IN THE SUPREME COURT OF FLORIDA

LLOYD E. ALBRITTON,

Petitioner,

v

STATE OF FLORIDA,

Respondent.
_____/

CASE NO. 66,169

RESPONDENT'S BRIEF ON JURISDICTION

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POINT I

THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH BOGAN V STATE, 454 So.2d 686 (Fla. 1st DCA 1984); SWAIN V STATE, 455 So.2d 533 (Fla. 1st DCA 1984); and DORMAN V STATE, __So.2d__ [9 FLW 1854](Fla. 1st DCA Aug. 24, 1984).

ARGUMENT

Petitioner contends that the First District Court of Appeal has held, in the three cases cited above, that a sentence imposed following a valid departure from the recommended guidelines sentence can be excessive even though it is within the "maximum statutory sentence authorized by statute for the offense in question." Respondent disagrees and contends that the decision in the instant case, does not conflict with the three decisions of the First District Court of Appeal cited above. The Fifth District Court of Appeal held, in the instant decision, that upon departure from the guidelines for clear and convincing reasons, "The only lawful limitation on a departure sentence is the maximum statutory sentence authorized by statute for the offense in question." Petitioner seizes upon certain language in Bogan, Swain and Dorman, to suggest conflict. Petitioner asserts that, since the First District Court of Appeal in each case states that the departure sentence was not "excessive", that there is conflict between those decisions and the instant decision.

Certainly one possible reason for the First District Court of Appeal holding that the sentences were not excessive, is because they were within the "maximum statutory sentence authorized by statute for the offense in question." In both Dorman

and Bogan, the First District Court of Appeal made a one sentence statement that the departure sentences were not excessive. But, in Swain, the court made a more complete statement which seems to be in close accord with the instant decision. The Swain court stated:

> The sentencing guidelines do not explicitly provide any guidance for the trial courts in determining a sentence once the trial court has validly departed from the guidelines. The sentences sub judice are within the parameters established by the legislature. 455 So.2d at 535.

In a footnote, the court then cites to the statutory sections which established the sentence for the offense in question. This strongly implies that the First District Court of Appeal actually agrees with the Fifth District Court of Appeal, that only general law restricts the sentence which may be imposed after the trial court validly departs from the recommended guidelines sentence. Indeed, there are other plausible reasons for the First District Court of Appeal's use of the term "excessive", in the above cited decisions, but the use of this language does not constitute express and direct conflict. In fact, the reasoning set out by the Fifth District Court of Appeal in the instant decision, supports the holding of the First District Court of Appeal in Dorman, Swain, and Bogan, that the sentences in all three were not excessive.

The above cited decisions of the First District Court of Appeal only impliedly conflict with the instant decision. The First District Court of Appeal did not expressly state that a sentence imposed after a valid departure from the guidelines, that

is within the bounds of applicable sentencing statutes, could still be excessive. It merely stated that the sentences in those specific cases were not excessive. The above cited decisions of the First District Court of Appeal can be interpreted to hold the same way as the instant decision. The Swain decision makes a statement similar to the instant decision. Conflict must be express and direct to invoke the discretionary jurisdisdiction of this Court. Nielsen v City of Sarasota, 117 So.2d 731 (Fla. 1960); Mancini v State, 312 So.2d 732 (Fla. 1975); Jenkins v State, 385 So.2d 1356 (Fla. 1980). Respondent respectfully contends that since the conflict implied by the Petitioner is not express and direct, invocation of this Court's discretionary jurisdiction is not warranted.

POINT II

THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH CARNEY V STATE, __So.2d__ [9 FLW 2143] (Fla. 1st DCA Oct. 9, 1984).

ARGUMENT

Respondent contends that the instant decision does not expressly and directly conflict with the decision of the First District Court of Appeal in Carney v State, supra, The instant decision did not hold that, whenever a valid reason for departure exists amongst invalid reasons, the sentence should always be affirmed. Rather, the instant decision holds that a departure sentence can be affirmed if a valid reason does exist. The Fifth District Court of Appeal stated:

> We assume the trial judge understood his sentencing discretion and understood that the mere existence of "clear and convincing reasons" for departing from the sentencing guidelines never requires the imposition of a departure sentence and that the trial judge believed that a sentence departing from the guidelines should be imposed in this case if legally possible. Accordingly, a departure sentence can be upheld on appeal if it is supported by any valid ("clear and convincing"), reason without the necessity of a remand in every case.

This language clearly implies that there will be cases where the court could find at least one valid reason to support the departure, but would still remand to determine if the departure is warranted based on the valid reason alone. Sometimes, it might not be clear that the trial court would have departed based

on the valid reason alone. In those cases, the appellate court should remand the cause to the trial court for consideration of departure based on the valid reasons, or reason, alone.

Likewise, as the First District Court of Appeal recognized in Carney, there will be cases where the valid reason alone would clearly be sufficient cause for the trial court to depart. The instant case is a prime example of this. Petitioner pled guilty to D.W.I., manslaughter, knowing he had at least six (6) prior D.W.I. convictions. The scoresheet totalled eleven (11) points for seven prior D.U.I's. The Petitioner's prior record was held to be a clear and convincing reason for departure, while the other reasons cited by the trial court for departure were held to be invalid. The Fifth District Court of Appeal, determined that the trial court "believed that a sentence departing from the guidelines should be imposed in this case if legally possible." The facts of the instant case indicate that justice was served by the sentence imposed. Clearly, the trial court would have departed based on the valid reason alone. Thus, the Fifth District Court of Appeal held that, if a clear and convincing reason exists to support the trial court's departure from the recommended guidelines sentence, the sentence can be affirmed, "without the necessity for remand in every case."

The instant decision and the decision in Carney, can (and Respondent contends should) be interpreted in the same manner. The First District Court of Appeal certified the instant issue as a question of great public importance in Carney, as well as, Young, Mitchell, and Brooks. In as much as the same question is

not certified in the instant cause, and any conflict is merely implied and not express and direct, Respondent respectfully contends that the resolution of this issue is better left to the decisions in those cases. Respondent respectfully contends that, since the conflict inplied by Petitioner is not express and direct, invocation of this Court's discretionary jurisdiction is not warranted. Nielsen v City of Sarasota, supra; Mancini v State, supra; and Jenkins v State, supra.

CONCLUSION

Based on the arguments and authorities presented herein, Respondent respectfully prays this Honorable Court decline to exercise its discretionary jurisdiction in this cause.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Respondent's Brief on Jurisdiction has been furnished by delivery to Daniel J. Schaefer, Assistant Public Defender, this 17th day of December, 1984.

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