

IN THE SUPREME COURT OF FLORIDA

FILED

SID J. WHITE ✓

FEB 25 1987

CLERK, SUPREME COURT

By Deputy Clerk

DON WHITE,
Petitioner,

-vs-

THE STATE OF FLORIDA,
Respondent.

Case No. 69,948

ON DISCRETIONARY REVIEW FROM THE
DISTRICT COURT OF APPEALS THIRD DISTRICT OF FLORIDA

PETITIONERS BRIEF ON JURISDICTION

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EPILOGUE

The Petitioner, DON WHITE, was the Appellant in the District Court of Appeals for the Third District of Florida, and will be referred to as Petitioner.

The Respondent, STATE OF FLORIDA, was the Appellee below, and will be referred to as Respondent in this brief.

Record Reference will be found in the Appendix attached hereto, and will specifically be referred to as such in this brief-with appropriate page numbers in sequence.

STATEMENT OF THE CASE AND FACTS

On July 17, 1986, Petitioner submitted a Motion for Post-Conviction Relief pursuant to Rule 3.850., Florida Rules of Criminal Procedure, in the Circuit Court of the Sixteenth Judicial Circuit of Florida, alleging that he had been denied the effective assistance of counsel, that his sentence as imposed by the Trial Court was constitutionally illegal, and that his guilty plea was involuntary based upon an illegal sentence, (See Appendix pages 5-6).

The Trial court, the Honorable David P. Kirwan, Circuit Judge, denied the Motion for Post-Conviction Relief, and Petitioner appealed.

The District Court of Appeals affirmed the denial of the motion for Post Conviction Relief without an evidentiary hearing on December 9, 1986 premised on the authority of Rowe v. State, ___ So.2d ___ (Fla. 2d DCA 1986)(11 FLW 2060); and Bell v. State, 453 So.2d 478 (Fla. 2nd DCA 1984).

On January 13, 1987, the District Court also denied the Petitioners motion for Rehearing, (See Appendix pages 8-9).

Petitioner sought review in this Court February 6, 1987. This Jurisdictional Brief follows.

SUMMARY OF THE ARGUMENT

The Petitioner will argue that the decision of the Third District Court of Appeal of Florida conflicts with this Courts decision and the decision of other District Court of appeal in this State on the same point and issue of law.

The point which the District Court below holds, is that a criminal defendant who's crime occured after October 1, 1983 which is the situtation in the instant case, may or can waive the sentencing guidlines, the effect is therefore a criminal defendant can waive the guidlines even though his criminal action occured after the Sentencing Guidlines came into effect. This holding clearly violates the statutory intent of the Legislature and therefore is totally erroneous based on case law precedents and statutory construction, hencefore creating a conflict of court decisions within the State, and the U.S. Supreme Court.

It is the Petitioners position that the decision should be reversed to the District Court and the conflict resolved.

WHETHER THE DISTRICT COURT'S OPINION BASED ON ROWE v. STATE, ___ So.2d ___ (Fla.2d DCA 1986)(11 FLW 2060); and BELL v. STATE, 453 So.2d 478 (Fla. 2d DCA 1984); CONFLICTS WITH THIS COURTS DECISION IN WILLIAMS v. STATE, ___ So.2d ___ (12 FLW 1)(Fla. 1987), AND OTHER DISTRICT COURT DECISIONS HENRY v. STATE, ___ So.2d ___, (12 FLW 68)(Fla.2d DCA 1987); AND DUNN v. STATE, ___ So.2d ___ (12 FLW 389) (Fla.5th DCA 1987).

The decision of Rowe, and Bell, conflicts with Williams, supra., in that they both purport to allow the Defendant to waive the sentencing guidelines which he statutorily cannot do, (See Appendix pages 10-11).

In Williams, supra., this Court maintained that "a defendants acquiescence cannot confer authority on the court for departure" Williams supra., (12 FLW at 1) (See Appendix at pages 12-13). In Dunn, the district court while dealing with the same situation, stated principally the same thing and relied on this Courts opinion in Williams by holding that:

"Because the crime of which Appellant was convicted occurred after October 1, 1983, the sentencing guidelines are applicable and the court must impose a guideline sentence. The Appellant cannot waive this requirement, Williams v. State, 12 FLW 1 (Fla. DEC. 24, 1986). If a departure from the guidelines is unwarranted then the sentencing judge must clearly state, in writing, the reasons for the departure, State v. Jackson, 478 So.2d 1054 (Fla. 1985)"

Id. at Dunn, supra., 12 FLW at 389.

In Henry, supra., the very court which issued the Rowe, decision stated that a "Guidelines sentence cannot be waived. Even if Appellants waiver was intended to be an agreement to allow the court to depart from the appellants presumptive sentence, rather than a waiver of guidelines sentencing it was

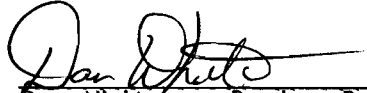
still invalid." Henry at 12 FLW at 69. (See Appendix pages 14-15).

Also, the Court never gave a reason for departure, Albritton v. State, 476 So.2d 158 (Fla. 1985); Hendrix v. State, 475 So.2d 1218 (Fla. 1985); Lerma v. State, 497 So.2d 736 (Fla. 1986), which is also a conflict of decisions with this court. Notwithstanding any of the above the trial court did not attach portions of the record showing that Petitioner was not entitled to any relief, nor ordered the State Attorney to respond to the allegations, nor conducted a evidentiary hearing on the Petitioners claims, see Holland v. State, ___ So.2d ___ (12 FLW 94, 95)(Fla. 1987). Futher, the allegations that Petitioners counsel was ineffective in even making an stipulation to waive the guidelines, which Petitioner claims had he known of this he would have gone to trial instead pleading guilty, conflicts with the procedures announced by the United States Supreme Court in Hill v. Lockhart, ___ U.S. ___, 106 S.Ct. 366 (1985), concerning the validity of guilty pleas due to ineffective assistance of counsel.

Nevertheless, because there are viable conflict of decisions between this court and other district courts on the same point of law, merits this courts exercsing jurisdiction to review this case.

WHEREFORE, the Petitioner moves this Court to accept jurisdiction from the decision of the Third District Court of Appeal of Florida which is in direct conflict with other District Court decisions and this Courts decision on the same point of law. It is so prayed.

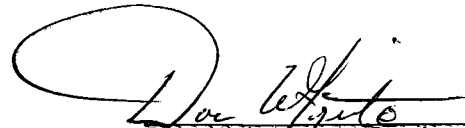
Respectfully submitted



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CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the afore JURIS-
DICTIONAL BRIEF, has been furnished to Counsel for Respondent, HON. ROBERT
A. BUTTERWORTH, JR., Attorney General, 401 N.W. 2nd Avenue, Suite 820, Depart-
ment of Legal Affairs, Miami, Florida, 33125, this 16 day of February, 1987,
by U.S. Mail.


Don White Pro'se Petitioner