IN THE SUPREME COURT OF FLORIDA

DAVID DEVON BLACKMON,

Petitioner,

v. **Case No. SC11-903**

STATE OF FLORIDA, **First DCA No. 1D10-2018 & 1D10-2021**

Respondent.
_____/

ON DISCRETIONARY REVIEW OF THE DECISION
OF THE FIRST DISTRICT COURT OF APPEAL

CORRECTED AMENDED JURISDICTIONAL BRIEF OF PETITIONER

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

GAIL E. ANDERSON
ASSISTANT PUBLIC DEFENDER
FLA. BAR NO. 0841544
LEON COUNTY COURTHOUSE
301 S. MONROE ST., SUITE 401
TALLAHASSEE, FLORIDA 32301
(850) 606-8514
Gail.Anderson@flpd2.com

COUNSEL FOR PETITIONER

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PRELIMINARY STATEMENT

Petitioner seeks review of the decision in Blackmon v. State, ___ So. 3d ___ (Fla. 1st DCA March 31, 2011) (attached). Petitioner was the Appellant and the Respondent was the Appellee in the proceedings in the First District Court of Appeal. The parties will be referred to as they appear before this Court.

STATEMENT OF THE CASE AND FACTS

Petitioner was charged with burglary, petit theft and dealing in stolen property. Blackmon, slip op. at 2. The trial court did not instruct the jury that it could not return guilty verdicts for both theft and dealing in stolen property under section 812.025, Florida Statutes (2009), and Petitioner did not request that instruction. Blackmon, slip op. at 3. The jury acquitted Petitioner of burglary, but found him guilty of both petit theft and dealing in stolen property. Id. The trial court adjudicated Petitioner guilty of both offenses. Id.

In the First District Court of Appeal, Petitioner challenged his convictions for both petit theft and dealing in stolen property. Blackmon, slip op. at 1. Petitioner argued and Respondent agreed that the trial court fundamentally erred in convicting Petitioner of both offenses. Id. at 5. However, Petitioner argued that the remedy for this error was a new

trial, while Respondent argued the remedy was to vacate the petit theft conviction. Id.

Petitioner's argument in the First District relied upon Kiss v. State, 42 So. 3d 810 (Fla. 4th DCA 2010). Blackmon, slip op. at 5. The First District described the decision in Kiss:

> In that case, a jury found the defendant guilty of three counts of dealing in stolen property and one count of grand theft of the same property and in the same course of conduct. Id. at 811. On appeal, the defendant argued that the trial court fundamentally erred by failing to instruct the jury that, pursuant to section 812.025, it could not return a guilty verdict on both grand theft and dealing in stolen property. Id. The defendant argued that the trial court did not cure this error by adjudicating him guilty of only the dealing in stolen property count and, therefore, he was entitled to a new trial. Id. The Fourth District agreed and remanded for a new trial. Id. The court reasoned that the failure to instruct the jury on its obligation under section 812.025 prejudiced the defendant because, if properly instructed, the jury could have found the defendant guilty of only theft, the lesser offense.

Blackmon, slip op. at 5-6.

The First District found "some attraction to the Fourth District's reasoning in Kiss because section 812.025, by its terms, imposes an obligation on the trier of fact (here, the jury), not the trial court." Blackmon, slip op. at 7. However, the First District disagreed with Kiss, choosing to follow its decision in Alexander v. State, 470 So. 2d 856 (Fla. 1st DCA 1985), which held that the proper remedy for the trial court's

failure to instruct the jury on section 812.025 is to vacate the conviction for the lesser offense. Blackmon, slip op. at 7. The First District reasoned:

> In our view, this remedy better respects the jury's determination that the state met its burden to prove the greater offense and also avoids the need to speculate what verdict the jury might have returned had it been required to choose between the greater and lesser offenses. Moreover, in this case, we have no trouble concluding that the jury would have found Blackmon guilty of dealing in stolen property had it been required to choose between that offense and petit theft because the evidence established that Blackmon did not steal the bars for his personal use, but rather that he sold the stolen bars at his earliest opportunity.

Id. at 8 (citation omitted).

The First District further explained that its decision was consistent with this Court's decision in Hall v. State, 826 So. 2d 268 (Fla. 2002):

> The remedy of vacating the lesser offense is also consistent with the remedy directed by the Florida Supreme Court in Hall. The defendant in that case was charged with, among other things, grand theft and dealing in stolen property. See 826 So. 2d at 269. The defendant pled nolo contendere to those charges. Id. The trial court accepted the plea and adjudicated the defendant guilty of both offenses. Id. On appeal, the defendant argued that the trial court erred when it adjudicated him guilty of both offenses in violation of section 812.025. Id. The Fourth District affirmed, concluding that the statute did not apply when the defendant entered a plea of nolo contendere. Id. at 270.
>
> On review, the Florida Supreme Court quashed the

Fourth District's decision. Id. at 272. The court reasoned that:

> Section 812.025 allows the State to charge theft and dealing in stolen property in connection with one scheme or course of conduct in separate counts, but the trier of fact must then determine whether the defendant is a common thief who steals property with the intent to appropriate said property to his own use or to the use of a person not entitled to the use of the property or whether the defendant traffics or endeavors to traffic in the stolen property. . . . Just as the trier of fact must make a choice if the defendant goes to trial, so too must the trial judge make a choice if the defendant enters a plea of nolo contendere to both counts. . . . Thus, we find that section 812.025 prohibits a trial court from adjudicating a defendant guilty of both theft and dealing in stolen property in connection with one scheme or course of conduct pursuant to a plea of nolo contendere.

Id. at 271. Notably, the supreme court did not construe section 812.025 to preclude a defendant from entering pleas to both theft and dealing with [sic] stolen property; rather, the court construed the statute to prohibit the trial court from adjudicating a defendant guilty of both offenses. As a result, the court remanded not to allow the defendant to withdraw his pleas, but rather with directions that either the grand theft count or the dealing in stolen property count be reversed and that the defendant be resentenced on the remaining count. Id. at 272.

Blackmon, slip op. at 8-10.

The First District reversed Petitioner's petit theft conviction and remanded with directions that the trial court

vacate that conviction. Blackmon, slip op. at 10. The court also certified conflict with Kiss "regarding the proper remedy when, contrary to section 812.025, the defendant is convicted of both theft and dealing in stolen property." Id.

Petitioner filed notice of his intent to seek discretionary review in this Court.

SUMMARY OF ARGUMENT

Under Article V, §3(b)(3), Florida Constitution, this Court has jurisdiction and the discretion to exercise that jurisdiction to review the First District's decision in Blackmon, where the court certified conflict with the Fourth District's decision in Kiss. The issue raised by this conflict is a criminal defendant's remedy when a jury is not instructed that it cannot find the defendant guilty of both theft and dealing in stolen property and thus finds the defendant guilty of both offenses. The First District held that the remedy is to vacate the lesser conviction and expressly rejected the reasoning of Kiss, which held that the remedy is a new trial. This Court should exercise its jurisdiction and resolve the conflict.

ARGUMENT

THIS COURT SHOULD ACCEPT JURISDICTION TO RESOLVE THE CERTIFIED CONFLICT BETWEEN BLACKMON AND KISS.

This Court has jurisdiction to review the First District's decision in Blackmon under Article V, §3(b)(3) of the Florida Constitution. In Blackmon, the First District certified conflict with the Fourth District's decision in Kiss v. State, 42 So. 3d 810 (Fla. 4th DCA 2010).

The issue raised by the First District's decision is a criminal defendant's remedy when a jury is not instructed pursuant to section 812.025 and thus returns guilty verdicts on both theft and dealing in stolen property. Based upon virtually identical facts, the First District held that the proper remedy was to vacate the lesser conviction, while the Fourth District held that the proper remedy was a new trial. Blackmon, slip op. at 7; Kiss, 42 So. 3d at 813. The First District followed its decision in Alexander v. State, 470 So. 2d 856 (Fla. 1st DCA 1985), and pointed out that the court had consistently applied Alexander. Blackmon, slip op. at 7. The Fourth District followed its decision in Aversano v. State, 966 So. 2d 493 (Fla. 4th DCA 2007), Kiss, 42 So. 3d at 812, which it also followed in Kablitz v. State, 13 So. 3d 155 (Fla. 4th DCA 2009)

The conflict exemplified by Blackmon and Kiss does not simply involve those two decisions, but is a recurring issue. As Kiss stated, "We are once again faced with the conundrum created by the application of section 812.025." 42 So. 3d at 811. In rejecting the reasoning of Kiss, the First District followed its decision in Alexander. Blackmon, slip op. at 7. The Alexander court followed Ridley v. State, 407 So. 2d 1000 (Fla. 5th DCA 1981). Alexander, 470 So. 2d at 857. In Kiss, the Fourth District disagreed with Ridley, describing it as "[t]he source of th[e] misconception" that the proper remedy for not instructing a jury on section 812.025 is to vacate the lesser conviction. 42 So. 3d at 812. The Fourth District certified conflict with Ridley. Kiss, 42 So. 3d at 813.

Although the First District concluded that its decision was consistent with this Court's decision in Hall v. State, 826 So. 2d 268 (Fla. 2002), Petitioner submits that the First District's decision also conflicts with Hall. In Hall, the defendant pled nolo contendere to both theft and dealing in stolen property and was adjudicated guilty of both offenses. 826 So. 2d at 269. On appeal, the Fourth District rejected Hall's claim that he could not be adjudicated on both offenses, holding that section 812.025 did not apply to a nolo contendere plea. Id. at 270.

This Court quashed that portion of the Fourth District's decision, holding that when a defendant enters a plea to both theft and dealing in stolen property, the trial judge must "make a choice" between the two counts. Hall, 826 So. 2d at 271. The court then remanded "with directions that the conviction be reversed on either Count III [grand theft] or count IV [dealing in stolen property] . . . and that the defendant be resentenced on the remaining count." Id.

Contrary to the First District's reasoning, this Court's decision in Hall is entirely consistent with Kiss and inconsistent with Blackmon. Because Hall entered a plea, the finder of fact in that case was the trial court, and this Court directed the finder of fact to "make a choice" between the two counts. Hall, 826 So. 2d at 271. The First District found it notable that this Court "did not construe section 812.025 to preclude a defendant from entering pleas to both theft and dealing with [sic] stolen property; rather, the court construed the statute to prohibit the trial court from adjudicating a defendant guilty of both offenses." Blackmon, slip op. at 9. However, what is truly notable about Hall is that this Court left the decision regarding which count should be reversed to the finder of fact and did not itself reverse one of the counts.

This is precisely what occurred in Kiss, where the appellate court directed that the finder of fact (there, a jury) decide which count applied. This is the precise opposite of what occurred in Blackmon, where the appellate court itself decided which count applied rather than leaving that decision to a finder of fact.

The First District's certification of conflict with Kiss provides this Court with jurisdiction and with the discretion to exercise that jurisdiction. The persistent difficulty with the application of section 812.025, as well as the conflict between Blackmon and Hall, counsel in favor of the Court's exercise of jurisdiction. This Court should accept jurisdiction and resolve the conflict between Blackmon and Kiss.

CONCLUSION

Petitioner requests the Court to accept this case for discretionary review and order briefing on the merits.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Jurisdictional Brief of Petitioner was furnished by U.S. Mail to **Heather Flanagan Ross and Charmaine Millsaps**, Assistant Attorneys General, Counsel for the State of Florida, The Capitol PL01, Tallahassee, Florida 32399-1050, and to **Mr. David Devon Blackmon**, DOC# 121397, NWFRC Annex, 4455 Sam Mitchell Drive, Chipley, FL 32428-3597, on this ___ day of May, 2011.

CERTIFICATE OF FONT AND TYPE SIZE

I hereby certify that this brief was typed using Courier New, 12 point.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

_____
GAIL E. ANDERSON
Assistant Public Defender
Florida Bar No. 0841544
Leon County Courthouse
301 S. Monroe Street, Suite 401
Tallahassee, FL 32301
(850) 606-8514
Gail.Anderson@flpd2.com
COUNSEL FOR PETITIONER