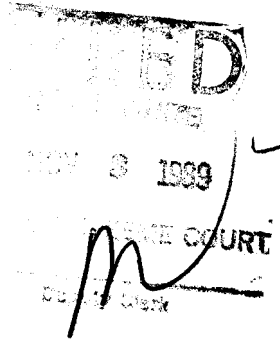


10 Request

IN THE SUPREME COURT OF FLORIDA



STATE OF FLORIDA,
Petitioner,

vs.

Case No. 74,315

CHARLES E. MCCRAY,
Respondent.

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

ANSWER BRIEF OF RESPONDENT ON THE MERITS

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT
FLORIDA BAR NO. 0143265

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PRELIMINARY STATEMENT

Respondent Charles E. McCray was the defendant in the trial court and the appellee in the District Court of Appeal, Second District. Petitioner, the State of Florida, was the plaintiff in the trial court and the appellant in the District Court. Petitioner is seeking review of the District Court's opinion dismissing Petitioner's appeal. The opinion is set forth in the appendix to this brief. References to the appendix are designated by "A" and the page number. References to the record on appeal are designated by "R" and the page number.

STATEMENT OF THE CASE AND FACTS

On November 30, 1987, Respondent pleaded guilty to several charges and the trial court entered judgments of guilt and placed him on two years' community control to be followed by five years' probation. (R52-62) This punishment represented a downward departure from the recommended guidelines' sentencing range of 5 1/2 to 7 years' incarceration. (R54) On December 14, 1987, the trial court filed its written reasons for the departure. (R73) On December 21, 1987, two orders entitled "judgment of guilt placing defendant on probation" and "judgment of guilt placing defendant in community control" were filed in the circuit court clerk's office. These orders, dated November 30, 1987, stated the conditions of probation and community control. (R74-77) The State filed its notice of appeal on December 21, 1987, which identified the December 14, 1987, order of written reasons for the guidelines departure as the subject of the appeal. (R78)

Respondent moved to dismiss the State's appeal on the ground that the notice of appeal was untimely filed. The Second District agreed and dismissed the appeal. (A1-2)

SUMMARY OF THE ARGUMENT

The State had the statutory right to appeal the departure sentences imposed by the trial court, but was required to file its notice of appeal within fifteen days after the judgments and sentences were rendered. Petitioner's argument that the written reasons for departure constitute the order to be appealed must be rejected. Otherwise, neither the State nor the defendant could appeal an illegal departure sentence if the court failed to enter reasons for departure. Since the notice of appeal in this case was filed more than fifteen days after the judgments and sentences were rendered, the District Court of Appeal, Second District lacked jurisdiction and correctly dismissed the appeal.

ARGUMENT

ISSUE I

THE DISTRICT COURT OF APPEAL, SECOND
DISTRICT DID NOT ERR IN FINDING THE
STATE'S NOTICE OF APPEAL UNTIMELY.

The right to appeal from a final judgment is prescribed by statute. State v. Pettis, 520 So.2d 250, 252 (Fla. 1988). The State of Florida's right to appeal a guidelines departure sentence is provided by section 927.07(1)(i), Florida Statutes (1987):

(1) The state may appeal from:

* * *

(i) A sentence imposed outside
the range recommended by the
guidelines authorized by s. 921.001.

The time limit for filing an appeal is prescribed by rules adopted by this Court. Art. V, § 2(a), Fla. Const. The State of Florida is required to file its notice of appeal within fifteen days of rendition of the order to be reviewed. Fla. R. App. P. 9.140(2). The time limit for filing a notice of appeal is jurisdictional, and an untimely appeal must be dismissed. Lampkin-Asam v. District Court of Appeal, 364 So.2d 469 (Fla. 1978).

In this case, the guidelines departure sentences were imposed, and the final judgments were rendered on November 30, 1987. (R52-62) The State filed its notice of appeal twenty-one days later on December 21, 1987. (R78) The trial court entered a written order stating its reasons for departure on December 14, 1987. (R73)

The District Court of Appeal, Second District dismissed the State's appeal as untimely because the notice of appeal was filed more than fifteen days after the judgments and sentences were rendered. (A1-2) Relying upon the Third District's conflicting decision in State v. Williams, 463 So.2d 525 (Fla. 3d DCA 1985), Petitioner argues that the time for filing a notice of appeal from a guidelines departure sentence should run from the date the written order stating reasons for departure is filed rather than from the date the sentence is rendered.

Both the decision in Williams and the Petitioner are wrong. Section 927.07(1)(i), Florida Statutes (1987), grants the State the right to appeal the departure sentence, not the order stating reasons for departure. State v. Hieber, 541 So.2d 1208 (Fla. 2d DCA 1988); State v. Ealy, 533 So.2d 1173, 1174 (Fla. 2d DCA 1988). Similarly, the defendant has the right to appeal a departure sentence under section 924.06(1)(e), Florida Statutes (1987).

The legislature chose wisely in making the departure sentence the order to be appealed rather than the reasons for departure. If no appeal could be filed until the trial court entered written reasons for departure, neither the State nor the defendant would be able to appeal an illegal departure sentence unsupported by reasons for departure. Trial courts could avoid complying with the guidelines in any case by refusing to enter written reasons for departure above or below the guidelines.

Moreover, Petitioner is wrong in arguing that it is

necessary to review the written reasons for departure before deciding whether to appeal a departure sentence. The State should have known that it was aggrieved by the departure sentences without regard to the trial court's written reasons. Surely the State would have wanted its appeal even if the trial court had never entered written reasons for departure.

Since the State filed an untimely appeal more than fifteen days after the judgments and sentences were rendered, the Second District correctly determined that it lacked jurisdiction and dismissed the appeal. See Lampkin-Asam v. District Court of Appeal. The order dismissing the appeal should be affirmed.

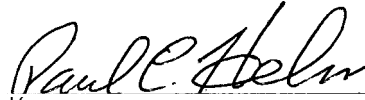
CONCLUSION

Respondent respectfully requests this Honorable Court to affirm the decision of the District Court of Appeal, Second District dismissing Petitioner's untimely appeal.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert Butterworth, Room 804, 1313 Tampa St., Tampa, FL 33602, (813) 272-2670, on this 1st day of November, 1989.

Respectfully submitted,



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