

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

CLYDE GARLAND WAYNE,

Respondent.

NOV 27 1971

CASE NO. 71,420 *M*

PETITIONER'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

On January 11, 1985, the respondent was charged, by information, with having committed burglary of a structure and petit theft (R 7). On June 21, 1985, respondent pled guilty and was sentenced to 30 months in prison followed by 2 1/2 years probation on the burglary charge (R 9-10). Respondent received a 60 day jail sentence on the petit theft charge, to run concurrently with the sentence imposed for the burglary charge (R 10).

With regard to the probationary portion of respondent's sentence, the trial court withheld imposition of sentence and did not impose a prison term upon respondent (R 9). In order to remain on probation, respondent was required to comply with certain probationary conditions (R 9-10). Respondent's probationary freedom and the withholding of sentencing was conditioned upon respondent's compliance with the conditions of probation (R 9). Respondent was notified that if he violated the conditions of his probation, he could be arrested, his probation could be revoked, and that the trial court could then impose any sentence which it might have imposed before placing him on probation (R 9). Respondent agreed to these terms and signed the order of probation, indicating that the conditions of his probation had been explained to him (R 9).

On September 3, 1986, a warrant for respondent's arrest for violation of probation was issued (R 12). Respondent was charged with violating the conditions of his probation by having failed to make three reports to the probation office as instructed by

his probation officer, failed to make three written monthly reports to his probation officer, and failed to pay his costs of supervision (R 11-12).

On November 13, 1986, respondent pled guilty to the probation violation (R 16-17). The trial court accepted the plea (R 3), revoked respondent's probation, and sentenced respondent to four (4) years in prison (R 4). This sentence was a departure from the sentence recommended by Florida's Sentencing Guidelines (R 14-15). The trial court wrote that it was departing from the recommended sentence because respondent had "previously received 60 months D.O.C. in this case" and that "sentence of 3 1/2 years would be almost like no sentence at all." (R 14).

Respondent appealed his sentence to the Fifth District Court of Appeal (R 22). The only issue presented in the appellant's brief was the validity of the reason given for departure by the trial court. The District Court of Appeal, sua sponte, addressed the issue of the application of the double jeopardy clauses of the Florida and United States Constitutions to the sentencing of respondent following the revocation of his probation and reversed his sentence, holding that the sentence violated double jeopardy principles. See, Wayne v. State, 12 F.L.W. 2120 (Fla. 5th DCA Sept. 3, 1987).

On September 14, 1987, petitioner filed a motion for rehearing. Rehearing was denied on October 6, 1987. This appeal followed.

SUMMARY OF ARGUMENT

The decision of the Fifth District Court of Appeal expressly construes the double jeopardy clauses of the Florida and United States constitutions, and also prima facie expressly and directly conflicts with decisions of other district courts of appeal or of this court. As a result, this court has jurisdiction to review the decision below. This court should exercise its jurisdiction because the district court of appeal has erroneously applied double jeopardy principles to the facts of this case.

ARGUMENT

THIS COURT HAS AND SHOULD EXERCISE
ITS JURISDICTION IN THE INSTANT
APPEAL.

In its decision reversing respondent's sentence, the district court of appeal held that constitutional double jeopardy prohibits respondent from being:

... sentenced a second time for the
same offense merely because he has
violated the probation appended to
the lawful sentence of confinement.

(See, Appendix). In so holding, the district court of appeal expressly construed provisions of Florida and United States constitutions. As a result, this court has jurisdiction. See, Art. V, § 3, (b) (3), Fla. Const.; Fla. R. App. P. 9.030 (a) (2) (A) (ii).

This court should accept jurisdiction in this case because the district court of appeal has erroneously interpreted and applied the state and federal double jeopardy clauses in reversing respondent's sentence. The trial court withheld sentencing respondent to a term of imprisonment, and placed him on probation, conditioned upon respondent's compliance with certain restrictions and obligations contained in the probation order. These restrictions and obligations, along with the consequence of non-compliance, were explained to respondent. Respondent accepted the probation. Thus, it is clear that the trial court's agreement to place respondent on probation following respondent's 30 month prison term was conditional. In accepting the probation terms, the respondent agreed that if he violated those terms, the trial court could revoke his probation

and impose any sentence which it might have imposed for placing him on probation.

This court has previously held that where a trial court's acceptance of a guilty plea or imposition of punishment is conditional, the violation of the conditions by a defendant may subject the defendant to trial or resentencing without offending double jeopardy principles. See, Johnson v. State, 483 So.2d 423 (Fla. 1986). By agreeing to the conditions of the trial court, a defendant waives double jeopardy rights.

A similar holding is found in Ricketts v. Adamson, 107 S.Ct. 2680 (1987). In Ricketts, the United States Supreme Court held that where the acceptance of a guilty plea by a trial court was conditioned upon the defendant's performance of a plea agreement with the State of Arizona that the defendant would testify against any and all parties involved in the dynamite bomb death of a newspaper reporter, and the defendant later refused to abide by the plea agreement, the defendant's plea to and sentence for second degree murder could be set aside, and the defendant convicted of and sentenced for first-degree murder, despite the fact that the defendant had already begun serving his sentence. Such a procedure was held not to have violated double jeopardy principles.

Just as the agreement of the defendant in Ricketts, that the first-degree murder charge could be reinstated under certain conditions was precisely equivalent to a waiver of the double jeopardy offense as to the first-degree murder charge, the agreement of the respondent, in the instant case, that the trial

court could impose any sentence which it might have imposed before placing respondent on probation also represents such a waiver to any resentencing upon violation of probation.

Historically, decisions in the area of sentencing establish that a sentence does not contain the qualities of constitutional finality that accompany an acquittal. Sentencing, under the constitution, is not a game whereby a wrong move by the sentencing judge means immunity to the prisoner. United States v. DiFrancesco, 449 U.S. 117, 101 S.Ct. 426, 436-437, 66 L.Ed.2d 328 (1980); Bozza v. United States, 330 U.S. 160, 67 S.Ct. 645, 91 L.Ed. 818 (1947); United States v. Jones, 722 F.2d 632 (11th Cir. 1983); Llerena v. United States, 508 F.2d 78 (5th Cir. 1975). Since the Fifth District Court of Appeal erred in applying the double jeopardy clause to this case, this court should exercise its jurisdiction

The district court of appeal also relied upon Poore v. State, 503 So.2d 1282 (Fla. 5th DCA 1987), for its holding. Poore is presently pending review in this court in Case No. 70,397. As a result, prima facie express conflict exists and allows this court to exercise its jurisdiction. Jollie v. State, 405 So.2d 418 (Fla. 1981).

CONCLUSION

Based on the arguments and authorities cited herein, petitioner respectfully prays this honorable court exercise its discretionary jurisdiction in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above Petitioner's Brief on Jurisdiction has been furnished by U.S. mail to Assistant Public Defender Michael L. O'Neil, counsel for respondent, 112 Orange Avenue, Suite A, Daytona Beach, FL 32014, this 16 day of November, 1987.



Kevin Kitpatrick Carson
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