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FILED
DEBBIE CAUSSEAUX
MAR 24 2000
CLERK, SUPREME COURT
BY _____

IN THE SUPREME COURT **OF FLORIDA**

DOUGLAS **ISOM**
PETITIONER

VS

STATE OF FLORIDA

DCA CASE NO. 97-2430

SC 00-720

PETITIONERS JURISDICTIONAL BRIEF

ON REVIW FROM THE DISTRICT COURT OF
APPEAL THIRD DISTRICT, STATE OF FLORIDA.

DOUGLAS ISOM PRO- **SE**

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STATEMENT OF THE CASE AND FACTS

The pertinent facts relevant to determination of whether discretionary review is warranted are set forth in the following opinion of the district as follows;

The district court found that there was a miscalculation of the petitioner scoresheet, and that this miscalculation would have changed the sentence to a lower sentencing range.

The court further found that the departure order was implicit. . . , (see foot note 3) after making this determination the district court invoked the harmless error rule, finding that the trial court would still depart, using RUBIN to support its decision. This decision is in expressly and directly conflict with this court in JONES , DARRISAW, HENDRIX, AND MANICO.

The district court find that the trial court failed to make a finding that it was necessary for the protection of the public under 775,084 to sentence the petition to a extended term,However, The district court found the issue could not be raised in a 3.850, because the petitioner did not raise this issue on appeal. The district court stated. . . .We think the law of the case doctrine preclude the appellant from raising this issue now.This decison is in expressly and directly conflict with. DANIELA, BOVER (Which is pending in this court) NICEWONDER and ZOLACHE. The district court found the ex- post facto violation of the escalating pattern of criminal conduct was rejected on direct of appeal after resentencing and cannot be raised in a 3.850 is in expresssly and directly in conflict with this court in BEDFORD, CALLAWAY and MANICO.

(REHEARING DENIED MARCH 15, 200)

SUMMARY OF AUGUMENT

In this case the district court found the error was harmless which are expressly and directly conflict with. JONES V STATE 530 So.2d 53 (Fla. 1988), DARRISAW V STATE 660 So. 2d 269 (Fla 1995) and HENDRIX V STATE 475 So. 2d 1218 (Fla. 1985).

The district court further thought the law of the case doctrine precluded the petitioner from challenging the adjudication of habitual offender in a post conviction proceeding,because the issue was not raised on direct appeal are in direct conflict with. DANIELS V STATE 593 So. 2d 312 (1st DCA 1992), NICEWONDER V STATE 698 So.2d 376 (1st DCA 1997), ZOLACHE V STATE 687 So. 2d 298 (4th DCA 1997) BEDFORD V STATE 633 So. 2d 13 (Fla. 1994) MANIC0 V STATE 714 So. 2d 429(Fla.1998) and BOVER V STATE 732 So.1118 (3rd DCA 1999). Bover is pending before this court.

JURISDICTIONAL STATEMENT

The Florida Supreme 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 on the same point of law ART. V. 3(b) (3) Fla. const. 9.030 a(2)A(iv).

ARGUMENT

THE DECISION OF THE THIRD DISTRIT COURT OF APPEAL IN ISOM V. STATE EXPRESSLY AND DIRECTLY CONFLICTS WITH THIS COURT AND OTHER DISTRICT COURT'S

This court has jurisdiction under ARTICLE V SECTION 3(b)3 of the FLORIDA Constitution,Where a decision of a district court expressly and directly conflicts with a decision of this court or another district court. Further this court have a case pending in the SUPREME court BOVER V STATE case no. 95,649, the question in BOVER is wheather an adjudication of habitual offender can be raised in a 3.800(a) or 3.850.

This petitioner raised the challege of the adjudication of the habitual offender in the porper motion, When the district court thought it could not be raised in a 3.850. The district court stated. . . . We THINK this is precluded because of the law of the case doctrine.

The district court found that this issue was not raised on appeal and mistakely thought that this issue could not be raised in a 3.850 this decision of the district court in ISOM is in expressly and directly conflict with NICEWONDER V STATE 698 So. 2d 376(lth DCA 1997) MANIC0 V STATE 714 So.2d 429 (Fla.1998) ZOLACHE V STATE 687 So.2d 298 (4th DCA 1997) and DANIELS V STATE 593 So. 2d 312 (1st DCA 1992).

This court should accept jurisdiction to prevent a manifested injuctice and a miscarriage of justice from accruing.

In the opinion in ISOM the district court found in. . . foot note 3. . . . , **IN ANY EVENT THE FINDING IS IMPLICIT IN THE DEPARTURE ORDER THAT WAS ENTERED.** after making this finding the district court employed the **harmless** error rule, which created an expressly and directly conflict with. **JONES V STATE** 530 So. 2d 53 (Fla.1988), **DARRISAW** V STATE 660 So. 2d 269 (Fla 1995), and **HENDRIX** V STATE 475 So. 2d 1218 (Fla.1995). Which require a clear and convincing reason before departure from the guidelines is allowed.

Petitioner is serving a life sentence, which is a illegal sentence, The jurisdiction of this court is the only possible means to correct this manifested injustice and to put a end to this miscarriage of justice

CONCLUSION

This court has discretionary jurisdiction to review the decision below and this court should exercise that jurisdiction to consider the merits of the petitioners argument.

RESPECTFULLY SUBMITTED

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished to DOUGLAS J. GLAID assistant attorney general of the department of legal affairs 110 tower 10th floor 110 S.E 6th street,Ft. Lauderdale FLA. 33301 via U.S. mail on this 8 day of march 2000

Douglas Isom

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APPENDIX

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JANUARY TERM, A.D. 2000

DOUGLAS ISQM,	**	
Appellant,	**	
vs.	**	CASE NO. 3D97-2430
THE STATE OF FLORIDA,	**	LOWER TRIBUNAL NO. 88-7919
Appellee.	**	

Opinion filed February 2, 2000.

An appeal under Fla. R. App. P. 9.140(i) from the Circuit Court for Dade County, Roberto M. Pineiro, Judge.

Douglas Isom, in proper person.

Robert A. Butterworth, Attorney General, and Douglas J. Glaid, Assistant Attorney General, for appellee.

Before JORGENSON, and COPE, JJ., and NESBITT, Senior **Judge.**

On Rehearins Denied

PER CURIAM.

On consideration of defendant-appellant Douglas Isom's motion for rehearing, we withdraw our previously issued opinion and substitute the following opinion:

Defendant Isom appeals orders denying his motions for

postconviction relief under Florida Rules of Criminal Procedure 3.800(a) and 3.850. We affirm,

Defendant was convicted of trafficking, and conspiracy to traffick, in cocaine. See Isom v. State, 619 So. 2d 369 (Fla. 3d DCA 1993). On direct appeal, the convictions were affirmed but the habitual offender sentence was reversed and the cause remanded for resentencing. This was done for two reasons. First, the trial court ' s remarks suggested that the court may have proceeded under the incorrect assumption that the habitual offender statute made the imposition of a life sentence mandatory, rather than being discretionary. See id. at 375. The court remanded for a new sentencing hearing in view of the fact that the court had discretion over the length of sentence.

Second, the parties had proceeded to the original sentencing " on the incorrect assumption that the habitual offender adjudication took the case out of the sentencing guidelines." Id. at 376. Defendant's offense date was March 9, 1988. Under the law then existing, it was necessary to articulate departure reasons if the sentence would exceed the guidelines, notwithstanding that the sentence was being imposed under the habitual offender statute. $eed .

On remand, the case was assigned to a successor judge for resentencing. In 1995 the successor judge reviewed the entire trial record, heard extensive argument at a lengthy sentencing

hearing, and then reimposed a life sentence on defendant as a habitual offender. The court entered a written departure order. On appeal, this court affirmed without written opinion. See Som v. State, 690 So. 2d 613 (Fla. 3d DCA 1997).

Defendant then filed motions for postconviction relief under Florida Rules of Criminal Procedure 3.800(a) and 3.850. Defendant first contends that there are scoresheet errors which reduce his guidelines range. As calculated for the resentencing hearing, the guidelines were seventeen to twenty-two years.[1]

For present purposes, we assume that the defendant's claims of scoresheet error are correct.[2] By defendant's calculation, the scoresheet should be corrected by eliminating fifty-six points. This would reduce his recommended sentencing guidelines range to twelve to seventeen years, instead of seventeen to twenty-two

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[1]The resentencing scoresheet also calculated a permitted range. However, the trial court's order recognizes that, given defendant's offense date, only the recommended range applies.

[2]Defendant argues that no points should have been assessed for legal constraint at the time of defendant's offense, as he was being held in jail awaiting trial on criminal charges. Under the 1988 version of the sentencing guidelines, this circumstance was not included within the definition of legal constraint. See Fla. R. Crim. P. 3.701(d)(6)(1988). This defendant is correct on the scoring of legal constraint. This scoring charge would not, standing alone, change his recommended sentence.

Defendant claims several other scoring errors. The present record does not conclusively refute those claims. See Fla. R. App. P. 9.140(i). If defendant is correct then the guidelines range would be lower.

years.

Relying on earlier Third District Court of Appeal precedent, defendant argues that where a trial court imposes an upward departure sentence, but there was a material scoring error such that the defendant should have been placed in a lower guidelines range, it follows that there must be a new sentencing proceeding at which the trial court may reconsider the issue of departure. See Mackey v. State, 703 So. 2d 1383, 1185 (Fla. 3d DCA 1997), Quashed in part, 719 so. 2d 284 (Fla. 1998). The Florida Supreme Court recently disapproved Mackey, ruling that "it does not necessarily. follow that all cases involving scoresheet errors must be automatically reversed for resentencing." 719 So. 2d at 284; see **also** State v. Rubin, 723 So. 2d 716 (Fla. 1998).

As this court recently said in another case, "We conclude that . . . any scoresheet error **was** harmless as the record reflects that although the appellant's point total would have been lower, the trial court would have nevertheless imposed the departure sentence, which was supported valid reasons." Rubin v. State, 734 So. 2d 1089 (Fla. 3d DCA 1999) (on remand from State v. Rubin, 721 So. 2d 716 (Fla. 1998)).

In the present case, the defendant has had two sentencing hearings. There was an initial sentencing hearing at which the original trial judge imposed a life term as a habitual offender. This court's reversal explained that under the applicable version

of the statutes, there could be an upward departure from the sentencing guidelines only upon valid departure reasons, and that if the trial court determined to impose habitual offender sentence, then the length of the habitual offender sentence was discretionary and did not automatically have to be a life sentence. With those directions, a successor judge reviewed the entire record, conducted another sentencing proceeding, and again imposed a life sentence as a habitual offender. The court entered a written sentencing order delineating defendant's ten prior felony convictions between 1973 and 1988, finding an escalating pattern of criminal conduct, see § 921.001(8), Fla. Stat. (1987), and imposing the life sentence. As was true in Rubin, we conclude that if there were to be a new sentencing proceeding, the result would not change.

Defendant contends that the trial court failed to make a specific finding that it was necessary for the protection of the public that defendant be sentenced to an extended term as a habitual offender. The 1987 version of the habitual offender statute provided, in part, for habitual offender sentencing "upon a finding that the imposition of sentence under this section is necessary for protection of the public from further criminal activity by the defendant . . . ." § 775.084(4)(a), Fla. Stat. (1987). At the resentencing hearing, no one raised the question of including a specific finding that imposition of such a sentence was necessary for the protection of the public, and the written

departure order does not contain such a finding in so many words. No complaint about the absence of this finding was made in defendant's appeal to this court after resentencing. The main topic of debate at the resentencing proceeding was whether a valid reason for departure existed.

We think that this claim is barred by the law of the case doctrine. This court's 1993 reversal was not based on a claim that the defendant failed to qualify as a habitual offender, nor was it based on a claim of inadequate habitual offender findings. Instead, the purpose of the reversal was to determine if valid departure reasons existed, see Isom, 619 So. 2d at 375-76, and to be sure that the trial court understood it had discretion over the length of the sentence. On remand the trial court properly confined its attention on those matters.[3]

Defendant next argues that, based on the wording of the trial court's sentencing order, the trial court employed the wrong test for an escalating pattern of criminal conduct. See § 921.001(8), Fla. Stat. (1997). This claim was rejected in the defendant's direct appeal after resentencing.

Defendant's remaining claims are without merit.'

Affirmed.

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[3]In any event the finding is implicit in the departure order that was entered.

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT
JANUARY TERM, A.D. 2000
MARCH 15, 2000

DOUGLAS ISOM,

Appellant(s)/Petitioner(s),

vs.

THE STATE OF FLORIDA,

Appellee(s)/Respondent(s).

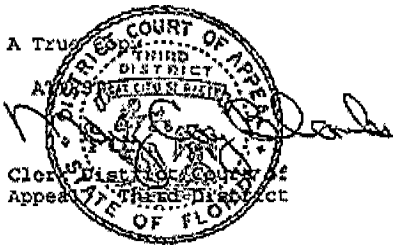
CASE NO.: 3D97-2430

LOWER
TRIBUNAL NO. 88-7919

Upon consideration, appellant's motion for rehearing and/or clarification is hereby denied.

Appellant's motion for suggestion of a certification of conflict to the Supreme Court of Florida is hereby denied.

JORGENSON and COPE, JJ., and NESBITT, Senior Judge, concur.



cc:
Douglas Isom
Robert A. Butterworth

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