IN THE FLORIDA SUPREME COURT
STATE OF FLORIDA, TALLAHASSEE, FLORIDA

GREGORY PONTON
Appellant

v.

CASE NO. SC09-1554
DCA NO. 3D09-1554

STATE OF FLORIDA
Appellee.
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# APPELLANT'S INITIAL BRIEF

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Randall O. Reder, P.A.
Florida Bar No. 264210
1319 W. Fletcher Ave.
Tampa, FL 33612-3310
phone (813) 960-1952
fax (8130 265-0940
email reder@redersdigest.com

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## STATEMENT OF FACTS

Around 6:15 in the morning of February 29, 1996, Gregory Ponton entered the dwelling of Warren and Eugenia Schatzle and robbed and assaulted them (R. 127). They ran away to a neighbor's house, and Mr. Ponton immediately fled the premises, jumped into the front passenger seat of a taxicab, and ordered the driver to take off (R. 204-05). The taxi cab driver jumped out and flagged down a passing marine patrol officer (R. 206-07). The taxi cab driver testified this all occurred around 6:30 a.m. (R. 203, 209).

## STATEMENT OF CASE

The State charged Mr. Ponton with seventeen counts. Counts 1 -14 named the Schatzles as victims; counts 15 and 16 named the taxi cab driver as a victim and count 17 for possession of a firearm by a convicted felon (R. 9-25).

Counts 4, 13 and 17 resulted in acquittal or were nol prossed (R. 5). Mr. Ponton was convicted on the remaining counts. On October 22, 1997, the trial court sentenced Mr. Ponton to three consecutive life sentences as a habitual violent felony offender with "concurrent 15 yr. mm and concurrent 3 yr F/A mm" (R. 31).

Mr. Ponton through his attorney Maria E. Lauredo filed a Motion to Correct Sentencing Error (R. 27-29). On June 21, 2001, the trial court vacated the sentence as to Count I only and resentenced Mr. Ponton to a term of imprisonment for 160 months (R. 35-37).

Mr. Ponton filed a pro se motion to correct an illegal sentence (R. 244-62), which was denied. The Third District Court of Appeal reversed and remanded with instructions to the trial court to "attach written portions of the record conclusively refuting the defendant's claim." *Ponton v. State*, 990 So.2d 609 (Fla. 3d DCA 2008).

On remand, the trial court entered an "Order Granting in Part and Denying in Part Defendant's Motion to Correct Illegal Sentence" (R. 5-7). One of the arguments

raised – which both the trial court and appellate overlooked – was that section 775.084(5), Florida Statutes precludes a judge from using sentences imposed at the same hearing as a basis for applying the Habitual Violent Felony Offender. The trial judge found that counts 1 – 14 should be concurrent, but should run consecutively to the sentences imposed on counts fifteen and sixteen (R. 6). The court denied the request to remove the Habitual Violent Felony Offender status (R. 6).

Mr. Ponton appealed. The Third District Court of Appeal affirmed "as to the consecutive sentences as a habitual violent felony offender (HVFO) on counts fifteen and sixteen." *Ponton v. State*, 16 So.3d 918 (Fla. 3d DCA 2009). The Court also affirmed the trial court's denial of the request to remove the HVFO status, suggesting there may be a conflict with the Second District Court of Appeal's decision in *Rutherford v. State*, 820 So.2d 407 (Fla. 2d DCA 2002).

## SUMMARY OF ARGUMENT

In this case Gregory Ponton was convicted of multiple counts of crimes involving a single criminal episode. Although there were different victims, the crimes occurred within a fifteen minute period and in the same vicinity. The trial court therefore erred in ordering some of the sentences to run consecutively with others.

Furthermore, the trial court erred by applying Florida's Habitual Violent Offender Act because the State did not satisfy the sequential conviction requirement per section 775.084(5), Florida Statutes (1994).

## III. WHETHER THE TRIAL COURT ERRED BY IMP0SING CONSECUTIVE SENTENCES ALONG WITH APPLYING THE HABITUAL VIOLENT FELONY OFFENDER STATUTE.

The trial court clearly erred by imposing consecutive sentences and applying the habitual violent felony offender statute. This issue was specifically addressed and decided by this Court in *State v. Hill*, 660 So.2d 1384, 1386 (Fla. 1995), which stated:

> we find that a trial court is without authority to enhance sentences from multiple crimes committed during a single criminal episode by both sentencing a defendant as a habitual offender and ordering that the sentences be served consecutively.

In this case, the trial judge found that the convictions for the first fourteen counts were not part of the same criminal episode as the convictions for counts fifteen and sixteen. But the record does not support this finding. The record establishes that the crime episode lasted about fifteen minutes and occurred at a residence and a street right outside it. Although there were different victims, the location and time sequence clearly establish this as a single criminal episode.

## II. WHETHER THE TRIAL COURT ERRED BY IMPOSING THE HABITUAL VIOLENT FELONY OFFENDER ACT ON THE BASIS OF SENTENCES ENTERED THE SAME DATE

Even if this Court finds the facts of this case do not constitute a single criminal episode, the trial court erred in finding Mr. Ponton to be habitual offender because the State "did not satisfy the sequential conviction requirement pursuant to section 775.084(5)." *Bover v. State*, 797 So.2d 146, 1251 (Fla. 2001). "[A]lthough the sentencing for separate convictions arising out of unrelated crimes can take place on the same day, the sentences cannot be part of the same sentencing procedure." *Id.* at 1250. *See Wilson v. State*, 25 So.3d 704 (Fla. 2d DCA 2010); *Bunch v. State*, 976 So.2d 1190 (Fla. 5th DCA 2008); *Walker v. State*, 842 So.2d 969 (Fla. 4th DCA 2003); *Gordon v. Moore*, 832 So.2d 880 (Fla. 3d DCA 2002).

## CONCLUSION

Since the trial judge erred by imposing an illegal sentence, this Court should vacate the sentence and remand with instructions that the trial court impose concurrent sentences without any enhancement under the Florida Habitual Violent Felony Offender Act.

Respectfully submitted,

Randall O. Reder, P.A.
Florida Bar No. 264210
1319 W. Fletcher Ave.
Tampa, FL 33612-3310
phone (813) 960-1952
fax (813) 265-0940

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail on July 22, 2010, to Linda Katz, Assistant Attorney General, 444 Brickell Ave., Suite 950, Miami, FL 33131-2407.

I hereby certify that this brief has been prepared using New Times Roman 14-point font in compliance with Florida Rule of Appellate Procedure 9.100(l).

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Randall O. Reder