IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

MARK CARR,

Respondent.

CASE NO. 72,926

RESPONDENT'S BRIEF ON THE JURISDICTION

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

JAMES R. WULCHAK
CHIEF, APPELLATE DIVISION
ASSISTANT PUBLIC DEFENDER
112 Orange Avenue - Suite A
Daytona Beach, Florida 32014
(904) 252-3367

ATTORNEY FOR RESPONDENT

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STATEMENT OF THE CASE AND FACTS

The respondent accepts the petitioner's statement of the case and facts as set forth in its brief on jurisdiction with the following additions and clarifications:

The trial court imposed separate sentences on the four burglary counts of five years each to run concurrently with each other and with the sentence on the armed robbery. (See Appendix to Petitioner's brief, A 1, 2) On the armed robbery count, although the presumptive guidelines sentence was seven to nine years, the court imposed a sentence of forty years imprisonment, but suspended thirty-two years of that sentence, and imposed twenty years probation after the incarceration. Carr v. State, 13 FLW 1339 (Fla. 5th DCA June 2, 1988); Petitioner's Appendix 1, 2)

On appeal to the District Court of Appeal, Fifth District, the respondent argued that the sentence on the armed

robbery of forty years exceeded the guidelines (with no reasons being given for the departure), notwithstanding the fact that the court had suspended thirty-two years of the sentence, when considered in light of the district court's decision of Poore v. State, 503 So.2d 1282 (Fla. 5th DCA 1987), **rev. granted** Case No. 70,397 (July 22, 1987). The District Court of Appeal, Fifth District, rejected this argument finding only that the incarcerative portion of the sentence (not considering the suspended portion) was within the guidelines range. Carr v. State, supra. See also Carr v. State, supra at 1340 (Cowart, J., dissenting). The district court did strike the twenty-year probationary term, finding that it was imposed in addition to the suspended thirty-two years. Carr, supra.

The respondent filed a motion for rehearing, seeking clarification and/or reversal on the forty-year sentence which had been imposed. (See Appendix attached hereto.) The motion for rehearing was denied.

SUMMARY OF ARGUMENT

Stafford v. State, 455 So.2d 385 (Fla. 1984), cited by the petitioner as conflict, is inapplicable. Since the trial court imposed additional five-year concurrent sentences on the burglary counts and not probation, Stafford's holding allowing for concurrent probation and parole for separate sentences does not apply here.

The respondent agrees that, if the twenty-year probation term is construed as the petitioner does in Points II and III of its brief on jurisdiction, that the twenty-year probation is part of the suspended portion of the sentence only and not as an additional period beyond the forty years, the district court decision may conflict with Cassidy v. State, 464 So.2d 581 (Fla. 4th DCA 1985), and Alexander v. State, 422 So.2d 25 (Fla. 2d DCA 1982).

ARGUMENT

WHETHER THE OPINION OF THE DISTRICT COURT IN CARR V. STATE, 13 FLW 1339 (FLA. 5TH DCA JUNE 2, 1988), EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF OTHER DISTRICT COURTS OR OF THIS COURT?

The state first contends that the instant decision conflicts with Stafford v. State, 455 So.2d 385 (Fla. 1984). Stafford, as the state notes, appears to approve of concurrent parole and probation where they are for separate offenses, as opposed to being for a single offense.

The petitioner, however, mistakenly asserts that, under Stafford, supra, the twenty-year probation term which the district court struck could have been for the other offenses for which the respondent was convicted. However, the state fails to note that the respondent was sentenced to the maximum five years each on each of the burglary of a structure convictions, said sentences to run concurrent to each other and with the sentence on the armed robbery charge. Thus, Stafford is inapplicable. The trial court cannot impose the twenty-year probation for these offenses.

Petitioner next interprets the trial court's sentencing order to impose the twenty-year probation to run instead of or during the thirty-two year suspended portion of the forty-year

sentence. If this is the case, and the district court's interpretation of the sentence that the probation was to run consecutive to the thirty-two year suspended sentence, then the district court's opinion does appear to be in conflict with the decisions of Cassidy v. State, 464 So.2d 581 (Fla. 4th DCA 1985), and Alexander v. State, 422 So.2d 25 (Fla. 2d DCA 1982).

In this light, the respondent would concur with the petitioner that this Court should exercise its conflict jurisdiction in this cause.

CONCLUSION

Because two bases of conflict jurisdiction arguably exist, this Court's review of the decision of the District Court of Appeal, Fifth District, might be appropriate.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

JAMES R. WULCHAK
CHIEF, APPELLATE DIVISION
ASSISTANT PUBLIC DEFENDER
112 Orange Avenue - Suite A
Daytona Beach, FL 32014
(904) 252-3367

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been delivered by mail to: The Honorable Robert A. Butterworth, Attorney General, 125 N. Ridgewood Avenue, Daytona Beach, Florida 32014; and the respondent, Mr. Mark Carr, Inmate Number A 322598, P.O. Box 747, Starke, FL 32091, this 12th day of September, 1988.

JAMES R. WULCHAK
CHIEF, APPELLATE DIVISION
ASSISTANT PUBLIC DEFENDER