Reg App.

IN THE SUPREME COURT OF FLORIDA

CASE NO. 72,096

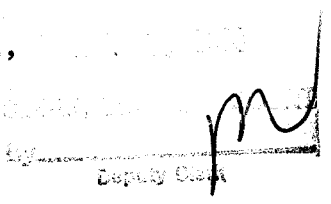
THE STATE OF FLORIDA,

Petitioner,

vs.

HAROLD TUTHILL,

Respondent.



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ON PETITION FOR DISCRETIONARY REVIEW

* *

BRIEF OF PETITIONER ON JURISDICTION

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INTRODUCTION

Petitioner, the State of Florida, was the Appellee in the District Court of Appeal of Florida, Third District, and the prosecution in the trial court. Respondent, Harold Tuthill, was the Appellant in the District Court of Appeal and the defendant in the trial court. The parties will be referred to as they stand in this Court. All emphasis is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

In April of 1983 Respondent was charged with committing lewd and lascivious acts in the presence of an eleven year old child, Circuit Court Case No. 83-6740. On May 10, 1983, Respondent pleaded guilty to the above charge and was placed on four years probation. On September 14, 1984, an affidavit alleging violation of probation was entered against Respondent, alleging that Respondent violated his probation by committing a new substantive offense, to wit, lewd and lascivious acts upon a minor. The affidavit was amended on November 20, 1984, altering the date on which the new offense occurred.

A probation violation hearing was conducted on December 3, 1984, at which the victim of the new offense, her brother (an eyewitness), her mother, and the investigating detective all testified. The trial court found Respondent in violation, and sentenced him to fifteen years imprisonment. Respondent was not separately convicted of the lewd and lascivious act which formed the basis of the violation.[1]

Respondent appealed to the Third District, which affirmed the probation violation, but reversed the sentence because the trial court did not afford Respondent sufficient opportunity to be heard at sentencing. Tuthill v. State, 478 So. 2d 409 (Fla. 3d DCA 1985).

After remand the case was reassigned to Judge Edward Cowart for resentencing. Judge Cowart held sentencing on March 3, 1986, at the conclusion of which he departed above the recommended maximum of thirty months, and sentenced Respondent to fifteen years imprisonment. The written reasons for departure were:

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[1] Respondent was arrested and charged with this new offense in Circuit Court Case No. 84-20799, however, upon revocation of probation the State entered a nolle prosse of the new charge.

> ... That the substantive offense which was the basis of the probation violation was substantially similar to the charge on which the defendant was placed on probation.
>
> ... That the new offense occurred within six months of the defendant being placed on probation.

Respondent appealed his sentence to the Third District, which held that because Respondent was not independently convicted of the criminal acts which constituted the violation, the trial court could not deviate more than one cell above the recommended guideline range. Tuthill v. State, 12 F.L.W. 2250 (Fla. 3d DCA, September 15, 1987). The State filed a timely motion for rehearing, which was denied on February 16, 1988. During the pendency of the motion, the Fourth and Fifth Districts issued their opinions in Lambert v. State, 13 F.L.W. 70 (Fla. 4th DCA, December 30, 1987), and Young v. State, 13 F.L.W. 325 (Fla. 5th DCA, February 4, 1988), in which both Courts expressly rejected the Third District's holding in Tuthill, supra.

A notice invoking the discretionary review jurisdiction of this Court was filed by Petitioner on March 9, 1988.

QUESTION PRESENTED

WHETHER THE DECISION OF THE THIRD DISTRICT IN TUTHILL v. STATE, 12 F.L.W. 2250 (FLA. 3d DCA, SEPTEMBER 15, 1987), EXPRESSLY AND DIRECTLY CONFLICTS WITH THE FOURTH AND FIFTH DISTRICTS' OPINIONS IN LAMBERT v. STATE, 13 F.L.W. 70 (FLA. 4th DCA, DECEMBER 30, 1987), and YOUNG v. STATE, 13 F.L.W. 325 (FLA. 5th DCA, February 4, 1988).

SUMMARY OF ARGUMENT

The decision of the Third District in the case sub judice directly and expressly conflicts with the decisions of the Fourth and Fifth Districts in Lambert and Young, supra, hence the exercise of discretionary review in this cause is warranted.

ARGUMENT

THE DECISION OF THE THIRD DISTRICT IN TUTHILL v. STATE, 12 F.L.W. 2250 (FLA. 3d DCA, SEPTEMBER 15, 1987), EXPRESSLY AND DIRECTLY CONFLICTS WITH THE FOURTH AND FIFTH DISTRICTS' OPINIONS IN LAMBERT v. STATE, 13 F.L.W. 70 (FLA. 4th DCA, DECEMBER 30, 1987), AND YOUNG v. STATE, 13 F.L.W. 325 (FLA. 5th DCA, FEBRUARY 4, 1988).

In State v. Pentande, 500 So.2d 526 (Fla. 1987), this Court held that where the conduct constituting a probation violation is sufficiently egregious, the trial court may enter an upward departure sentence in excess of the automatic one cell increase provided by Fla.R.Cr.P. 3.701(d)(14). This Court did not address the question of whether, where the egregious conduct is itself a criminal offense, the defendant must first be independently convicted of that offense before it can be used as a basis for departure.

The first District Court to address this issue was the Second District in Lewis v. State, 510 So.2d 1089 (Fla. 2d DCA 1987), wherein the Second District held that a separate conviction is required. In the instant cause, Tuthill, supra, the Third District also held that a separate conviction is mandated. However, in Lambert, supra, and Young, supra, the Fourth and Fifth District, respectively, rejected Lewis and Tuthill,

holding that a separate conviction was unnecessary under Pentande, supra. In so holding, both courts certified the question to this Court as being of great public importance.

From the above analysis it is plain that the District Courts are evenly divided on this important issue, that the conflict is direct and express, and that the exercise of discretionary review in this cause is definitely warranted.

CONCLUSION

Based on the foregoing, Petitioner respectfully urges this Court to grant discretionary review in this cause.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF PETITIONER ON JURISDICTION was furnished by mail to BETH WEITZNER, Assistant Public Defender, Appellate Division, 8th Floor, 1351 N.W. 12th Street, Miami, Florida 33125, on this 14 day of March, 1988.

RALPH BARREIRA
Assistant Attorney General

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