IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Appellee/Petitioner,

v. FSC Case No.
DCA Case No. 2D01-5207

ADAM FREE SOUSA,

Appellant/Respondent.

_____/

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

PETITIONER'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

On August 15, 2003 the Second District Court of Appeal affirmed Respondent's convictions for two counts of attempted murder with a firearm and one count of aggravated assault with a firearm. However, the Second District remanded for Respondent's three consecutive mandatory minimum sentences to be served concurrently. Sousa v. State, 28 Fla. L. Weekly D1909 (Fla. 2d DCA August 15, 2003) (Exhibit 1).

The charges arose out of a shooting spree involving three victims. The victims were shot in rapid succession. Respondent was found guilty as charged. He was sentenced on Count 1, attempted second degree murder to 50 years, with a 25 year minimum mandatory; Count 2, attempted second degree murder, to 50 years, with a 25 year minimum mandatory; and Count 3, aggravated assault, to 5 years, with a 3 year minimum mandatory. The minimum mandatory sentences for the use of a firearm were made pursuant to §775.087. Sousa, supra. However, the Second District opinion remanded for the mandatory minimum portions of the sentences to be served concurrently, not consecutively. The State filed its Notice to Invoke on November 24, 2003.

SUMMARY OF ARGUMENT

This Court has jurisdiction in the instant case because the Second District Court of Appeal's decision expressly and directly conflicts with decisions of this Court and the Fourth District. The Second District opinion is in direct and express conflict with this Court's holding in State v. Christian, 692 So. 2d 889 (Fla. 1997)as well as the Fourth District's holding in Newton v. State, 603 So. 2d 558 (Fla. 4th DCA 1992).

Minimum mandatory sentences for offenses arising from a single episode may be stacked consecutive where, as here, the defendant shoots at multiple victims.

ISSUE

> THIS COURT HAS JURISDICTION TO REVIEW THE INSTANT CASE BECAUSE THE SECOND DISTRICT COURT OF APPEAL'S DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS FROM THIS COURT AND THE FOURTH DISTRICT.

This Court has authority as the highest court of the state to resolve legal conflicts created by the district courts of appeal. The Florida Constitution, article V, section 3(b)(3), authorizes this Court to review a decision of a district court of appeal that expressly and directly conflicts with a decision of this Court or another district court of appeal.

This Court has identified two basic forms of decisional conflict which properly justify the exercise of jurisdiction under section 3(b)(3) of the Florida Constitution. Either (1) where an announced rule of law conflicts with other appellate expressions of law, or (2) where a rule of law is applied to produce a different result in a case which involves "substantially the same controlling facts as a prior case. . . ." Nielsen v. City of Sarasota, 117 So. 2d 731, 734 (Fla. 1960). Furthermore, it is not necessary that a district court explicitly identify conflicting district court decisions in its opinion in order to create an express conflict under section 3(b)(3). Ford Motor Co. v. Kikis, 401 So. 2d 1341 (Fla. 1981).

The Second District opinion is in conflict with this Court's holding in State v. Christian, 692 So. 2d 889 (Fla. 1997). The Second District opinion in Sousa affirmed Respondent's convictions for two counts of attempted murder with a firearm and one count of aggravated assault with a firearm. However, the Second District remanded for the mandatory minimum portions of the sentences to be served concurrently. The opinion relied upon the holding in Mondesir v. State, 814 So. 2d 1172 (Fla. 3d DCA 2002).

In Mondesir, the Third District interpreted the following language in §775.087(2)(d): "The court shall impose any term of

imprisonment provided for in this subsection consecutively to **any other** term of imprisonment imposed for any other felony offense." The Third District held the "any other" language in the statute refers only to another separate crime, rather than those involved in a single prosecution. Accordingly, the court in Mondesir remanded the case back to the trial court to sentence the new offenses consecutive to the prior cocaine offense. However, the sentences for the substantive offenses were to be concurrent to each other.

The Second District's reliance upon Mondesir is misplaced, and places the Sousa holding in direct conflict with longstanding case law from this Court recognizing consecutive minimum mandatory sentences for crimes involving multiple victims. This Court has held that minimum mandatory sentences involving a single episode to be sentenced concurrently. Cf. Hale v. State, 630 So. 2d 521 (Fla. 1993)(disapproving stacking of two habitual offender sentences).

However, this Court has also held that such minimum mandatory sentences are properly sentenced consecutively when there are multiple victims involved in a single episode. To sentence Respondent to three concurrent sentences when there are three separate victims involved in three separate acts is contrary to prior case law as well as in direct contrast to the

legislative intent as set forth by this statute. Therefore, the trial court properly made the minimum mandatory sentences consecutive.

The instant opinion is in conflict with the Florida Supreme Court's holding in State v. Christian, 692 So. 2d 889 (Fla. 1997). In Christian, the court held that the minimum mandatory sentences for second degree murder with a firearm and attempted second degree murder with a firearm were to be sentenced consecutively. Christian involved a single continuous episode with two separate victims. The instant case, while arguably a single criminal episode, nonetheless involved three separate and distinct victims injured in Petitioner's shooting spree.

> As a general rule, for offenses arising from a single episode, stacking is permissible where the violations of the mandatory minimum statutes cause injury to multiple victims,[1] or multiple injuries to one victim. (Footnote omitted). The injuries bifurcate the crimes for stacking purposes. (Footnote omitted). **The stacking of firearm mandatory minimum terms thus is permissible where the**

[1] See, Downs v. State, 616 So. 2d 444 (Fla. 1993), approved, 616 So. 2d 444 (Fla. 1993) (approving stacking of one twenty-five year capital felony mandatory minimum term with one three-year firearm mandatory minimum term where defendant killed woman and committed aggravated assault on witness); State v. Enmund, 476 So. 2d 165 (Fla. 1985) (approving stacking of two capital felony mandatory minimum terms where defendant committed two homicides).

> **defendant shoots at multiple victims,[2] and impermissible where the defendant does not fire the weapon.[3]** (Emphasis added).

Christian, 692 So. 2d at 890.

The Second District opinion points to the express language of the statute and the legislative intent as described in §775.087(2)(d) to justify the imposition of a concurrent sentence in this matter. However, §775.087(2)(d) also provides that the legislature intends that violators of this statute "be punished to the fullest extent of the law." Moreover, Fla. Stat. § 775.021 (2001)also provides:

(4) (a) Whoever, in the course of one criminal transaction or episode, commits an act or acts which constitute one or more separate criminal offenses, upon conviction and adjudication of guilt, shall be sentenced separately for each criminal offense; and the sentencing judge may order the sentences to be served concurrently or consecutively. For the purposes of this subsection, offenses are separate if each offense requires proof of an element that the other does not, without regard to the accusatory pleading or the proof adduced at trial.

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[2] The injury may consist of the heightened danger caused by a fired weapon. State v. Thomas, 487 So. 2d 1043 (Fla. 1986)(approving stacking two firearm mandatory minimum terms where defendant shot woman and shot at but missed her son).

[3]See State v. Ames, 467 So. 2d 994 (Fla. 1985) (disapproving stacking of two firearm mandatory minimum terms where defendant committed burglary, robbery, and sexual battery on same victim, without firing weapon); Palmer v. State, 438 So. 2d 1 (Fla. 1983) (disapproving stacking of thirteen firearm mandatory minimum terms where defendant robbed thirteen mourners in funeral home, without firing weapon).

(b) 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** as set forth in subsection (1) to determine legislative intent. (Emphasis added).

See also, Lifred v. State, 643 So. 2d 94(Fla. 4th DCA 1994), approved by State v. Christian, 692 So. 2d 889 (Fla. 1997)(trial court had discretion under Fla. Stat. ch. 775.087(2) to impose consecutive mandatory minimum terms on defendant for the crimes of attempted murder with a firearm of one victim and aggravated battery with a firearm of a second victim, because both occurred during the course of an armed robbery of both victims, and the firearm was discharged twice, resulting in injury to two victims); State v. Parker, 812 So. 2d 495 (Fla. 4th DCA 2002)(stacking of firearm mandatory minimum terms thus is permissible where the defendant shoots at multiple victims, and impermissible where the defendant does not fire the weapon).

The Second District opinion also overlooked the holding in Newton v. State, 603 So. 2d 558 (Fla. 4th DCA 1992), approved, 594 So. 2d 306 (Fla. 1992). In Newton, the Court upheld the three consecutive 25 year minimum mandatory sentences. The factual scenario described in Newton is strikingly similar to the instant case. Newton "committed three separate and distinct offenses. After firing at Officer Indian, he turned and fired at Officer Hawkins. As Newton fled, he fired another shot at

Officers Indian and Hawkins. After being spotted running through a field, he fired a shot at Officer Justice." Newton was properly sentenced to three consecutive 25 year minimum mandatories.

The facts in the instant case similarly demonstrate three separate and distinct offenses with three separate victims. Thomas Nagel testified that he heard Sousa screaming as he came down the escalator. He asked Sousa what he was doing, and Sousa charged Nagel's table. (V. II: T. 232, 234). Phil Bocelli, head of security, approached. Sousa was holding a handgun two feet from Nagel's head. Bocelli went to grab Sousa's hand, the gun went off, and Bocelli was shot. Nagel then heard another gunshot about 2-3 minutes later. (V. 238-239).

Phillip Bocelli testified that he was a director of security at the Bonita Springs dog track. He entered the lobby and found an older man (Nagel) holding a younger man (Appellant) in a headlock. Sousa was holding a handgun. (V. I: T. 88). Mr. Bocelli approached Sousa who swung around and fired one shot, hitting Bocelli in the stomach. (V. I: T. 95-96). Sousa then stomped on Bocelli's head with his foot. Bocelli then heard another gun shot after he was down. (V. I: T. 99, 102).

Peter Verchick testified he came out of his office and saw Sousa moving towards Bocelli, who was on the floor. He asked

what Sousa was doing and told him, “hey stop that.” Sousa kicked Bocelli in the head. Sousa then shot Verchick in the groin. (V. II: T. 272, 277, 295).

The testimony establishes three separate and distinct offenses. Nagel testified there was a 2-3 minute gap between gunshots. Sousa put the gun in Nagel’s face. Then he shot Bocelli as they scuffled. Sousa then kicked the prone Bocelli in the head. Only then did Sousa shoot Peter Verchick in the groin. Accordingly, prior case law as well as legislative intent support sentencing the minimum mandatory portions of these sentences consecutively.

The cases the instant opinion rely upon are all distinguishable. Mondesir did not involve the firing of the gun. Moreover, there were not multiple victims in Mondesir. In Palmer, supra, although there were thirteen victims of the robbery, the defendant did not use the firearm. This was a key reason the Florida Supreme Court distinguished Palmer in its decision in Christian. In Green v. State, 845 So. 2d 895 (Fla. 3d DCA 2003) it is apparent that no firearm was fired in the commission of the charged felonies. Therefore, the concurrent nature of the sentences was proper.

This Court, in Christian, supra, set forth the test for the stacking of firearm minimum mandatory sentences for offenses

arising from a single episode: Consecutive sentences are proper where the offenses cause injury to multiple victims or multiple injuries to one victim. Stacking is permissible where the defendant shoots at multiple victims. Stacking is impermissible where the weapon is not fired. Here, Sousa shot two separate victims, and committed aggravated assault on another victim while holding the firearm. Accordingly, the sentences were properly made to run consecutive to each other.

Petitioner submits that the Second District Court of Appeal's decision expressly and directly conflicts with this Court's holding in State v. Christian and the Fourth District's decision in Newton v. State. Given this express and direct conflict, the State respectfully requests that this Court exercise its discretionary jurisdiction and accept the instant case for review.

CONCLUSION

In conclusion, the State respectfully requests that this Honorable Court accept jurisdiction in the instant cause.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief on Jurisdiction has been furnished by U.S. mail to Bruno F. DeZayas, Assistant Public Defender, P.O. Box 9000—Drawer PD, Bartow, Florida 33831-9000, this 26th day of November 2003.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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