IN THE SUPREME COURT OF FLORIDA

CASE NO. SC09-1554

GREGORY PONTON,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

ON DISCRETIONARY REVIEW FROM THE DISTRICT
COURT OF APPEAL, THIRD DISTRICT

ANSWER BRIEF OF RESPONDENT ON THE MERITS

BILL McCOLLUM
Attorney General

LINDA S. KATZ
Assistant Attorney General
Florida Bar Number 0672378

RICHARD L. POLIN
Florida Bar No. 0230987
Bureau Chief, Criminal Appeals
Office of the Attorney General
Department of Legal Affairs
444 Brickell Avenue, Suite 650
Miami, Florida 33131
(305) 377-5441
(305) 377-5655 (fax)

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STATEMENT OF THE CASE AND FACTS

On March 21, 1996, Defendant was charged with a seventeen count Information. Counts 4, 13 and 17 resulted in acquittals or were nolle prossed. Defendant was convicted on the remaining fourteen charges and sentenced as a habitual violent felony offender. (R. 25, 28-29). Concurrent sentences were imposed on counts, 1,3,6,8.9,10,11 and 14, all of which involved crimes committed against Warren and/or Eugenia Schatzle at 1225 Northeast 96th Street during the same criminal episode. These sentences were to run consecutive to the concurrent sentences imposed in counts 2,5,7 and 12, which were also committed against Warren and/or Eugenia Schatzle in the course of the home invasion at their home at the above stated address. The sentence for counts 2,5,7 and 12 were also consecutive to the crimes committed in counts 15 and 16, which were committed against Joseph Chandler and/or Elaine Gordon and were committed in Joseph Chandler taxicab on a roadway not located at or near 1225 Northeast 96th Street. (R. 3-4, 7-23, 37-215).

In count 1, Defendant was convicted as charged for armed burglary with assault or battery, a life felony. Pursuant to a Motion To Correct Sentencing Error, which was filed by counsel on October 25, 2000, the trial court resentenced Defendant as to count 1 only, in order to remove the habitual violent felony

offender designation pursuant to Heggs v. State, 759 So.2d 620 (Fla. 2000) and imposed a guideline sentence. (R. 25-35).

On or about May 16, 2008, Defendant filed a pro se Motion To Correct Illegal Sentence which alleged, inter alia, the following pertinent claims:

> I. THE TRIAL COURT ERRED BY SENTENCING DEFENDANT TO CONSECUTIVE HABITUAL VIOLENT FELONY OFFENDER SENTENCES WHEREAS DEFENDANT'S OFFENSES STEMMED FROM A SINGLE CRIMINAL EPISODE.
>
> III. THE DEFENDANY WAS IMPROPERLY DESIGNATED AS HABITUAL VIOLENT FELONY OFFENDER BY THE TRIAL COURT BECAUSE DEFENDANT PRIOR CONVICTIONS WHICH WAS ALL ENTERED ON SAME DAY DID NOT QUALIFY AS SEQUENTIAL COVNCITIONS.

(R. 242-260). On December 5, 2008, the trial court trial court entered an Order Granting In Part And Denying In Part Defendant's Motion To Correct Illegal Sentence. (R. 3-5). Pursuant to Hale v. State, 630 So.2d 521 (Fla. 1993), the trial court agreed with the portion of Defendant's motion which asserted that counts 1-14 should be concurrent, as the transcripts of the victims' testimony clearly indicated neither the victims, the crimes, the location of the time of the crimes in counts 15-16 are the same as the victims, crimes, location or time of the crimes in counts 1-14. The court cited to Spratling v. State, 672 So.2d 54 (Fla. 1st DCA 1996) and held that the sentences for counts 1-14 shall be concurrent with each other

and consecutive to the sentences for counts 15-16. (R. 3-5, 37-200), containing the testimony of Eugenia and Warren Schatzle and pages 200-215, containing the testimony of Joseph Chandler).

As to Defendant's third claim, which alleged that the trial court improperly designated him as a habitual violent felony offender because his prior convictions were all entered on the same day and did not qualify as sequential convictions, the trial court found the claim to be legally insufficient, as there is no sequential sentencing requirement for a habitual violent felony offender under Florida Statute 775.084(b). The court indicated that Defendant qualified as a habitual violent felony offender based on his convictions for armed robbery and kidnapping in case 81-23398, for which he received a fifteen year sentence, and which occurred after the convictions in 1978. (R. 224-230).

Petitioner appealed the denial to the lower court. On August 5, 2009, the lower court entered an opinion which affirmed the trial court's denial. In affirming the consecutive sentences as a habitual violent felony offender (HVFO) on counts fifteen and sixteen, the court cited to Spratling v. State, 672 So.2d 54 (Fla. 1st DCA 1996). In connection with the claim of alleged improper imposition of habitual violent felony offender sentences, the court noted that Defendant relied on Rutherford v. State, 820 So.2d 407 (Fla. 2d DCA 2002). As to Rutherford,

the lower court's opinion stated "we have previously explained that the Second District apparently has an internal conflict of decisions. There is no sequential conviction requirement for an adjudication as an HVFO." The lower court then cited to Williams v. State, 898 So.2d 966 (Fla. 3d DCA 2005) and affirmed on point three based on Williams. Petitioner sought rehearing below, which was denied.

Petitioner then sought this Court's discretionary review.

SUMMARY OF ARGUMENT

I. The testimony established the existence of different victims, different locations and a temporal break between the crimes committed in counts 1-14 and those in counts 15-16. Thus, the trial court acted within its discretion in determining that two separate criminal episodes occurred. Accordingly, the consecutive habitual offender sentences were properly affirmed.

II. Rutherford was not decided on the merits, has been criticized by Williams v. State, 898 So. 2d 966 (Fla. 3d DCA 2005) and when the second district did decide the same issue on the merits in subsequent cases, it relied upon the authority set forth in Williams and acknowledged that in the case of a habitual violent felony offender sentence, where only one prior qualifying offense is required, it does not matter if the qualifying felony was sentenced together with, or separate from, other qualifying felonies. Thus, there is no merit to Defendant's claim, nor is there express or direct conflict to invoke this Court's jurisdiction.

ARGUMENT

I. THE THIRD DISTRICT COURT OF APPEAL DID NOT ERR IN AFFIRMINGING CONSECUTIVE SENTENCES FOR COUNTS 1-14 TO COUNTS 15-16 WHERE THE FIRST FOURTEEN COUNTS INVOLVED THE SAME VICTIMS, LOCATION AND CRIMINAL EPISODE, BUT THERE WAS A TEMPORAL BREAK BETWEEN cOUNTS 1-14 AND COUNTS 15-16, WHICH INVOLVED DIFFERENT VICITMS AT A DIFFERENT LOCATION FROM THOSE INVOLVED IN COUNTS 1-14. (REPHRASED).

Defendant alleges that although there were different victims and locations, the sentences in counts 1-14 should not be consecutive to the sentences in counts 15-16 because the crimes occurred within a fifteen minute period and in the same vicinity. Defendant’s argument is without merit.

As a threshold matter, this issue was not addressed in Petitioner’s brief on jurisdiction. The conflict alleged in Petitioner’s brief only addressed the claim set forth in the second issue herein. Although once the Court accepts jurisdiction it has discretion to address all issues raised in the lower court, as a general rule the Court does not address issues which are beyond the scope of the issue which was the basis upon which jurisdiction was accepted.

Nevertheless, the Florida Supreme Court has long held a trial court is not authorized to enhance both the defendant's sentences as a habitual offender and make each of the enhanced

sentences consecutive when they arise out of the same criminal episode. Hale v. State, 630 So.2d 521, 525 (Fla.1993). However, "[t]here is ... no bright line ... for determining whether a criminal episode is single for purposes of evaluating consecutive enhancement sentences." Wilcher v. State, 787 So.2d 150, 152 (Fla. 4th DCA 2001). Generally, the courts have considered whether separate victims are involved, whether the crimes occurred in separate locations, and whether there has been a temporal break between the incidents. Smith v. State, 650 So.2d 689, 691 (Fla. 3d DCA 1995); Anderson v. State, 877 So.2d 958, 959 (Fla. 5th DCA 2004); Spratling v. State, 672 So.2d 54 (Fla. 1st DCA 1996). A trial court's decision concerning whether two offenses were committed during a single criminal episode will be upheld if supported by competent, substantial evidence. Colson v. State, 678 So.2d 1354 (Fla. 1st DCA 1996).

In its order denying the subject claim, the trial court cited to and attached excerpts of the trial testimony of victims Eugenia and Warren Schatzle and Joseph Chandler. The excerpts indicated that Eugenia and Warren became aware of Defendant's presence in their home, which is located at 1225 Northeast 96th Street, at approximately 6:15 a.m. and that he was in their home for 10-15 minutes. (Transcript pages 422, 484, 504, 506 & 559). Joseph Chandler testified that at approximately 6:30 a.m., while in his cab at Biscayne Boulevard and 96th Street, Defendant

jumped in the front passenger seat of his cab and ordered him to take off. (Transcript page 637). Thus, the testimony established the existence of different victims, different locations and a temporal break between the crimes committed in counts 1-14 and those in counts 15-16. Thus, the trial court acted within its discretion in determining that two separate criminal episodes occurred. Accordingly, the consecutive habitual offender sentences were properly affirmed.

II. THE THIRD DISTRICT COURT OF APPEAL PROPERLY AFFIRMED THE IMPOSITION OF HABITUAL VIOLENT OFFENDER SENTENCES WHERE ONLY ONE QUALIFYING FELONY IS NECESSARY. (REPHRASED).

Defendant argues that the trial court erred in imposing habitual violent felony offender sentences on the basis of sentences entered on the same date. Defendant's argument is without merit.

The habitual violent felony offender provisions are set forth in Florida Statute to § 775.084(1)(b). The pertinent portions provide as follow:

> (b) "Habitual violent felony offender" means a defendant for whom the court may impose an extended term of imprisonment, as provided in paragraph (4)(b), if it finds that:
>
> 1. The defendant has previously been convicted of *a* felony or an attempt or conspiracy to commit a felony and one or more of such convictions was for:

(Emphasis added).

The cases cited to in Defendant's brief in support of his argument that the State did not satisfy the sequential conviction requirement are inapplicable to the subject case as they all involve cases in which the defendant was sentenced as a habitual offender as opposed to the case at bar, where Defendant was sentenced as a habitual *violent* offender. The provisions

relating to a habitual offender are contained in Florida Statute to § 775.084(1)(a) and require the defendant to have been previously convicted of any combination of *two or more felonies.* Although subsection (5) of the statute requires that the prior felonies "must have resulted in a conviction sentenced separately prior to the current offense and sentenced separately from any other felony conviction that is to be counted as a prior felony", it is axiomatic that such provision does not pertain to habitual violent felony offender sentencing, which requires only one prior conviction.

In his jurisdictional brief, Petitioner relied on Rutherford v. State, 820 So.2d 407 (Fla. 2d DCA 2002) to argue that he does not qualify for sentencing as an habitual *violent* felony offender (HVFO) because his prior convictions were not sequential. In response to this argument, the lower court's opinion stated "we have previously explained that the Second District apparently has an internal conflict of decisions. There is no sequential conviction requirement for an adjudication as an HVFO." In Rutherford, the second district court of appeal reversed the summary denial of defendant's 3.800(a) motion to correct illegal sentence because the trial court failed to address his claim that the predicate offenses used to qualify him as a habitual violent felony offender did not satisfy the sequential convictions requirement of section 775.084(5),

Florida Statutes (Supp. 1996) because the predicate convictions used to enhance his sentences were all entered on the same date pursuant to a single plea agreement. The State maintains that there is no direct and express conflict with Rutherford because it was a procedural question which did not address the issue on the merits.

Furthermore, the authority of Rutherford, as suggested by Petitioner, was nullified by later decisions. Subsequent to Rutherford, when the second district did in fact address the claim on the merits, they realized that the claim was in fact without merit and held that "[a] defendant needs only one qualifying prior conviction in order to be sentenced as a habitual violent felony offender." Hall v. State, 821 So. 2d 1154 (Fla. 2d DCA 2002). Several subsequent cases from the Second District have cited to Williams v. State, 898 So. 2d 966 (Fla. 3d DCA 2005), the case cited to and relied upon in the opinion below, which held that because only one qualifying felony is necessary for a habitual violent felony offender (HVFO) adjudication, it does not matter if the qualifying felony was sentenced together with, or separate from, other qualifying felonies. See Horne v. State, 954 So. 2d 33 (Fla. 2nd DCA. 2007), Nealy v. State, 956 So. 2d 1191 (Fla. 2nd DCA 2007) and Rutledge v. State, 969 So. 2d 381 (Fla. 2nd DCA 2007). Most interestingly, it appears that Rutherford has since been

affirmed based on the authority of Williams. Rutherford v. State, 9 So.3d 626 (Fla. 2nd DCA 2009).

As Rutherford did not address the issue on the merits and subsequent cases from the second district which did address the claim relied upon Williams, and thus clearly acknowledge that in the case of a habitual violent felony offender sentence, where only one prior qualifying offense is required, it does not matter if the qualifying felony was sentenced together with, or separate from, other qualifying felonies, Petitioner has failed to show the existence of a direct and express conflict with Rutherford, much less any merit to his claim.

CONCLUSION

Based on the foregoing, the Third District's opinion should be affirmed, as Defendant the Court is without jurisdiction and the issues are clearly without merit.

Respectfully submitted,

BILL McCOLLUM
Attorney General

_____
LINDA S. KATZ
Florida Bar No. 672378

_____
RICHARD L. POLIN
Florida Bar No. 0230987
Bureau Chief, Criminal Appeals
Office of the Attorney General
Department of Legal Affairs
444 Brickell Avenue, Suite 650
Miami, Florida 33131
(305) 377-5441
(305) 377-5655 (fax)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of Respondent On The Merits was mailed this 15th day of September, 2010, to Randall O. Reder, Esq. 1319 W. Fletcher Ave., Tampa, FL 33612-3310.

_____
LINDA S. KATZ

CERTIFICATE REGARDING FONT SIZE AND TYPE

I hereby certify that the foregoing Brief has been typed in Courier New, 12-point type, in compliance with the Florida Rules of Appellate Procedure.

_____
LINDA S. KATZ