IN THE SUPREME COURT OF FLORIDA

CASE NO. SC08-1489
DCA CASE NO. 3D08-1657

BERNARD JOYNER,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW TO THE
DISTRICT COURT OF APPEAL, THIRD DISTRICT

BRIEF OF RESPONDENT ON JURISDICTION

BILL McCOLLUM
Attorney General
Tallahassee, Florida

RICHARD L. POLIN
Bureau Chief, Criminal Appeals
Florida Bar No. 0230987

NIKOLE HICIANO
Assistant Attorney General
Florida Bar Number 0844411
Office of the Attorney General
Department of Legal Affairs
444 Brickell Avenue, Suite 650
Miami, Florida 33131
(305) 377-5850 (W)
(305) 377-5655 (F)

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STATEMENT OF THE CASE AND FACTS

Petitioner, Bernard Joyner, was the defendant in the trial court and Appellant in the District Court of Appeal, Third District. Respondent, the State of Florida, was the prosecution in the trial court and the Appellee in the District Court of Appeal, Third District.

The trial court denied the Petitioner's motion to correct illegal sentence. He appealed to the Third District Court of Appeal. See Joyner v. State, 33 Fla. L. Weekly D 1844 (Fla. 3d DCA July 23, 2008) ("Joyner"). The following facts are taken from Joyner. In Joyner the Third District Court of Appeal affirmed the denial of additional credit for time served finding that a provision in a plea agreement that credit was to have been awarded only for time served from a specific date effectively waived any claim to credit for time served before that date. In 2004, Petitioner entered into a plea agreement and was sentenced to five years probation for the offense of false imprisonment. In 2006, Petitioner was arrested for violation of probation. He entered a plea of admission to the violation and was sentenced to two years incarceration in the Department of Corrections. He received credit time served for seventy-eight days. Subsequently, he filed a motion claiming that he was entitled to 122 additional credit time served.

In denying the motion, the circuit court attached a copy of the plea

agreement. The agreement stated that Joyner understand and agreed that as part of my plea bargain he would be receiving the credit for time served from November 29, 2006, to February 15, 2007. The appellate court held that credit under Florida Statute Section 921.161(1)(2004), could have been waived as part of a plea agreement. The Third District found that as Defendant's agreement provided for credit for time served between two stated dates he was not entitled to credit served before those dates.

Petitioner now seeks discretionary review in this Court alleging that the opinion Third District's opinion in Joyner is in express and direct conflict with Davis v. State, 405 So. 2d 418 (Fla. 1981), Reed v. State, 810 So. 2d 1025 (Fla. 2d DCA 2002), Silverstein v. State, 654 So. 2d 1040 (Fla. 4th DCA 1995), and Van Ellis v. State, 455 So. 2d 1065 (Fla. 1st DCA 1984).

SUMMARY OF THE ARGUMENT

The decision of the Third District Court is not in express and direct conflict with any decisions of this Court or any of the district courts of appeal on the same question of law. Accordingly, this Court should decline to exercise its jurisdiction to review the lower court's decision.

ARGUMENT

THE DECISION OF THE THIRD DISTRICT COURT DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH ANY DECISIONS OF THIS COURT OR ANY OF THE DISTRICT COURTS OF APPEAL.

This Court should decline to exercise its discretionary jurisdiction in this matter. Article V, § 3(b)(3), Florida Constitution and Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv), provide that the discretionary jurisdiction of the Florida Supreme Court may be sought to review a decision of a District Court of Appeal which expressly and directly conflicts with a decision of another District Court of Appeal or of the Florida Supreme Court on the same question of law. Decisions are considered to be in express and direct conflict when the conflict appears within the four corners of the majority decisions. Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986), Jenkins v. State, 385 So. 2d 1356, 1359 (Fla. 1980).

Here, Petitioner argues that the Third District's opinion in Joyner is in express and direct conflict with Davis v. State, 405 So. 2d 418 (Fla. 1981), Reed v. State, 810 So. 2d 1025 (Fla. 2d DCA 2002), Silverstein v. State, 654 So. 2d 1040 (Fla. 4th DCA 1995), and Van Ellis v. State, 455 So. 2d 1065 (Fla. 1st DCA 1984). Petitioner further argues that as opinion below cited to Johnson v. State, 974 So. 2d 1152 (Fla. 3d DCA), which is stayed pending disposition of Rivera v.

State, 954 So. 2d 1216 (Fla. 3d DCA 2007), review granted 968 So. 2d 557 (Fla. 2007), there is prima facie evidence of an express conflict of decisions.

First, Petitioner is misconstruing Jollie v. State, 405 So. 2d 418 (Fla. 1981). Jollie concerned whether this Court had jurisdiction to review unelaborated per curiam affirmance ("PCA") that cite to another decision of a district court. There, this Court found 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 v. State, 405 So. 2d 418, 420 (Fla. 1981)(emphasis added). However, the opinion below is not an unelaborated per curiam opinion. Instead, it provides a basis upon which it can be distinguished from the other opinions cited by the Appellant.

Respondent would also note that the matter under review in Rivera is not the same issue as the present case. The issue in Rivera, is that "[t]he defendant's claim for additional credit for time served is inconsistent with the terms of the plea agreement on the record." Rivera, 954 So.2d at 1217. The Third District explained, citing Fulcher v. State, 875 So.2d 647 (Fla. 3d DCA 2004), that "to grant the requested additional credit here would reach an absurd result by undoing the

amounts of time the defendant specifically agreed to serve." Rivera, 954 So.2d at 1218. The instant opinion is not based on a claim that is "inconsistent with the terms of the plea agreement" or "would reach an absurd result." In fact, the instant opinion is based upon credit for time served that is entirely consistent with the written plea agreement and the plea colloquy. As such, Petitioner's claim of a prima facie case of express conflict fails.

Petitioner's allegation that the district court's decision below expressly and directly conflicts with decisions of other district courts of appeal is without merit. In Davis v State, 968 So. 2d 1051, 1052 (Fla. 5th DCA 2007), the Fifth District considered whether a plea agreement statement providing that "credit for time served as 7/31/2006 is 1,531 days" waives entitlement to additional days of jail credit. The Fifth District found that the statement was not conclusive evidence that the defendant knowingly and voluntarily waived jail credit to which he would otherwise be entitled to. The Fifth District remanded the case to the trial court with instructions to either grant the motion or attach portions of the record conclusively refuting the inmate's claim.

Here, the signed agreement on credit for time served clearly states that the Defendant understands and agrees that he will be receiving credit for time served from November 29, 2006 to February 15, 2007. In addition to being factually

distinguishable, the holding in Davis is likewise distinguishable from the instant case. The Fifth District held that waiver could not be shown "merely by a defendant's stipulation to a certain amount of credit, absent evidence that the defendant knew of his entitlement to additional jail credit and voluntarily relinquished that right." Davis, 968 So.2d at 1053. The Third District held "that a provision in a plea agreement that the defendant is to be awarded credit for time served from a specific date effectively waives any claim to credit for time served before that date." Despite Petitioner's urging otherwise, these two holdings are not in express or direct conflict. Davis goes to "a certain amount of credit" – *e.g.,* a number of days and the Third District's opinion speaks to a written plea agreement for credit for time served between specific dates.

Petitioner also seeks to establish a conflict between the instant opinion and Silverstein v. State, 654 So.2d 1040 (Fla. 4th DCA 1995). As with Davis, Silverstein is factually distinguishable inasmuch as it allowed a certain number of days of credit for time served – 127 days – whereas the Third District's opinion allowed for credit for time served from a date certain. Furthermore, the holding in Silverstein is that where the waiver of credit is not shown on the record, it will not be presumed. Silverstein, 654 So.2d at 1041. In the instant case, the waiver was shown in the agreement in writing. As such, no express or direct conflict exists

between the opinion under review and the opinion in Silverstein.

Next, Petitioner seeks to establish conflict between the instant opinion and Reed v. State, 810 So. 2d 1025 (Fla. 2d DCA 2002). In Reed the defendant's motion alleged that she was incarcerated in county jail from November 4, 1999, to October 16, 2000; that she was therefore entitled to 357 days' jail credit toward her prison sentence; and that the trial court had awarded her only 251 days' credit. Id. Her motion did not allege that the court records reflected that she was entitled to the jail credit she was seeking, and she did not attach any jail or court records reflecting that she served the claimed amount of time in jail. Id. The trial court asserted that defendant had executed a plea agreement which stipulated to jail credit of 251 days. Id. However, the only attachment to the trial court's order was a portion of the judgment and sentence which stated that defendant would be allowed a total of 251 days' jail credit followed by the phrase, "stipulated credit." Id.

The district court found the motion facially insufficient. In dicta, the district court noted that had the motion been facially sufficient, reversal would have been compelled order because the attachments to the order did not refute Reed's claim. Id. Without an attached signed plea agreement or the transcript of the plea colloquy showing that Reed had stipulated to the jail credit, the trial court's order and its attachments are insufficient to refute Reed's claim to additional jail credit. Id.

However, here, the trial court attached the district court found that the attached plea agreement showed that the Petitioner was only being credited for time served between two specific dates. Moreover, dicta can not be the basis to establish express and direct conflict.

In Van Ellis v. State, 455 So. 2d 1065 (Fla. 1st DCA 1984), the defendant was adjudged guilty of unarmed robbery and was sentenced to serve 364 days in jail to be followed by three years probation. Id. Defendant subsequently pled guilty to a parole violation and was sentenced to serve further jail time. In addition, appellant's probationary period was extended. Id. Defendant was charged with violating his parole a second time. On the second violation, the trial court revoked his probation, adjudicated him guilty of unarmed robbery, and sentenced him to six years in prison with credit for 139 days previously served. Id. The district court found that were not the same as in Epler v. Judges of Thirteenth J.C., Hillsborough Cty., 308 So. 2d 134 (Fla. 2d DCA 1975), where pursuant to a plea bargain, the defendant voluntarily and specifically relinquished his right to be credited for time served prior to his sentencing. Id. at 1066. The district court held that under those particular circumstances, the defendant waived his right to credit for time served and could not raise that issue on appeal. Id. at 1066. The court remanded the matter for the trial court to determine the jail time appellant served and to give him

credit therefore.

Van Ellis is distinguishable from the case at bar. Here, the Third District found that as the defendant had waived entitlement to additional credit as he entered an agreement which provides credit for time served between two specific dates. Van Ellis contained no such agreement.

CONCLUSION

On the basis of the foregoing, this Court should decline to exercise its jurisdiction to review the lower court's decision.

Respectfully submitted,

BILL McCOLLUM.
Attorney General
Tallahassee, Florida

RICHARD L. POLIN
Bureau Chief
Florida Bar No. 0230987

NIKOLE HICIANO
Assistant Attorney General
Florida Bar Number 0844411
Office of the Attorney General
Department of Legal Affairs
444 Brickell Avenue, Suite 650
Miami, Florida 33131
(305) 377-5850 (W)
(305) 377-5655 (F)

CERTIFICATE OF SERVICE

HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Petitioner on Jurisdiction was mailed this 26th day of August 2008, to Shannon P. McKenna, Assistant Public Defender, NW 14th Street, FL 33125.

_____

NIKOLE HICIANO
Assistant Attorney General

CERTIFICATE REGARDING FONT SIZE AND TYPE

The undersigned attorney hereby certifies that the foregoing Brief of Respondent on Jurisdiction has been typed in Times New Roman, 14-point type.

_____

NIKOLE HICIANO
Assistant Attorney General

APPENDIX A

Bernard A. Joyner, Appellant, vs. The State of Florida, Appellee.

No. 3D08-1657

COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

2008 Fla. App. LEXIS 11224*; *33 Fla. L. Weekly D 1844

July 23, 2008, Opinion Filed

NOTICE:

NOT FINAL UNTIL DISPOSITION OF TIMELY FILED MOTION FOR REHEARING.

PRIOR HISTORY: [*1]

An Appeal under *Florida Rule of Appellate Procedure 9.141(b)(2)* from the Circuit Court for Miami-Dade County, Beatrice Butchko, Judge. Lower Tribunal No. 03-36010.

COUNSEL: Bennett H. Brummer, Public Defender, and Shannon P. McKenna, Assistant Public Defender, for appellant.

Bill McCollum, Attorney General, and Nikole Hiciano, Assistant Attorney General, for appellee.

JUDGES: Before COPE, SUAREZ, and CORTINAS, JJ.

OPINION BY: COPE

OPINION

COPE, J.

This is an appeal from an order denying a motion under *Florida Rule of Criminal Procedure 3.800(a)* for additional credit for jail time served. We affirm.

According to the motion filed by defendant-appellant Bernard Joyner, in 2004 the defendant entered into a plea agreement and was sentenced to five years probation for the offense of false imprisonment. According to the motion, he was incarcerated for 122 days prior to his release on probation.

In 2006, the defendant was arrested for violation of probation. He entered a plea of admission to the violation and was sentenced to two years incarceration in the Department of Corrections. He was incarcerated for seventy-eight days in jail prior to his commitment to the Department. The trial court awarded seventy-eight days of credit for jail [*2] time served.

The defendant subsequently filed the motion now before us, contending that he is entitled to credit for an additional 122 days, representing the 122 days he served in 2004 prior to his initial placement on probation. The trial court summarily denied the motion. The defendant has appealed.

To support the denial, the court attached the following agreement dated February 15, 2007:

> *AGREEMENT*
>
> *On*
>
> *CREDIT FOR TIME SERVED*
>
> 1. I, *Bernard Joyner*, am the Defendant in Case No. *FO336010*
>
> 2. I am (check one):
>
> pleading guilty
>
> pleading no contest
>
> admitting to a *violation of community control*
>
> *X* Admitting to a *violation of probation*
>
> 3. *I understand* and *agree* that as part of my plea bargain *I will be receiving the following credit for time served* (check one and fill in as appropriate):
>
> [checkmark] From 11-29, 2006 to 2-15, 2007
>
> [] days credit for time served
>
> [] all credit for time served
>
> [] no credit for time served

(Emphasis in original). The form was signed by the defendant, defense counsel, the assistant state attorney, and the judge. [1]

1 The plea colloquy was not transcribed. The sole basis of denial of relief was the agreement.

The question before us is whether the agreement operated as a [*3] waiver of the defendant's claim for the 122 days he served in 2004. By statute a defendant is to be given "credit for all of the time she or he spent in the county jail before sentence." *§ 921.161(1), Fla. Stat.* (2004). Credit for time served may be waived, however, as part of a plea agreement. *Prangler v. State, 470 So. 2d 105, 106 (Fla. 2d DCA 1985)*; *Epler v. Judges of the Thirteenth Judicial Circuit, 308 So. 2d 134 (Fla. 2d DCA 1975)*.

We affirm the denial of relief on authority of *Johnson v. State, 974 So. 2d 1152 (Fla. 3d DCA), review granted, 968 So. 2d 557 (Fla. 2008)* (stayed pending disposition of Florida Supreme Court review in *Rivera v. State, 954 So. 2d 1216 (Fla. 3d DCA), review granted, 968 So. 2d 557 (Fla. 2007))*. The *Johnson* court held that "a provision in a plea agreement that the defendant is to be awarded credit for time served from a specific date effectively waives any claim to credit for time served before that date." *974 So. 2d at 1152*.

At the court's request, the parties have addressed the question whether there is an internal conflict of this court's decisions regarding whether there is a waiver of credit for time served, when a provision in the plea agreement [*4] states that credit is to be provided from a particular date. [2] The defendant contends that there is a conflict between the language just quoted in *Johnson* and four of this court's earlier decisions: *Griffin v. State, 838 So. 2d 1218 (Fla. 3d DCA 2003)*; *Ryan v. State, 837 So. 2d 1075 (Fla. 3d DCA 2003)*; *Sommers v. State, 829 So. 2d 379 (Fla. 3d DCA 2002)*; and *Cozza v. State, 756 So. 2d 272 (Fla. 3d DCA 2000)*. We conclude that all of the cases are distinguishable and that there is no internal decisional conflict.

2 The court expresses its appreciation to the public defender and the State for filing their responses on an expedited basis. The defendant had asserted an entitlement to immediate release from incarceration.

In *Cozza,* this court remanded because the plea colloquy was not in the postconviction record on appeal. *756 So. 2d at 273*. There is no indication in the opinion that there was any written plea agreement. In the absence of the plea colloquy, this court was unable to determine whether the defendant had waived credit for time served. Accordingly, this court reversed the order denying the defendant's motion for credit for additional time served, and remanded for further proceedings. [*5] *Id. at 273-74*.

In *Ryan,* the defendant accepted a plea offer by the court and the court pronounced sentence. *837 So. 2d at 1076*. After the colloquy, the court awarded credit for time served between February 22, 2002 and the sentencing on March 18, 2002. The defendant contended that he was entitled to additional credit for time previously served. This court remanded for the granting of the additional credit because there had been no waiver of credit for time served during the plea colloquy. The trial court's order regarding credit for time served had been entered after the plea colloquy was over. *Id. at 1076-77*.

In *Griffin,* this court enforced a waiver of credit for time served for the period prior to the defendant's sentencing on March 6, 2000. *838 So. 2d at 1219*. The court concluded that there had been no waiver for time served subsequent to March 6, 2000, and directed that additional credit be given for the subsequent time served. *Id. at 1220*.

In *Sommers,* the defendant was sentenced to a split sentence of twelve years incarceration followed by ten years of probation. *829 So. 2d at 379*. He completed the incarceration and began serving the probationary period. After his first violation, [*6] the defendant was sentenced to community control followed by probation. After his second violation, the defendant entered into a plea agreement for community control followed by probation, with credit for time served since March 28, 2000. *Id. at 379-80* & n. 1. [3] On his third violation, eleven months later, the defendant was sentenced to fifteen years incarceration. There was no plea agreement on the third violation.

3 This agreement apparently provided for credit which would be applied against the defendant's two-year term of community control.

Sommers contended that he was entitled to additional credit for time served, namely, the time he served on his original prison sentence in the Department of Corrections. The State maintained that the defendant's plea agreement which resolved the second affidavit of violation (when the defendant was sentenced to community control and probation) amounted to a waiver of a claim of credit for time served when, eleven months later, the defendant was sentenced to fifteen years incarceration. This court disagreed, saying that the earlier agreement "does not amount to a global waiver of credit for all time served, as the state suggests." *Id. at 380 n. 1.* [*7] *See generally § 921.0017, Fla. Stat.* (2001) (requiring credit for time served in certain split sentence cases).

In the case now before us the defendant entered the agreement quoted above, which provided for credit for time served between two stated dates. The present case is indistinguishable from this court's decision in *Johnson, 974 So. 2d at 1152-53*, and we affirm on authority of that case.

Affirmed. [4]

4 Speaking for himself, the writer of this opinion suggests that the Agreement on Credit for Time Served could be improved by including an express waiver clause, *see Hinkel v. State, 937 So. 2d 1201 (Fla. 5th DCA 2006)*; *Williams v. State, 711 So. 2d 1369, 1370 (Fla. 4th DCA 1998)*, in plain language and in capital letters or bold faced type.