

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC08-1850q

DCA NO. 3D08-1721

TODRICK ROBERTS,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

BRIEF OF RESPONDENT ON JURISDICTION

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

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INTRODUCTION

Respondent, THE STATE OF FLORIDA, was the prosecution in the trial court and the Appellee in the District Court of Appeal, Third District. Petitioner, TODRICK ROBERTS, was the Defendant in the trial court and the Appellant in the District Court of Appeal. In this brief, Petitioner will be referred to as Roberts and the Respondent will be referred to as the State.

STATEMENT OF THE CASE AND FACTS

Roberts filed a motion for post conviction relief with regard to his habitual violent offender sentence. The motion was summarily denied without an evidentiary hearing. Roberts then appealed the denial to the Third District Court of Appeal. On August 13, 2008, the appellate court entered a per curiam affirmance and cited to its prior case of Williams v. State, 898 So. 2d 966, 967 (Fla. 3d DCA 2005) for the following proposition:

Since only one qualifying felony is needed for an HVFO adjudication, it does not matter if the qualifying felony was sentenced together with, or separate from, other qualifying felonies.

Roberts v. State, 2008 Fla. App. LEXIS 12099 (Fla. 3rdDCA 2008).

Roberts thereafter filed a pro se notice of intent to invoke

this Court's discretionary jurisdiction and a Jurisdictional Brief.

QUESTIONS PRESENTED

WHETHER THE DECISION OF THE LOWER COURT EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISIONS OF Bover v. State, 797 So. 2d 1246 (Fla. 2001) OR Rutherford v. State, 820 So. 2d 407 (Fla. 2nd DCA 2002)? (REPHRASED).

SUMMARY OF THE ARGUMENT

The grounds set forth in Roberts' brief do not provide the Supreme Court of Florida with jurisdiction to review the Third District Court of Appeal's decision. The lower court's opinion does not expressly and directly conflict with the decisions of Bover v. State, 797 So. 2d 1246 (Fla. 2001) or Rutherford v. State, 820 So. 2d 407 (Fla. 2nd DCA 2002). Bover involves a basic habitual offender sentence which does involve two predicate felony offenses, whereas the instant case involves a habitual *violent* felony offender sentence which only involves a single predicate offense. Rutherford does involves a habitual *violent* felony offender sentence, but the case was not decided on the merits, has been criticized by Williams v. State, 898 So. 2d 966 (Fla. 3d DCA 2005) and when the second district did decide the same issue on the merits in subsequent cases, it relied upon the authority set forth in Williams. Thus, there is not express or direct conflict to invoke this Court's jurisdiction.

ARGUMENT

THE DECISION OF THE LOWER COURT DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH THE DECISIONS OF Bover v. State, 797 So. 2d 1246 (Fla. 2001) OR Rutherford v. State, 820 So. 2d 407 (Fla. 2nd DCA 2002). (REPHRASED).

Roberts claims that the Court has jurisdiction pursuant to Rule 9.030(a)(2)(A)(iv), Fla. R. App. P., which provides for this Court's discretionary review of decisions of district courts of appeal that expressly and directly conflict with a decision of another district court of appeal or of the supreme court on the same question of law. The Court has explained express and direct conflict as appearing within the four corners of the majority decision. Reaves v. State, 485 So.2d 829 (Fla. 1986). The State maintains that the Court is without jurisdiction to review this decision on the grounds set forth in Roberts' brief, as no such express and direct conflict exists.

Nevertheless, in support of his claim of jurisdiction, Roberts argues that the lower court's opinion is in conflict with Bover v. State, 797 So. 2d 1246 (Fla. 2001) and Rutherford v. State, 820 So. 2d 407 (Fla. 2nd DCA 2002). Roberts has not cited to any specific case which expressly and directly conflicts with the lower court's opinion. The issue in Bover was

whether a Florida Rule of Criminal Procedure 3.800(a) motion could be used to correct a habitual felony offender sentence where the predicate felony offenses did not satisfy the sequential conviction requirement of the habitual offender statute. The Court held that when the sequential felonies required pursuant to Florida Statute section 775.084(5) do not exist, a defendant who was sentenced as a habitual offender is entitled to have the sentence corrected as an illegal sentence pursuant to rule 3.800(a), as long as the error is apparent from the face of the record. Id. at 1251. In reaching its holding, the Court acknowledged that section 775.084(5) specifically requires "that the court must have imposed sentence for the two prior convictions separately from each other." Id. at 1251. Accordingly, the sentencing for separate convictions for unrelated crimes can take place on the same day, as long as the sentences are not part of the same sentencing proceeding.

In Rutherford, the second district court of appeal reversed the summary denial of defendant's 3.800(a) motion to correct illegal sentence because the trial court failed to address his claim that the predicate offenses used to qualify him as a habitual violent felony offender did not satisfy the sequential convictions requirement of section 775.084(5), Florida Statutes (Supp. 1996), as the predicate convictions used to enhance his

sentences were all entered on the same date pursuant to a single plea agreement. There is not direct and express conflict with Rutherford because it was a procedural question which did not address the issue on the merits. Moreover, the dicta and mere suggestion that if the defendant in Rutherford was correct, he would be entitled to relief, has been criticized by the Third District Court of Appeal in Williams v. State, 898 So. 2d 966, 967 (Fla. 3rd DCA 2005), the case which was cited to in its opinion below, as apparently wrongly decided. Subsequent to Rutherford, when the second district did in fact address the claim on the merits, they realized that the claim was in fact without merit and held tha "[a] defendant needs only one qualifying prior conviction in order to be sentenced as a habitual violent felony offender." Hall v. State, 821 So. 2d 1154 (Fla. 2d DCA 2002).

Furthermore, several subsequent cases from the Second District have cited to Williams v. State, the case cited to in opinion below, which held that because only one qualifying felony is necessary for a habitual violent felony offender (HVFO) adjudication, it does not matter if the qualifying felony was sentenced together with, or separate from, other qualifying felonies. See Horne v. State, 954 So. 2d 33 (Fla. 2nd DCA. 2007),

Nealy v. State, 956 So. 2d 1191 (Fla. 2nd DCA 2007) and Rutledge v. State, 969 So. 2d 381 (Fla. 2nd DCA 2007).

The lower court cited to Williams, which dealt with a habitual *violent* felony offender sentence. Thus, Bover, which deals with only a basic habitual offender sentence is clearly factually distinguishable from the case at bar. Accordingly, there is no direct and express conflict. As for Rutherford, it did not address the issue on the merits and subsequent cases from the second district which did address the claim relied upon Williams, and thus clearly acknowledge that in the case of a habitual *violent* felony offender sentence, where only one prior qualifying offense is required, it does not matter if the qualifying felony was sentenced together with, or separate from, other qualifying felonies. Therefor, Roberts has failed to show the existence of a direct and express conflict with Bover or Rutherford.

CONCLUSION

As indicated by the foregoing facts, authorities and reasoning, the Third District's opinion does not directly and expressly conflict with Bover or Rutherford. Thus, the State respectfully maintains that this Court lacks jurisdiction and the petition to invoke discretionary jurisdiction should be denied.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Respondent On Jurisdiction was mailed to **TODRICK ROBERTS**, DC#443353, Okaloosa Correctional Institution, 3189 Little Silver Road, Crestview, Florida 32539-6708, on this 20th day of October, 2008.

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CERTIFICATION OF TYPE SIZE AND STYLE

Pursuant to the Rule 9.210(a)(2), Fla. R. App. P. regarding the type size of briefs filed in the Supreme Court of Florida, Respondent hereby certifies that the subject brief was typed in font Courier New, 12 point.

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