

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

S.C. Court No.

Lower Court No. 2D04-1313

JEROME T. BELL,

Respondent.

ON PETITION FOR REVIEW FROM
THE SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA

INITIAL BRIEF OF PETITIONER ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

On May 9, 2003, the State Attorney for the Tenth Judicial Circuit in and for Polk County filed an information against Respondent charging the commission of the following offenses: Count one, driving while license revoked (habitual offender); count two, driving under the influence; count three, resisting officer with violence; count four, battery on a law enforcement officer, and; count five, depriving officer of means of protection or communication. (VI: R26-28).

On February 2 and 3, 2004, a jury trial was held before the Honorable Circuit Court Judge Randall McDonald. During the course of the trial, Respondent plead nolo contendere to count one and was acquitted of count two. (VI: R65). He was found guilty, as charged, of counts three and five and guilty of battery, a lesser included offense of battery on a law enforcement officer, of count four. (VI: R63-64).

On February 16, 2004, Respondent was sentenced as follows: Count one, a term of imprisonment of five years to run consecutive to count three but concurrent with count five; count three, designation as a Prison Releasee Reoffender (PRR) and imprisonment of five years; count four, time served, and; count five, a term of imprisonment of five years to run concurrent with count one but consecutive to count three. (VI: R87-94). It was further ordered Respondent receive 289 days in jail credit. (VI: R94).

Respondent appealed his conviction claiming the trial court erred in sentencing him to consecutive sentences. It was specifically argued his consecutive sentences were illegal in light of the Second District Court of Appeal's holding in Rodriguez v. State, 883 So. 2d 908 (Fla. 2nd DCA 2004) wherein it expressed recognition of this Court's holdings in Daniels v. State, 595 So. 2d 962 (Fla. 1992) and Hale v. State, 630 So. 2d 521 (Fla. 1993) that consecutive sentences are prohibited under the Prison Releasee Reoffender (PRR) Act when the sentences arise out of crimes occurring during one single criminal episode.

On February 16, 2007, the Second District Court of Appeal issued its written opinion affirming in part and reversing in part; the court agreed with Respondent's claim that a five year PRR sentence on a felony offense followed by a five-year consecutive sentence on another felony offense is illegal if both offenses arose out of the same criminal episode. However, it found the occurrence of two criminal episodes in the instant case. It found counts three and five occurred during the same criminal episode only reversing the imposition of a consecutive sentence in count five. It also certified conflict with Reeves v. State, 920 So. 2d 724 (Fla. 5th DCA) review granted 933 So. 2d 521 (Fla. 5th DCA 2006) stating as follow:

Recognizing that Reeves v. State, 920 So. 2d 724 (Fla. 5th DCA) review granted, 933 So. 2d 521 (Fla. 2006), acknowledged conflict with Rodriguez on this issue and that the Florida Supreme Court has accepted review of Reeves, we acknowledge conflict with Reeves.

On December 5, 2006, an oral argument was held in Reeves and that case is currently pending review in this Court. In an abundance of caution, Petitioner will file a concomitant motion to stay in abeyance to conserve judicial economy.

PRELIMINARY STATEMENT

Citations to the record on appeal will be referred to by the symbol (V) followed by the appropriate page number.

SUMMARY OF THE ARGUMENT

This Court may exercise its discretionary jurisdiction to review the instant case wherein the Second District Court of Appeal certified conflict with a decision rendered by the Fifth District Court of Appeal on the same question of law. In Bell v. State, 32 Fla. L. Weekly D 476 (Fla. February 16, 2007), the Second District held a PRR sentence followed by a consecutive sentence is illegal if the crimes arose out of a single criminal episode. This holding conflicts with the holding Reeves v. State, 920 So. 2d 724 (Fla. 5th DCA) on the same question of law. Accordingly, Respondent respectfully requests this Court review the instant case.

ARGUMENT

ISSUE

**WHETHER THIS COURT SHOULD ACCEPT
DISCRETIONARY REVIEW OF THE DECISION FROM
THE SECOND DISTRICT COURT OF APPEAL?**

As this Court explained in the Florida Star v. B.J.F., 530 So. 2d 286, 288 (Fla. 1988), the state constitution creates two separate concepts regarding this Court's discretionary review. The first concept is the broad general grant of subject-matter jurisdiction. The second more limited concept, discretionary jurisdiction, is a constitutional command as to how this Court may exercise its discretion in accepting jurisdiction. Florida Star v. B.J.F., 530 So. 2d at 288.

Discretionary jurisdiction may be invoked to review a decision by a district court which certifies direct conflict with a decision of another district court. Fla. Const. Art. V, § 3(b)(4). This Court has held the "concern in cases based on our conflict jurisdiction is the precedential effect of those decisions which are incorrect and in conflict with decisions reflecting the correct rule of law." Wainwright v. Taylor, 476 So. 2d 669, 670 (Fla. 1985). In the instant case, the Second District Court of Appeal certified conflict with a decision from the Fifth District Court of Appeal on the same question of law.

Petitioner submits this Court should accept jurisdiction and review this case.

In the instant case, Respondent was convicted of resisting an officer with violence in count three and depriving an officer of means of protection or communication in count five. (VI: R26-28 & R63-64). He was subsequently was designated a Prison Releasee Reoffender (PRR) in regards to count three and sentenced to imprisonment of five years. As to count five, a five year prison term was ordered to run concurrently with count one but consecutive to count three. (VI: R87-94).

Respondent appealed his conviction to the Second District claiming his consecutive sentences were illegal in light of Rodriguez v. State, 883 So. 2d 908 (Fla. 2nd DCA 2004) wherein the second district recognized this Court's holdings in Daniels v. State, 595 So. 2d 962 (Fla. 1992) and Hale v. State, 630 So. 2d 521 (Fla. 1993) that the imposition of consecutive sentences are prohibited under the Prison Releasee Reoffender (PRR) Act when the crimes arose out of one single criminal episode.

On February 16, 2007, the Second District issued its written opinion affirming in part and reversing in part; the court agreed with Respondent's contention that a five year PRR sentence followed by a five year consecutive sentence is illegal if both offenses arose out of the same criminal episode. It concluded Respondent's sentence in regards to count five was illegal because a consecutive sentence

pursuant to the PRR statute was ordered to follow a five-year sentence. It also certified conflict with Reeves v. State, 920 So. 2d 724 (Fla. 5th DCA) review granted, 933 So. 2d 521 (Fla. 2006) and recognized Reeves acknowledged conflict with Rodriguez v. State, 883 So. 2d 908 (Fla. 2nd DCA 2004) on this issue.

Here, the Second District's holding is diametrically opposite to the holding in Reeves. In Reeves, the petitioner also argued the trial court's imposition of a consecutive sentence pursuant to the PRR statute was illegal because his crimes arose out of the same criminal episode. In advancing this argument, he relied on Rodriguez wherein the second district held it was illegal to combine or blend enhanced or unenhanced sentences to impose a total sentence exceeding the sentence permitted under the applicable enhancement statute.

It was ultimately concluded by the Fifth District that a PRR sentence followed by a consecutive criminal punishment code sentence, not otherwise enhanced beyond the statutory maximum, is not illegal even if the crimes arise from a single episode. Reeves v. State, 920 So. 2d 724, 726 (Fla. 5th DCA 2006). In reaching its conclusion, the district court expressed disagreement with the holding in Rodriguez finding Rodriguez "treats a PRR sentence as an enhanced sentence, rather than a minimum mandatory sentence." It further noted a distinction between the habitual offender sentencing scheme and sentencing pursuant to a PRR designation. Id.

The Fifth District explained the PRR statute, also viewed as a "minimum mandatory statute", did not authorize enhancement of sentences beyond the statutory maximum. Once an offender receives a PRR designation, the only legal sentence is the statutory maximum which must be served in its entirety. Reeves v. State, 920 So. 2d 724 at 726. According to the Fifth District, the same is not true in respect to a habitual offender sentences. Under a habitual offender sentencing scheme, it is illegal to use consecutive sentencing to lengthen an overall sentence when there is one or more counts arising from one single criminal episode. Id.

Under the holding in Reeves, Petitioner submits the Second District erred in reversing Respondent's sentence in count five. Respondent was convicted of the commission of "depriving [an] officer of means of protection or communication", a third-degree felony in violation of section). According to the Criminal Punishment Code, a third degree felony is punishable by a maximum term of imprisonment of five-years. § 775.082 (9)(a)(3)(d), Fla. Stat.(2004). Respondent was sentenced to five years imprisonment to run concurrently with count one but consecutive to count three. Here, the term of actual imprisonment was not beyond the statutory maximum of five-years.

An application of the law set forth in Reeves to the facts of the instant case leads to the conclusion that the imposition of a consecutive sentence pursuant to a PRR designation is not

illegal because the term of imprisonment ordered was not enhanced beyond the statutory maximum. According to the holding in Reeves, the fact that counts three and five may have been born out of the same criminal episode is of no legal significance given that Respondent was sentenced pursuant to the PRR statute and a habitual offender sentencing scheme.

Accordingly, this Court should accept review of the second district's opinion Bell.

CONCLUSION

Because the Second District Court of Appeal certified conflict in the instant case with Reeves, a decision by the Fifth District Court of Appeal, this Court should accept jurisdiction and review decision in this matter.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing has been furnished by U.S. mail to Allyn Giambalvo, Assistant Public Defender, Public Defender's Office, Criminal Courts Complex, 14250 49th Street North, Clearwater, Florida 33762-2800 on this 15th day of March 2007.

COUNSEL FOR PETITIONER

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).

COUNSEL FOR PETITIONER