IN THE SUPREME COURT OF FLORIDA

CASE NO. SC06-1321
DCA CASE NO. 3D05-1301

JERMAINE TYNELL DUHART,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

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

BRIEF OF RESPONDENT ON JURISDICTION

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INTRODUCTION

Petitioner, Jermaine Tynell Duhart, was the defendant in the trial court and the appellant in the Third District Court of Appeal. Respondent, the State of Florida, was the prosecution in the trial court and the appellee in the Third District Court of Appeal. The parties shall be referred to as they stood in the trial court.

STATEMENT OF THE CASE AND FACTS

In 1997, Defendant was convicted of four counts of Robbery with a Deadly Weapon or Firearm and sentenced as a habitual violent felony offender to 40 years in state prison with a fifteen year mandatory minimum. (App. A). Defendant's sentence was reversed and remanded in Duhart v. State, 847 So. 2d 497 (Fla. 3d DCA 2003), based on Defendant's erroneous designation as a habitual violent felony offender. Defendant was resentenced as a habitual felony offender but the sentence was again reversed and remanded in Duhart v. State, 858 So. 2d 1222 (Fla. 3d DCA 2003), because neither Defendant nor his counsel were present during the resentencing hearing.

During the next resentencing hearing the trial court resentenced Defendant under the 1995 guidelines, that were held to be unconstitutional in Heggs v. State, 759 So. 2d 620 (Fla. 2000). The trial court believed it could achieve its sentencing goals under the 1995 guidelines and declined to sentence Defendant as a habitual felony offender. Defendant filed a motion to correct illegal sentence which the trial court initially denied, incorrectly believing it had sentenced Defendant as a habitual felony offender. However, upon recognizing its mistake, the trial court vacated its order denying Defendant's motion and resentenced Defendant under the 1994 guidelines as a habitual felony offender. (App. A). Defendant appealed his

sentence to the Third District Court of Appeal. On February 22, 2006, the district court per curiam affirmed, stating:

> In this case, however, the trial court initially, and continually, imposed the habitual offender designation on appellant's sentences. It was only at the fourth sentencing hearing that the trial court did not include the habitual offender designation finding instead that the twenty-year sentence provided by a 1995 sentencing guidelines scoresheet provided an appropriate sentence for the appellant's convictions.
>
> We therefore find this case to be more comparable to Plute v. State, 835 So. 2d 368 (Fla. 2d DCA 2003). In Plute, the defendant was sentenced, without a habitual offender designation, under the constitutionally infirm 1995 guidelines. On resentencing, the trial court imposed habitual offender enhancements to achieve a sentence equivalent to the one originally imposed. In affirming the trial court's resentence, the Second District opined that:
>
> > 'Mr. Plute's original sentence was illegal, having been imposed in reliance upon an unconstitutional statute that had never been validly enacted. It is well-established that a harsher sentence may be imposed on resentencing in such a context without violating double jeopardy.'
>
> Plute, 835 So. 2d at 369.
>
> Given that the trial court in this case, unlike the court in Martinez, continually designated the defendant as a habitual offender; and given the fact that the designation here, like that in Plute, was used to align the defendant's sentence with the one imposed under the 1995 guidelines, we affirm.

(App. A). Defendant now seeks discretionary review in this Court.

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 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 Defendant's petition to review the decision of the district court.

ARGUMENT

THE 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.

Defendant contends that this Court should invoke its discretionary review power to review the Third District Court of Appeal's decision in the instant case. Defendant claims only that "[t]he decision of the District Court of Appeal, Third District, in the present case expressly and directly conflicts with the First District Court of Appeal in Grimes v. State, 616 So. 2d 996 (Fla. 1st DCA 1992), Davis v. State, 587 So. 2d 580 (Fla. 1st DCA 1991), and Donald v. State, 562 So. 2d 792 (Fla. 1st DCA 1990)." The State 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.

Article V, Section 3(b)(3), Fla. Const. (1980) and Fla. R. App. P. 9.030(a)(2)(A)(iv), provide that the discretionary jurisdiction of the Supreme Court of Florida 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 of Florida 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.

The rationale for limiting this Court's jurisdiction is the recognition that district courts "are courts primarily of final appellate jurisdiction and to allow such courts to become intermediate courts of appeal would result in a condition far more detrimental to the general welfare and the speedy and efficient administration of justice than that which the system was designed to remedy." Jenkins v. State, 385 So. 2d 1356, 1358 (Fla. 1980).

This Court cannot exercise its discretionary jurisdiction to review the decision below because, contrary to Defendant's claim, the decision below is not in direct conflict with the cases cited by Defendant, or any decision from this Court or any other district court on the same question of law.

In Grimes v. State, 616 So. 2d 996 (Fla. 1st DCA 1992), the trial court declined to sentence the defendant as a habitual felony offender at the initial sentencing because it was not sure whether the defendant could be designated a habitual felony offender on a first degree felony punishable by life. Additionally, the trial court failed to make findings regarding whether the predicate convictions had been set aside or the defendant had been pardoned which the First District Court of Appeal held to be per se reversible error.

In Davis v. State, 587 So. 2d 580 (Fla. 1st DCA 1991), the trial court refused to designate the defendant a habitual felony offender even after the State urged the court to so. The First District Court of Appeal stated that "[t]he trial court's ***initial*** decision not to find Davis a habitual offender, after considering the evidence and hearing argument on the issue, constituted an acquittal of a habitual offender sentence." (emphasis added).

In Donald v. State, 562 So. 2d 792 (Fla. 1st DCA 1990), the trial court at the initial sentencing expressed the belief that a life sentence would not be the appropriate sentence for the defendant and illegally sentenced the defendant as a habitual violent felony offender to a term of twenty years instead of the requisite life sentence with a minimum mandatory of fifteen years. Therefore, the First District Court of Appeal held that the trial court could not resentence the defendant

to a life sentence as a habitual violent felony offender because it initially expressed the view that a life sentence was not the appropriate punishment.

In the decision below, the Third District Court of Appeal stated that "[i]n this case, however, the trial court initially, and continually, imposed the habitual offender designation on appellant's sentences." (App. A). The trial court never varied in the length of the sentence it desired to impose. Therefore, there was no increase in the length of Defendant's sentence upon resentencing. In Grimes and Davis, the trial court refused to impose the habitual offender designation at the original sentencing hearing and therefore the defendant's sentence would increase in length upon resentencing if the designation was later added. In Donald, the trial court did not want to sentence the defendant to a life sentence, which is required by the habitual violent felony offender designation, so it could not later resentence the defendant to a life sentence that would again increase the length of the sentence the defendant was already serving.

These facts are not present in the case currently before this Court and therefore they are not in conflict with the Third District Court's decision. In the case before this Court, the trial court initially and repeatedly designated Defendant a habitual felony offender. In the one instance the trial court declined to designate Defendant as such, it was because the trial court mistakenly believed it could achieve an equivalent sentence without the habitual offender designation. The

Third District Court's opinion also does not certify conflict with any case or certify a question to this Court. 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 on the preceding authorities and arguments, the State respectfully requests that this Court decline jurisdiction to review this cause.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Respondent was mailed this __ day of August, 2006, to Howard Blumberg, Assistant Public Defender, 1320 N.W. 14th Street, Miami, FL 33125.

_____

MICHELE SAMAROO
Assistant Attorney General

CERTIFICATE OF TYPEFACE COMPLIANCE

I HEREBY CERTIFY that the foregoing Response was written using 14 point Times New Roman in compliance with Fla. R. App. P. 9.210(a)(2).

_____

MICHELE SAMAROO
Assistant Attorney General