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.
_____/

APPELLANT'S REPLY BRIEF

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

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

FLORIDA STATUTES

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

Because this Court has accepted jurisdiction, it has the discretion to consider this issue. *E.g., Savoie v. State*, 432 So.2d 308 (Fla. 1982); *Zirin v. Charles Pfizer & Co.*, 128 So.2d 594 (Fla. 1961).

Appellant agrees that the factors to consider whether there is a single criminal episode are whether separate victims are involved, whether the crimes occurred in separate locations and whether there has been a temporal break. The courts have held that a crime occurring outside a building where another crime was committed is not a separate location. *E.g., Colson v. State,* 678 So.2d 1354 (Fla. 1st DCA 1996); *Hardee v. State*, 659 So.2d 322 (Fla. 1st DCA 1994). They have also held that stealing a car after burglarizing a home without "any temporal interruption" constitutes a single criminal episode. *Wicker v. State*, 655 So.2d 1240 (Fla. 2d DCA 1995).

The temporal break factor may be dispositive even though the crimes were at separate locations and involved different victims.

> In this case, we find the temporal break factor to be decisive. Although the crimes were separate crimes, committed against separate victims—a police officer and two women—at different locations, they are united by the defendant's sole purpose to elude the police officer and committed within a short period of time in the same neighborhood. For this reason, we reverse and remand this case for re-sentencing.

Robinson v. State, 25 So.3d 1246, 1247 (Fla. 3d DCA 2010).

Furthermore, the State should be estopped from arguing there are two separate criminal episodes. If indeed, they were separate, then there should have been separate trials. *See e.g., Crossley v. State*, 596 So.2d 447 (Fla. 1992).

The record filed with this Court does not show that this issue was raised before the trial court. Attached as an appendix to this brief is a letter the undersigned received from Appellant claiming that he did file a motion to sever the charges, but that the judge denied the motion on the basis all the crimes were part of the same criminal episode. If indeed this occurred, the doctrine of estoppels en pais should be applied. "Equitable estoppels or estoppels in pais is the principle by which a party who knows or should know the truth is absolutely precluded, both at law and in equity, from denying, or asserting the contrary of, any material fact." *Robertson v. Robertson*, 61 So.2d 499, 503 (Fla. 1952), *quoting* 19 Am. Jur., Estoppel, Sec. 34, page 634.

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

The State correctly points out that only one prior conviction is necessary to sentence a habitual violent felony offender as opposed to two prior convictions for habitual felony offenders. Compare section 775.084(1)(a) with section 775.084(1)(b), Florida Statutes.

However, both sections are subject to section 775.084(5), Florida Statutes, (emphasis supplied) which provides:

> In order to counted as a prior felony for purposes of sentencing under this section, *the felony 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.

In *Williams v. State*, 898 So.2d 966 (Fla. 3d DCA 2005), the District Court of Appeal was construing the last phrase of this subsection, not the italicized phrase which applies to this case. In this case, we are not talking about two prior convictions being separately sentenced, but rather the unambiguous statutory requirement that the prior conviction be sentenced separately prior to the current offense. This was not done in this case.

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 October 12, 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).

_____

Randall O. Reder