IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner/Appellee,

v.

CARDELL ADAMS,

Respondent/Appellant.

CASE NO. 2000-18
DCA CASE No. 98-3338

RESPONDENT'S ANSWER BRIEF ON DISCRETIONARY JURISDICTION

RICHARD L. JORANDBY
Public Defender

ANTHONY CALVELLO
Assistant Public Defender
15th Judicial Circuit of Florida
Florida Bar No. 266345
Attorney for Cardell Adams
The Criminal Justice Building
421 Third Street, 6th Floor
West Palm Beach, Florida 33401
(561) 355-7600

CERTIFICATE OF TYPE SIZE AND STYLE

In accordance with the Florida Supreme Court Administrative Order, issued on July 13, 1998, and modeled after Rule 28-2(d), Rules of the United States Court of Appeals for the Eleventh Circuit, counsel for Respondent, Mr. Cardell Adams, hereby certifies that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately.

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PRELIMINARY STATEMENT

Respondent, Mr. Cardell Adams, was the Defendant and Petitioner, State of Florida, was the Prosecution in the Criminal Division of the Circuit Court of the 17th Judicial Circuit, In and For Broward County, Florida.

In the brief, the parties will be referred to as they appear before this Honorable Court.

The symbol "R" will denote Record on Appeal

The symbol "T" will denote jury trial.

STATEMENT OF THE CASE AND FACTS

Respondent, Mr. Cardell Adams,' accepts Petitioner's Statement of the Case and Facts as found in Petitioner's brief on jurisdiction with the following addition:

Respondent, Cardell Adams, was charged and convicted of burglary of an occupied dwelling, R 5-6, 27. Prior to Respondent's sentencing hearing, Petitioner-State filed a written Notice to have Respondent declared a habitual felony offender. R 7. In addition, Petitioner-State filed a separate written Notice to have Respondent declared a Prison Releasee Reoffender pursuant to section 775.082. R 9.

At the conclusion of the sentencing hearing, the Trial Judge found that Respondent qualified for sentencing as a Prison Releasee Reoffender pursuant to section 775.082(8) (a) (2), ***Florida Statutes*** (T 312-313) and as a habitual felony offender pursuant to Section ***775.084, Florida Statutes.*** T 313-314. "The court then sentenced appellant [Respondent] to a total of thirty years. The judge specified that the first fifteen years would be served as a PRR. Under the prison releasee reoffender statute, the maximum term for the offense committed by appellant is fifteen years. See § 775.082(8)(a)2.c. The last fifteen years were to be served as an HFO, for which he would receive full credit for time served. The

Prison Releasee Reoffender Act does not allow any type of early release, including gain time. See § 775.082(8)(b). In contrast, a defendant sentenced as a habitual felony offender is eligible for early release after completing at least 85% of his sentence. See §§ 775.084(4)(j); 944.275(4)(b)." ***Adams v. State,*** 24 Fla. L. Weekly D2394(Fla.4th Oct. 20,1999). See Appendix.

SUMMARY OF ARGUMENT

This Honorable Court does not have authority pursuant to Article V, Section 3(b) (3) of the *Florida* ***Constitution*** to review this decision of the Fourth District Court of Appeal because the decision does not expressly and directly conflict with a decision of another District Court of Appeal on the same question of law.

ARGUMENT

THIS DECISION OF THE FOURTH DISTRICT COURT OF APPEAL DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH THE DECISION OF ANOTHER DISTRICT COURT OF APPEAL.

This Honorable Court has authority pursuant to Article V, Section 3(b)(3) of the *Florida Constitution (1980)* to review a decision of a district court of appeal that expressly and directly conflicts with a decision of another district court of appeal or the Supreme Court on the same question of law. *See The Florida* **Star** *v. B.J.F.*, 530 So. 2d 286, 288 (Fla. 1988). This Court in *Mancini v. State, 312* So, 2d 732, 733(Fla. 1975), made clear that its "jurisdiction to review decisions of courts of appeal because of alleged conflicts is invoked by (1) the announcement of a rule of law which conflicts with a rule previously announced by this court or another district, or (2) the application of a rule of law to produce a different result in **a** case which involves substantially the same facts as a prior case. In this second situation, the **facts of the case** are of the utmost importance." [Emphasis Added].

At bar, Respondent, Mr. Cardell Adams was sentenced to thirty (30) years in prison as a habitual felony offender and fifteen (15) years in prison as a prison releasee reoffender. The Fourth

District explained in its opinion: " The court then sentenced appellant [respondent] to a total of thirty years. The judge specified that the first fifteen years would be served as a PRR. Under the prison releasee reoffender statute, the maximum term for the offense committed by appellant is fifteen years. See § 775.082(8)(a)2.c. The last fifteen years were to be served as an HFO, for which he would receive full credit for time served." *Adams v. State, supra.*

The case cited by Respondent in support of their request for conflict jurisdiction ***Grant v. State,24*** Fla. L. Weekly D2627 (Fla. 2d DCA Nov. 24, 1999), is factually distinguishable from the instant case. Respondent, Cardell Adams, received a thirty (30) year habitual felony offender sentence and a concurrent fifteen (15) year Prison Releasee Reoffender sentence. In contrast, Mr. Grant was sentenced to a concurrent term of 15 years in prison as a habitual felony offender and 15 years as a Prison Releasee Reoffender. The Second District explained:

> Lastly, Grant argues that his sentence violates double jeopardy because it consists of two separate sentences as a prison releasee reoffender and as a habitual felony offender for a single offense. However, the final judgment and sentence clearly reflects that Grant received **one sentence of fifteen years as a habitual felony offender with a minimum**

> **mandatory term of fifteen years as a prison releasee reoffender.** Minimum mandatory sentences are proper as long as they run concurrently, See Jackson v. State, 659 So.2d **1060**, 1061-62 (Fla.1995). Moreover, Moreland v. State, cited by Grant, is distinguishable because in that case the defendant actually received two alternative sentences. see 590 so. 2d 1020, 1021 (Fla. 2d DCA 1991) (defendant **was** sentenced to life in prison with a twenty-five year minimum mandatory as **a** habitual offender or to life under the guidelines, whichever **was** less). **Because the minimum mandatory sentence runs concurrently to the habitual felony offender sentence, there is no error.**
>
> *Id. [Emphasis Added].*

This Honorable Court has authority pursuant to Article V, *Section* 3(b)(3) of the *Florida Constitution* (1980) to review a decision of a district court of appeal that expressly declares valid a state' statute. *Fla. R. App. P.* 9.030(a)(2)(A)(i). See **also** *Libertarian Party of Florida v. Smith, 687 So.* 2d 1292 (Fla. 1996). However, the Fourth District in the instant case did not expressly declared valid any Florida statute, Further, the Fourth District did not expressly construe our State Constitution or the United States Constitution in their decision. *See Fla. R. App. P.* 9.030(a)(2)(A)(ii). Therefore, this Honorable Court does not have jurisdiction over the instant cause on the alternative basis advanced by Petitioner-State and should decline to review this

cause on the merits.

CONCLUSION

Based on the foregoing arguments and the authorities cited therein, Respondent respectfully requests this Honorable Court to deny Petitioner's request for discretionary review over the instant cause.

Respectfully submitted,

RICHARD L. JORANDBY
Public Defender

ANTHONY CALVELLO
Assistant Public Defender
Florida Bar No. 266345
15th Judicial Circuit of Florida
Attorney for Cardell Adams
The Criminal Justice Building
421 Third Street, 6th Floor
West Palm Beach, Florida 33401
(561) 355-7600

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,	)	
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Petitioner/Appellee,	)	
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v.	)	**CASE NO.**
	)	**DCA CASE No. 98-3338**
CARDELL **ADAMS,**	)	
	)	
Respondent/Appellant.	)	
	)	

APPENDIX

24 Fla.L.Weekly **D2394.**

compensation benefits.[1] We reverse.

Durall was terminated by her employer of thirteen years, BellSouth Communications Systems, Inc. ("BellSouth"), after BellSouth received a letter from a customer regarding a telephone conversation between Durall and a third party in which Durall used derogatory language to describe the customer. Durall and the third party, a vendor who supplied products for BellSouth, had together placed a call to the customer in order to discuss the installation of a product, but the customer was not available at the time of the call. Durall and the vendor left a message, but unbeknownst to them, the customer's voice mail did not disconnect the call at the end of the message and the rest of the conversation between Durall and the vendor was recorded. The customer's letter to BellSouth attached a transcript of the conversation at issue.

Durall's initial application for unemployment compensation was granted. BellSouth appealed that ruling to the Unemployment Compensation Appeals Bureau which reversed the award of benefits and found that Durall's actions constituted misconduct associated with her employment. The UAC affirmed the decision of the appeals referee finding it was in accord with the essential requirements of law. Durall's appeal to this court followed.

Durall first argues that the record did not contain competent, substantial evidence to support the appeals referee's finding that she used derogatory language to refer to a customer because the finding was based solely upon hearsay. We agree.

Two BellSouth managers and Durall testified before the appeals referee. The evidence presented indicated that, without a doubt, Durall had a conversation with a vendor which was recorded on a customer's voice mail, but the only evidence presented as to the content of the conversation was the transcribed message supplied by the customer. Although Durall admitted having a conversation, she testified that the transcribed message did not reflect the contents of the conversation, and she could not remember the discussion verbatim. Neither the customer nor the vendor testified. Further, the BellSouth managers admitted that they had never actually heard the tape at issue, and the tape itself was not admitted into evidence.

The UAC must affirm the factual findings of the appeals referee if there was competent, substantial evidence in the record to support those findings. *See Pownall v. Unemployment Appeals Comm'n*, 729 So. 2d 479, 480 (Fla. 4th DCA 1999). Under section 120.57(1)(c), Florida Statutes (Supp. 1998), hearsay is admissible in administrative proceedings, but hearsay alone is insufficient to support a finding unless it would be admissible over objection in a civil action. It is not disputed that the transcript of the conversation at issue in this case is hearsay evidence. Because the transcript was the only evidence of Durall's misconduct and because no testimony was presented at the hearing which could establish the predicate necessary to admit the transcript as an exception to the hearsay rule, we find that the appeals referee's decision was not based on competent, substantial, evidence. *See Warkv. Home Shopping Club, Inc.*, 715 So. 2d 323, 324 (Fla. 2d DCA 1998).

Moreover, even if the transcript could be considered competent, substantial evidence of Durall's comments regarding the customer, we also agree with Durall's second argument that her comments do not evince willful or wanton disregard of BellSouth's interest so as to support a denial of benefits.

An employee may be denied unemployment compensation benefits if his or her misconduct meets the standard identified in section 443.036(29), Florida Statutes (Supp. 1998):

> MISCONDUCT.-"W' includes, but is not limited to, the following, which shall not be construed in pari materia with each other:
>
> (a) Conduct evincing such willful or wanton disregard of an employer's interests as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of his or her employee; or
>
> (b) Carelessness or negligence of such a degree or recurrence as to manifest culpability, wrongful intent, or evil design or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his or her employer.

See also § 443.101, Fla. Stat. (1997). The employer has the burden of proving that the claimant engaged in misconduct connected with work. *See Gardner v. Unemployment Appeals Comm'n*, 682 So. 2d 1222, 1223 (Fla. 4th DCA 1996). Further, in determining what constitutes misconduct under that standard, courts are to construe the statute providing the standard narrowly in favor of the claimant. *See Easton v. Unemployment Appeals Comm'n*, 693 So. 2d 712, 713 (Fla. 4th DCA 1997).

Here, Durall did not challenge or undermine her employer in any way. Her conduct, if we accept the transcribed conversation, was not an intentional or wanton disregard of BellSouth's interests. Durall did not know her conversation was being recorded, and she testified that she would never have spoken directly to a customer in such a manner. Finally, BellSouth's manager testified that Durall was terminated without warning for this single transgression. While BellSouth may have been justified in terminating appellant's employment, Durall's alleged conduct does not meet the standard of misconduct contemplated in the statute so as to support a denial of benefits.

Accordingly, we reverse the order of the Unemployment Appeals Commission and remand for an award of unemployment compensation benefits to Durall.

REVERSED and REMANDED. (KLEIN and TAYLOR, JJ., concur.)

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[1]We have jurisdiction in this matter pursuant to Florida Rule of Appellate Procedure 9.030(b)(1)(C).

* * *

Criminal law—Sentencing—Double jeopardy—Imposition of separate sentences as habitual offender and under Prison Releasee Reoffender Act for same crime constitutes violation of Double Jeopardy Clause—Prison Releasee Reoffender Act is constitutional

CARDELL ADAMS, Appellant, v. STATE OF FLORIDA, Appellee. 4th District. Case No. 98-3338. Opinion filed October 20, 1999. Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Robert Carney, Judge; L.T. Case No. 97-23000 CF10A. Counsel: Richard L. Jorandby, Public Defender, and Anthony Calvello, Assistant Public Defender, West Palm Beach, for appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Debra Rescigno, Assistant Attorney General, West Palm Beach, for appellee.

(WARNER, C.J.) Appellant was convicted of burglary of an occupied dwelling and sentenced as both a habitual offender and a prison releasee reoffender, in which the court gave separate sentences under each statute. Adams appeals his sentence on the ground that the court erred in sentencing him twice for the same double jeopardy and we reverse. [illegible] trial court constitutes

After appellant's conviction, the trial court found that appellant qualified as both a pi-i&a releasee reoffender ("PRR") and a habitual felony offender ("HFO") pursuant to sections 775,084 and 775.082, Florida Statutes (1997). The court then sentenced appellant to a total of thirty years. The judge specified that the first fifteen years would be served as a PRR. Under the prison releasee reoffender statute, the maximum term for the offense committed by appellant is fifteen years. *See* § 775.082(8)(a)2.c. The last fifteen years were to be sewed as au HFO. for which he would receive full credit for time served. The Prison Releasee Reoffender Act does not allow any type of early release; including gain time. -See § 775.082(8)(b). In contrast, a defendant sentenced as a habitual felony offender-iseligible for early release after completing at least 85 % of his sentence. *See* §§ 775.084(4)(j); 944.275(4)(b). In the instant case, if the appellant were sentenced as an HFO. and would be required to serve 85 % of the sentence, given all allowable credits, he would serve approximately 25 .5 years , more than the maximum under the PRR Act. However, by sentencing him to the first fifteen years as a PRR, for which no gain time is credited, appellant would only accumulate the gain time in the last fifteen years, and would serve 12.75 additional years, or 27.75 years minimum, which would deprive him of allowable gain time under the HFO statute.

The Double Jeopardy Clause of both the United States Constitution and the Florida Constitution guarantee that no person shall twice be put in jeopardy for the same offense. *See* U.S. Const. Amend. V; Fla. Const. art. I, § 9. Part of that protection is against multiple punishments for the same offense. *See Lippman v. State*, 633 So. 2d 1061, 1064 (Fla. *1994).* In *Ex Parte Lange*, 85 U.S. 163, 168, 21 L. Ed 872 (1873), the Supreme Court stated:

> If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offense. And though there have been nice questions-in-the application of this rule to cases in which the act charged was such as to come within the definition of more than one statutory offense, or to bring the party within the jurisdiction of more than one court, *there has never been any doubt of its entire and complete protection of the party when a second punishment is proposed in the same court, on the same facts, for the same statutory offense.*

(emphasis supplied). In *Lange* the defendant had been convicted of a misdemeanor for which the punishment was a fine *or* imprisonment. The trial court, however, imposed both a fine *and* imprisonment. Lange was imprisoned, but paid the fine five days later. The trial court, realizing its mistake, vacated the first sentence and imposed solely a prison sentence. Lange sought a writ of habeas corpus in which he alleged that by paying the fine he had satisfied one of the two alternative punishments authorized by the statute and was therefore entitled to release, having been punished for his crime. The Court held that service of the prison sentence would constitute double jeopardy, and the trial court's order vacating the fine and imposing solely the prison sentence was void. *See id.* at 175-76. Thus, Lange was entitled to his release. *See also In re Bradley*, 318 U.S. 50, 63 S. Ct. 470, 87 L. Ed. 608 (1943).

In protection against multiple punishments, the Double Jeopardy Clause seeks to ensure that the total punishment does not exceed that authorized by the Legislature. *See Jones v. Thomas*, 491 U.S. 376, 381, 109 S. Ct. 2522, 2525, 105 L. Ed. 2d 322 (1989). "The purpose is to ensure that sentencing courts do not exceed, by the device of multiple punishments, the limits prescribed by the legislative branch of government, in which lies the substantive power to define crimes and prescribe punishments." *Id.*, 491 U.S. at 381, 109 S.Ct. at 2525-26 (citation omitted).

As in *Lange*, the Legislature created alternative sentencing options for the same offense. In the instant case, appellant has received two separate sentences for the same crime, with different lengths and release eligibility requirements. Upon completion of his fifteen year sentence as a PRR, appellant will have received the maximum sentence permitted for his crime under that statute. Thus, the continuation of the sentence as a habitual offender would leave appellant incarcerated after having completely served his PRR sentence for the identical criminal act. A reading of the statute reveals that the Legislature did not intend to authorize an unconstitutional "double sentence" in cases where a convicted defendant qualified as both a prison releasee reoffender and a habitual offender. Section 775.082(8)(c) states: "[n]othing in this subsection shall preventacourt from imposing a greater sentence of incarceration as authorized by law, pursuant to s. -775.084 or any other provision of law." Wc conclude that this section overrides the mandatory duty to sentence *a* qualifying defendant as a prison releasee reoffender under section 775.082(8)(d), where the court elects to hand down a harsher sentence as a habitual offender.

Furthermore, section 775.021(4)(b) states:

> The intent of the Legislature is to convict and sentence for each criminal offense committed in the course of one criminal episode or transaction and not to allow the principle of lenity . . . . *Exceptions to this rule of construction are:*
>
> 1. Offenses which require identical *elements* of proof.

(emphasis added). If the Legislature does not intend to create multiple sentences for offenses requiring identical elements of proof. then surely the statute does not permit sentencing twice for the *same* offense. The imposition of a sentence under bothstatutes constitutes double jeopardy and is illegal.

Since the court can only decline to enter a PRR sentence when it imposes a harsher HFO sentence, we conclude that the proper disposition of this case is to reverse the sentence and remand with directions to vacate the PRR sentence. This is consistent with the legislative intent. See *Jones, 491* U.S. at 381,109 S. Ct. at 2525.

We affirm as to all other issues, including the challenge to the constitutionality of the Prison Releasee Reoffender Act. which we have previously addressed. *See Young v. State*, 719 So. 2d 1010 (Fla. 4th DCA 1998), *rev. denied, 727 So. 2d* 915 (Fla. 1999).

Conviction affirmed; sentence reversed and remanded for vacation of the Prison Releasee Reoffender sentence. (STEVENSON, J., and KREEGER, JUDITH L., Associate Judge, concur.)

* * *

Criminal law—Armed robbery—Evidence—Claim that trial court erroneously admitted collateral crime evidence of a subsequent robbery attempt not preserved for appellate review where defense counsel did not make specific objection which would have allowed court to reconsider its ruling—Sentencing—Prisoner Releasee Reoffender Act is constitutional—Act does not violate prohibition against ex post facto laws, does not violate single subject rule, does not violate separation of powers doctrine, does not violate right to equal protection, does not constitute cruel and unusual punishment, and does not violate procedural or substantive due process

WILLIAM JENNINGS, Appellant, v. STATE OF FLORIDA, Appellee. 4th District. Case No. 98-2903. Opinion filed October 20, 1999. Appeal from the Circuit Court for the Nineteenth Judicial Circuit, St. Lucie County; Cynthia G. Angelos, Judge; L.T. Case No. 97-2755 CF. Counsel: Richard L. Jorandby, Public Defender, and Marcy K. Allen, Assistant Public Defender, West Palm Beach, for appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Elaine L. Thompson, Assistant Attorney General, West Palm Beach, for appellee.

(PER CURIAM.) Appellant, William Jennings, challenges his conviction and sentence for armed robbery and argues that the trial court erred in allowing the State to admit collateral crime evidence of a subsequent robbery attempt and erred in sentencing him pursuant to the Prisoner Releasee Reoffender Act because the Act is unconstitutional. We affirm.

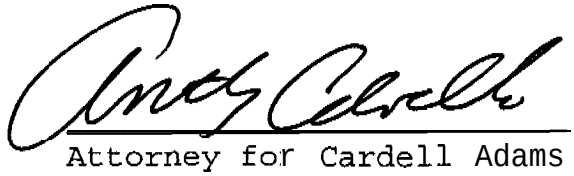
Appellant was charged by information with robbery with a deadly weapon and tried by jury after a night auditor at the Comfort Inn notified police that appellant robbed him at gunpoint. Prior to trial, appellant moved the court in limine to exclude evidence that approximately one month after the armed robbery at issue in this case, appellant attempted to rob the same night auditor at the Holiday Inn Express. According to the night auditor, during the robbery at the Holiday Inn, appellant allegedly stated, "Aren't you the person I robbed at the Comfort Inn last month?" The trial court granted appellant's pre-trial motion in limine and ruled that appellant's statement to the victim would be admitted but the circumstances under which it was allegedly made-the -robbery at the Holiday Inn—would be excluded, *See Williams v. State*, 110 So- 2d 654 (Fla.), *cert. denied*, 361 U.S. 847 (1959).

At trial, the judge receded from her ruling on the pre-trial motion in limine and stated that she would a&nit testimony regarding the attempted robbery at the Holiday Inn because appellant had "opened the door" to such evidence. When the court made its ruling, Jennings' counsel stated only, "Please forgive me. I'm not exactly sure what it was in the prior testimony that opened the door to this." Upon receiving an explanation that Jennings opened the door to such evidence when he testified that he committed the Comfort Inn robbery but denied having a gun, defense counsel made no further comments or objections. Defense counsel did not offer a specific objection which would have allowed the trial court to reconsider its ruling in light of the issue raised by appellant. Because appellant failed to contemporaneously object to the admission of the disputed evidence, we find that this issue is not preserved for review, *See Lawrence v. State,* 614 So. 2d 1092, 1094 (Fla. 1993); *Coffee v. State,* 699 So. 2d 299, 300 (Fla. 2d DCA 1997). Furthermore, wc find that based on the record in the instant case, even if the issue had been preserved, appellant would not have met his burden of demonstrating *prejudicial* error.

Appellant also challenges the constitutionality of the Prisoner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the Appendix has been furnished by courier to Georgina Jimenez-Orosa, Assistant Attorney General, Third Floor, 1655 Palm Beach Lakes Boulevard, West Palm Beach, Florida 33401-2299, this 12th day of January, 2000.



Attorney for Cardell Adams