

IN THE SUPREME COURT OF FLORIDA

CASE NO. 72,096

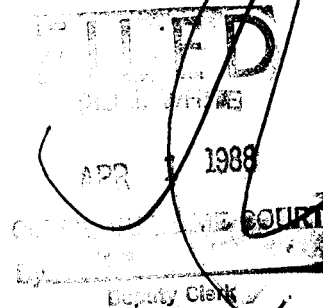
THE STATE OF FLORIDA,

Petitioner,

-vs-

HAROLD TUTHILL,

Respondent.



ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF RESPONDENT 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 appear before this Court. All emphasis is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

Respondent rejects petitioner's Statement of the Case and Facts because it relies upon matters outside of the record proper and, instead, shall rely upon the factual recitation contained in the district court's opinion:

In 1983, following entry of his nolo contendere plea to the charge of committing a lewd and lascivious act in the presence of a child, appellant Harold Tuthill was sentenced to a four-year term of probation. In 1984, the state filed a new information and an affidavit alleging that Tuthill violated his probation by committing a lewd and lascivious act upon a minor. At the conclusion of a probation violation hearing, the trial court revoked probation and sentenced Tuthill to serve fifteen years in the state penitentiary. The state then entered a nolle prosequi of the information charging the substantive offense that formed the basis of the probation violation. In the ensuing appeal, this court ruled that Tuthill "was not afforded an opportunity to be heard on the question of the severity of the sentence to be imposed." Tuthill v. State, 478 So.2d 409, (Fla. 3d DCA 1985), review denied, 484 So.2d 10 (Fla. 1986). Although we affirmed the

trial court's revocation of probation, we remanded the cause to the trial court for resentencing. Tuthill.

On remand, the trial judge recused himself from the case. A successor judge conducted a hearing and imposed sentence. Deviating from guidelines' recommendations, the trial court sentenced Tuthill to a term of fifteen-years' imprisonment. The trial court's reasons for deviating from the guidelines recommendations were:

. . . 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.

Tuthill v. State, 12 F.L.W. 2250 (Fla. 3d DCA, September 15, 1987).

Respondent appealed the more severe fifteen-year guidelines prison sentence to the Third District Court of Appeal.¹ The Third District ordered that the sentence be reversed for three independent reasons: (1) respondent was entitled to withdraw his election to be sentenced under the guidelines since the statutory change effected after his election deprived him of the right to appellate review of the extent of the departure, (2) the alleged substantive offense which formed the basis of the probation revocation could not be used as the basis for departure since no conviction was obtained, in violation of Rule 3.701(d)(11), Fla.R.Crim.P., and (3) the evidence regarding the timing of the alleged substantive violation was inconclusive, failing to

1. The originally imposed, non-guidelines fifteen-year sentence carried parole eligibility.

satisfy the reasonable doubt standard set forth in State v. Mischler, 488 So.2d 523 (Fla. 1986). Tuthill, supra, 12 F.L.W., 2250-51.

QUESTION PRESENTED

WHETHER THIS COURT SHOULD DECLINE TO EXERCISE
ITS DISCRETIONARY REVIEW JURISDICTION IN THE
PRESENT CASE?

SUMMARY

The Third District Court of Appeal reversed the 77-year old respondent's fifteen-year prison sentence based upon three grounds. Although as to one of the grounds, decisional conflict with Lambert v. State, 517 So.2d 133 (Fla. 4th DCA 1987) and Young v. State, 13 F.L.W. 325 (Fla. 5th DCA, February 4, 1988) is apparent, this Court should not exercise its discretionary review jurisdiction since reversal of respondent's sentence is required based upon the two other grounds, and any decisional disharmony will be resolved by this Court's decision in Lambert and Young, which cases are presently before this Court for review on the merits.

ARGUMENT

THIS COURT SHOULD DECLINE TO EXERCISE ITS
DISCRETIONARY REVIEW JURISDICTION IN THE
PRESENT CASE.

The Third District's decision in the present case reversed the respondent's fifteen-year prison sentence based upon three sentencing guidelines issues. As to one of those issues - the trial court's reliance upon an offense upon which probation was revoked as a basis for a guidelines departure where that offense did not result in conviction - the conclusion of the Third District that Rule 3.701(d)(11), Fla.R.Crim.P., requires a conviction, appears to be in conflict with the holdings in Lambert v. State, 517 So.2d 133 (Fla. 4th DCA 1987) and Young v. State, 13 F.L.W. 325 (Fla. 5th DCA February 4, 1988). It is submitted, however, that this Court should refrain from exercising its discretionary review jurisdiction.

In the present case, the Third District's decision ordering reversal of the sentence rests upon issues which are independent of the foregoing issue. The trial court departed from the guidelines for two reasons: the respondent committed a similar offense while on probation, and it was committed within six months of respondent having been placed on probation. In regard to the latter ground, the Third District held that the evidence failed to meet the reasonable doubt standard required by State v. Mischler, 488 So.2d 523 (Fla. 1986). This holding was premised upon substantial evidence presented at the revocation hearing which established that the alleged substantive violation occurred

before respondent had been placed upon probation. Since the factual foundation for the Third District's holding that the proof was insufficient to establish the timing of the substantive violation was bottomed upon inconclusive evidence that respondent committed the substantive violation while on probation, this holding, independent from the Rule 3.710(d)(11)-guidelines issue, precludes consideration of the substantive violation as a basis for departure. Moreover, and as another independent ground for its reversal of respondent's sentence, the Third District held that respondent was entitled to withdraw his election to be sentenced under the guidelines. Tuthill, supra, 12 F.L.W., at 2250.

Because the Third District's reversal of respondent's fifteen-year departure sentence rests upon grounds independent of the issue upon which conflict is claimed, prompt resentencing of the 77-year old respondent in accordance with those independent grounds is appropriate. This is especially so since the claimed decisional disharmony regarding the Rule 3.710(d)(11)-guidelines issue will be resolved by this Court in both Lambert and Young, which decisions are presently pending before this Court on the merits², and therefore it is unnecessary for this Court to invoke its discretionary jurisdiction in the present case.

2. See Lambert v. State, S.Ct. Case No. 71, 890; Young v. State, S.Ct. Case No. 72, 047.

CONCLUSION

Based upon the foregoing, respondent requests that this Court deny the petition for discretionary review.

Respectfully submitted,

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BY: Beth C. Weitzner
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail to the Office of the Attorney General, 401 N.W. 2nd Avenue, Miami, Florida this 30th day of March, 1988.


BETH C. WEITZNER
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