

075

THE SUPREME COURT OF FLORIDA

CASE NO.

73,806

THE STATE OF FLORIDA,

Petitioner,

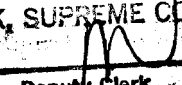
vs.

ROBERTO L. BETANCOURT,

Respondent.

FILED
SID J. WHITE

MAR 18 1989

CLERK, SUPREME COURT
By: 
Deputy Clerk

ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF PETITIONER ON JURISDICTION

ROBERT A. BUTTERWORTH
Attorney General

DEBORA J. TURNER
Florida Bar# 379018
Assistant Attorney General
Department of Legal Affairs
Suite N-921
401 Northwest 2nd Avenue
Miami, Florida 33128
(305) 377-5441

TABLE OF CONTENTS

INTRODUCTION	1
STATEMENT OF THE CASE AND FACTS	2
ISSUE PRESENTED	4
WHETHER THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL IN THE INSTANT CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL IN WALDRON V. STATE, 529 SO.2D 772 (FLA. 2D DCA 1988) (EN BANC) AND THE DECISION OF FIFTH DISTRICT COURT OF APPEAL IN DYER V. STATE, 534 SO.2D 843 (FLA. 5TH DCA 1988).	
SUMMARY OF THE ARGUMENT	5
ARGUMENT	6
CONCLUSION	8
CERTIFICATE OF SERVICE	8

TABLE OF CITATIONS

Dyer v. State,
13 F.L.W. 2612 (Fla. 5th DCA Dec. 5, 1988)2

Dyer v. State,
534 So.2d 843 (Fla. 5th DCA 1988)2,3,5,6,7

Harrison v. State,
523 So.2d 726 (Fla. 3d DCA 1988)3,7

Johnson v. State,
511 So.2d 748 (Fla. 5th DCA 1987)2

State v. Mestas,
507 So.2d 587 (Fla. 1987)2

Waldron v. State,
529 So.2d 772 (Fla. 2nd DCA 1988)..... 3,5,6,7

INTRODUCTION

Petitioner, **THE STATE OF FLORIDA**, was the Appellee in the Third District Court of Appeal of Florida and the prosecution in the trial court, the Circuit Court of the Eleventh Judicial Circuit, in and for Dade County, Florida. The Respondent, **ROBERTO L. BETANCOURT**, 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 before this Court. The symbol "A" will be used to designate the Appendix to this brief. All emphasis is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

Respondent, **ROBERTO L. BETANCOURT**, was convicted of armed robbery with a deadly weapon. (A.1). He was sentenced as a youthful offender to a split sentence of four years' incarceration followed by two years of community control. (A.1). There is no indication that the trial court considered the sentence as a departure from the sentencing guidelines and no reasons for departure were given. (A.1-2).

On appeal to the Third District Court of Appeal, Respondent challenged his sentence on the ground that it exceeded the maximum permitted under the sentencing guidelines (i.e., 34 - 44 years' incarceration) without the required statement of reasons for departure (A.1-2). In its opinion, the Third District agreed with Respondent's position. (A.1-3). The Court held that the Respondent's sentence must be reversed based upon caselaw indicating that when a combination sentence of incarceration and community control exceeds the recommended guidelines sentence, it is to be deemed a departure sentence which must be accompanied by written reasons. State v. Mestas, 507 So.2d 587 (Fla. 1987) (community control more severe alternative than probation; not a nonstate prison sanction). Dyer v. State, 13 F.L.W. 2612, 2163, n.2 (Fla. 5th DCA Dec. 5, 1988) (citations omitted); Johnson v. State, 511 So.2d 748, 749 (Fla. 5th DCA 1987) (probation and community control not interchangeable under the guidelines). (A.2).

As his remedy, the Respondent requested that, on remand, the trial court be directed to sentence him within the guidelines. (A.3). Relying upon Harrison v. State, 523 So.2d 726, 727 (Fla. 3d DCA 1988), the Third District held that "such an instruction was required." (R.3). However, the Third District expressly stated the following:

We acknowledge that our rule conflicts with that followed in the Second and Fifth Districts. See *Dyer v. State*, 13 F.L.W. at 2613 (trial judge who originally thought he or she was entering a guideline sentence can, on remand, be allowed to depart and provide written reasons); *Waldron v. State*, 529 So.2d 772, 774 (Fla. 2d DCA 1988) (en banc) (same).

Accordingly, the Third District reversed the Defendant's sentence and remanded for resentencing within the guidelines.

On February 15, 1989, Petitioner filed a motion to stay the issuance of a mandate pending review of this cause by this Court. On March 6, 1989, the Third District granted Petitioner's motion.

On February 28, 1989, Petitioner timely filed its Notice to Invoke Discretionary Jurisdiction and this Petition follows.

ISSUE PRESENTED

WHETHER THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL IN THE INSTANT CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL IN *WALDRON V. STATE*, 529 SO.2D 772 (FLA. 2D DCA 1988) (EN BANC) AND WITH THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL IN *DYER V. STATE*, 13 F.L.W. 2612 (FLA. 5TH DCA DEC. 5, 1988).

SUMMARY OF THE ARGUMENT :

The decision of the Third District Court of Appeal in the case sub judice directly and expressly conflicts with the decision of the Second District Court of Appeal in Waldron and the Fifth District Court of Appeal in Dyer. Specifically, the Third District has required a sentencing remedy different from that provided by the Second and Fifth District Courts of Appeal in cases where a guideline departure sentence is imposed without written reasons due to the trial court's mistaken belief that a guideline sentence was being imposed. Therefore, discretionary review of this cause should be granted.

ARGUMENT

THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL IN THE INSTANT CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL IN WALDRON V. STATE, 529 SO.2D 772 (FLA. 2D DCA 1988) (EN BANC) AND THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL IN DYER V. STATE, 534 SO.2D 843 (FLA. 5TH DCA 1988).

The decision of the Third District Court of Appeal in the instant case directly and expressly conflicts with decisions from the Second and Fifth District Courts of Appeal on the same issue of law. Specifically, these District Courts have rendered opinions with opposite results on the issue of whether a trial judge -- who mistakenly thought he or she was entering a guideline sentence -- can on remand, be allowed to then depart from the guidelines and enter written reasons. In view of this conflict, this Court should accept discretionary review in this cause. Fla. R.App.P. 9.030(a)(2)(A)(iv).

In Dyer v. State, 534 So.2d 843, 844 (Fla. 5th DCA 1988), the Fifth District Court of Appeal followed the analysis set forth in Waldron v. State, 529 So.2d 772 (Fla. 2nd DCA 1988) (en banc). As the court stated in Dyer, 534 So.2d at 844, "we agree with our sister court's analysis in its ~~en banc~~ opinion ... that a trial judge who originally thought he was entering a

guidelines sentence, can, on remand, be allowed to depart and provide written reasons". Conversely, the Third District Court of Appeal in the case sub judice followed its prior ruling in Harrison v. State, 523 So.2d 726 (Fla. 3d DCA 1988), and held that the proper remedy in such instance would not be to allow the trial judge an opportunity on remand to enter a departure sentence with written reasons, but rather to direct that the defendant be sentenced within the guidelines.

In view of the foregoing, it is clear that the decision of the Third District Court of Appeal in this case directly and expressly conflicts with the decisions of the Second District in Waldon and the Fifth District in Dyer. Therefore, this Court's exercise of discretionary review in this cause is warranted.

CONCLUSION

Based upon the foregoing, Petitioner respectfully requests this Court to grant discretionary review in this cause.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General

Deborah Turner

Fla. Bar#: 379018
Assistant Attorney General
Department of Legal Affairs
Suite N-921
401 Northwest 2nd Avenue
Miami, Florida 33128
(305) 377-5441

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 **HENRY HARNAGE**, Assistant Public Defender, 1351 Northwest 12th Street, Miami, Florida 33125 on this 10th day of March, 1989.

Deborah Turner
DEBORA J. TURNER

cld