IN THE SUPREME COURT OF FLORIDA

CASE NO. 66,352

FILED
SID J. WHITE
JAN 2 1985
CLERK, SUPREME COURT
By
Chief Deputy Clerk

THE STATE OF FLORIDA,

Petitioner

vs.

LIVINGSTON MILBRY,

Respondent.

* *

ON PETITION FOR DISCRETIONARY REVIEW

* *

BRIEF OF PETITIONER ON JURISDICTION

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TABLE OF CONTENTS

	PAGE
INTRODUCTION	1
STATEMENT OF THE CASE	1
STATEMENT OF THE FACTS	1-2
ISSUE ON APPEAL	3
ARGUMENT	4-6
CONCLUSION	7
CERTIFICATE OF SERVICE	7

TABLE OF CITATIONS

CASE	PAGE
Dunlap v. State, 433 So.2d 631 (Fla. 1st DCA 1983).....	3, 4, 6

OTHER AUTHORITIES

Section 775.082(3)(d), Fla.Stat. (1983)....	2
Section 812.014(2)(b), Fla.Stat. (1983)....	2
Section 985.05, Fla.Stat. (1983)...........	2, 4, 5

INTRODUCTION

The petitioner, the State of Florida, was the appellee in the Third District Court of Appeal and the prosecution in the Circuit Court of the Eleventh Judicial Circuit, in and for Dade County, Florida. The Respondent, Livingston Milbry, was the appellant and defendant in those same respective courts. The parties shall be referred to as petitioner and respondent in this brief.

The "A" designates the attached appendix and shall be accompanied by an appropriate page number.

STATEMENT OF THE CASE

The respondent was charged with robbery and grand theft in Dade County Circuit Court. In a non-jury trial, the respondent was found guilty on the theft count only. He appealed the trial court's judgment and sentence to the Third District Court of Appeal of Florida. The Third District Court of Appeal reversed the sentence and remanded the cause for resentencing.

STATEMENT OF THE FACTS

The respondent, a youthful offender, was sentenced to four years imprisonment plus two years of community control

pursuant to Section 958.05, Florida Statutes (1983). This six year combination of imprisonment and probation exceeded the five year statutory maximum for theft. Sections 812.014(2)(b), 775.082(3)(d), Florida Statutes (1983).

The respondent appealed the sentence to the Third District Court of Appeal on the ground that the trial court erred in sentencing him to a combination of imprisonment and probation pursuant to Section 958.05, Florida Statutes (1983), that exceeded the statutory maximum for the crime committed. (A.1). The Third District Court of Appeal agreed and reversed the respondent's sentence. (A.1-2).

ISSUE ON APPEAL

WHETHER THE DECISION OF THE DISTRICT COURT OF APPEAL IN THE PRESENT CASE IS IN EXPRESS AND DIRECT CONFLICT WITH THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL IN DUNLAP V. STATE, 433 SO.2D 631 (FLA. 1ST DCA 1983).

ARGUMENT

THE DECISION OF THE DISTRICT COURT OF APPEAL IN THE PRESENT CASE IS IN EXPRESS AND DIRECT CONFLICT WITH THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL IN DUNLAP V. STATE, 433 SO.2D 631 (FLA. 1ST DCA 1983).

In Dunlap v. State, 433 So.2d 631 (Fla. 1st DCA 1983), the First District Court of Appeal was presented with facts identical to those presented in the instant case. Dunlap, a youthful offender, was sentenced pursuant to Section 958.05, Fla.Stat., to a term of four years imprisonment followed by two years in a community controlled program. On appeal, Dunlap contended that such a sentence was statutorily impermissible because it exceeded the maximum term of imprisonment applicable to an adult when convicted of second degree grand theft. Holding that the Youthful Offender Act preempted general sentencing provisions for those who so qualified, the First District Court of Appeal stated:

> Dunlap was sentenced as a youthful offender pursuant to Chapter 958, Florida Statutes, which expressly provides that such disposition is "in lieu of other criminal penalties authorized by law...." See Section 958.05. While Section 958.05(2) indicates that the offender shall serve the entire sentence "unless sooner released as provided by law," we construe this language as referring to the possibility of earlier release, such as by parole, consistent with the

> sentence imposed. Insofar as Chapter 958 circumscribes the penalties for qualifying offenders, thereby precluding application of other sanctions, see, Whitlock v. State, 404 So.2d 795 (Fla. 3d DCA 1981), general sentencing provisions external to chapter 958 do not constrain the term of Dunlap's confinement as a youthful offender.
>
> Dunlap v. State, supra, 433 So.2d at 631.

The holding in the instant case, however, directly and expressly conflicted with the Dunlap decision. Concluding that the general sentencing provisions external to chapter 958 do constrain confinement as a youthful offender, the Third District Court of Appeal ruled:

> The sole point on appeal is that the trial court erred in sentencing the defendant, as a youthful offender under Section 958.05, Florida Statutes (1983), to four years imprisonment plus two years of community control because this 6-year combination of imprisonment and probation exceeds the statutory maximum of five years imprisonment for second degree grand theft. Sections 812.014(2)(b), 775.082(3)(d), Fla.Stat. (1983). See State v. Holmes, 360 So.2d 380 (Fla. 1978); Gonzalez v. State, 392 So.2d 334 (Fla. 3d DCA 1981); Corraliza v. State, 391 So.2d 330 (Fla. 3d DCA 1980), pet. for review denied, 399 So.2d 1141 (Fla. 1981); Skinner v. State, 366 So.2d 486 (Fla. 3d DCA 1979); Watts v. State, 328 So.2d 223 (Fla. 2d DCA 1976).

> We agree and reverse the sentence herein.
>
> This Court is committed to the principle that the Youthful Offender Act [ch. 958, Fla.Stat. (1983)] may not be invoked to impose a sentence which exceeds the statutory maximum set for the offense for which an accused stands convicted. Saunders v. State, 405 So.2d 1037 (Fla. 3d DCA 1981); Contra Dunlap v. State, 433 So.2d 631 (Fla. 1st DCA 1983). The Act was obviously designed to impose more sanctions on a youthful offender who meets the statutory requirements, not to aggravate the sanction which would ordinarily apply.
>
> (A.1-2).

The Third District Court of Appeal in the present case explicitly acknowledged that their ruling conflicted with Dunlap v. State, supra. (A.2). The issue here involves important questions of legislative intent and public policy which command attention from this Court. The disruptive effect of the conflict between these decisions on Florida law warrants the granting of discretionary review.

CONCLUSION

Based upon the foregoing rationale and authority, the Petitioner requests this Court to grant discretionary review in this cause.

Respectfully submitted,

JIM SMITH
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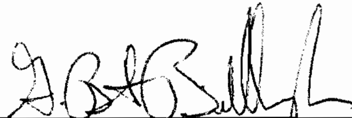

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF PETITIONER ON JURISDICTION was furnished by mail to RORY STEIN, Assistant Public Defender, 1351 N.W. 12th Street, Miami, Florida 33125, on this 28th day of December, 1984.

G. BART BILLBROUGH
Assistant Attorney General

/vbm