IN THE

SUPREME COURT OF FLORIDA

DALE JOHNSON,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. SC07-368
	)	
STATE OF FLORIDA,	)	
	)	
Respondent.	)	
_____	)	

PETITIONER=S INITIAL BRIEF

On Review from the District Court of Appeal, Fourth District, State of Florida

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PRELIMINARY STATEMENT

Petitioner was the defendant in the Circuit Court of the Seventeenth Judicial Circuit, In and For Broward County, and the appellant in the Fourth District Court of Appeal. Respondent was the prosecution and appellee in the lower courts. In this brief the parties will be referred to as they appear before this Court.

The symbol AR@ will denote the one-volume record on appeal, which consists of the relevant documents filed below.

The symbol AT@ will denote the one-volume transcript of the proceedings held on March 21, 2005.

The symbol AST@ will denote the one-volume transcript of the proceedings held on March 22,2005.

STATEMENT OF THE CASE AND FACTS

Petitioner was tried before a jury for felony driving under the influence[1], the information alleging that his normal faculties were impaired and that he had three prior convictions for the same offense, and refusing to submit to a chemical or physical test of his breath, blood, or urine. *R 4-5*.[2] The evidence introduced during trial established the following.

Deputy Weingert was driving along Sterling Road when a motorcyclist entered the road from a plaza requiring her to hit her brakes. *T 82-84*. At the next traffic light the motorcyclist, after driving between two cars stopped at the light and pulling in front of the first car in the left lane, fell off the motorcycle. *T 84*. Deputy Weingert activated her lights while the rider and a motorist pushed the motorcycle off the street. *T 84-85*. As she spoke to petitioner, Deputy Weingert noticed that his speech was slurred and extremely slow, his eyes were bloodshot, and he smelled of alcohol. *T 85*. Deputy Devlin responded to Deputy Weingert's call for assistance. *T 86, 94-97*. While speaking to petitioner Deputy Devlin noticed that he was having difficulty standing, his speech was slurred and slow, and he smelled of alcohol. *T 98*. Deputy Devlin advised petitioner that he was

[1] ' 316.193(1) & (2)(b)3., *Fla. Stat.* (2003).

[2] ' 316.1939, *Fla. Stat.* (2003).

performing a driving under the influence investigation. *T 98.* Petitioner neither complained of any injuries nor mentioned being on medication, but mentioned that he had a few drinks. *T 98-99.* Deputy Devlin explained the one-leg stand exercise to petitioner three times, but petitioner made no attempt to perform the exercise. *T 100-102.* After petitioner performed poorly on the walk-and-turn exercise Deputy Devlin discontinued the exercises and placed him under arrest. *T 102-105.* Petitioner was transported to the breath alcohol testing center where he refused to submit to a breath test. *T 107-110.*[3] Susan Jones, a drug and alcohol testing technician, present at the breath alcohol testing center when petitioner arrived noticed that he exhibited a strong odor of alcohol, flush face, bloodshot eyes, slurred speech, unsteady gait, and mood swings. *T 123-126.*

The jury was read the standard misdemeanor driving under the influence instruction, the charge making no mention of a prior convictions element. *R 20; T 155-156.* Petitioner was found guilty of the instant DUI. *R 30; T 169.* Thereafter, the trial court, with the consent of the lawyers for both parties, made a finding, based upon its review of petitioner=s driving record[4], that he had three prior

[3] A videotape of petitioner at the breath alcohol testing center was played for the jury. *T 108-110.*

[4] A redacted copy of petitioner=s driving record was introduced into evidence without objection. *ST 71-72, 111.* The driving record can be found in the first few

convictions for driving under the influence. *T 172-174.*[5] Petitioner was adjudicated guilty of felony driving under the influence and was sentenced to three years in prison to be followed by two years of probation. *R 37-39, 42-43; T 174, 183-185.*[6]

Before the Fourth District Court of Appeal, petitioner argued "that his right to a jury trial was violated when the trial court determined, without a jury, that he had three prior DUI convictions." *Johnson v. State,* 944 So. 2d 474, 475 (Fla. 4th DCA 2006).[7] The district court rejected petitioner's argument, concluding that he "waived his right to a second phase jury determination." *Id.* at 476. Although

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pages of the record on appeal. Although the Fourth District Court of Appeal has found that a driving record, without more, is not sufficient evidence to support a finding of prior DUI convictions, *Fender v. State,* 32 Fla. L. Weekly D1527, 1528 (Fla. 4th DCA June 20, 2007), appellant did not move for a judgment of acquittal on that basis, *F.B. v. State,* 852 So. 2d 226, 230-231 (Fla. 2003); *Jackson v. State,* 788 So. 2d 373, 374-375 (Fla. 4th DCA 2001) *rev. denied,* 807 So. 2d 654 (Fla. 2002).

[5] Petitioner was not called as a witness at trial. However, the trial court asked petitioner if there was anything he wanted to say regarding the prior convictions issue, explaining that respondent presented it with a driving record indicating that he had three prior DUI convictions and stating that if the driving record was inaccurate, now was the time for someone to tell him. *ST 173-174.* Petitioner responded "[n]o, sir." *ST 174.*

[6] After being found guilty of driving under the influence, petitioner pled no contest to refusing to submit to a chemical or physical test of his breath, blood, or urine and was sentenced to a concurrent term of 364 days in the county jail. *T 177-180, 183.*

[7] It was undisputed that a written waiver of the right to a trial by jury was not executed by petitioner.

recognizing that in order to be valid, an oral waiver of the right to a jury trial must be preceded by a colloquy during which the trial court provides the defendant with a full explanation of the consequences of the waiver, and that the trial court did not conduct a colloquy with petitioner concerning the waiver in this case, the district court found a valid jury trial waiver stating:

> Johnson's counsel had previously stipulated to a second phase bench trial and affirmed this stipulation at trial, in Johnson's presence, per the court's request. We therefore hold that the stipulation of Johnson's counsel affected a valid waiver of Johnson's right to a second phase jury determination of his prior DUI convictions, and affirm on this issue.

Id. at 476-477.[8]

Petitioner's timely filed motion for rehearing and rehearing en banc was denied. Notice to invoke the discretionary jurisdiction of this Court, based upon express and direct conflict, was subsequently filed. By order dated July 9, 2007, this Court accepted jurisdiction and set a briefing schedule. This brief now follows.

[8] Citing to *State v. Harbaugh*, 754 So. 2d 691 (Fla. 2000), the district court recognized that whether petitioner had the required three prior DUI conviction was a matter he had a right to have a jury decide. 944 So. 2d at 476.

SUMMARY OF THE ARGUMENT

POINT ON APPEAL

Petitioner was tried for felony DUI. The first phase of petitioner=s trial, limited to whether he committed the instant DUI, was tried before a jury, but the second phase of the trial, the purpose of which was to determine whether petitioner possessed the requisite prior convictions, was tried before the court without a jury. Petitioner had a right to have the jury decide whether he possessed the requisite prior convictions. Petitioner did not waive, either in writing or orally on-the-record, his right to a phase two jury. Although the instant error is subject to harmless error analysis, the error cannot be considered harmless in this case. The decision of the district court should be quashed and this cause remanded with directions to empanel a jury to determine whether petitioner had the requisite prior convictions to support a conviction for felony DUI.

ARGUMENT

POINT ON APPEAL

PETITIONER DID NOT EXECUTE A VALID ORAL WAIVER OF HIS RIGHT TO HAVE A JURY DETERMINE WHETHER HE HAD THE REQUIRED THREE PRIOR CONVICTIONS IN HIS TRIAL FOR FELONY DRIVING UNDER THE INFLUENCE.

Petitioner was tried for felony driving under the influence, the information alleging that he had three prior DUI convictions. The first phase of the trial, limited to whether petitioner was guilty of driving under the influence, was tried before a jury and resulted in a guilty verdict. *R 20, 30; T 155-156, 169.* During the second phase of the trial, the trial court, with the consent of the lawyers for both parties, made a finding, based upon its review of petitioner=s driving record, that petitioner had three prior convictions for driving under the influence and adjudicated him guilty of the felony offense. *T 172-174.* The record fails to reflect that petitioner waived either in writing or orally on the record his right to have a jury determine whether he had the requisite prior convictions.

I

The Sixth Amendment to the United States Constitution reads, A[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury....@ *accord* Art. I, ' 16, *Fla. Const; Fla. R. Crim. P.* 3.251; '

918.0157, *Fla. Stat.* (2003). A defendant accused of committing a serious offense, one carrying a maximum potential penalty of more than six months in prison, is entitled to a jury trial. *Whirley v. State,* 450 So. 2d 836, 837-838 (Fla. 1984). ; *See Reed v. State,* 470 So. 2d 1382 (Fla. 1985); *Weber v. City of Fort Lauderdale,* 675 So. 2d 696, 698 (Fla. 4th DCA 1996). The right to trial by jury guarantees to the accused that a jury will decide whether each and every essential element of the charged offense has been proven beyond a reasonable doubt. *United States v. Gaudin,* 515 So. 2d 506, 509-510, 115 S.Ct. 2310, 2313-2314, 132 L.Ed. 2d 444 (1995).

II

Section 316.193, *Florida Statutes* (2003) prohibits driving under the influence in the following relevant manner:

> (1) A person is guilty of the offense of driving under the influence and is subject to punishment as provided in subsection (2) if the person is driving or in actual physical control of a vehicle within this state and:
>
> (a) The person is under the influence of alcoholic beverages, any chemical substance set forth in s. 877.111, or any substance controlled under chapter 893, when affected to the extent that the person=s normal faculties are impaired:
>
> * * *
>
> (2)(a) Except as provided in paragraph (b), subsection (3), or subsection (4), any person who is

> convicted of a violation of subsection (1) shall be punished:
>
> * * *
>
> 2. By imprisonment for:
> a. Not more than 6 months for a first conviction
>
> * * *
>
> (b)3. Any person who is convicted of a fourth or subsequent violation of this section, regardless of when any prior conviction for a violation of this section occurred, commits a felony of the third degree....

A[T]he requirement of three prior misdemeanor DUI offenses is considered an element of felony DUI.@ *State v. Finelli*, 780 So. 2d 31, 33 (Fla. 2001); *accord State v. Rodriguez*, 575 So. 2d 1262, 1264-1265 (Fla. 1991).[9] In *Rodriguez* the Court addressed the procedure to be employed in trying a defendant charged with felony DUI stating:

> We conclude that if a defendant charged with felony DUI elects to be tried by jury, the court shall conduct a jury trial on the elements of a single incident of DUI at issue without allowing the jury to learn of the alleged prior DUI offenses. If the jury returns a guilty verdict as to that single incident of DUI, the trial court shall conduct a separate proceeding without a jury to determine, in accord with general principles of law, whether the defendant had been convicted of DUI on three or more

[9] A third degree felony is punishable by up to five years in prison. ' 775.082(3)(d), *Fla. Stat.* (2003).

> prior occasions. All evidence of the prior DUI convictions must be presented in open court with full rights of confrontation, cross-examination, and representation by counsel. The trial court must be satisfied that the existence of three or more prior DUI convictions has been proved beyond a reasonable doubt before entering a conviction for felony DUI.

575 So. 2d at 1266.

Recognizing that the bifurcated process announced in *Rodriguez* infringed upon the defendant=s right to a jury trial, the court subsequently modified the procedure stating, A[g]iven, therefore, that every element of felony DUI must be proven to the satisfaction of the jury beyond a reasonable doubt, the jury, unless waived by the defendant, must decide the issue regarding the three prior convictions.@ *State v. Harbaugh,* 754 So. 2d 691, 694 (Fla. 2000).

III

Although A[a] defendant=s right to a jury trial is indisputably one of the most basic rights guaranteed by our constitution...,@ *State v. Griffith,* 561 So. 2d 528, 530 (Fla. 1990), A[a] defendant may in writing waive a jury trial with the consent of the state.@ *Fla. R. Crim. P.* 3.260. This Court has recognized that rule 3.260 expressly requires a written waiver, but has held that an oral on-the-record waiver will suffice. *Tucker v. State*, 559 So. 2d 218, 220 (Fla. 1990); *See Harringer v. State*, 566 So. 2d 893, 894 (Fla. 4th DCA 1990). In so doing the Court stated:

> An appropriate oral colloquy will focus a defendant=s attention on the value of a jury trial and should make a defendant aware of the likely consequences of the waiver. If the defendant has been advised by counsel about the advantages and disadvantages of a jury trial, than the colloquy will serve to verify the defendant=s understanding of the waiver.

Tucker, 559 So. 2d at 220; *accord Zeigler v. State*, 647 So. 2d 292, 293 (Fla. 2d DCA 1994). A valid oral waiver is one that is preceded by a colloquy between the court and the accused, *id.,* and is executed by the accused, not his attorney. *See Upton v. State,* 658 So. 2d 86, 88 (Fla. 1995). A defendant may waive all or part of his right to a jury trial, *see Blair v. State,* 698 So. 2d 1210, 1216-1217 (Fla. 1997)(defendant can waive right to six person jury and agree to jury of five), including, in felony DUI cases, the right to have the jury determine whether he has the requisite prior convictions, *Smith v. State,* 771 So. 2d 1189, 1191 & n. 4 (Fla. 5th DCA 2000). As with the complete waiver of the right to trial by jury, a partial waiver of the right to a jury trial must, in the absence of a written waiver, be proceeded by an appropriate on-the-record colloquy with he defendant. *See Blair,* 698 So. 2d at 1217-1218. In the absence of a valid waiver, a defendant=s failure to Aobject to the judge sitting as the fact-finder [is] insufficient to demonstrate that he agreed with the waiver.@ *Upton,* 658 So. 2d at 88; *accord Sinkfield v. State,* 681 So. 2d 838, 839 (Fla. 4th DCA 1996). Moreover, Aa defendant=s silence in court does

not constitute a valid waiver of the right to a jury trial, even where such silence follows defense counsel=s oral waiver on behalf of the defendant.@ *Sansome v. State*, 642 So. 2d 631, 632 (Fla. 1st DCA 1994); *accord Babb v. State*, 736 So. 2d 35, 36-37 (Fla. 4th DCA 1999).

IV

Petitioner exercised his right to have a jury trial in regard to the first phase of his bifurcated felony DUI trial, but did not do so during the second phase. The appellate record fails to reflect that petitioner waived his right to a jury trial during the second phase of the bifurcated trial either orally, after a proper colloquy, or in writing. In *Harbaugh* the Court determined that depriving the defendant of his right to a have a jury decide whether the state proved the prior offenses element of felony DUI beyond a reasonable doubt was subject to harmless error analysis. 754 So. 2d at 694-695; *See also Washington v. Recuenco*, - U.S.-, 126 S.Ct. 2546, 165 L.Ed. 2d 466 (2006); *Neder v. State*, 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed. 2d 35 (1999). Harmless error analysis asks Awhether the record demonstrates beyond a reasonable doubt that a rational jury would have found [the existence of the element of the offense not submitted to it].@ *Galindez v. State*, 955 So. 2d 517, 523 (Fla. 2007). It cannot be said beyond a reasonable doubt that a rational jury asked to find that the defendant had three prior DUI convictions, based upon its review of

a document that courts have found, as a matter of law, to be insufficiently reliable to establish the prior convictions, would not determine it insufficiently reliable as a matter of fact.[10] The partial denial of petitioner=s right to a jury trial cannot, as a result, be deemed harmless error. Accordingly, the decision of the Fourth District Court of Appeal should be quashed and this matter remanded with directions to empanel a jury to determine whether petitioner possessed the requisite prior convictions.

[10] While it is true that under questioning from the trial court petitioner admitted that his driving record was accurate, had the second phase of the trial been conducted in front of a jury, neither appellee nor the trial court would have questioned petitioner concerning the accuracy of his driving record. For whatever reason, the trial court felt that petitioner=s right to remain silent did not apply in this case. Because petitioner did not testify in his defense at trial, his response to the trial court=s improper inquiry should not be relied upon by this Court in performing its harmless error analysis.

CONCLUSION

Based upon the foregoing argument and the authorities cited therein, petitioner requests this Honorable Court quash the decision of the Fourth District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the Petitioner=s Initial Brief has been furnished by courier to Ms. Sue-Ellen Kenny, Assistant Attorney General, 1515 North Flagler Drive, Ninth Floor, West Palm Beach, Florida 33401-3432 and by U. S. Mail to Mr Dale Johnson, DC #670324, South Florida Reception Center, 14000 Northwest 41st Street, Doral, FL 33178-3003 this 3rd day of August, 2007.

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CERTIFICATE OF FONT SIZE

In accordance with *Florida Rule of Appellate Procedure* 9.210, petitioner hereby certifies that the instant brief has been prepared with 14 point Times New Roman type, a font that is not spaced proportionately.

_____
David John McPherrin

Attorney for Dale Johnson