doesn't allow us to answer those kinds of questions. You have to rely upon your recollection of what the person said when they testified. You have to rely upon that and the instructions on the law that you have been given the, way they are.

We find that the trial court erred by instructing the jury that the law did not allow the court to read back testimony. See Fla. R. Crim. P. 3.410. This preemptive instruction by the trial judge was obviously intended to deter any requests to have testimony read back. While it is understandable that no trial judge wishes to encourage read-back requests, given the mandate of rule 3.410, it is error to discourage them. In our view, however, this error does not constitute fundamental error. Therefore, as the issue was not preserved by defense counsel with an objection to the

offending instruction, it has been waived for appellate purposes. See Diaz v. State, 567 So. 2d 18, 19 (Fla. 3d DCA 1990).

Finally, Davis challenges his sentences as both a prison release re-offender pursuant to section 775.082(8), Florida Statutes (1999), and a habitual violent felony offender pursuant to section 775.084(4), Florida Statutes (1999). The State agrees that it would be error to sentence Davis under both statutes, but claims that Davis was sentenced only as a prison release re-offender. We are unable to determine from the record whether the State is correct; therefore, we must reverse on the sentencing issue and remand to the trial court to ensure that the record clearly reflects that Davis was not sentenced as a habitual viblent felony offender.

Affirmed in part, reversed in part and remanded.