

IN THE SUPREME COURT OF FLORIDA

COMER H. BRYAN, III,)
)
 Petitioner,)
)
 vs.)
)
 STATE OF FLORIDA,)
)
 Respondent.)
 _____)

Supreme Ct. Case No. _____
DCA Case No. 5D02-1383

**ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL**

PETITIONER'S JURISDICTIONAL BRIEF

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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TABLE OF CONTENTS

	<u>PAGE NO.</u>
TABLE OF CONTENTS	i
TABLE OF CITATIONS	ii
STATEMENT OF THE CASE AND FACTS	1
SUMMARY OF ARGUMENT	3
ARGUMENT	
<u>POINT I:</u> THIS COURT HAS JURISDICTION TO REVIEW THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL.	4
CONCLUSION	6
CERTIFICATE OF SERVICE	6

TABLE OF CITATIONS

<u>CASES CITED:</u>	<u>PAGE NO.</u>
<i>Jollie v. State</i> 405 So. 2d 418 (Fla. 1981)	3, 5
<i>Huss v. State</i> 771 So. 2d 591 (Fla. 1 st DCA 2002)	4
<i>Martin v. State</i> 809 So. 2d 65 (Fla. 5 th DCA 2002)	4
<i>Stutts v State</i> 821 So.2d 449 (Fla. 1 st DCA 2002)	4
<i>Thompson v. State</i> 808 So. 2d 284 (Fla. 5 th DCA), <i>rev. granted</i> , 826 So. 2d 994 (Fla. 2002)	4
 <u>OTHER AUTHORITIES CITED:</u>	
Section 322.34(2)(c), Florida Statutes (1999).	1, 4

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STATEMENT OF CASE AND FACTS

On March 13, 2000, Petitioner was charged by information with one count of felony driving while license suspended or revoked (“DWLSR”), in violation of Section 322.34(2)(c), Florida Statutes (1999). The state charged that petitioner had five prior convictions for DWLSR¹. Pursuant to a plea agreement, the trial court imposed a sentence of 11 months and 29 days, suspended upon the successful completion of two years’ community control. In March 2002, the state charged petitioner with violating community control. Petitioner moved to withdraw his original plea, asserting that his prior convictions did not elevate the offense to a third-degree felony. The trial court denied his motion to withdraw the plea. The

¹ Petitioner was previously convicted of DWLSR on September 30, 1988, October 2, 1989, December 20, 1991, May 4, 1992 and January 19, 1995.

trial court revoked petitioner's probation and imposed sentence of twenty four months in the Department of Corrections².

Bryan appealed to the Fifth District Court and asserted that under the plain meaning of the statute at the time of Bryan's offense, his prior convictions did not qualify to elevate the offense to a third degree felony and the Circuit Court lacked jurisdiction over the charged offense. The Fifth District Court of Appeal affirmed the trial court's ruling.

² The trial court granted petitioner's 3.800(b)(2) motion to correct sentence, adjudicated him guilty, and imposed the suspended sentence of 11 months and 29 days.

SUMMARY OF ARGUMENT

Where a decision of the district court cites as authority a case which is pending for review in this court, jurisdiction may be invoked. *Jollie v. State*, 405 So. 2d 418 (Fla. 1981). Petitioner seeks review of the decision of the Fifth District Court of Appeal.

ARGUMENT

THIS COURT HAS JURISDICTION TO REVIEW THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL.

Petitioner was sentenced under Section 322.34(2)(c), Florida Statutes with one count of felony driving while license suspended or revoked. On appeal, petitioner alleged fundamental error based on *Huss v. State*, 771 So. 2d 591 (Fla. 1st DCA 2002); *Stutts v State*, 821 So.2d 449 (Fla. 1st DCA 2002), and asserted Section 322.34(2)(c) was changed by the legislature in 1997 and not by the First District's ruling in *Huss*. Therefore, the circuit court lacked subject matter jurisdiction over a misdemeanor and erred to use petitioner's prior convictions as a predicate for a conviction of felony DWLSR because the prior convictions occurred before Section 322.24(2)(c) was amended in 1997. The district court ruled *Huss* is not retroactive and affirmed citing *Martin v. State*, 809 So. 2d 65 (Fla. 5th DCA 2002) and *Thompson v. State*, 808 So. 2d 284 (Fla. 5th DCA), *rev. granted*, 826 So. 2d 994 (Fla. 2002)³. In *Stutts*, the First District certified conflict with the Fifth District's opinion in *Thompson*.

³ The opinion noted the First District's certified conflict with the Fifth District's opinion in *Thompson*. Review of *Thompson*, Supreme Court case # SC02-800, is currently pending review before this Honorable Court.

In *Jollie v. State*, 405 So. 2d 418 (Fla. 1981) this court stated that:

Common sense dictates that this Court must acknowledge its own public record actions in dispensing with cases before it. We thus conclude 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 this Court continues to constitute prima facie express conflict and allows this Court to exercise its jurisdiction.

Jollie at 420. This court may exercise jurisdiction to review the decision of the Fifth District Court of Appeal.

CONCLUSION

Based upon the authorities cited and the argument presented, petitioner is entitled to discretionary review of the decision of the Fifth District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Charles J. Crist, Jr., Attorney General, 444 Seabreeze Boulevard, 5th Floor, Daytona Beach, Florida 32118 via his basket at the Fifth District Court of Appeal and mailed to: Mr. Bryan H. Comer, III, 48 Lake Luther Drive, Lakeland, Florida 33805, this 2nd day of January 2004.

KEVIN HOLTZ
ASSISTANT PUBLIC DEFENDER

CERTIFICATE OF FONT

I hereby certify that the size and style of type used in this brief is point proportionally spaced Times New Roman, 14pt.

KEVIN HOLTZ
ASSISTANT PUBLIC DEFENDER