IN THE SUPREME COURT OF FLORIDA

CASE NO. SC03-1675

JOHN W. MANN,

Petitioner,

vs.

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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INTRODUCTION

Petitioner was the appellant in the Third District Court of Appeal and the defendant in the trial court of the Eleventh Judicial Circuit, in and for Dade County. Respondent, the State of Florida, was the appellee and the prosecution, respectively, in the lower courts. In this brief, the parties will be referred to as they appear before this Honorable Court. The Appendix attached to this jurisdictional brief contains a conformed copy of the district court's decision rendered below.

STATEMENT OF THE CASE AND FACTS

Petitioner entered into a plea bargain in circuit court case numbers 96-26121, 97-9198, and 97-12145. Mann v. State, 851 So. 2d 901, 902 (Fla. 3d DCA 2003). (Appendix.) He pled guilty in all three cases as an habitual violent felony offender ("HVO") and was sentenced to a combination of community control, probation, and alcohol treatment. Id. Thus, as matters stood after the 1997 plea bargain, Petitioner had already been adjudicated an HVO. Id.

In 1998, Petitioner was found to have violated his probation. Id. At sentencing, both the State and defense acknowledged that Petitioner would be sentenced as an HVO, with

the State arguing for a longer sentence and the defense arguing for a shorter sentence. Id. The trial court pronounced sentence, stating:

> Mr. Mann, I am going to sentence you as follows. In case number 96-26121, to ten years as an habitual offender with a five year minimum mandatory. In case number 97-9198 on Count I to twenty years as an habitual offender with a ten year minimum mandatory. On Count II, ten years with five year minimum mandatory to run concurrent. Sentence imposed in this case will run concurrent with the sentence imposed in the first case.
>
> In case number 97-12145 to ten years with a five year minimum mandatory on Count I. Credit time served to Counts II and III. Ten years with a five year minimum mandatory on Count IV to run concurrent with Count I and concurrent with the sentences imposed in the other two cases.

Id. The written sentencing order reflected Petitioner's HVO status as well as the minimum mandatory terms. Id.

Petitioner later filed a motion to correct illegal sentence as to case number 97-9198, which was denied. Id.[1] Petitioner appealed, arguing that because the trial court pronounced sentence as an habitual offender ("HO") rather than as an HVO, he was entitled to have the sentencing order modified to reflect

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[1] A separate but identical challenge to the HVO sentence imposed in case number 97-12145 was denied and currently is on appeal in the Third District. Mann v. State, Third District Case No. 3D03-1656. The HVO sentence in case number 96-26121 was vacated on other grounds in Mann v. State, 824 So. 2d 330 (Fla. 3d DCA 2002). 851 So. 2d at 902 n.2.

an HO sentence and to eliminate the HVO mandatory minimum sentence. Id. The district court disagreed:

> First, the defendant had already been adjudicated an HVO at the time of his 1997 plea bargain. Both sides acknowledged at the sentencing proceeding that the sentence upon revocation of probation would be as an HVO. The only dispute between the sides was what the length of the sentence should be.
>
> Against that background, and in considering the nature of the sentence imposed, it is clear that the trial court merely mispoke by stating that the sentence would be as a habitual offender, rather than stating as a habitual violent offender. We reach that conclusion not only for the reasons already stated, but also because the trial court imposed HVO mandatory minimum sentences upon revocation of probation.

Id. at 902-903.

Petitioner cited this Court's decision in Ashley v. State, 850 So. 2d 1265 (Fla. 2003), but the Third District distinguished Ashley as being "quite different" and found it inapplicable here. Mann, 851 So. 2d at 903. The district court concluded that Petitioner's sentence was not increased after it was imposed, and there was no double jeopardy violation such as occurred in Ashley. Id.

Petitioner filed a notice to invoke the discretionary jurisdiction of this Court based on direct conflict, followed by a jurisdictional brief.

SUMMARY OF THE ARGUMENT

This Court should decline to accept jurisdiction in this case because Petitioner has failed to demonstrate express and direct conflict with Ashley v. State, 850 So. 2d 1265 (Fla. 2003), or any other appellate decision on the same question of law.

ARGUMENT

THIS COURT SHOULD DECLINE TO ACCEPT JURISDICTION IN THIS CAUSE BECAUSE THE DISTRICT COURT'S DECISION DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH ASHLEY v. STATE, 850 SO. 2D 1265 (FLA. 2003), OR ANY OTHER APPELLATE DECISION ON THE SAME QUESTION OF LAW.

Petitioner asserts that the decision of the Third District Court of Appeal in this cause directly and expressly conflicts with this Court's decision in Ashley v. State, 850 So. 2d 1265 (Fla. 2003), on the same point of law. Article V, Section 3(b)(3), Florida Constitution (1980), and Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv) provide that the discretionary jurisdiction of this Court may be invoked 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 this Court on the same question of law. Respondent respectfully requests that this Court decline to accept review in this case as Petitioner has failed to present a legitimate basis for the invocation of this Court's discretionary jurisdiction.

Petitioner's contention that the district court's opinion expressly and directly conflicts with Ashley is without merit. The specific issue addressed in Ashley was whether "a trial court can bring a defendant back to court, vacate the sentence

imposed, and resentence him to what amounts to a more onerous sentence after he has begun serving the original sentence, without violating the double jeopardy clause." 850 So. 2d at 1266. The trial court, after hearing argument for and against sentencing Ashley as an HVO, orally sentenced him as an HO and imposed a twenty-five year prison sentence. Id. In other words, the trial court failed to find Ashley was an habitual *violent* felony offender. Id. The written judgment and sentence, however, indicated Ashley had been sentenced as an HVO with no minimum mandatory term indicated on the written sentencing form. Id. A few days later, Ashley reappeared in court, whereupon he was orally sentenced to twenty-five years in prison as an HVO, and for the first time a ten-year minimum mandatory term was imposed. Id.

This Court concluded the trial court's actions constituted a violation of the double jeopardy clause. Id. at 1267. "Once a sentence has been imposed and the person begins to serve the sentence, that sentence may not be increased without running afoul of double jeopardy principles." Id.

As the Third District explained below, Ashley is distinguishable from the instant case because Petitioner's sentence was never increased after it was imposed, and there was no double jeopardy violation such as occurred in Ashley. 851

So. 2d at 903. Here, Petitioner was adjudicated an HVO as part of his 1997 plea bargain; thus, the sentence imposed in 1998 upon revocation of probation would likewise be as an HVO. Id. In fact, both sides acknowledged at the 1998 sentencing proceeding that Petitioner *would be* sentenced as an HVO; the only dispute related to the length of the sentence. Id. at 902-903. In addition, the trial court imposed HVO minimum mandatory sentences orally and in writing. Id. at 902. The Third District correctly distinguished Ashley and concluded that the trial court's failure to use the word *violent* when pronouncing sentence was a "mere slip of the tongue which did not give rise to a double jeopardy issue." Id. at 903. Respondent respectfully suggests that the district court's decision does not expressly and directly conflict with Ashley on the same question of law.

In urging this Court to accept his case for review, Petitioner suggests that his situation is similar to the defendant's in Evans v. State, 675 So. 2d 1012 (Fla. 4th DCA 1996). This Court in Ashley discussed Evans and expressly approved its rationale. 850 So. 2d at 1266-67. In Evans, as part of a plea agreement, Evans was adjudicated guilty of two felonies and sentenced as an HO to probation. 675 So. 2d at 1013. Also as part of the plea agreement, Evans agreed to be

sentenced as an HO if he violated probation. Id. When he did violate probation, he was sentenced to prison time as an HO. Id. The sentences were suspended and Evans was placed on probation, however, the judgment of HO status was never set aside. Id. As a result, and by agreement of the parties, the trial court vacated the suspended sentences, thereby allowing Evans to be resentenced on his initial violation of probation. Id. At resentencing, the trial court did not state that Evans was being sentenced as an HO; however, the written order did reflect he was being habitualized. Id. at 1014. Later, when the State moved for clarification because the commitments prepared by the court clerk did not reflect habitualization, Evans objected on double jeopardy grounds, recalling that the court's oral pronouncement had not mentioned habitualization. Id. The court proceeded to order the commitments amended to reflect an HO sentence. Id.

The Fourth District in Evans reversed, holding that even if the trial court's failure to orally state that Evans was being sentenced as an HO was "merely [] an oversight," clarifying the sentence two days after oral pronouncement to reflect an HO term of imprisonment violated double jeopardy. Id. at 1014-15. "[O]nce sentence is imposed, jeopardy attaches, and appellant cannot be resentenced to a greater term of imprisonment." Id.

at 1014. As previously mentioned, the Ashley Court agreed with this reasoning. 850 So. 2d at 1267.

The instant case is distinguishable from Evans. Unlike in Evans, here both sides recognized at the 1998 revocation proceeding that Petitioner *would be* sentenced as an HVO. 851 So. 2d at 902. Furthermore, the trial court imposed minimum mandatory sentences, which is appropriate for HVO sentences but not for HO sentences. Id. See Ashley, 850 So. 2d at 1271 n.6 (Harding, J., dissenting) (comparing section 775.084(4)(a), Florida Statutes (1999) (habitual felony offenders) and section 775.084(4)(b) (habitual violent felony offenders) and noting that only the HVO section provided for a mandatory term). The written sentencing order reflected HVO status as well as the minimum mandatory terms. 851 So. 2d at 902. As the district court found, the trial court's failure to use the word *violent* truly was a "mere slip of the tongue." Id. at 903.[2] In sum, both Ashley and Evans are distinguishable because Petitioner was not returned to court and resentenced to what amounted to a more onerous sentence after he had begun serving the original sentence. His sentence was not increased and no double jeopardy

[2] The Third District's citation to McCray v. State, 838 So. 2d 1213 (Fla. 3d DCA 2003), may suggest the court thought the trial court did not really fail to say the word *violent* when pronouncing sentence, but that its omission from the transcript was the result of a transcription error.

violation occurred. Petitioner has failed to demonstrate express and direct conflict with these or other appellate court decisions. Accordingly, this Court should decline to accept the district court's decision for review.

CONCLUSION

Wherefore, based upon the foregoing argument and authorities cited herein, Respondent respectfully requests that this Court DECLINE to accept 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 furnished by U.S. Mail on this _____ day of October, 2003, to John W. Mann, DC# M07271, Dorm A1112S, Apalachee Correctional Institution, 52 West Unit Drive - West, Sneads, Florida 32460.

_____
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CERTIFICATE OF FONT COMPLIANCE

Counsel for the Respondent, the State of Florida, hereby certifies that the 12 point Courier New font used in this brief complies with the font requirements of rule 9.210(a)(2), Florida Rule of Appellate Procedure.

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APPENDIX