

IN THE SUPREME COURT OF FLORIDA

MARVIN RAYMOND BALLARD,)
)
 Petitioner)
)
 vs.)
)
 STATE OF FLORIDA,)
)
 Respondent.)
 _____)

CASE NO. 68,967

PETITIONER'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

Petitioner, MARVIN RAYMOND BALLARD, received a sentence from the circuit court in excess of the recommended sentencing guideline range. On May 21, 1986, the district court entered its decision approving the guideline departure in aggravation for the two reasons set forth by the trial judge, Ballard's escalating pattern of more serious offenses and his unamenability to rehabilitation. (A-1). In its decision, the district court noted that it had previously relinquished jurisdiction and remanded the case to the trial court to put its reasons for the departure sentence into writing. This interim decision, temporarily relinquishing jurisdiction, was entered on November 6, 1985. Ballard v. State, 10 F.L.W. 2477 (Fla. 4th DCA 1985). Petitioner filed for rehearing from that decision in November and upon its denial had sought to invoke this Court's discretionary jurisdiction in Case No. 68,122. Review was denied on April 1, 1986 in that case.

The decision sought to be reviewed herein is a different decision than the case which petitioner sought to have reviewed in 68,122. Petitioner did not file a motion for rehearing from the decision of May 21, 1986, but timely filed his notice to invoke discretionary jurisdiction on June 20, 1986.

SUMMARY OF ARGUMENT

The decision of the district court in petitioner's case directly and expressly conflicts with decisions of this Court and other district courts on the same question of law: whether a defendant's "escalating pattern of more serious offenses" is a sufficient reason to justify a departure sentence under Hendrix v. State, 475 So.2d 1218 (Fla. 1985).

Additionally, the district court's decision herein reflects that it relinquished jurisdiction and allowed the trial court to put the reasons for departure into writing, which the circuit court had failed to do at the time of sentencing. This conflicts with this Court's decision in State v. Oden, 478 So.2d 51 (Fla. 1985), which explicitly holds that entry of a written order delineating reasons for departure must be contemporaneous with the sentencing of the defendant.

ARGUMENT

THE DECISION OF THE DISTRICT COURT IN PETITIONER'S CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER DISTRICT COURTS ON THE PRECISE ISSUE OF LAW: WHETHER A DEFENDANT'S ESCALATING PATTERN OF MORE SERIOUS OFFENSES IS A VALID REASON FOR DEPARTURE AND WHAT IS THE APPROPRIATE APPELLATE REMEDY FOR A TRIAL COURT'S FAILURE TO PLACE HIS REASONS FOR A SENTENCING GUIDELINE DEPARTURE IN WRITING?

The decision of the district court approves of a trial court's departing from the recommended sentence under the guidelines for the reasons of (1) the defendant's escalating pattern of more serious offenses and (2) the defendant's unamenable to rehabilitation through the probation process (Appendix 1-2). Ballard v. State, 11 F.L.W. 1179 (Fla. 4th DCA May 21, 1985). Accordingly, the district court's decision directly and expressly conflicts with the decisions of other district courts which hold that a defendant's "violent pattern of conduct" or the "increasing severity of crimes" of which the defendant was previously convicted are not sufficient to justify departure under the rule of Hendrix v. State, 475 So.2d 1218 (Fla. 1985), because such reasons count a defendant's prior convictions twice. See Battles v. State, 11 F.L.W. 323 (Fla. 3d DCA February 4, 1986), disapproving a defendant's "violent pattern of conduct" on Hendrix, and Smith v. State, 479 So.2d 804 (Fla. 1st DCA 1985), disapproving the "increasing severity of crimes" reason under Hendrix. Accordingly, this Court has jurisdiction pursuant to Florida Constitution, Article V, Section (3)(b)(3) and Florida Rule of Appellate Procedure 9.030(a)(2) (A)(iv).

In its decision the district court acknowledged that there was conflicting authority on the validity of these reasons for departure in aggravation. The district court cited decisions from Second, Fifth and First Districts to show that the departure reasons were valid but then the court said: "But see Battles v. State, 11 F.L.W. 323 (Fla. 3d DCA February 4, 1986); Smith v. State, 479 So.2d 804 (Fla. 1st DCA 1985)." (A-2). Such a "but see" citation is the functional equivalent of a certification of direct conflict with decisions of other district courts of appeal, which basis also establishes this Court's discretionary jurisdiction to review the decision in petitioner's case. Florida Constitution, Article IV, Section (3)(b)(4) and Florida Rule of Appellate Procedure 9.030(a)(2)(A)(vi).

Petitioner previously sought discretionary review of the district court's interim decision remanding for the trial court to enter its reasons for departure in writing. Review was denied by a vote of four-to-three on April 1, 1986, but petitioner is trying again since he did not cite State v. Oden, 478 So.2d 51 (Fla. 1985), as a basis for conflict in case 68,122 and because conflict is apparent on the face of the decision on this question of law, the appropriate appellate remedy for a trial court's failure to place his reasons for a sentencing guideline departure in writing.

In its decision of May 21, the district court says that it temporarily relinquished jurisdiction for entry of a written order delineating reasons for departure. In State v. Oden, supra, this Court adopted a different rule of law, that failure

to enter a contemporaneous written order of departure requires reversal for resentencing. If this Court requires a reversal absent a contemporaneous writing of the departure reasons, then the Fourth District's decision in petitioner's case to allow a temporary relinquishment of jurisdiction for a belated entry of a written order supporting departure has created direct and express conflict on the same question of law. Accordingly, this Court has discretionary jurisdiction to review the decision in petitioner's case on this basis also. Florida Constitution, Article V, Section (3)(b)(3).


This Court should exercise its discretion to accept jurisdiction to maintain uniformity among the district courts on what is a valid reason to justify a sentencing guideline departure in aggravation. Mr. Ballard's sentence has been aggravated based on a restatement of his prior convictions, a reason which is insufficient in the First or Third District Courts of Appeal. The purpose of uniformity in the sentencing guidelines will be thwarted if conflicting decisions, such as the one in petitioner's case, go unresolved by this Court. Accordingly, petitioner prays this Court will accept jurisdiction and ask for briefs on the merits because a substantial issue concerning the proper application of this Court's precedents and the sentencing guideline rules is implicated by the decision in petitioner's case.

CONCLUSION

The decision of the district court expressly and directly conflicts with a decision of this Court and with decisions of other district courts of appeal on the same question of law regarding two separate issues on the proper application of the sentencing guideline rules. This Court should accept jurisdiction and resolve the conflict.

Respectfully submitted,

RICHARD L. JORANDBY
Public Defender

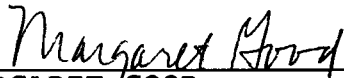


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by courier, to NOEL PELELLA, Assistant Attorney General, Counsel for Respondent, Elisha Newton Dimick Building, Room 204, 111 Georgia Avenue, West Palm Beach, FL 33401, this 30th day of June, 1986.



MARGARET GOOD
Assistant Public Defender