

1-6-89

IN THE SUPREME COURT OF FLORIDA

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AARON HAMILTON,)
)
 Petitioner,)
)
 vs.)
)
 STATE OF FLORIDA,)
)
 Respondent.)
 _____)

DCA CASE NO.: 87-983
SUPREME COURT CASE NO.: 73,398

PETITIONER'S BRIEF ON JURISDICTION

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

DANIEL J. SCHAFER
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IN THE SUPREME COURT OF FLORIDA

AARON HAMILTON)
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 Petitioner,)
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 vs. DCA CASE NO.: 87-983
 STATE OF FLORIDA,) SUPREME COURT CASE NO.: 73,398
)
 Respondent.)

STATEMENT OF THE CASE AND FACTS

On January 2, 1986 Petitioner was placed on 18 months community control after pleading no contest to three drug sale offenses. (R 144, 183, 198)

On October 8, 1986 an affidavit was filed alleging Petitioner violated three conditions of his community contro (R 145) One of the allegations in the affidavit was that Petitioner violated criminal law in that "he and others conspired to burn and did burn three barns as evidenced by nis arrest by the Marion County Sheriff's Department."

After a hearing the trial court found Petitioner guilty of violating probation and proceded to sentencing. (R 368) The guideline recommended sentence (including the one cell increase allowed in violation of probation cases) was up to 3½ years in prison. The Court decided to depart and sentenced Petitioner to fifteen years for the following reasons as noted in writing on the scoresheet:

(1) violation occurred nine months after being sentenced to community control.

(2) burning three barns was a substantial violation and was flagrant, "egregious" State v. Pentaude, 500 So.2d 526 (Fla. 1987).
(R 162)

On appeal Petitioner asserted that a sentencing guideline departure could not be based on a substantive criminal offense for which he had neither been tried or convicted. The Fifth District Court of Appeal rejected this argument in an opinion which stated only the following:

AFFIRMED on the authority of Young v. State,
519 So.2d 719 (Fla. 5th DCA 1988).

Hamilton v. State, 13 FLW 2529 (Fla. 5th DCA November 17, 1988)

Judge Cowart dissented stating his opinion that "this Court should recede from Young v. State . . . and follow the majority view . . . to the effect and result that a 'subsequent offense' should not be used to justify a departure in any event unless the defendant is convicted of the subsequent offense. . ." Judge Cowart also suggested the following question should be certified as one of great public importance:

CAN A DEPARTURE SENTENCE ON A PRIOR OFFENSE
BE BASED ON A SUBSEQUENT OFFENSE AS TO WHICH,
AT THE TIME OF SENTENCING, THE DEFENDANT HAD
NOT BEEN CONVICTED?

On December 2, 1988 Petitioner filed timely Notice to Invoke Discretionary Jurisdiction. This brief follows.

SUMMARY OF ARGUMENT

The Fifth District Court of Appeal decided Petitioner's case with a per curiam decision without opinion which cites as controlling authority a decision that is pending review in this Court. Young v. State, case no. 72,047. Such a per curiam affirmance "constitutes prima facie express conflict for purposes of jurisdiction." State v. Lofton, 13 FLW 677 (Fla. November 23, 1988)

ARGUMENT

THIS COURT HAS JURISDICTION BECAUSE APPELLANT'S CASE WAS DECIDED IN A PER CURIAM DECISION WITHOUT OPINION WHICH CITES AS CONTROLLING AUTHORITY A DECISION THAT IS PENDING REVIEW IN THIS COURT.

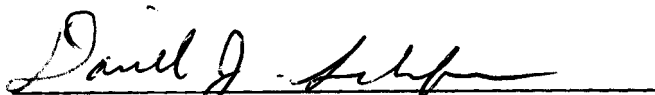
In the recent case of State v. Lofton, 13 FLW 677 (Fla. November 23, 1988) this Court reaffirmed the principle that "a per curiam decision without an opinion of a District Court of Appeal which cites as controlling authority a decision which is pending review in this Court constitutes prima facie express conflict for purposes of jurisdiction." Petitioner's case was decided in a per curiam decision which cites as controlling authority Young v. State, 519 So.2d 719 (Fla. 5th DCA 1988). This case is currently pending review. Young v. State, case no. 72, 047. Therefore, this Court has jurisdiction pursuant to Article V, Section 3 (b)(3), Florida Constitution.

CONCLUSION

Based on the arguments and authorities cited herein,
Petitioner respectfully requests that this Honorable Court accept
jurisdiction in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been
delivered to the Honorable Robert Butterworth, Attorney General,
125 N. Ridgewood Avenue, 4th Floor, Daytona Beach, FL 32014, in
his Basket, at the Fifth District Court of Appeal, and a copy
mailed to: Aaron Hamilton, 1150 S.W. Allapattah, Indiantown, FL
33456, this 12th day of December, 1988.



DANIEL J. SCHAFER
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