

IN THE SUPREME COURT OF FLORIDA

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CLERK, SUPREME COURT

CASE NO. By 07/10/86 Deputy Clerk

BARRY ALLEN WILLIAMS,)
)
) Petitioner,)
)
) v.)
)
) STATE OF FLORIDA,)
)
) Respondent.)

DISCRETIONARY REVIEW OF THE DECISION OF THE
DISTRICT COURT OF APPEAL, SECOND DISTRICT OF FLORIDA

BRIEF OF THE RESPONDENT ON THE MERITS

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PRELIMINARY STATEMENT

BARRY ALLEN WILLIAMS, the appellant in the Florida District Court of Appeal, Second District, will be referred to as the "Petitioner" in this brief. The STATE OF FLORIDA, the appellee in the Florida District Court of Appeal, Second District, will be referred to as the "Respondent." The record on appeal which is contained in two (2) volumes will be referred to by the symbol "R" followed by the appropriate page number.

SUMMARY OF THE ARGUMENT

The trial court did not err by departing from the sentencing guidelines where petitioner had expressly agreed to a conditional plea agreement and subsequently committed a breach thereof. At sentencing, the trial court, inter alia, conditioned sentencing in accordance with the guidelines upon petitioner's appearance at his scheduled sentencing hearing. Petitioner's willful and intentional failure to appear, a breach of his own plea agreement, permitted the trial court to do what he said he would do upon breach of the condition and the departure from the sentencing guidelines was warranted.

ARGUMENT

WHETHER A TRIAL COURT MAY DEPART
FROM THE SENTENCING GUIDELINES
WHERE A DEFENDANT FAILS TO APPEAR
FOR SENTENCING AND THE TRIAL COURT
EXPRESSLY CONDITIONED SENTENCING
IN ACCORDANCE WITH THE GUIDELINES
UPON THE DEFENDANT'S APPEARANCE
AT HIS SCHEDULED SENTENCING HEARING.

In its decision below, the Florida District Court of Appeals, Second District, specifically held that:

[W]here a defendant, as a condition of the acceptance of his plea, agrees to a departure from the presumptive guidelines sentence in the event he fails to appear for sentencing, the trial court may depart from the guidelines upon finding the defendant's failure to appear was willful and intentional.

Williams v. State, 471 So.2d 201, 203 (Fla. 2d DCA 1985). The Second District's well reasoned decision was correct.

On May 31, 1984, Petitioner entered pleas of guilty to charges of burglary of a dwelling, grand theft and petit theft. Said pleas of guilty were entered as a part of a plea bargain where Petitioner was to receive the sentence derived from computation under the guidelines. The guidelines provided for any non-state prison sanction (R.44). However, the trial court conditioned Petitioner's sentence upon three (3) things, to wit; (1) Petitioner's criminal record was as represented, (2) that Petitioner reappear before the trial court on July 20, 1984, at 2:00 p.m. in order to be sentencing, and (3) that Petitioner engage in no further criminal activity (R.21). Petitioner was advised by the trial court that if one of the conditions was not met, the court would not be bound by its promise to sentence in accordance with the guidelines and that Petitioner could be sentenced to up to 20 years in prison (R.22).

Petitioner understood the conditions and tendered his pleas of guilty (R.22). Petitioner did not appear before the trial court on July 20, 1984 and he was subsequently picked up in Texas and transported by prisoner transport to Lee County (R.38). At sentencing on November 13, 1984, the trial court noted that Petitioner's failure to appear on July 20th was reason to release the trial court from the promised sentence under the guidelines. The trial court determined that he was going to depart from the guidelines because of Appellant's willful failure to appear in that it was apparent that Petitioner was not a suitable person to be sentenced to probation (R.39). The trial court departure from the guidelines was warranted based upon the foregoing factual recitation.

In his brief, Petitioner relies, as he did before the District Court, upon the decisions rendered by the First District Court of Appeal in Harms v. State, 454 So.2d 689 (Fla. 1st DCA 1984) and Parker v. State, 465 So.2d 1361 (Fla. 1st DCA 1985). In its decision below, the Second District specifically found that both Harms and Parker were materially distinguishable from the instant case. In Harms, the court was concerned with the ability of the defendant to affirmatively select application of the sentencing guidelines. In Parker, supra, the court observed in footnote 2 that in Parker and Harms the records did not suggest that the defendant's failure to appear was willful and intentional or otherwise motivated by a desire to secure the application of the Rule 3.701 sentencing guidelines.

Sub judice, however, the record affirmatively reflects that Petitioner willfully and intentionally failed to appear for sentencing. Thus, neither Harms nor Parker deal with the situation presented to the District Court below, that is, whether the failure to appear at a scheduled sentencing hearing is sufficient reason for departure from the guidelines where a trial court has expressly warned the Petitioner that such a result would ensue upon failure to appear.

Petitioner also asserts that "it is obvious that [the trial court] sought to avoid the mandatory application of the sentencing guidelines by making their application conditional upon Petitioner abiding by the three conditions imposed by the court. This the sentencing court is clearly forbidden to do." (Petitioner's brief at page 5) This contention is simply without merit. In no way did the trial court attempt to avoid the application of the sentencing guidelines. The ball was solely in Petitioner's court as to whether the sentencing guidelines would be applied. As the Second District observed, "If Appellant had fulfilled all of the conditions attached to his plea agreement, the trial court would have been precluded from sentencing Appellant outside of the guidelines." Williams, supra, at 203. Once Petitioner failed to comply with a condition of his plea agreement, the trial court was justified in departing from the guidelines. See, Geter v. State, 473 So.2d 31 (Fla. 1st DCA 1985); Johnson v. State, 458 So.2d 850 (Fla. 2d DCA 1984); Bell v. State, 453 So.2d 478 (Fla. 2d DCA 1984).

Petitioner also claims that a departure from the guidelines is not warranted where based upon factors relating to the instant offense for which convictions have not been obtained. In support thereof, Petitioner relies on Monti v. State, ___ So. 2d ___ (Fla. 5th DCA 1985), Case No. 85-612, Opinion filed December 26, 1985 [11 SLW 61]. In Monti, the Fifth District agreed that failure to appear, standing alone, is not a sufficient basis for departure inasmuch as such conduct amounts to criminal contempt. However, the instant case is easily distinguishable from Monti and the First District decisions in Harms, supra, and Parker, supra. The court below specifically found that Petitioner willfully and intentionally failed to appear for his sentencing hearing. This willful and intentional failure to appear is not merely another offense, but rather it is a clear breach of a condition of a plea to which the Petitioner had expressly agreed. The Second District below premised its decision not on the fact that there was a failure to appear, but rather that the promise to appear on a specified date was one of the conditions of a plea which Petitioner breached.

The instant case is exacerbated by the fact that Petitioner was released on his own recognizance after he tendered his conditional guilty pleas. As aforementioned, the trial court expressly conditioned imposition of sentence in accordance with the guidelines on Petitioner's appearance at the July 20th sentencing hearing. Thus, when Petitioner failed to appear from a scheduled sentencing hearing, he was in breach of the agreement reached with the trial court. The computation of the sentencing guidelines in this case indicated that Petitioner should have received "any non-state prison sanction" (R.44). At the sentencing hearing on

November 13, 1984, the trial court noted that Petitioner's failure to appear on July 20th was reason to release the trial court from the promised sentence under the guidelines. The trial court determined that he was going to depart from the guidelines because of Petitioner's failure to appear in that it was apparent that Petitioner was not a suitable person to be sentenced to probation (R.39). The trial court correctly recognized that a defendant should not be permitted to agree to certain conditions in a plea bargain and then ignore his own agreement with impunity. Also, if Petitioner agreed to appear and then did not do so, it is apparent that placing Petitioner on probation would be illogical in light of the fact that Petitioner did not follow his agreed-to condition, much less the conditions imposed by the trial court and probation officer.

Sub judice, Petitioner expressly acknowledged that the trial court could sentence Petitioner to up to twenty (20) years in prison for breach of a condition of plea (R.22). Even knowing this, Petitioner still chose to willfully and intentionally fail to appear before the trial court for sentencing. Inasmuch as Petitioner agreed to a departure from the presumptive guidelines sentence as a condition of the acceptance of his plea, the trial court correctly and justifiably departed from the guidelines.

CONCLUSION

Based upon the foregoing reasons, argument and authorities, the decision of the Florida District Court of Appeal, Second District, should be affirmed by this Honorable Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by United States Mail to Robert Hill, Esq., P. O. Box 1086, 2115 Main Street, Fort Myers, Florida 33902 this 12th day of February, 1986.

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OF COUNSEL FOR RESPONDENT