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Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

JAMES CLARIN GREGORY,)
)
Petitioner,)
)
vs.)
)
STATE OF FLORIDA,)
)
Respondent.)
_____)

CASE NO. 66, 317

PETITIONER'S BRIEF ON JURISDICTION

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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 Petitioner,)
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STATEMENT OF THE CASE AND FACTS

On June 29, 1983 Petitioner pled guilty to four counts of knowingly uttering or issuing a worthless check (R 128-129). The State agreed to nolle prosequi nine other worthless check charges in exchange for the plea (R 124). Sentencing was delayed several times, and finally held on January 17, 1984, before the Honorable Robert R. Perry, Circuit Judge (R 85-112). Petitioner elected to be sentenced under the Sentencing Guidelines rule (R45). A Guidelines Scoresheet was prepared for the court (R 46). The recommended sentence under the Guidelines was 3 1/2 to 4 1/2 years (R 96). The State submitted a written motion asking the court to depart from the guidelines and impose a longer sentence (R 43-44). Petitioner argued that there was no clear and convincing reason to depart from the Guidelines, therefore, they should be followed (R 98-103). The court stated its position as follows:

THE COURT: Mr. Zolezzi, I'm mindful of your argument. One word stands out; the word is "mockery". The sentencing guide-

lines, as I am able to figure them out, Mr. Zolezzi, seem to me to be a collusion between the three branches of government to escape the responsibility which is and should be the State's.

They have for all practical purposes made it impossible for crimes against property to be punishable by incarceration in the penitentiaries of the state. They have in a very real sense passed the buck from where it should be under the laws of this state, with the state, back to the local communities. And, they've made us all responsible for property crimes simply because of prison overcrowding and federal lawsuits, realizing full well at the time they abrogated their responsibility in the matter, that we were facing overcrowded jails, federal lawsuits, and a declining tax base.

It is to be sincerely hoped, by this Judge and this citizen, that the people will make their wishes known in the matter. If the sentencing guidelines were a law, I would, upon the slightest motion, hold it unconstitutional as being an illegal imposition on the constitutional powers of this Court.

Since they come to us in the guise of rules of court, one cannot say that, as Shakespeare did, the law is an ass or an idiot, but it is sure and certain, Mr. Zolezzi, that these guidelines make a mockery, in this Judge's view, of the law. And in my view, it would also be a mockery of everything that I believe that this country is, stands for, has been, and could be again to not consider the prior criminal involvement of Defendants just like these.

Therefore, I propose to depart from the guidelines in the imposition of sentence. We will let the appropriate authorities--you've preserved your points beautifully, we will let the appropriate authorities pass on it.

But I hope that the people of this state will let the executives who has jurisdiction over the Department of Corrections, the Legislature which passed the Corrections Reform Act of 1983 of which the guidelines seem to be a big part, and the supreme court, whom I hold in the highest regard, know their feelings with regard to these guidelines.

Once again, I cannot improve on Shakespeare's language. Anything else? (R 103-105).

No other reasons for departing from the guidelines were given by the court. Petitioner was sentenced to serve two and one half (2 1/2) years in prison on each of the four counts, said

sentences to be served consecutively (R 110-112).

In the District Court of Appeal, Appellant argued that the trial court's reasons for departure were not "clear and convincing" for two reasons. First, most of Judge Perry's sentencing statement was an attack on the guideline system itself, having nothing to do with Petitioner or his offense. And second the brief reference to "the prior criminal involvement of Defendants just like these" could not support departure because Petitioner's prior record had already been accorded significant weight in arriving at the 3 1/2 to 4 1/2 year recommended sentence. [Without prior convictions Petitioner's recommended sentence would have been "any non-state prison sanction".(R 46)]

On October 11, 1984, the District Court of Appeal, Fifth District, held as follows:

PER CURIAM

AFFIRMED on the authority of Hendrix v. State,
No. 83-1702 (Fla. 5th DCA August 2, 1984) [9F.L.W. 1697]
(See Appendix "A" attached hereto).

Rehearing was denied on November 19, 1984. A Notice to Invoke Discretionary Jurisdiction, based on express and direct conflict was filed December 19, 1984. This brief follows.

ISSUE

WHETHER EXPRESS AND DIRECT
CONFLICT EXISTS FOR THIS COURT
TO REVIEW THE INSTANT CASE
PURSUANT TO ARTICLE V, SECTION
(3) (b) (3), FLORIDA CONSTITUTION.

The Fifth District Court of Appeal affirmed Petitioner's conviction on the authority of Hendrix v. State, No. 83-1702 (Fla. 5th DCA August 2, 1984) [9 F.L.W. 1697]. Discretionary review of Hendrix, supra, by this Court is presently pending, Supreme Court Case No. 65,928.

A district court of appeal per curiam opinion which cites as controlling authority a decision that is pending review in the Supreme Court of Florida constitutes prima facie express conflict and allows the court to exercise its jurisdiction. Jollie v. State, 405 So.2d 418, 420 (Fla. 1981).

Accordingly, should this court exercise the discretionary jurisdiction in Hendrix, that same jurisdiction should be exercised to resolve the same question of law in the instant case.

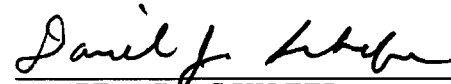
Additionally Petitioner would assert that reading Judge Perry's sentencing statement in this case together with the District Court's opinion in Hendrix shows just how important it is for this Court to accept Jurisdiction in Hendrix and in the instant case. Petitioner's case shows just how far reaching the Hendrix decision is in the Fifth District. If Hendrix is allowed to stand, apparantly any passing reference to a defendant's "prior criminal involvement" will justify departure from the guidelines. Petitioner believes this is not what the Supreme Court contemplated when it approved the Sentencing Guideline system.

CONCLUSION

Based upon the argument and authority cited herein, this Court is requested to exercise the jurisdiction that clearly exists.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

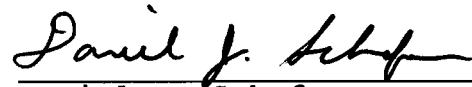


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CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed to the Honorable Jim Smith, Attorney General at 125 N. Ridgewood Avenue, Fourth Floor, Daytona Beach, Florida 32014, and to James Clarin Gregory, 3876 Evans Road Box 50, Polk City, Florida 33868 on this 2nd day of January, 1985.



Daniel J. Schafer
Assistant Public Defender