IN THE SUPREME COURT OF FLORIDA

74,211

KENNETH SKEENS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

FILED
SID J. WHITE
MAY 30 1989
CLERK, SUPREME COURT
By ______
Deputy Clerk

Case No.

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL, SECOND DISTRICT OF FLORIDA

BRIEF OF PETITIONER ON JURISDICTION

JAMES MARION MOORMAN
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Bar No. 0143265
TENTH JUDICIAL CIRCUIT

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CERTIFICATE OF SERVICE

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§790.01(2), Fla.Stat. 2

PRELIMINARY STATEMENT

Petitioner, KENNETH SKEENS, was the Appellant in the Second District Court of Appeal and the Defendant in the trial court. Respondent, the State of Florida, was the Appellee in the Second District Court of Appeal. The appendix to this brief contains a copy of the decision rendered by the Second District Court of Appeal on April 26, 1989.

STATEMENT OF THE CASE AND FACTS

On April 3, 1985, the State Attorney for the Thirteenth Judicial Circuit in and for Hillsborough County, Florida, charged the Petitioner, KENNETH SKEENS, with one count of felon in possession of a firearm contrary to Fla.Stat. $790.23, and one count of carrying a concealed firearm contrary to Fla.Stat. §790.01(2). The charges arose out of a single act occurring on February 14, 1985.

On March 3, 1987, Mr. Skeens entered a plea of guilty to the charges. The trial court adjudicated Mr. Skeens guilty of both charges. On the charge of felon in possession of a firearm, the court imposed a two-year period of community control to be followed by a ten-year period of probation. On the charge of carrying a concealed weapon, the court sentenced Mr. Skeens to time served. Mr. Skeens reserved the right to appeal the legality of the sentences and timely filed a notice of appeal on March 6, 1987.

On November 28, 1988, the Second District Court of Appeal issued an order to show cause why Mr. Skeens' appeal should not be dismissed in accordance with Counts v. State, 376 So.2d 59 (Fla. 2d DCA 1979). In response to the order to show cause, Mr. Skeens asserted that the trial court's sentence was illegal. The appellate court affirmed the sentence on April 26, 1989. Its holding conflicts with decisions rendered by the First and Fourth District Courts of Appeal.

SUMMARY OF ARGUMENT

Mr. Skeens argues that the Second District Court of Appeal's decision upholding the imposition of community control and probation in tandem expressly and directly conflicts with contrary holdings of the First and Fourth District Courts of Appeal. The result of the Second District's holding is that Mr. Skeens receives a harsher sanction because he is within the jurisdiction of the Second District Court of Appeal. If community control and probation cannot be imposed in tandem, a theory which the Second District Court of Appeal has rejected in other cases and in this case, then resentencing is required.

ARGUMENT

WHETHER THE DECISION IN SKEENS v. STATE, CASE NO. 87-813 (Fla. 2d DCA April 26, 1989), IS IN CONFLICT WITH THE FIRST AND FOURTH DISTRICT COURTS OF APPEAL AS TO WHETHER OR NOT COMMUNITY CONTROL AND PROBATION CAN BE IMPOSED IN TANDEM?

In Williams v. State, 464 So.2d 1218 (Fla. 1st DCA 1985), Mitchell v. State, 463 So.2d 416 (Fla. 1st DCA), cause dismissed, 469 So.2d 750 (1985), and Chessler v. State, 467 So.2d 1102 (Fla. 4th DCA 1985), the First and Fourth District Courts of Appeal held that for purposes of the sentencing guidelines, probation and community control are alternative forms of disposition which should not be imposed in conjunction or in tandem with one another.

In Burrell v. State, 483 So.2d 479 (Fla. 2d DCA 1986), the Second District Court of Appeal expressly disagreed with Williams and held to the contrary. In Skeens v. State, Case No. 87-813 (Fla. 2d DCA April 26, 1989), the same court acknowledged conflict with Williams, Mitchell, and Chessler, but followed its holding in Burrell.

Florida law is in conflict on the issue of whether community control and probation can be imposed in tandem. The result of the conflict of decisions is that the Petitioner is subject to the imposition of a harsher sanction because he is within the jurisdiction of the Second District Court of Appeal.

Inasmuch as the First and Fourth District Courts of Appeal would have deemed the sanction improper and required resentencing, this Court should accept jurisdiction in order to settle the conflict.

CONCLUSION

In light of the foregoing reasons, argument, and authorities, Petitioner has demonstrated that conflict does exist with the instant decision and the decisions of the First and Fourth District Courts of Appeal *so* as to invoke discretionary review of this Honorable Court.

Respectfully submitted,

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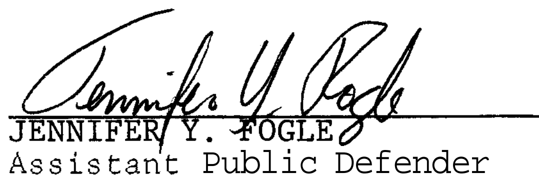

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Office of the Attorney General, Park Trammell Bldg. 8th Floor, 1313 Tampa Street, Tampa, FL 33602, this day of May, 1989.

JENNIFER Y. FOGLE

JYF:ddv