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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC13-

Lower Tribunal No. 3D10-206

PHILLIP DAVIS,

Petitioner,

vs.

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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TABLE OF CONTENTS

TABLE OF CITATIONS	ii
INTRODUCTION	1
STATEMENT OF THE CASE AND FACTS	1
SUMMARY OF ARGUMENT	6
ARGUMENT	7

**I. NO EXPRESS AND DIRECT CONFLICT EXISTS BETWEEN THE
THIRD DISTRICT'S OPINION IN THIS CASE AND THIS COURT'S
State v. Warner, 762 So. 2d 507 (Fla. 2000), and
Wilson v. State, 845 So. 2d 142 (Fla. 2003), opinions.**

CONCLUSION	9
CERTIFICATE OF SERVICE	10
CERTIFICATE REGARDING FONT SIZE AND TYPE	10

TABLE OF CITATIONS

<u>Case</u>	<u>Page</u>
<u>Bell v. State</u> , 847 So. 2d 558 (Fla. 3d DCA 2003).....	4
<u>Charles v. State</u> , 816 So. 2d 731 (Fla. 3d DCA 2002).....	5
<u>Davis v. State</u> , 2013 WL 1979919 (Fla. 3d DCA 2013).....	3, 6
<u>State v. Warner</u> , 762 So. 2d 507 (Fla.2000).....	3, 4
<u>Vondervor v. State</u> , 847 So. 2d 610, 614 (Fla. 5th DCA 2003)....	5
<u>Wilson v. State</u> , 845 So. 2d 142 (Fla.2003).....	4

INTRODUCTION

Petitioner, PHILLIP DAVIS, was the Defendant in the trial court and the Appellee in the Third District. Respondent, THE STATE OF FLORIDA, was the Prosecution in the trial court and the Appellant in the Third District. The parties shall be referred to as they stand in this Court.

STATEMENT OF THE CASE AND FACTS

Petitioner appealed from his conviction and sentence for organized fraud, aggravated white-collar crime, third-degree grand theft; two counts of second-degree grand theft; and twenty-five counts of money laundering. The following exchange occurred between the trial court, counsel and Davis before trial:

[STATE]: Judge the State has offered a plea to a single count of aggravated white collar crime, which is count two of the information. First degree felony, level nine open to the Court. The guidelines on that would score out to bottom of 48 month and on top of 30 years.

[DEFENSE COUNSEL]: And Judge, that's the first I've heard of this plea offer.

THE COURT: Okay.

[DEFENSE COUNSEL]: The plea that was given to me before was, basically, an open plea to the Court. There was no discussion or reference by the State to nolle prose [sic] of any particular counts.

THE COURT: All right. Well now you know. Mr. Davis's plea offer was four years to 30 years with a plea straight up or open to the Court with no promises. All I say to that is, thank you.

...

THE COURT: Okay.... So why don't you speak to your client[] about that plea. I don't know anything about the case, so I would have to hear extensively from the lawyers before impose [sic] a sentence.

[DEFENSE COUNSEL]: Judge, I—

THE COURT: But they would know that the bottom is four years.

[DEFENSE COUNSEL]: Judge, I can tell you this, at least from my discussions with Mr. Davis, he's not interested in any pleas that would have the bottom of the guidelines of state imprisonment. We had discussed in generalities based upon what the State had told me before.

THE COURT: All right. So let me just colloquy him on that.

...

THE COURT: Okay. You've heard the number, you heard the plea. The State's new plea offer this morning in essence, a guideline plea straight up to the Court with the possibility of a sentence four years to 30 years. Are you interested in pleading guilty within that—knowing that your sentencing would be anywhere between that range?

[THE DEFENDANT]: It could be 30 years.

THE COURT: Okay.

[THE DEFENDANT]: Could be as high as 30 years or as low as four years.

THE COURT: That's right.

[THE DEFENDANT]: Straight up to the Court. No, ma'am.

THE COURT: Okay.

...

THE COURT: Well, let me ask you this. Would ... you take four? Bottom of the guidelines?

[THE DEFENDANT]: No, Your Honor.

THE COURT: All right. Because I consider four right now. Okay. So I don't know anything about the case, but it is a guideline in the sentence, so all right. Very well.

The trial court then proceeded to try the case. The jury convicted Davis of one count of organized scheme to defraud \$50,000 or more, one count of aggravated white-collar crime, two counts of grand theft of more than \$20,000 but less than \$100,000, and five counts of money laundering. The trial court imposed a sentence of twenty years in state prison, followed by ten years of probation, for which restitution was ordered as a special condition in the amount of \$82,825.30. This appeal ensued.

Davis v. State, 2013 WL 1979919, at *1-2 (Fla. 3d DCA 2013).

On May 15, 2013, the district court affirmed. Id. In its opinion, the district court held in pertinent part:

The Supreme Court of Florida addressed the issue of judicial plea bargaining and vindictiveness in State v. Warner, 762 So. 2d 507 (Fla.2000). In Warner, the court refused to proscribe judicial participation in the plea bargaining process, fashioning instead several restrictions designed to limit judicial involvement so as "to minimize the potential coercive effect on the defendant, to retain the function of the judge as a neutral arbiter, and to preserve the public perception of the judge as an impartial dispenser of justice." Id. at 513. To this end, the court stated that trial courts must not initiate plea dialogues. Id. However, they may, at their discretion, participate in such discussions upon the request of a party. Id.

Once involved, Warner states that "the trial court may actively discuss potential sentences and comment on proposed plea agreements[, and] [t]he judge may state on the record the length of sentence which, on the basis of information then available to the judge, appears to be appropriate for the charged offense." Id. at 514. "The question for the court's consideration is: 'Knowing what you know today, what do you think the sentence would be if the defendant pled guilty, as charged?' " Id. To further avoid the potential for coercion, the court also stated that "a judge must neither state nor imply alternative sentencing possibilities which hinge upon future procedural choices, such as the exercise of a defendant's right to trial," and required that a record be made of all plea discussions involving the court. Id.

The Supreme Court of Florida addressed the issue of vindictiveness again in Wilson v. State, 845 So. 2d 142 (Fla.2003). In Wilson, the court stated that Warner did not mandate a presumption of vindictiveness in all cases where a higher sentence was imposed after the judge had participated in the plea discussions. Id. at 152. Rather, the court concluded that "a totality of the circumstances review [was] the more appropriate analysis to employ to determine whether a defendant's constitutional right to due process of law was violated by the imposition of an increased sentence after unsuccessful plea discussions in which the trial judge participated." Id. at 156. The court explained that:

Judicial participation in plea negotiations followed by a harsher sentence is one of the circumstances that, along with other factors, should be considered in determining whether there is a "reasonable likelihood" that the harsher sentence was imposed in retaliation for the defendant not pleading guilty and instead exercising his or her right to proceed to trial. The other factors that should be considered include but are not limited to: (1) whether the trial judge initiated the plea discussions with the defendant in violation of Warner; (2) whether the trial judge, through his or her comments on the record, appears to have departed from his or her role as an impartial arbiter by either urging the defendant to accept a plea, or by implying or stating that the sentence imposed would hinge on future procedural choices, such as exercising the right to trial; (3) the disparity between the plea offer and the ultimate sentence imposed; and (4) the lack of any facts on the record that explain the reason for the increased sentence other than that the defendant exercised his or her right to a trial or hearing. 845 So. 2d at 156 (internal citations and footnote omitted).

...[T]his Court [in Bell v. State, 847 So. 2d 558 (Fla. 3d DCA 2003)] stated:

***4** In this case, the State had made a plea offer which was pending. Upon inquiring about the status of the plea negotiation, the defendant explained to the court why he was unwilling to accept the state's offer. The court then indicated the one modification that it would entertain, the elimination of the community service hours. This was permissible under State v. Warner, 762 So. 2d 507, 514

(Fla.2000). The court refrained from becoming an advocate for the State's plea offer. The court did not imply or state that there would be any future adverse consequences from failure to accept the plea offer. See Wilson v. State, 845 So. 2d at 158. Upon the defendant's rejection of the offer, the court proceeded with the pending matters and preparation for trial.

Id. at 564. Moreover, in Bell the trial court's remarks at sentencing made clear that the sentence imposed was based upon the evidence presented at trial, in particular "the severe impact on the victim and that this serious crime could have been even worse had the victim not escaped." Id.

Here, like in Bell, the trial court inquired about the status of the plea negotiation, and defense counsel explained to the trial court why Davis was unwilling to accept the State's offer, i.e., Davis was unwilling to consider any offer that "would have the bottom of the guidelines of state imprisonment." The trial court then engaged in a colloquy with Davis in which the judge asked Davis whether he would be willing to accept the State's plea offer and Davis expressed concern about the potential of being sentenced to thirty years under the guidelines. The trial court then asked Davis whether he would be willing to accept four years, the minimum sentence under the guidelines. See generally Vondervor v. State, 847 So. 2d 610, 614 (Fla. 5th DCA 2003) ("Prior to trial, a judge may ask the attorneys if a plea offer has been extended, and may ask the defendant if he is aware of a pending plea offer without violating Warner 's restrictions."). The trial court expressed her willingness to consider four years given her knowledge of the case at that point. This is permissible under Warner. See Warner, 762 So. 2d at 514 ("The judge may state on the record the length of sentence which, on the basis of information then available to the judge, appears to be appropriate for the charged offense.").

Furthermore, the trial court did not depart from its role as an impartial arbiter. The trial court did not in any way urge the defendant to accept the plea, or imply or state that the sentence imposed would hinge on future procedural choices, such as exercising the right to trial. Indeed, unlike the trial court in Bell, the trial court here did not even suggest an alternative plea it would entertain. Cf. Charles v. State, 816 So. 2d 731, 733-34 (Fla. 3d DCA

2002) (reversing sentence as vindictive where judge made plea offer to defendant, which defendant rejected, and judge made statements on the record indicating that defendant "made the biggest mistake of his life" in rejecting plea offer and "the Court's disposition of this matter would have been even more lenient if, in fact, [defendant] had acknowledged [] responsibility and had entered a guilty plea to the charges").

While there was a significant disparity between the offer and the sentence eventually imposed by the trial court, the judge made clear the reason for this at the sentencing hearing. At the time of the plea discussion, the trial court had not yet heard any testimony or evidence concerning Davis's scheme to defraud.^{FN1} See Warner, 762 So. 2d at 514 ("A judge's preliminary evaluation of the case is not binding, since additional facts may emerge prior to sentencing which properly inform the judge's sentencing discretion."). The trial court explained at the sentencing hearing that the harsher sentence was based on testimony and evidence adduced at trial which led the court to believe that the scheme at issue was sophisticated in nature, involving great planning and premeditation.^{FN2} Such remarks indicate a valid and permissible explanation for the increase in sentence that is unrelated to Davis's choice to exercise his right to a trial.

FN1 THE COURT: This case—we didn't do a lot of pretrial motions or litigation, so I really didn't know the scheme or the evidence....

FN2 THE COURT: ... I paid very close attention to the evidence presented in this case. I took copious notes. I listened to your testimony very carefully, Mr. Davis.

....

I believe that this scheme that you both designed was simple but done with great planning and premeditation, and, therefore, sophisticated. I say that because it entailed forming corporations, bank accounts, enlisting an individual to serve as the president of one manning [sic] corporation, and that takes time and effort....

Davis v. State, 2013 WL 1979919, at *2-5 (Fla. 3d DCA 2013).

SUMMARY OF ARGUMENT

There is no basis upon which discretionary review can be granted in this case. The Third District's opinion does not conflict with any case of this Court or of any other district court in Florida. This Court should therefore deny the petition to review the decision of the district court based upon conflict jurisdiction.

ARGUMENT

I. NO EXPRESS AND DIRECT CONFLICT EXISTS BETWEEN THE THIRD DISTRICT'S OPINION IN THIS CASE AND THIS COURT'S State v. Warner, 762 So. 2d 507 (Fla. 2000), and Wilson v. State, 845 So. 2d 142 (Fla. 2003), opinions.

The essence of the Petitioner's argument is that the State initiated the plea discussions in open court and that those plea discussions came to an end when the defendant responded, "Straight up to the Court. No, ma'am." The Petitioner continues to argue that when the court next said, "Well, let me ask you this. Would...you take four? Bottom of the guidelines?", the court was then initiating new discussions. On the basis of the foregoing premises, the Petitioner argues that the Third District erred in its application of the general principles enunciated in Warner.

The Petitioner's argument is in error for the following reasons. First, the plea discussions in this case were clearly initiated by the State, not the Court, when the State advised everyone that it had offered a plea to a single offense, within

the guideline range of 48 months to thirty (30) years. That was not done by the Court.

Second, when the Court then advised of the possible maximum and minimum sentences in the case, the Petitioner responded to the State's offer, as follows: "Straight up to the Court. No, ma'am." This was clearly not a final word on the part of the Petitioner. When the Petitioner advised the court that he would not enter an open plea, straight up to the Court, the Petitioner, at a minimum, was giving an ambiguous response and implying the possibility that he would entertain a plea somewhere within that range if the Court's discretion was narrower than the top and bottom of the guidelines.

Thus, when the Court followed up with the next question, whether the Petitioner would accept the bottom of the guidelines, the Court was merely following up on the ambiguity inherent in the Petitioner's own prior response. Moreover, the Court's follow up question was as to a matter that was within the limits of the plea offered by the State.

With these principles in mind, it is clear that there is no conflict with this Court's decisions. In Warner, this Court held: "Once involved, the court may actively discuss potential sentences and comment on proposed plea agreements." 762 So. 2d at 514. (emphasis added). As the State had already offered a plea agreement that encompassed the bottom of the plea

agreement, and the Petitioner's comment - not straight up to the court - implied the possibility of a plea with a narrower range or agreed sentence within the range offered by the State, the court was doing no more than what this Court authorized in Warner - commenting on the proposed plea agreement.

Likewise, in Wilson, when this Court addressed its prior decision in Warner, this Court stated: "Warner involved a very narrow holding that permits a trial judge to respond to a request from a defendant as to what sentence the judge would impose in exchange for a guilty plea." 845 So. 2d at 152. As the defendant's response in this case, as noted above, expressed concerns as to the "straight up" component of the plea offer, that comment would reasonably be construed by trial court judges as an implied inquiry from the defendant as to what maximum within the offered plea the trial court would guarantee as either a sentence or a maximum.

Accordingly, there is no express and direct conflict in the instant case. Moreover, even if there were such a conflict in this case, the ultimate decision of the Third District would nevertheless remain intact due to the alternative holding of the Court, that the harsher sentence imposed after trial was satisfactorily explained by the trial court on the basis of the newly learned facts of the case.

CONCLUSION

WHEREFORE, based on the preceding authorities and arguments, Respondent 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 on Jurisdiction was emailed this 24th day of July to Andrew Stanton at appellatedefender@pdmiami.com.

/s/Michael W. Mervine
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CERTIFICATE REGARDING FONT SIZE AND TYPE

The foregoing Brief of Respondent on Jurisdiction was typed in Courier New, 12-point font, in accordance with the Florida Rules of Appellate Procedure.

/s/Michael W. Mervine
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