

IN THE SUPREME COURT
STATE OF FLORIDA

FILED
1986
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STATE OF FLORIDA,

Petitioner,

v.

CASE NO.

69034

LARRY TEAGUE,

Respondent.

PETITIONER'S BRIEF ON JURISDICTION

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OTHER AUTHORITIES:

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STATEMENT OF THE CASE AND FACTS

On June 6, 1985, respondent was charged with one count of burglary of a structure and two counts of grand theft, second degree (R 241-242).¹ §§ 810.02(3), 812-014(2)(b)(1), Fla. Stat. (1983). On August 16, 1985, respondent entered a plea of guilty to one count of grand theft in exchange for the state entering a nolle prosequere on the remaining two charges (R 96-110,251). On September 3, 1985, the state filed a notice of intent to prosecute the respondent as a habitual offender (R 261-265). At a hearing on November 25, 1985, respondent was determined to be a habitual offender pursuant to section 775.084, Florida Statutes (1985) (R 138).

Respondent's recommended guidelines sentence was 3-1/2-4-1/2 years incarceration. The trial court departed, imposing a sentence of eight years in prison (R 196,283-285). As reasons for departure, Judge Leffler wrote on the bottom of the scoresheet: "After hearing, pursuant to the requirements of 775.084, Florida Statutes, the court found the defendant to be an habitual offender with enhanced penalty as provided to be necessary for the protection of the public. (Gann v. State) (459 So.2d 1175 (Fla. 5th DCA 1984))" (R 281).

Respondent timely appealed to the District Court of Appeal, Fifth District. The sole issue on appeal was whether habitual offender status is a clear and convincing reason for departure.

On July 3, 1986, the decision was filed in this cause (see petitioner's appendix). The district court quashed the sentence

¹(R) refers to the record on appeal.

on the authority of their decision in Vicknair v. State, 483 So.
2d 896 (Fla. 5th DCA 1986), pending Case No. 68,536.

SUMMARY OF ARGUMENT

This honorable court should invoke its discretionary jurisdiction pursuant to Article 5, Section 3(b)(3), Florida Constitution because the decision in this cause expressly relied upon a decision pending review in this honorable court. Furthermore, this decision conflicts with decisions of three other district courts of appeal on the same legal issue, whether habitual offender status is a clear and convincing reason for departure.

POINT ON APPEAL

THIS HONORABLE COURT SHOULD EXERCISE ITS DISCRETIONARY JURISDICTION TO REVIEW THIS CASE BECAUSE THE DECISION CITES AS CONTROLLING AUTHORITY A DECISION THAT IS PENDING REVIEW IN THIS COURT AND BECAUSE THIS DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF THREE OTHER DISTRICT COURTS OF APPEAL.

ARUGUMENT

In this guidelines departure case, the sole issue is whether the only reason given by the trial court, habitual offender status, is a clear and convincing reason for departure. In its decision in this cause, the district court of appeal cited as controlling authority their decision in Vicknair v. State, 483 So.2d 896 (Fla. 1986). The Vicknair decision certified this question as one of great public importance; this honorable court is currently reviewing this question in State v. Vicknair, case number 68,536. Petitioner contends that this reliance on Vicknair constitutes prima facie express conflict such that this court should exercise its discretionary jurisdiction. Art. V, § 3(b)(3) Fla. Const., Jollie v. State, 405 So.2d 418 (Fla. 1981), State v. Brown, 475 So.2d 1 (Fla. 1985).

The decision in this case reiterates the court's holding in Vicknair, that habitual offender status is not a clear and convincing reason for departure. Three other district courts of appeal have held that habitual offender status is a clear and convincing reason for departure from the recommended guidelines sentence. Massard v. State, 11 F.L.W. 1090 (Fla. 4th DCA May 7, 1986); Holt v. State, 472 So.2d 551 (Fla. 1st DCA 1985); Winters v. State 475 So.2d 1025

(Fla. 1st DCA 1985); Payne v. State, 480 So.2d 202 (Fla. 1st DCA 1985), pending review, 68, 180, oral argument set for September 12, 1986; Ferguson v. State, 481 So.2d 924 (Fla. 2nd DCA 1986), pending case number 68,146; Fleming v. State, 480 So.2d 715 (Fla. 2nd DCA 1986). This provides an independent reason for exercising jurisdiction based upon express and direct conflict.

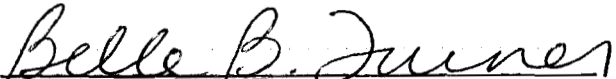
Alternatively, petitioner respectfully requests this honorable court to consolidate this case with either State v. Vicknair, Case No. 68,536 or Ferguson v. State, Case No. 68,146, as suggested in Jollie, supra, for purposes of appellate review, since the issue presented is identical.

CONCLUSION

Based on the arguments and authorities presented herein, petitioner respectfully requests this honorable court exercise its discretionary jurisdiction in this cause.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Petitioner's Brief on Jurisdiction has been furnished by mail to Michael S. Becker, Assistant Public Defender, 112 Orange Avenue, Suite A, Daytona Beach, Florida 32014, counsel for the respondent, this 9th day of July, 1986.


BELLE B. TURNER
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