ORIGINAL

IN THE SUPREME COURT OF FLORIDA

VASHON 0. LEWIS,

Petitioner,

versus

STATE OF FLORIDA,

Respondent.

CASE NO. SCOO-686
DCA CASE NO. 5D99- 197

APPEAL FROM THE CIRCUIT COURT
IN AND FOR BREVARD COUNTY
AND THE FIFTH DISTRICT COURT OF APPEAL

PETITIONER'S BRIEF ON JURISDICTION

JAMES B. GIBSON, PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

BRYNN NEWTON
ASSISTANT PUBLIC DEFENDER
Florida Bar Number 175 150
112-A Orange Avenue
Daytona Beach, Florida 32 114-43 10
904-252-3367

ATTORNEY FOR PETITIONER

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STATEMENT OF THE CASE AND FACTS

Petitioner was charged by an information filed in the Circuit Court of Brevard County, Florida, with burglary of an occupied dwelling. ((R 112, Vol. I) He was tried by a jury on July 16, 1998, and found guilty as charged. (R 137, Vol. I; T 217, Vol. IV) On January 12, 1999, he was sentenced as a Prison Releasee Reoffender to 15 years in prison, concurrent with a sentence for the same offense as an habitual violent felony offender, of ten years in prison followed by ten years on probation. (R 93, 94, 98-100, Vol. I; R 232-233, 234-235, 239, 240, 241-246, Vol. II)

Petitioner appealed and his conviction was affirmed by the Fifth District Court of Appeal in a corrected opinion issued on December 30, 1999; his sentence as an habitual offender was vacated and his sentence as a Prison Releasee Reoffender was affirmed. Lewis v. State, 25 Fla. L. Weekly D145 (Fla. 5th DCA December 30, 1999). (APPENDIX). Rehearing was denied on February 28, 2000. His notice of seeking this Honorable Court's review was filed on March 24, 2000.

SUMMARY OF ARGUMENT

The Fifth District Court of Appeal's decision in this cause cites as controlling authority decisions which are currently pending review in this Honorable Court in Supreme Court Case Numbers SC96764 and SC96765.

ARGUMENT

THE DISTRICT COURT OF APPEAL'S DECISION CITES AS CONTROLLING AUTHORITY THE DECISIONS IN RICHARDSON V. STATE, 24 Fla. L. Weekly D23 13. (Fla. 5th DCA October 8, 1999), review granted, Case Number SC96764; AND GRAY V. STATE, 742 So.2d 805 (Fla. 5th DCA 1999), review granted, Case Number SC96765 WHICH ARE PENDING REVIEW BY THIS HONORABLE COURT.

In its opinion affirming Petitioner's conviction for burglary, reversing his sentence as an habitual offender and affirming his sentence as a Prison Releasee Reoffender, the Fifth District Court of Appeal wrote:

> We have previously rejected appellant's position on the constitutional issues. *Alexander v. State,* 739 So.2d 667 (Fla. 5th DCA 1999); *Moon v. State, 737* So.2d 655 (Fla. 5th DCA 1999); *Cook v. State, 737* So.2d 569 (Fla. 5th DCA 1999); *Richardson v. State,* 24 Fla. L. Weekly D23 13 (Fla. 5th DCA Oct. 8, 1999), *review granted, No.* SC96764 (Fla. Jan, 6, 2000); *Gray v. State, 742* So.2d 805 (Fla. 5th DCA 1999), *review granted, SC96765* (Fla. Jan. 18, 2000).

Lewis v. State, 25 Fla. L. Weekly D144 (Fla. 5th DCA December 30, 1999) [corrected opinion]. (APPENDIX)

See also Jollie v. State, 405 So. 2d 418 (Fla. 1981), wherein this Honorable

Court held that a District Court of Appeal per curiam opinion which cites as controlling authority a decision that is either pending review in or has been reversed by the Supreme Court constitutes prima facie conflict and allows the Supreme Court to exercise its jurisdiction.

CONCLUSION

For the reasons expressed herein, Petitioner respectfully requests that this Honorable Court exercise its discretionary jurisdiction and grant review of the Fifth District Court of Appeal's decision in this cause.

Respectfully submitted,

JAMES B. GIBSON, PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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ASSISTANT PUBLIC DEFENDER
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112-A Orange Avenue
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32 118, by delivery to his basket at the Fifth District Court of Appeal; and by mail to Mr. Vashon Lewis, 500 Ike Steele Road, Wewahitchka, Florida 32465, this third day of April, 2000.

ATTORNEY

VASHON 0. LEWIS v. STATE OF FLORIDA
Case Number

CERTIFICATE OF FONT

I HEREBY CERTIFY that the size and style of type used in this brief is 14-point "Times New Roman."

BRYNN NEWTON
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IN TI-IE SUPREME COURT OF FLORIDA

VASHON 0. LEWIS,

Petitioner,

versus

CASE NO. SCOO-686
DCA CASE NO. 5D99-197

STATE OF FLORIDA,

Respondent.

APPEAL FROM THE CIRCUIT COURT
IN AND FOR BREVARD COUNTY
AND THE FIFTH DISTRICT COURT OF APPEAL

A P P E N D I X

IN THE **DISTRICT COURT** OF APPEAL OF THE STATE OF FLORIDA

FIFTH DISTRICT JULY TERM 1999

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

VASHON OLAND LEWIS,

Appellant,

v.

CASE NO. 5D99-197
CORRECTED

STATE OF FLORIDA,

Appellee.

Opinion Filed December 30, 1999

Appeal from the Circuit Court
for Brevard County,
Martin Budnick, Senior Judge.

James B. Gibson, Public Defender, and
Brynn Newton, Assistant Public Defender,
Daytona Beach, for Appellant.

Robert A. Butterworth, Attorney General,
Tallahassee, and Denise 0. Simpson,
Assistant Attorney General, Daytona Beach,
for Appellee.

GRIFFIN, J.

Vashon 0. Lewis ["Lewis"] seeks review of his sentence as both a habitual violent felony offender and prison releasee reoffender.

The State charged Lewis with one count of burglary of an occupied dwelling on March 16, 1998. On March 18, 1998, the State filed notice of its intent to seek prison releasee reoffender penalties upon conviction. At a jury trial on July 16, 1998, the jury found Lewis guilty.

The State then filed its notice to seek habitual felony offender penalties on August

12, 1998. On September 18, 1998, Lewis filed a motion to declare section 775.082(8), Florida Statutes (1 997), the "Prison Releasee Reoffender Act," unconstitutional. Specifically, Lewis argued that the statute violated: (1) the single subject rule; (2) the separation of powers doctrine by divesting the trial court of sentencing discretion in favor of the state attorney and victims; (3) state and federal due process guarantees; (4) equal protection; and (5) the constitutional prohibitions against cruel and unusual punishment. Lewis additionally argued that the statute was void for vagueness due to the failure to define the terms "sufficient evidence," "material witness," "extenuating circumstance," and "just prosecution." Finally, he argued that sentencing him as both a habitual violent felony offender and as a prison releasee reoffender violated double jeopardy. The court denied his motion in all its components.

The trial court entered a written order adjudicating Lewis a' habitual violent felony offender based upon the following prior convictions: armed burglary; grand theft; grand theft with firearm; aggravated assault; burglary of a dwelling: and battery on the elderly. The court also entered a written order the same day adjudicating Lewis a prison releasee reoffender based upon the same convictions. In addition, the court entered its judgment adjudicating Lewis guilty of the offense of burglary of an occupied dweliing and sentencing him to concurrent terms, as a habitual felony offender, to ten years imprisonment followed by ten years of probation and, as a prison releasee reoffender, to fifteen years in prison.

We have previously rejected appellant's position on the constitutional issues. *Alexander v. State, 739 So.* 2d *667* (Fla. 5th DCA 1999); *Moon v. State, 737 So.* 2d 655 (Fla. 5th DCA *1999); Cook v. State, 737 So.* 2d *569* (Fla. 5th DCA *1999); Richardson v. State,* 24 Fla. L. Weekly 02313 (Fla. 5th DCA Oct. 8, 1999), review *granted, No. SC96764*

(Fla. Jan. 6, 2000); *Gray v. Slate, 742 So.* 2d 805 (Fla. 5th DCA 1999), review *granted,* SC96765 (Fla. Jan. 18, 2000).

Lewis also contends that being sentenced both as a habitual violent felony offender and as a prison releasee reoffender, under section 775.082(8), Florida Statutes (1997), otherwise known as the "Prison Releasee Reoffender Punishment Act," ["PRR"], violates the prohibitions against double jeopardy provided in the Fifth Amendment and Article I, section 9, of the Florida Constitution. Accordingly, Lewis requests this court to vacate "one of his dual sentences," without choosing one or the other. The State, on the other hand, construes subsection (c) of the Act to mean the trial court may impose both sentences.

Subsection (c) provides:

> (c) Nothing in this subsection shall prevent a court from imposing a greater sentence of incarceration as authorized by law, pursuant to s. 775.084 *or* any other provision of law.

We agree with Lewis that the above subsection authorizes alternatives; namely, the statute allows the State to seek whichever sentence may imprison the defendant longer. It does not provide for dual sentences. See *Adams v. State, 24* Fla. L. Weekly 02394 (Fla. 4th DCA Oct. 20, 1999)("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."); see *also Glave* v. *State*, 24 Fla. L. Weekly D2546 (Fla. 4th DCA Nov. 10, 1999).

Here, the trial court sentenced Lewis, as a prison releasee reoffender, to a term of fifteen years imprisonment to run concurrently with his "split sentence" as a habitual violent felony offender of ten years in prison followed by ten on probation. Thus, like the defendant in *Adams,* Lewis "has received two separate sentences for the same crime, with different

lengths and release eligibility requirements." *Adams*, 24 Fla. L. Weekly at D2395. This was error. Because the PRR sentence is the longer of the two incarceration[1] alternatives, it is the one that must be imposed. We vacate the habitual violent offender sentence.

AFFIRMED in part; VACATED in part.

GOSHORN and THOMPSON, JJ., concur.

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[1]The PRR statute speaks in terms of greater sentences of incarceration.

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

VASHON OLAND LEWIS,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

/

05-1998-CF-004212-AXXXX

CASE NO. 5D99-197

DATE: February 28, 2000

BY ORDER OF THE COURT:

Upon consideration of the December 30, 1999, corrected opinion issued by this Court, it is

ORDERED that Appellant's MOTION FOR REHEARING OR-THAT CONFLICT OR QUESTION BE CERTIFIED, filed January 14, 2000, is denied. It is further

ORDERED that Appellee's MOTION FOR REHEARING, CLARIFICATION, OR CERTIFICATION OF QUESTION, filed January 7, 2000, is denied.

FILED IN TVL-01
CLERK OF CIR. CT.
BREVARD CO. FL.
2000 MAR 21 A 5:28
SANDY CRAWFORD

I hereby certify that the foregoing is
(a true copy of) the original Court order.

FRANK J. HABERSHAW, CLERK

cc: Office of the Attorney General, Daytona Beach
Office of the Public Defender, 7th JC
Vashon Lewis