

IN THE SUPREME COURT OF FLORIDA

DENNIS STARK, :

Petitioner, :

vs.

STATE OF FLORIDA, :

Case No. SC10-409

Respondent. :

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

BRIEF OF PETITIONER ON JURISDICTION

JAMES MARION MOORMAN
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TENTH JUDICIAL CIRCUIT

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STATEMENT OF THE FACTS AND OF THE CASE

Petitioner was charged with two counts of burglary to an "unoccupied dwelling", one count of dealing in stolen property, and one count of resisting an officer without violence. The offenses allegedly occurred between January 22 and February 11, 2003. In separate informations, he was also charged with two additional counts of dealing in stolen property, occurring on December 2, 2002 and September 16, 2002. Notice was served that the prosecution would seek enhanced penalties, including a sentence as a prison releasee reoffender, at least in the case containing the burglary charges. On October 3, 2003 Petitioner entered pleas of guilty to the charges. There was no understanding as to the sentence to be imposed, and a PSI was waived. Petitioner did not dispute his classification as either a habitual offender or as a prison releasee reoffender. According to the oral pronouncement of the court, Petitioner was adjudicated guilty and, as to the burglaries, he was sentenced to 30 years in prison, as a prison releasee reoffender and as a habitual felony offender with 15 years being suspended. After serving the unsuspended portion, he

was to be placed on 15 years probation. He was sentenced to "time served" as to the misdemeanor charge. He was sentenced to 15 years in prison, as a habitual felony offender as to each of the dealing in stolen property counts. The sentences were concurrent. The written sentences as to the dealing in stolen property counts conformed with that pronouncement, and neither they nor the misdemeanor count will be discussed further. However, the written sentence as to the burglaries varied from the oral pronouncement. The written sentences, at least initially, as to the burglary counts imposed the 30 year sentence, suspended after 15 years with the balance on probation, as orally stated, but neglected to classify Petitioner as either a habitual offender or as a prison releasee reoffender. The District Court denied permission to file a belated direct appeal.

Petitioner filed a motion to correct sentencing error in the Trial Court, arguing the burglary sentences were illegal because he was sentenced to concurrent equal terms of imprisonment as both a habitual felony offender and as a prison releasee reoffender. The trial court realized the written sentences did not conform with the oral pronouncements, and were therefore illegal on their faces. The trial court also realized Petitioner could not be sentenced to equal terms of imprisonment as both a prison releasee reoffender and as a habitual felony offender and

amended the judgment and sentences as to counts 1 and 3 (the burglary counts) so as to one count he was sentenced to 15 years in prison as a prison releasee reoffender, and as to count 3, to 30 years in prison as a habitual felony offender, with 15 years being suspended and the balance on probation. Petitioner timely filed a notice of appeal as to that ruling.

Undersigned counsel was assigned to the appeal and filed a motion to correct sentencing error because Petitioner was not present for his resentencing. The trial court granted said motion and resentenced Petitioner. However, instead of simply reimposing the corrected sentence with Petitioner present, the trial court sentenced Petitioner "de novo". The new sentences (as to counts 1 and 3) classified Petitioner as both a prison releasee reoffender and as a habitual felony offender. To avoid the prohibition against equal terms of incarceration as both a prison releasee reoffender and as a habitual felony offender, the trial court increased the incarcerative portion of the habitual felony offender sentence on each count by one month, so that Petitioner was sentenced to 15 years in prison as a prison releasee reoffender as to each count, and to 30 years in prison as a habitual felony offender as to each count, concurrently, with 14 years and 11 months (instead of the initial 15 years) of the habitual

felony offender portion to be suspended, and to be served on probation instead.

Petitioner filed yet another motion to correct sentencing error, arguing it was improper to increase the incarcerative portion of the sentence. That motion was denied. The sentences were reviewed on appeal. The state confessed error. The only issue was what remedy to impose on the Trial Court. In a decision rendered on February 10, 2010 The District Court ordered a resentencing, but allowed the Trial Court of imposing any sentence it could have originally imposed, provided the incarcerative portion of the sentence was not increased. Petitioner had argued that precedent from other Districts indicated the remedy was to impose only the prison releasee reoffender sentence.

This petition followed.

ISSUE

Does Issue in the Decision in Dennis Stark v. State of Florida, Case No. 2D07-3913 (Fla. 2nd DCA February 10, 2010) Conflict with a Decision of this Court or of Another District Court?

SUMMARY OF ARGUMENT

The Second District's opinion expressly and directly conflicts with at least one opinion of another District Court on the question of whether a sentencing court may, after violating the prohibition against imposing concurrent and equal sentences as both a prison releasee reoffender and as a habitual felony offender, do anything other than delete the habitual felony offender portion of the sentence.

ARGUMENT

Fla.R.A.P. 9.030(a)(2)A(iv) provides for the discretionary review by this Court of any decision of a District Court that expressly and directly conflicts with a decision of this Court, or of another District Court. The State conceded and the District Court found that error was committed as to sentencing Petitioner to a greater incarcerative term than he had been sentenced to originally, and once he had begun serving the sentence imposed.

Petitioner had argued that because he had already serving his sentence it would be improper to do anything other than delete the illegal habitual Felony Offender Sentence that had been imposed concurrently and equally with the Prison Releasee Reoffender sentences, citing Michel v. State, 935 So. 2nd 1228 (Fla. 5th DCA 2006). The District Court acknowledged Michel, but nevertheless held the Trial Court could impose any sentence on Petitioner that it could

have legally imposed initially, provided only that the incarcerative portion of the sentence was not increased. Nielsen v. City of Sarasota, 117 So. 2nd 731 (Fla. 1960) held that if a decision announced a rule of law, which conflicts with a previously announced rule of law, or applies a rule of law to essentially similar facts and reaches a different result from a previous decision, then the decisions are in conflict. That is what has happened in the instant case. By allowing the Trail Court greater latitude in resentencing Petitioner than was allowed by the decision in Michel, the decision in the instant case is in conflict with that in Michel.

CONCLUSION

This Court should accept review of the decision of the Second District to resolve the conflict of whether a sentencing court may, after illegally sentencing a criminal defendant to concurrent and equal sentences as both a prison releasee reoffender and as a habitual felony offender, do anything other than delete the habitual felony offender portion of the sentence.

Respectfully Submitted:

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served on the Office of the Attorney General at 3507 East Frontage Rd. Ste. 200 Tampa, Fl. 33607 on this the 2nd day of March, 2010 by regular U.S. Mail.

CERTIFICATE OF COMPLIANCE

This brief is printed in "courier New" 12 point type in compliance with Fla. R. A. P. 9.210(2).

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APPENDIX

A. Opinion of District Court dated February 10,
2010, Dennis Stark - 2D07-3913.