IN THE SUPREME COURT OF FLORIDA

3RD DCA CASE NO. 07-2418
FSC CASE NO. _____

ANDREA JOHNSON

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

APPEAL FROM THE DISTRICT
COURT OF APPEAL
OF FLORIDA,THIRD DISTRICT

BRIEF ON JURISDICTION

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INTRODUCTION

This is a petition for discretionary review by the petitioner/defendant Andrea Johnson based on conflict jurisdiction from the decision of the Third District Court of Appeal, issued on February 13, 2008. Citations are to the Appendix containing the decision attached hereto.

STATEMENT OF THE CASE AND FACTS

The facts relevant to a determination of whether discretionary review is warranted are set forth in the decision of the Third District, as follows:

The defendant was charged with offenses in 2002 and spent time in boot camp in 2002. (A: 2) He was later charged with violating probation. (A: 2) At the probation violation hearing, he agreed in a plea colloquy and in writing to having violated probation specifically in return for a four-year state prison sentence with "all credit for time served from 11/14/05." (A: 2)

The defendant later sought credit for the time he previously spent in boot camp in the case in 2002 on his original charges. (A: 2) The trial judge denied his motion for credit for time served. (A: 2)

On appeal, the defendant argued he was entitled to credit for time served in boot camp and that his agreement to plead guilty to violation of probation in

exchange for a four-year prison sentence with all credit for time served from November 14, 2005, was not a waiver of credit for time served in boot camp in 2002. (A: 2) In its decision, the Third District agreed the defendant would normally be entitled to credit for time served in boot camp, but that his plea agreement to credit for all time served from a specific date, specifically November 14, 2005, effectively waived any claim to credit for time served before that date. (A: 1-2) The Third District cited in support its case of Rivera v. State, 954 So.2d 1216 (Fla. 3d DCA 2007), review granted, 968 So.2d 557 (Fla. 2007), and noted conflict with the Fifth District case of Davis v. State, 968 So.2d 1051 (Fla. DCA 2007). (A: 2) The Third District then affirmed the trial court's order denying the defendant's motion for credit for time served in boot camp. (A: 2)

SUMMARY OF ARGUMENT

The decision of the Third District expressly and directly conflicts with the decision of the Fifth District Court of Appeal in Davis v. State, 968 So.2d 1051 (Fla. 5th DCA 2007), on the issue of waiver for credit time served. The Third District held that waiver for credit time served can be shown by a provision in a plea agreement that the defendant is to be awarded credit for time served from a specific date, which effectively waives any claim to credit for time served before that date. In Davis, however, the Fifth District held that such a waiver cannot be shown merely by a defendant's stipulation to a certain amount of credit time served, without evidence the defendant knew of his entitlement to and voluntarily relinquished his right to additional credit before that date.

The Third District's decision also directly conflicts with the decisions of other district courts of appeal on the same issue in factually similar cases. See Silverstein v. State, 654 So.2d 1040 (Fla. 4th DCA 1995); Van Ellis v. State, 455 So.2d 1065 (Fla. 1st DCA 1984); Reed v. State, 810 So.2d 1025 (Fla. 2d DCA 2002).

In addition, the Third District cited as support for its implicit waiver theory a decision currently pending in this Court on the same issue, Rivera v. State, 968 So.2d 557 (Fla. 2007) (Fla.S.Ct. No: SC07-936), granting review of Rivera v. State, 954 So.2d 1216 (Fla. 3d DCA 2007).

ARGUMENT

THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISIONS IN DAVIS v. STATE, 968 So.2d 1051 (FLA. 5th DCA 2007), SILVERSTEIN v. STATE, 654 So.2d 1040 (FLA. 4th DCA 1995), REED v. STATE, 810 So.2d 1025 (FLA. 2d DCA 2002), AND VAN ELLIS v. STATE, 455 So.2d 1065 (FLA. 1st DCA 1984), ON THE ISSUE OF IMPLIED WAIVER OF CREDIT FOR TIME SERVED, AND THIS ISSUE IS PENDING IN THIS COURT IN RIVERA v. STATE, 968 So.2d 557 (FLA. 2007) (FLA.S.CT.NO: SC07-936).

In its decision, the Third District held that waiver for credit time served can be shown by a provision in a plea agreement that the defendant is to be awarded credit for time served from a specific date, and that such a provision effectively waives any claim to credit for time served before that date.

The Third District's implicit waiver theory directly conflicts with the decisions of other district courts of appeal on the same issue in factually similar cases. As the Third District noted in its decision, it is in conflict with the Fifth District in Davis v. State, 968 So.2d 1051 (Fla. 5th DCA 2007). In Davis, as in the present case, the defendant entered into a plea agreement in which he agreed to credit for time served from a specific date. The plea agreement in Davis states "credit for time served as of 7/31/2006 is 1,531 days," and in the present case, the

agreement states "all credit for time served from 11/14/05." The defendant in Davis, as here, sought additional credit for time served before that date and the trial court denied that credit. The Fifth District, however, reversed and stated that it did "not view this statement in the plea agreement as conclusive evidence that Appellant knowingly and voluntarily waived jail credit to which he would otherwise be legally entitled." The court further held that a 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."

In Silverstein v. State, 654 So.2d 1040 (Fla. 4th DCA 1995), the trial court sentenced the defendant pursuant to a plea agreement on a probation violation to 364 days in jail with 127 days credit for time served, which was the amount of time the defendant served since he was arrested on the current probation violation. Although the defendant's attorney mentioned to the trial court that there was additional time served, the attorney did not object to the sentence as imposed. The Fourth District found that this failure to object was not a sufficient waiver and held: "Where a defendant's waiver of credit for time served on the incarcerative portion of a split sentence is not clearly shown on the record, it will not be presumed." The court reversed and remanded the case to the trial court to award

the defendant credit for time served previously in custody. Accord Reed v. State, 810 So.2d 1025 (Fla. 2d DCA 2002) (defendant's sentencing document alone, which states that he will receive 251 days stipulated credit, not a sufficient express and specific waiver of any remaining credit for time served); Van Ellis v. State, 455 So.2d 1065 (Fla. 1st DCA 1984) (court declined to find waiver of credit for time served where defendant did not voluntarily and specifically relinquish his right to time served when he did not object to his sentence of a specific length with a specific amount of credit for time served).

The decision of the Third District is in direct conflict with these decisions in holding that an implicit waiver of previous credit for time served is established simply by the agreement to a specified date, without any evidence the defendant was knowingly and voluntarily giving up other jail credit to which he would otherwise be legally entitled. This conflict is already recognized by this Court by its granting of discretionary review in Rivera v. State, 954 So.2d 1216 (Fla. 3d DCA 2007), rev. granted, 968 So.2d 557 (Fla. 2007) (Fla.S.Ct. Case No: SC07-936). Jollie v. State, 405 So.2d 418 (Fla. 1981) (district court of appeal decision which cites as controlling authority decision that is pending review in Florida Supreme Court constitutes prima facie express conflict).

CONCLUSION

Based upon the foregoing, the defendant requests that this Court exercise its discretionary jurisdiction to review the decision of the Third District Court of Appeal in this case to resolve the conflict in decisions.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND FONT COMPLIANCE

I hereby certify that this brief was prepared using Times New Roman 14 point font in compliance with Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

I hereby certify that a copy of the foregoing was mailed to Assistant Attorney General Heidi Milan Caballero, Office of the Attorney General, Criminal Division, 444 Brickell Ave., #650, Miami, Florida 33131, this ____ day of February, 2008.

By:_____

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