IN THE SUPREME COURT OF FLORIDA

DAVID J. QUARTERMAN, :

Petitioner, :

vs. : Case No. 70,567

STATE OF FLORIDA, :

Respondent. :

:

ON APPEAL FROM THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, STATE OF FLORIDA

PETITIONER'S BRIEF ON MERITS

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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ATTORNEYS FOR APPELLANT

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PRELIMINARY STATEMENT

Petitioner, David J. Quarterman, was the Appellant in the Second District Court of Appeal, and Defendant in the trial court. Respondent, the State of Florida, was the Appellee, in the Second District Court of Appeal.

STATEMENT OF THE CASE AND FACTS

The State Attorney for Pinellas County, Florida, filed an Information charging Petitioner, David J. Quarterman, with Armed Robbery. (R1) Petitioner entered a plea of guilty the substance of which was as follows:

> COUNSEL: I have explained to Mr. Quarterman that there is a minimum mandatory three years involved in the sentence. I have also also explained to Mr. Quarterman if he failed to show up for Court Monday or if he committed a new crime between now and Monday, that the Court's offer would not be binding on the Court and the Court could sentence him to anything in the Court's discretion. (R36)
>
> . . .
>
> THE COURT: All right, she explained to you there will be two conditions. One is that you show up Monday morning here in this courtroom at eight-thirty.
>
> . . .
>
> THE COURT: Same time, because if you do not, that means that I'm not limited to this five and a half years. Do you understand that?
>
> THE DEFENDANT: Yes, sir. (R38)
>
> . . .
>
> THE COURT: The maximum punishment is life in prison, which means no expectation of parole, so if you want to turn five and a half years into something considerably more serious, you better think twice before you don't show up Monday morning.
>
> THE DEFENDANT: Yes, sir.

THE COURT: Understand that?

THE DEFENDANT: yes, sir.

THE COURT: Do you agree to that condition?

THE DEFENDANT: Yes, sir.

THE COURT: All right, the second condition is no new offenses. I don't want you getting a ticket even for jay walking or public drunk or doing anything between now and Monday agreed? (R39)

THE DEFENDANT: Yes, sir.

Needless to say, Petitioner did not appear for sentencing and committed a new offense. [1.] Petitioner was sentenced in absentia to fifteen years incarceration with a three-year minimum mandatory and one hundred days credit for time served. The guideline recommenced sentencing range was four and one-half to five and one-half years, therefore, Petitioner's sentence was clearly a departure. (R19-25,42-46) The trial court in order to justify the departure filed the following reasons:

"Juvenile record not scored; Defendant failed to appear for sentencing; new offense committed between plea and sentencing date (1 week); Defendant agreed Court could impose maximum - i.e., life imprisonment, if he F.T.A'd and he did; professional manner which crime was committed, anyone of these reasons, standing alone, I would deviate upward."

Petitioner timely filed a Notice of Appeal to the Second District Court of Appeal. In its opinion the District Court

agreed with Petitioner that the trial court had erred by sentencing Petitioner in absentia. However, the District Court held that the trial court was justified in exceeding the guidelines because Petitioner had made a legitimate plea bargain allowing the court to do so. But, the Second District Court concerned with this Court's holding in Williams v. State, 500 So.2d 501 (Fla. 1986), certified the following question:

> "May a trial judge exceed the recommended guidelines sentence based upon a legitimate and uncoerced condition for a plea bargain."

Appellant timely filed a Notice to Invoke this Court's discretionary jurisdiction. Petitioner's brief on the merits follows.

SUMMARY OF ARGUMENT

If a guidelines departure sentence is not supported by clear and convincing reasons, the mere fact the defendant agreed to it does not confer upon the court the authority to impose what is otherwise an illegal sentence.

ARGUMENT

WHETHER THE TRIAL COURT MAY EXCEED THE RECOMMENDED GUIDELINES SENTENCE BASED ON INVALID REASONS MERELY BECAUSE THE DEFENDANT ACQUIESCES PURSUANT TO HIS PLEA AGREEMENT?

Petitioner, David J. Quarterman, was charged with Robbery. He pled guilty to the charge. At the plea hearing, the court informed Petitioner he would receive five and one-half years, which was the top limit of the guideline recommended sentencing range, under two conditions: 1) that he appear for sentencing and 2) he refrain from committing any new offenses. Petitioner did agree to these conditions. Petitioner failed to appear for sentencing and committed a new offense. The court sentenced Petitioner in absentia to a term of fifteen years. Needless to say this was a departure which the court justified on the basis of his failure to appear and the commission of the new offense.[2] The Second District Court of Appeal upheld the trial court's departure on the grounds that Petitioner had acquiesced to the departure sentence.

Indisputably, once Petitioner broke the conditions of the plea agreement, the agreement became null and void. However, the breakdown of the plea agreement did not give the court the authority to impose an illegal sentence, a guideline departure sentence based on what would have ordinarily been invalid

reasons. The instant case is on all fours with the opinion of this court in Williams v. State, 500 So.2d 501 (Fla. 1986). In Williams, supra, this court specifically held that "departing from the guidelines because a defendant has failed to appear is not permissible as it does not constitute a clear and convincing reason for departure. Moreover we hold that a defendant's acquiescence cannot confer authority on the court for such departure."

If Petitioner in this instance had been promised a sentence of three years, then upon his violating the agreement the court would have been fully justified in either imposing the maximum guideline sentence or for good and sufficient reasons imposing a departure sentence. However, the breakdown of the plea did not give the court complete "carte blanche." Sentences must be legally valid whether agreed to or not. If the court could not come up with valid reasons for departure, then the question arises whether the offense warranted a departure sentence in the first place.

F.R.Cr.P. 3.701(d)(11) prohibits the court from utilizing any offense for which the defendant has not yet been convicted either in scoring or as a reason for departure. See Cousins v. State, Case No. 85-2964 (2d DCA May 29, 1987)[12 F.L.W. 1348]. Both the failure to appear and Petitioner's new offense fall under this prohibition.

This court in Williams, supra, noted that Florida Statute 843.15(1)(a) makes failure to appear for sentencing a third degree felony punishable by a maximum sentence of five years. In effect, defendant Williams had been tried, found guilty, and sentenced to fifteen years for an offense carrying a maximum penalty of five years. This court stated:

> "Were we to permit the deviation from the guidelines because of a defendant's failure to appear, we would, in essence be circumventing the legislatively established punishment of five years by eliminating the trial. With a trial, a defendant could be sentenced to only five years. Without a trial, he could be sentenced to any period within the statutory maximum (for all his pending offenses)that the judge might (arbitrarily) choose without any hope of parole. Such a Kafkaesque situation cannot be permitted."

In the instant case, Petitioner, like defendant Williams, in essence received a ten year sentence for failing to appear.

One can certainly understand the trial court's displeasure with Petitioner for failing to comply with the conditions of his plea. One can also understand that Petitioner's failure to appear and the commission of a new offense deserves punishment. However, the trial court could have punished Petitioner without having to impose an illegal sentence. First, the Court could have held Petitioner in contempt. Secondly, the state could have chosen to prosecute Petitioner for the failure to appear and the

new offense. Using the Category 9 scoresheet with a failure to appear as the primary offense, Petitioner's robbery conviction as a prior conviction and the new offense as an additional offense at conviction, Petitioner, at the minimum, would fall into the four and one-half to five and one-half year range. This sentence could be run consecutively to any sentence currently being served, ie., the sentence for robbery, thereby allowing the court to legitimately impose, in effect, a ten year sentence.

It would be too easy for courts to subvert the purpose of the guidelines, uniformity in sentencing, by conditioning all pleas with an acquiescence to a departure sentence. If the sentence is illegal, such illegality should not be condoned merely because the defendant agrees to it. The District Court's opinion made much of the fact that plea bargain sentences have been recognized as a valid reason for departure. However, the court overlooked the fact that these were agreements to a specific term of years. Where the court has available to it the means to punish the defendant for any transgressions if necessary, it is neither necessary nor proper to condone such illegal sentences. In view of the court's holding in Williams, supra, the answer to the certified question must be answered in the negative.

CONCLUSION

In light of the foregoing reasons, arguments and authorities, Petitioner respectfully asks this Honorable Court that the certified question must be answered in the negative.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Lauren Hafner Sewell, Assistant Attorney General, Park Trammell Bldg., 8th Floor, 1313 Tampa Street, Tampa, Florida 33602, and to David Quarterman, D.C. #103566, Tomoka Correctional, 3950 Tiger Bay Road, Daytona Beach, FL 32014, June 12, 1987.

Respectfully submitted,

Allyn Giambalvo

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Assistant Public Defender