IN THE

SUPREME COURT OF FLORIDA

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

PETITIONER'S REPLY BRIEF

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

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TABLE OF CONTENTS

CONTENTS PAGE(S)

TABLE OF CONTENTS i

AUTHORITIES CITED ..... ii, iii

PRELIMINARY STATEMENT 1

STATEMENT OF THE CASE AND FACTS 2

SUMMARY OF THE ARGUMENT 3

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 4

CONCLUSION 9

CERTIFICATE OF SERVICE 10

CERTIFICATE OF FONT SIZE 10

AUTHORITIES CITED

CASES CITED — PAGE(S)

Aldrich v. State, 104 S.W. 3rd 890 (Tex. Crim. App 2003) 8

Brown v. State, 719 So. 2d 882 (Fla. 1998) 6

Johnson v. State, 944 So. 2d 474 (Fla. 4th DCA 2006) 4

Sansome v. State, 642 So. 2d 631 (Fla. 1st DCA 1994) 5, 6, 8

Singer v. United States, 380 U.S. 24, 85 S.Ct. 783, 13 L.Ed. 2d 630 (1965) 8

Sinkfield v. State, 681 So. 2d 838 (Fla. 4th DCA 1996) 6

State v. Schopp, 653 So. 2d 1016 (Fla. 1995) 8

State v. Upton, 658 So. 2d 86 (Fla. 1995) 5, 6

Tosta v. State, 352 So. 2d 526 (Fla. 4th DCA 1977) *cert. denied*, 366 So. 2d 885 (Fla. 1978) 8

Tucker v. State, 559 So. 2d 218 (Fla. 1990) 5, 6

United States v. Larson, 302 F. 3rd 1016 (9th Cir. 2002) 7

Whirley v. State, 450 So. 2d 836
(Fla. 1984) 8

Zeigler v. State, 647 So. 2d 292
(Fla. 2d DCA 1994) 6

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

Appellant will rely upon the statement of the case and facts as submitted in his initial brief.

SUMMARY OF THE ARGUMENT

POINT ON APPEAL

This Court=s decision to exercise jurisdiction over the instant case was correct because the district court=s decision is in conflict with prior decision from this Court and other district courts regarding what constitutes a valid oral waiver of the right to trial by jury. Whether the prior decisions found the invalid waiver *per se* reversible error or applied harmless error analysis is irrelevant to the question of the waiver=s validity. A stipulation satisfies the state=s burden of proof regarding an element of the crime, but doing so does not waive the defendant=s right to a jury trial. In this case appellant did not stipulate that he had three prior DUI convictions. Because appellant was charged with a serious offense, it was not necessary for him to make a demand in order to be tried before a jury. Trial before a jury was required unless appellant executed a valid waiver of his jury trial right. Appellant did not do so. The invalid waiver of the right to trial by jury can be raised for the first time on appeal. An invalid waiver of the right to trial by jury constitutes error and should not be condoned even if the reviewing court ultimately finds the error harmless.

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.

In response to appellant=s argument that the trial court did not obtain a valid waiver of his right to have a jury determine if he possessed the requisite three prior convictions in a felony DUI prosecution and that the trial court=s failure was not harmless error, appellee asserts the following: jurisdiction was improvidently granted; the trial court obtained a valid waiver; and the issue was not preserved for appellate review. Appellant disagrees.

I

Appellee appears to misunderstand the nature of the conflict presented in this case. Despite the absence of a written jury trial waiver and the trial court=s failure to conduct an on-the-record colloquy with appellant concerning his waiver of the phase-two jury, the Fourth District Court of Appeal determined that counsel=s stipulation to a phase-two bench trial, affirmed in appellant=s presence at the trial court=s request, constituted a valid phase-two jury trial waiver. *Johnson v. State,* 944 So. 2d 474, 476-477 (Fla. 4th DCA 2006). The district court did not

decide this case on the basis that an admittedly invalid jury trial waiver was harmless error. The point of conflict in this case is whether appellant=s silence while his lawyer orally waived his right to a jury trial constituted a valid waiver of his jury trial right.

In *Tucker v. State,* 559 So. 2d 218 (Fla. 1990) and *State v. Upton*, 658 So. 2d 86 (Fla. 1995) this Court held that absent a written waiver signed by the defendant, trial without a jury will result in reversal unless the defendant executed a personal oral waiver of the jury trial right after an on-the-record colloquy during which the trial court explained the consequences of the waiver. *See also Sansome v. State,* 642 So. 2d 631, 632 (Fla. 1st DCA 1994)(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.@). Whether *Tucker* and *Upton* employed a *per se* reversible error rule, rather than harmless error analysis, is irrelevant to whether the district court=s decision that appellant validly waived his jury trial right is in conflict with those cases regarding what constitutes a valid jury trial waiver. Deciding that an invalid waiver of the right to trial by jury is harmless error is an issue independent of whether the waiver was valid or invalid. The district court=s decision that appellant validly waived his jury trial right is in

conflict with decisions from this Court establishing the requirements for a valid oral waiver. Accordingly, this Court correctly accepted this case for review.

II

In asserting that the district court correctly found a valid waiver of the jury trial right appellee labored under the same misunderstanding that guided its analysis regarding this Court=s conflict jurisdiction. There is a difference between deciding whether a waiver of the jury trial right was valid or invalid and deciding whether an invalid waiver requires reversal. Based upon the prior holdings of this Court and others it cannot be said that the trial court obtained a valid waiver of the jury trial right from appellant. *Upton,* 658 So. 2d at 88; *Tucker,* 559 So. 2d at 220; *Sinkfield v. State*, 681 So. 2d 838 (Fla. 4th DCA 1996); *Zeigler v. State*, 647 So. 2d 292 (Fla. 2d DCA 1994); *Sansome*, 642 So. 2d at 631-632.

Stipulating to facts establishing the existence of an element of the charged offense satisfies the state=s burden of proof in regard to the element, but it does not waive the defendant=s right to a jury trial. *See Brown v. State,* 719 So. 2d 882, 889 (Fla. 1998)(stipulating to convicted felon status in prosecution for possession of a firearm by a convicted felon allowed trial court to instruct jury that it could consider element proven, but the decision does not indicate that the element was to

be excluded from the jury instructions).[1] More importantly, appellee=s claim that appellant stipulated to having three prior DUI convictions is not supported by the record. At the beginning of trial appellant=s attorney agreed that appellee sufficiently redacted appellant=s driving record.[2] Trial counsel never affirmatively agreed that appellant had three prior convictions or that the driving record was accurate; he agreed to the manner of redaction, he did not object to its introduction, and he made no argument concerning its accuracy. Appellant may not have contested the accuracy of his driving record, but he did not stipulate to its accuracy, rendering any argument that he somehow waived his right to a phase-two jury trial through stipulation unfounded.[3] While the invalidity of appellant=s

[1] In *Brown* the Court held that if counsel stipulates to the existence of an element of the crime the trial court must question the defendant to determine that he personally acknowledges the stipulation and that he is voluntarily waiving his right to have the state prove the element beyond a reasonable doubt. 719 So. 2d at 889. Such an inquiry should address the jury trial right as required by *Upton* and *Tucker*. If it does not, trial counsel could effectively waive the right to a jury trial on the defendant=s behalf by stipulating to the elements of the crime, thus avoiding *Upton=s* requirement that the only valid waiver of the jury trial right is one that comes personally from the defendant. In this case the trial court conducted no inquiry whatsoever into the Astipulation@ as required by *Brown*.

[2] Although the transcript reads that appellant=s attorney said, [i]t is reflected sufficiently,@ based upon the conversation occurring at the time it appears likely that counsel actually said Aredacted@ not Areflected.@ Either way, counsel did not say that the driving record was accurate.

[3] Because trial counsel did not stipulate that appellant had three prior DUI convictions, the trial court was not required to have appellant personally

waiver may ultimately be found to constitute harmless error, harmless error is error and should not be confused with proper conduct. *See State v. Schopp,* 653 So. 2d 1016, 1021 (Fla. 1995).

III

The right to a jury trial attaches to all crimes punishable by more than six months in jail. *Whirley v. State,* 450 So. 2d 836, 837-838 (Fla. 1984). A defendant charged with a serious offense need not make a demand for trial by jury; trial must be held before a jury unless it is waived by the defendant. *See Singer v. United States,* 380 U.S. 24, 85 S.Ct. 783, 13 L.Ed. 2d 630 (1965); *Tosta v. State,* 352 So. 2d 526, 527 (Fla. 4th DCA 1977) *cert. denied,* 366 So. 2d 885 (Fla. 1978). The invalidity of a jury trial waiver may be raised for the first time on appeal. *See Sansome,* 642 So. 2d at 632; *See also Aldrich v. State,* 104 S.W. 3rd 890, 895 (Tex. Crim. App 2003)(violation of waivable-only rights, which include the rights to the assistance of counsel and trial by jury, may be raised for the first time on appeal).

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acknowledge the stipulation and waive the right to have the state prove that he had three prior DUI convictions. *See Brown,* 719 So. 2d at 889. Therefore, the trial court should not have questioned appellant about the accuracy of his driving record and, as a result, his response to the trial court=s inquiry should not be considered. *See generally United States v. Larson,* 302 F. 3rd 1016, 1021 (9th Cir. 2002)(A[a] stipulation is valid if the defendant >knew of the effect of the stipulation and made an intelligent decision to shoulder the consequences.=@) After all, a bench trial is still a trial leaving the trial court powerless to question appellant unless he testified as a witness during trial.

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 Reply 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, Baker Correctional Institution, Post Office Box 500, 20706 U. S . Highway 90 West, Sanderson, FL 32087-0500 this 17th day of September, 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