IN THE SUPREME COURT OF FLORIDA

CASE NO. SC10-2198
L.T. CASE NO. 3D09-1543

LAZARO FLORES,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE THIRD DISTRICT COURT OF APPEAL

RESPONDENT'S BRIEF ON JURISDICTION

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STATEMENT OF CASE AND FACTS[1]

The relevant facts stated in the Third District Court of Appeal's decision in Flores v. State, 46 So. 3d 102 (Fla. 3d DCA October 6, 2010), are as follows:

> The State originally charged the defendant with one count of armed robbery and several counts of burglary of an occupied dwelling. The trial court sentenced the defendant, under the youthful offender statute, to two years community control followed by five years probation.
>
> Thereafter, the police arrested the defendant for possession of cocaine, and the Department of Corrections ("DOC") filed an affidavit of probation violation. The defendant pleaded guilty to both the substantive charge and the violation of probation. The trial court sentenced the defendant to drug offender probation for five years.
>
> Subsequently, the police arrested the defendant for selling marijuana within 1000 feet of a school. DOC filed a violation of probation affidavit, alleging this new charge and several other violations. The trial court held an evidentiary hearing, at which the undercover officer who purchased the marijuana from the defendant testified. Finding sufficient proof of the defendant's guilt on the new charge, the trial court revoked the defendant's probation, entered a judgment of conviction for armed robbery, and sentenced the defendant to life.

(A.2).

> On appeal, the defendant contends that because he has not been convicted of the new charge, the trial court erred in sentencing him beyond the six-year term permitted under the youthful offender statute. On the other hand, the State asserts that the trial court did not

[1] The Symbol "A." followed by a page number, refers to Petitioner's Appendix which was attached to his jurisdictional brief, and consisted of a conformed copy of the district court's opinion. Unless otherwise indicated, all emphasis has been supplied by Respondent.

err in sentencing the defendant to life imprisonment because it found that the defendant committed the new substantive offense. We agree with the State.

Florida's Youthful Offender Act, sections 958.011, .15, Fla. Stat. (2008), provides that "no youthful offender shall be committed . . . for a substantive violation [of probation] for a period longer than the maximum sentence for the offense for which he or she was found guilty, . . . or for a technical or nonsubstantive violation for a period longer than 6 years." § 958.14. "[A] 'substantive violation,' as the phrase is used in section 958.14, refers exclusively to a violation premised on the commission of a separate criminal act." State v. Meeks, 789 So. 2d 982, 989 (Fla. 2001).

Accordingly, Florida courts have held that the statute provides a six-year cap for technical violations, but not for the commission of a new criminal act. See Thompson v. State, 945 So. 2d 627 (Fla. 4th DCA 2006); Swilley v. State, 781 So. 2d 458 (Fla. 2d DCA 2001); Willis v. State, 744 So. 2d 1265 (Fla. 1st DCA 1999); Johnson v. State, 678 So. 2d 934 (Fla. 3d DCA 1996). This is true even when the new charges are nolle prossed or dismissed. See Morency v. State, 955 So. 2d 67, 68 n. 1 (Fla. 3d DCA 2007); Swilley, 781 So. 2d at 460 ("The filing of a nolle prosequi does not mean that the trial court cannot find that [the defendant] substantively violated his community control by committing new offenses.")

Moreover, a conviction in the new case need not precede sentencing on the probation violation as long as the court determining the violation has sufficient evidence that the defendant committed the new offense. In Swilley, the court reversed the trial court's order because the record did not establish that the defendant had committed the new offenses. The court, however, recommended that the trial court hold an evidentiary hearing for the State to prove the substantive violation. 781 So. 2d 461. In Thompson, the court accepted the lower court's conclusion that the defendant committed the crime of possession of cannabis based on a positive drug test. 945 So. 2d at 628.

The defendant relied on Rogers v. State, 972 So. 2d 1017 (Fla. 4th DCA 2008), for the proposition that a conviction on the new

offenses is required to revoke a youthful offender sentence and exceed the statutory cap. In Rogers, the Fourth District wrote:

> Youthful offender status may be revoked when the defendant is charged and convicted with a new, substantive offense. See Boynton v. State, 896 So. 2d 898, 899 (Fla. 3d DCA 2005). However, if the defendant is not charged by information with a new, substantive offense, but rather is charged by way of a violation of the defendant's youthful offender commitment, the defendant's youthful offender status may not be revoked. Id.

972 So. 2d at 1019. Because of this language, the defendant argues that he was improperly sentenced in excess of the statutory six-year cap.

We disagree for two reasons. First, although the Fourth District stated that without a conviction the youthful offender status may not be revoked, the court nevertheless affirmed the fifteen-year sentence the lower court imposed. 972 So. 2d at 1020 ("Appellant, therefore, was properly sentenced to 15 years in prison for [five counts of second-degree] felonies, but he should retain his youthful offender status. . . .") Thus, the Fourth District did not equate retaining youthful offender status with sentencing within the six-year cap.

Secondly, we respectfully disagree with the Fourth District's expansive reading of Boynton. After escaping from a correctional facility where he was committed as a youthful offender, Boynton committed two new crimes, and was convicted and sentenced to a forty-year imprisonment in the new cases. On appeal from the denial of his postconviction relief motion from the new convictions, Boynton argued that he should have been sentenced as a youthful offender. This Court affirmed the denial of postconviction relief. 896 So. 2d at 899.

Regrettably, the Boynton court additionally stated "a defendant previously classified as a youthful offender who is subsequently charged with substantive offenses, and not with a mere violation of probation/community control, is not entitled to be sentenced as a youthful offender upon conviction of the new, substantive offenses." 896 So. 2d at 899 (emphasis added). Because Boynton did not

> involve a probation revocation, this language is *dicta* and of no precedential value. Thus, neither Rogers nor Boynton stand for the proposition that a defendant must first be convicted on new offenses before he or she may be sentenced in excess of the six-year statutory cap.
>
> Here, the trial court heard from several witnesses, including the undercover police officer who purchased marijuana from the defendant. Therefore, the trial court had proof of the defendant's guilt on the new offense. Based on this finding, the trial court correctly revoked the defendant's probation and was not limited in sentencing by the youthful offender statutory cap of six years.

(A.3 - A. 6).

SUMMARY OF THE ARGUMENT

There is no basis upon which discretionary review can be granted in this case. The Third District Court's opinion does not conflict with Rogers v. State, 972 So. 2d 1017 (Fla. 4th DCA 2008), or any case of this Court or of any other district court in Florida. Consequently, conflict jurisdiction does not exist for the exercise of this Court's discretionary jurisdiction to review the decision below. This Court should therefore deny Petitioner's petition to review the decision of the district court.

ARGUMENT

PETITIONER'S APPLICATION FOR DISCRETIONARY REVIEW MUST BE DENIED BECAUSE THE THIRD DISTRICT COURT OF APPEAL'S DECISION DOES NOT DIRECTLY OR EXPRESSLY CONFLICT WITH A DECISION OF ANOTHER DISTRICT COURT OR THIS COURT.

Petitioner contends that this Court should invoke its discretionary review power to review the Third District Court of Appeal's decision in the instant case. Petitioner claims that the Third District erred by failing to apply the standard contained in Rogers v. State, 927 So. 2d 1017 (Fla. 4th DCA 2008). Petitioner argues that in Rogers "the Fourth District held that a defendant's youthful offender status may only be revoked 'when the defendant is charged and convicted with a new, substantive offense.' In reaching this conclusion, the Fourth District relied on Boynton v. State, 896 So. 2d 898, 899 (Fla. 3d DCA 2005), where the Third District held that 'a defendant previously classified as a youthful offender who is subsequently charged with substantive offenses . . . is not entitled to be sentenced as a youthful offender upon conviction of the new, substantive offense.'" (Petitioner's brief at p. 6). Respondent submits that this Court does not have any jurisdiction to review the Third District Court's opinion.

The jurisdiction of this Court is limited to a narrow class of cases enumerated in the Florida Constitution. As this Court explained in The Florida Star v. B.J.F., 530 So.2d 286, 288 (Fla. 1988), the state constitution creates two

separate concepts regarding this Court's discretionary review. The first concept is the broad general grant of subject-matter jurisdiction. The second more limited concept is a constitutional command as to how this Court may exercise its discretion in accepting jurisdiction. 530 So.2d at 288. This Court noted it lacked jurisdiction to review district court opinions that fail to expressly address a question of law. Id. Further, this Court lacks jurisdiction over district court opinions that contain only citation to other case law unless the case cited as controlling authority is pending before this Court, or has been reversed or receded by this Court, or explicitly notes a contrary holding of another district court or this Court. 530 So.2d at 288 n.3, citing, Jollie v. State, 405 So.2d 418 (Fla. 1981).

Article V, Section 3(b)(3), Fla. Const. (1980) and Fla.R.App.P. 9.030(a)(2)(A)(iv), which provides that the discretionary jurisdiction of the 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 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). Neither the record itself nor the dissenting opinion may be used to establish

jurisdiction. Id. at 830 (citing to Jenkins v. State, 385 So. 2d 1356 (Fla.1980))[2]. Accord Dept. of Health and Rehabilitative Services v. National Adoption Counseling Service, Inc., 498 So. 2d 888, 889 (Fla. 1986) (the court rejected "inherent" or "implied" conflicts).

This Court cannot exercise its discretionary jurisdiction to review the decision below because, contrary to Petitioner's claim, the decision below is not in direct or express conflict with "Florida Supreme Court precedent," or any decision from this Court or any other district court on the same question of law.

In the decision below, the Third District Court specifically distinguished Rogers:

> First, although the Fourth District stated that without a conviction the youthful offender status may not be revoked, the court nevertheless affirmed the fifteen-year sentence the lower court imposed. 972 So.2d at 1020 ("Appellant, therefore, was properly sentenced to 15 years in prison for [five counts of second-degree] felonies, but he should retain his youthful offender status....") Thus, the Fourth District did not equate retaining youthful offender status with sentencing within the six-year cap.
>
> Secondly, we respectfully disagree with the Fourth District's expansive reading of Boynton. After escaping from a correctional facility where he was committed as a youthful offender, Boynton committed two new crimes, and was convicted and sentenced to forty-year imprisonment in the new cases. On appeal from the denial of his postconviction relief motion from the new convictions, Boynton argued that he should have been sentenced as a youthful offender.

[2] The State notes that in Petitioner's Statement of the Case and Facts refers to the record on appeal and not the facts contained in the Third District Court of Appeal's slip opinion.

> This Court affirmed the denial of postconviction relief. 896 So.2d at 899.
>
> Regrettably, the Boynton court additionally stated "a defendant previously classified as a youthful offender who is subsequently charged with substantive offenses, and not with a mere violation of probation/community control, is not entitled to be sentenced as a youthful offender upon conviction of the new, substantive offenses." 896 So.2d at 899 (emphasis added). **Because Boynton did not involve a probation revocation, this language is dicta and of no precedential value. Thus, neither Rogers nor Boynton stand for the proposition that a defendant must first be convicted on new offenses before he or she may be sentenced in excess of the six-year statutory cap**.

Flores v. State, 46 So.3d 102, 104 -105 (Fla. 3d DCA 2010) (emphasis added).

Thus, the Third District's opinion in the instant case does not expressly and directly conflict with the Fourth District's opinion in Rogers, or the Third District's own opinion in Boynton, another district court of appeal or of the Supreme Court on the same question of law. Therefore, the Third District Court's opinion does not give rise to any express conflict and this petition to invoke discretionary review must be denied.

CONCLUSION

Wherefore, based upon the foregoing argument and authorities cited herein, Respondent respectfully requests that this Honorable Court reject discretionary jurisdiction in this cause.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing RESPONDENT'S BRIEF ON JURISDICTION was mailed this 16th day of December, 2010 to: **Manuel Alvarez**, Assistant Public Defender, 1320 N.W. 14th Street, Miami, Florida 33125.

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CERTIFICATION OF FONT AND TYPE SIZE

I HEREBY CERTIFY that the font and type size in this Brief of Respondent on Jurisdiction comply with Florida Rules of Appellate Procedure requirements in that Times New Roman 14-point was utilized.

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