IN THE FLORIDA SUPREME COURT

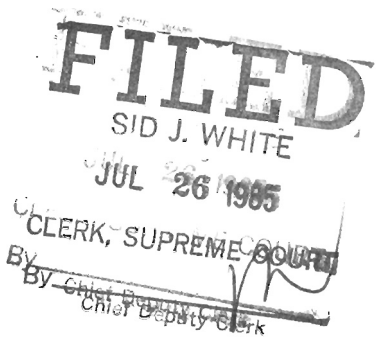
STATE OF FLORIDA,

Petitioner,

v. CASE NO. 67,313

JOHNNIE B. STUBBS,

Respondent.



ON DISCRETIONARY REVIEW
FROM THE FIRST DISTRICT COURT OF APPEAL

BRIEF OF RESPONDENT ON JURISDICTION

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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BRIEF OF RESPONDENT ON JURISDICTION

I PRELIMINARY STATEMENT

Respondent was the appellant in the lower tribunal, and the defendant in the trial court. The parties will be referred to as they appear before this Court. Petitioner's brief on jurisdiction will be referred to as "PB" followed by the appropriate page number in parentheses. Attached hereto as an appendix is the District Court's opinion.

II STATEMENT OF THE CASE AND FACTS

Respondent accepts petitioner's statement of the case and facts as substantially accurate.

III SUMMARY OF ARGUMENT

Respondent will argue in this brief that this Court should not accept review of this case. The District Court's holding does not conflict with any other reported case. Therefore, this Court has not jurisdiction to entertain petitioner's request for discretionary review.

IV ARGUMENT

ISSUE PRESENTED

THERE IS NO EXPRESS AND DIRECT CONFLICT WITH ANY OTHER REPORTED CASE, AND THUS THIS COURT HAS NO JURISDICTION TO ACCEPT REVIEW.

Petitioner seeks review on two grounds: first, that because respondent made no objection to the trial court's departure from the recommended guidelines sentence of any non-state prison sanction, he should not have been permitted to appeal his departure sentence of 30 months (PB at 3-5); and second, that the pre-July 1, 1984, sentence based upon a retroactive application of a change in the sentencing guidelines rule was lawful (PB at 5-6). Neither of these grounds can support a claim of conflict jurisdictions so as to allow this Court to grant discretionary review.

As to the contemporaneous objection point, no district court of appeal has held that a defendant who receives a sentenced which departs from the recommended range must register an objection at the time the sentence is imposed. Indeed, the district courts are all in agreement that a departure sentence maybe attacked on appeal, primarily because the Legislature and this Court have created the right to do so by virtue of Sections 921.001(5) and 924.06(1)(e), Florida Statutes, and by Fla.R.App.P. 9.140(b)(1)(E). See also Key v. State, 452 So.2d 1147 (Fla. 5th DCA), rev. den. 459 So.2d 1041 (Fla. 1984); Mitchell v. State, 458 So.2d 10 (Fla. 1st DCA 1984); Mincey v. State, 460 So.2d 396 (Fla. 1st DCA 1984); Ramsey v. State, 462

So.2d 875 (Fla. 2d DCA 1985); Levack v. State, 468 So.2d 261 (Fla. 2d DCA 1985); and Bradley v. State, 468 So.2d 378 (Fla. 1st DCA 1985).

Allowing the appeal of a departure sentence is also consistent with this Court's collective holding in State v. Rhoden, 448 So.2d 1013 (Fla. 1984), Walker v. State, 462 So.2d 452 (Fla. 1985) and State v. Snow, 462 So.2d 455 (Fla. 1985), which authorize the appeal of other types of sentencing errors.

Petitioner claims conflict with Dailey v. State, 10 FLW 1583 (Fla. 1st DCA June 27, 1985) and Whitfield v. State, 10 FLW 1564 (Fla. 1st DCA June 25, 1985). This claim must fail for two reasons. First, conflict jurisdiction cannot be founded upon contrary decisions by the same district court of appeal. Fla.R.App.P. 9.030(a)(2)(A)(iv). Dailey and Whitfield also arose from the First District. Second, Dailey and Whitfield do not apply the contemporaneous objection rule to departure sentences; rather, they apply it to scoresheet errors.

Likewise, in Bradley v. State, 10 FLW 1544 (Fla. 2d DCA June 21, 1985), the Second District cited Dailey and applied the contemporaneous objection rule to a scoresheet error, not to a departure sentence. The Second District's position on the right to appeal a departure sentence was stated above by citing Ramsey and Levack.

Curiously, petitioner did not argue the contemporaneous objection point in its brief before the the First District in the instant case. Petitioner seeks to require a defendant to attack a departure sentence in the trial court, while allowing itself the luxury of raising an argument to this Court which was not presented to the lower tribunal via its initial brief or a

rehearing motion.

In summary, then, petitioner has not demonstrated that the First District's reversal of the departure sentence is in conflict with any other district court or with this Court.

As to the holding that the change in the guidelines should not be applied retroactively, petitioner's claim of conflict with Lee v. State, 294 So.2d 305 (Fla. 1974) must also fail. Lee held that when the Legislature amended its statute in 1972 to require a 25 year minimum mandatory as a part of a life sentence for a capital crime, that amendment could not be applied retroactively to one whose crime was committed prior to the effective date of the amendment:

> To expose this petitioner to a greater penalty than that which originally could be imposed at the time of the commission of the instant offense would be an ex post facto application and hence clearly unconstutional.

Id. at 307. The non-death penalty for first degree murder was life before and after the amendment. But the additional penalty of 25 years without parole constituted a increase in the quantum of punishment, even though the maximum penalty remained the same.

There is no conflict with Lee, because when the Legislature ratified the change in the guidelines rule, effective July 1, 1984, the quantum of punishment for one in respondent's postition who violated probation increased from non-state prison to 12-30 months, even though the maximum penalty of 5 years remained the same.

The district courts of appeal are unanimous in holding that that an adverse in the guidelines rule cannot be applied retroactively. See, e.g., Jackson v. State, 454 So.2d 691 (Fla. 1st

DCA 1984); Randolph v. State, 458 So.2d 64 (Fla. 1st DCA 1984); Tackett v. State, 458 So.2d 368 (Fla. 2d DCA 1984); Bell v. State, 459 So.2d 478 (Fla. 5th DCA 1984); Saunders v. State, 459 So.2d 1119 (Fla. 1st DCA 1984); Burke v. State, 460 So.2d 1022 (Fla. 2d DCA 1984); and O'Malley v. State, 462 So.2d 868 (Fla. 4th DCA 1985).

In summary, then, petitioner has failed to demonstrate conflict with any other case on the question of retroactive application of the violation of probation amendment to the guidelines.

V CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, respondent urges this Court to find no conflict jurisdiction and to decline to accept review, so that respondent may be returned to the trial court for his required resentencing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above Brief of Respondent on Jurisdiction has been furnished by hand to Assistant Attorney General Andrea Hillyer, The Capitol, Tallahassee, Florida 32301; and by U.S. Mail to respondent, Johnnie B. Stubbs, #222122, Post Office Box 229, Lawtey, Florida 32058 on this 26 day of July, 1985.

P. Douglas Brinkmeyer

P. DOUGLAS BRINKMEYER