

IN THE SUPREME COURT OF FLORIDA

CASE NO. SCO8-227
L.T. CASE NO. 4D06-3661

TROY DAVENPORT,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

RESPONDENT'S BRIEF ON JURISDICTION

ON DISCRETIONARY REVIEW FROM THE
FOURTH DISTRICT COURT OF APPEAL

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STATEMENT OF THE CASE AND FACTS

Petitioner Troy Davenport was convicted of burglary of a dwelling and sentenced to 30 years as an habitual felony offender [HFO] and a prison releasee reoffender [PRR]. Davenport v. State, 971 So. 2d 293, 294 (Fla. 4th DCA 2008). He argued three issues on appeal to the Fourth District Court: “(1) the trial court erred in denying his motion for judgment of acquittal, (2) the jury instructions on the elements of burglary constituted fundamental error, and (3) the trial court erred in sentencing Davenport as an HFO and PRR.” *Id.*

The district court affirmed, “without further comment,” the first two issues. *Id.* As to the third issue, the court noted that the state had filed notices of its intent to have petitioner declared an HFO and PRR. *Id.* The jury found petitioner guilty. *Id.* The same trial judge in the case had also presided at petitioner’s two related cases, which were resolved by a negotiated plea. *Id.* In those plea cases, the trial court had declared petitioner a PRR and an HFO. *Id.*

At sentencing, “the trial court purported to take judicial notice of its own files in the related plea cases, wherein certified copies of the convictions were entered.” *Id.* Petitioner was sentenced to 30 years, with a 15-year minimum mandatory imposed on petitioner as a PRR. *Id.* On

appeal, petitioner argued that the trial court erred in the sentencing him as an HFO and PRR because there was no proof of his prior convictions or the date of his prison release admitted at the sentencing hearing. *Id.* at 294-295. The Fourth District agreed, finding that while it was permissible for the trial court to take judicial notice of its own files, the court had “to put such evidence in the record of each case when sentencing a defendant as an HFO and PRR.” *Id.* at 295. While certified copies from other files would suffice, the trial court failed to put those into the record of the case. *Id.* Thus, the case was reversed and remanded for resentencing. *Id.* Petitioner now seeks to invoke the discretionary jurisdiction of this Court.

SUMMARY OF THE ARGUMENT

Conflict jurisdiction requires express and direct conflict between two decisions, on the same point of law and appearing within the four corners of the decisions. Petitioner’s cases are not in direct and express conflict with his decision from the Fourth District Court of Appeal. In fact, this Court just recently decided this issue squarely against him.

JURISDICTIONAL STATEMENT

Petitioner can invoke this Court’s discretionary jurisdiction only by showing that the district court decision expressly and directly conflicts with a decision from this Court or from another Florida district court on the same

question of law. Fla. R. App. P. 9.030(a)(2)(A) (iv). Such showing is not possible here, where this Court has now decided this issue against petitioner.

ARGUMENT

THERE IS NO DISCRETIONARY REVIEW AVAILABLE; PETITIONER’S RELIED-UPON CASE WAS QUASHED IN PART BY THIS COURT, WHICH HAS EXPRESSLY DECIDED THIS ISSUE AGAINST PETITIONER. [Restated]

To invoke this Court’s discretionary jurisdiction, there must be express and direct conflict, on the same point of law, appearing “within the four corners of the majority decision.” Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986). The only relevant facts are “those facts contained within the four corners of the decisions allegedly in conflict.” *Id.* This is so because this Court’s powers “to review decisions of the district courts of appeal are limited and strictly prescribed.” Jenkins v. State, 385 So. 2d 1356, 1357 (Fla. 1980). District courts were never intended to be intermediate courts; rather, this Court functions “as a supervisory body in the judicial system for the State, exercising appellate power in certain specified areas essential to the settlement of issues of public importance and the preservation of uniformity of principle and practice, with review by the district courts in most instances being final and absolute.” *Id.* at 1357-1358.

Petitioner argues that the decision in his case, Davenport v. State, 971 So. 2d 293 (Fla. 4th DCA 2008), expressly and directly conflicts with Collins v. State, 893 So. 2d 592 (Fla. 2d DCA 2004), *approved in part, quashed in part*, --- So. 2d ---, 33 Fla. L. Weekly S373, 2008 WL 2277513 (Fla. June 5, 2008), and Bover v. State, 797 So. 2d 1246 (Fla. 2001). However, these cases are not in express and direct conflict. Rather, in Collins this Court expressly decided petitioner's issue---against him.

In Collins, 893 So. 2d at 593-594, the Second District Court of Appeal ruled that where the state provided insufficient evidence at sentencing that the appellant qualified as an HFO, the state would not be afforded a second opportunity on remand to present evidence that the appellant did in fact qualify. The Second District acknowledged that its decision was in conflict with virtually every other district. *Id.* at 594.

Upon review, while this Court approved of the lower court reversing the appellant's sentence, it held "that when a habitual offender sentence is reversed because of insufficient evidence, on remand for resentencing the State may again attempt to prove that the defendant meets the criteria for such sentencing." Collins v. State, --- So. 2d ---, 33 Fla. L. Weekly S373, 2008 WL 2277513, *8 (Fla. June 5, 2008). This Court noted that in Bover v. State, 797 So. 2d 1246 (Fla. 2001), which is the second case relied upon by

petitioner here, it had held that if the defense failed to object to the sufficiency of the evidence as to HFO status, the state could present additional evidence on remand. Collins, 2008 WL 2277513, *2. This Court now addressed:

the narrow question left open in *Bover*: when the defendant *does* object at sentencing to the sufficiency of the State's evidence supporting the habitual felony offender sentence, and on appeal the district court reverses on that basis, on remand for resentencing may the State present new evidence that the defendant is a habitual felony offender? Our answer is yes. We hold that because resentencing is a de novo proceeding, on remand the State may present additional evidence to prove that the defendant qualifies for habitual felony offender sentencing.

Id. (emphasis in original).

This Court went on to explain that resentencing is a new proceeding, a *de novo* proceeding as to all issues, which often benefits the defendant. *Id.* at *3. As a new proceeding, the trial court was “not limited by the evidence originally presented.” *Id.* at *4. Moreover, double jeopardy was not implicated, nor was due process. *Id.* at *6-7.

Thus, this Court's opinion is expressly against petitioner. Whether he did or did not object to the sufficiency of the evidence below, the proper procedure is to remand for resentencing, with any evidence proving that the defendant qualified as an HFO or PRR being put into the record at that time. That is precisely what the Fourth District ruled. Contrary to petitioner's

position, there is no conflict for this Court to resolve. Because the opinion at issue here is in perfect accord with petitioner's cited cases, review by this Court should not be granted.

CONCLUSION

For the foregoing reasons, discretionary review should not be granted. There is no direct and express conflict, on the same point of law, between the opinion issued in petitioner's case in the Fourth District and the cases he puts forth.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been forwarded via U.S. mail to petitioner: Troy Davenport, pro se, DC # 646588, Everglades Correctional Institution, P.O. Box 949000, Miami, Florida 33194-9000, on June 25, 2008.

DIANE F. MEDLEY
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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief has been prepared with Times New Roman 14-point type and complies with the font requirements of Florida Rule of Appellate Procedure 9.210.

Counsel for Respondent