

IN THE SUPREME COURT OF FLORIDA

GARY EDWIN SITAR,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

C
pb
CASE NO. 73,191

PETITIONER'S BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

Petitioner was the Defendant in the Circuit Court in and for Palm Beach County, Florida, and the Appellant in the District Court of Appeal, Fourth District. Respondent was the Prosecution in the Circuit Court and the Appellee in the District Court. The parties will be referred to as they appear before this Court.

The symbol A followed by a number will refer to the appendix to this brief.

STATEMENT OF THE CASE AND FACTS

Petitioner was convicted of vehicular homicide and leaving the scene of an accident involving death or personal injury. The trial Judge gave four reasons for exceeding guidelines, one of which was characterized by the District Court as follows:

"___defendant initially left the scene of the accident, returned but rendered no aid to his victim, and then again fled the scene of the accident." (A1)

The District Court found only that reason valid, but affirmed the departure sentence anyway. It cited its own Abt v. State, 528 So.2d 112 (Fla.4DCA 1988) and Section 921.001(5) Fla. Stat. (1987).

Petitioner timely sought rehearing (A3-4), which was denied September 29 (A5). By notice filed October 12, Petitioner seeks discretionary review of that decision.

SUMMARY OF ARGUMENT

By finding three of four reasons for departure from guidelines invalid and approving the sentence anyway, the Fourth District placed itself in direct conflict with standards governing such cases.

First of all, the citation to a new law requiring affirmance in such a case and its own decision applying the law retroactively makes it clear that it is in conflict with State v. Mesa, infra, which follows the constitutional mandate to avoid ex post facto laws. Because this same Court certified the conflict in the other case, the conflict is equally evident here and this Court has jurisdiction.

Secondly, failure to remand on identical operative facts not only conflicts with Albritton v. State, infra, but it also conflicts with this Court's Tillman v. State, infra, which comes after the effective date of the new law.

Even the approved reason for departure creates conflict, because it describes criminal conduct. State v. Mischler, infra, prohibits use of such conduct if it is an element of the crime charged or if it is not the subject of a conviction. It must be one or the other.

POINTS INVOLVED

- I. THE DECISION OF THE DISTRICT COURT OF APPEAL HEREIN TO RETROACTIVELY APPLY THE AMENDMENT TO SECTION 921.001(5) FLA. STAT. IS IN DIRECT CONFLICT WITH THE DECISION OF THE THIRD DISTRICT IN STATE V. MESA, 520 So.2d 328 (Fla. 3DCA 1988).
11. THE DECISION OF THE DISTRICT COURT OF APPEAL HEREIN NOT TO REMAND FOR RESENTENCING DESPITE THREE REASONS OUT OF FOUR FOR DEPARTURE BEING REJECTED IS IN DIRECT CONFLICT WITH THE DECISIONS OF THIS COURT IN ALBRITTON V. STATE, 476 So.2d 158 (Fla. 1985) AND TILLMAN V. STATE, 525 So.2d 862 (Fla. 1988).
111. THE DECISION OF THE DISTRICT COURT OF APPEAL HEREIN THAT SEEING THE VICTIM AND LEAVING WITHOUT RENDERING AID IS GROUNDS TO DEPART FROM GUIDELINES IS IN DIRECT CONFLICT WITH THE DECISION OF THIS COURT IN STATE V. MISCHLER, 488 So.2d 533 (Fla. 1986).

ARGUMENT POINT I

THE DECISION OF THE DISTRICT COURT OF APPEAL HEREIN TO RETROACTIVELY APPLY THE AMENDMENT TO SECTION 921.001(5) FLA. STAT. IS IN DIRECT CONFLICT WITH THE DECISION OF THE THIRD DISTRICT IN STATE V. MESA, 520 So.2d 328 (Fla. 3DCA 1988).

In upholding only one of four reasons given for departure from guidelines and citing to its own Abt v. State, 528 So.2d 112 (Fla. 4DCA 1988) and Section 921.001 (5) Fla.Stat. (1987), the District Court has made the basis of its ruling plain. It is applying retroactively the revision to the statute which requires an appellate Court to uphold the departure if any of the reasons given is upheld. Doing so is just as much in conflict with State v. Mesa, supra, here as it was in Abt where the Fourth District certified the conflict.

Petitioner realizes this Court has refused to examine the case cited in a PCA to see if it conflicted with other decisions, Dodi Publishing Co. v. Editorial America, S.A., 385 So.2d 1369 (Fla. 1980). However, when the cited case has been reversed by this Court or is pending review, this Court has jurisdiction, Jollie v. State, 405 So.2d 418 (Fla. 1981).

In the case at bar, there is more than just a citation to Abt to support this Court's jurisdiction. However, even if the

citation stood alone, it would be sufficient. That is so because the District Court has certified in Abt that the decision both passes upon a question of great importance and conflicts directly with State v. Mesa, supra. The only reason Abt is not already before this Court is that a rehearing petition directed to the opinion on rehearing en banc is pending.¹

Petitioner submits that Abt is pending review in this Court within the meaning of Jollie v. State, supra, because it will certainly be here shortly. Jollie was in large measure an effort to avoid denying relief because one decision came shortly before or after another. To deny relief here because Abt is held up on rehearing with the Judges en banc would be incongruous and inequitable, and should be avoided. The simplest way to do so is to simply follow State v. Brown, 475 So.2d 1 (Fla. 1985), where this Court took jurisdiction of the case because it relied on a decision the same Court had certified to this Court.

It is not a matter of reexamining the cited Abt case to see if it might conflict, as Dodi Publishing, supra, refused to do. It is only a matter of noting the certificate of conflict in Abt which makes the conflict in the instant case plain for all to see. This Court has jurisdiction.

ARGUMENT POINT II

THE DECISION OF THE DISTRICT COURT OF APPEAL HERE-
IN NOT TO REMAND FOR RESENTENCING DESPITE THREE
REASONS OUT OF FOUR FOR DEPARTURE BEING REJECTED
IS IN DIRECT CONFLICT WITH THE DECISIONS OF THIS
COURT IN ALBRITTON V. STATE, 476 So.2d 158 (Fla.
1985) AND TILLMAN V. STATE, 525 So.2d 862 (Fla. 1988).

Failure to return the sentence under review to the trial Judge for resentencing in this case also conflicts directly with Albritton v. State, supra, which establishes that resentencing is required when the appellate Court finds some of the departure reasons invalid. Of course, Albritton allows for harmless error analysis,

¹Inexplicably, even though Abt is not yet final, the Fourth District refused to hold this decision up, and also refused to certify the question or the conflict as it did in Abt. (A5)

but none was attempted by the Fourth District here.

The correct rule is stated in Tillman v. State,
supra:

"Although we find two clear and convincing reasons for departure, Tillman's habitual offender status appears to have been the trial court's main reason for departure in this case. Since the state has not shown beyond a reasonable doubt that the trial court would have departed in the absence of the valid reasons, we find it necessary to vacate the sentence and remand for resentencing. Albritton v. State, 476 So.2d 158 (Fla. 1985)." (525 So.2d at—864-865).

Petitioner has the same operative facts, a mixture of valid and invalid reasons being reviewed after the effective date of the amendment to Section 921.001(5). One has his sentence remanded and the other does not. That is sufficient to give this Court jurisdiction under Adams v. Seaboard Coast Line Rail Road Company, 296 So.2d 1 at 3-4 (Fla. 1974). When the district Court properly relies on a new statute to reach a different result, this Court has no jurisdiction to review the decision, In re Interest of M.P., 472 So.2d 732 (Fla. 1985). However, if the passage of new legislation does not allow the decisions to be distinguished this Court has jurisdiction, Perdue v. Miami Herald Publishing Company, 291 So.2d 604 at 606 (Fla. 1974). Since this Court's Tillman v. State makes it clear that the statute the district Court relied upon does not apply, there is conflict and this Court has jurisdiction.

ARGUMENT POINT III

THE DECISION OF THE DISTRICT COURT OF APPEAL
HEREIN THAT SEEING THE VICTIM AND LEAVING WITHOUT
RENDERING AID IS GROUNDS TO DEPART FROM GUIDELINES
IS IN DIRECT CONFLICT WITH THE DECISION OF THIS COURT
IN STATE V. MISCHLER, 488 So.2d 533 (Fla. 1986).

State v. Mischler, supra, is the landmark case governing grounds for exceeding guidelines. The decision in this case necessarily conflicts with it.

The Fourth District purports to find that returning to the scene, seeing the injured victim and then leaving without rendering aid is ground to exceed guidelines. However, the conduct described

by the Fourth District is a crime. Section 316.027 Fla.Stat. requires the driver to stop and remain until he fulfills the requirements of Section 316.062 Fla.Stat. and that requires him to render aid to the injured party.

Since State v. Mischler, supra, forbids departure for essential elements of the offense or for criminal conduct, on which there has not been a conviction,² there is no way the approved reason can be valid. If Petitioner stands convicted of leaving the scene of an accident involving death or personal injury (which is the case), it is an essential element. If he does not stand convicted of leaving the scene, it is criminal conduct on which there has not been a conviction.

Under any view, the reason is invalid and in conflict with State v. Mischler, supra. This Court has jurisdiction.

²It violates Rule 3.701(d)(11) Fla.R.Crim.Pr. and thus Mischler, supra.

CONCLUSION

Because the District Court applied the amended statute retroactively contrary to State v. Mesa, supra, refused to remand for resentencing contrary to Albritton, and Tillman, supra, and found what would be criminal conduct to be grounds for departure contrary to State v. Mischler, supra, this Court has jurisdiction and should grant review.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by mail to JOHN W. TIEDEMANN, ESQUIRE, Assistant Attorney General, 111 Georgia Avenue, Suite 204, West Palm Beach, FL. 33401 this 24th day of October, 1988.

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