IN THE SUPREME COURT OF FLORIDA

MICHAEL L. HERRIN,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

DCA
Case No. 89-1389

75,523

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

BRIEF OF PETITIONER ON JURISDICTION

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TENTH JUDICIAL CIRCUIT
FLORIDA BAR NO. 0143265

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PRELIMINARY STATEMENT

Petitioner, MICHAEL LYNN HERRIN, was the Appellee in the Second District Court of Appeal and the defendant in the trial court. Respondent, the State of Florida, was the Appellant in the Second District Court of Appeal. The appendix to this brief contains a copy of the decision rendered January 19, 1990.

STATEMENT OF THE CASE AND FACTS

On November 18, 1989, the State Attorney for the Tenth Judicial Circuit in and for Polk County, Florida, filed an information charging the Petitioner, MICHAEL LYNN HERRIN, with the purchase of cocaine within 1,000 feet of a school contrary to section 893.13, Florida Statutes (1987), which occurred on October 29, 1988 (R1). Mr. Herrin entered a guilty plea and a sentencing hearing was held on May 3, 1989 (R3-14, 18). At the hearing, Mr. Herrin testified that he had been addicted to cocaine since late 1986 (R6). At that time he was using rock cocaine every single day (R6). He sought treatment and spent three months in a rehabilitation center in Fort Lauderdale (R6-7). After his release, he managed to avoid using cocaine until October 29, 1988 (R7). On that date, Herrin testified he had been having social problems with friends which got him in a "depressed mood" (R7). He went down the road from where he lived and bought $10 worth of cocaine which he intended to use for himself before he was arrested (R7).

Subsequent to the arrest, Herrin attended N.A. meetings and enrolled in a 16-week Tri-County program (R8). The trial court found that there was evidence that Mr. Herrin had an addiction problem (R12). Although not until his arrest did Herrin attempt to use cocaine following his release from the rehabilitation program, the trial court stated this was "not uncharacteristic from what I'm seeing with crack" (R12). The court adjudicated Mr.

Herrin guilty, and placed him under two years community control followed by one year probation, drug evaluation, treatment, warrantless urinalysis, 100 hours of community work, and $150 in court costs (R12-13, 15-16). Under the sentencing guidelines, Mr. Herrin scored out to 3 1/2 - 4 1/2 years incarceration (R17). In the Justification of Mitigation of Sentence, the trial court stated "the defendant suffered from substance abuse. ~~Barbera v. State,~~ 505 So.2d 413 (Fla. 1987). The defendant is amenable to rehabilitation, as is evidenced by his voluntary entry into drug treatment. The defendant will also complete the drug treatment program at Tri-County" (R22).

The State filed a Notice of Appeal on May 16, 1989 (R23). The Second District Court of Appeal reversed the sentence. State v. Herrin, Case No, 89-1389 15 F.L.W. D231 (Fla. 2d DCA Jan. 19, 1990). The court held that for intoxication or substance abuse to justify a downward departure from the recommended guidelines sentence, the evidence must show the defendant was impaired at the time he committed the crime.

SUMMARY OF THE ARGUMENT

Mr. Herrin argues that his case conflicts with prior Florida Supreme Court and other District Court decisions as to whether drug addiction is a valid reason for downward departure from the sentencing guidelines, According to those prior decisions, evidence that a defendant suffered from drug addiction at the time of the offense is a valid reason to depart downwards. The Second District Court's opinion in Mr. Herrin's case that alcohol or drugs must have actually clouded the defendant's mind at the time of the offense in order to justify departure, constitutes a conflict with existing law.

The Second District Court also held that amenability to rehabilitation was not a valid reason for downward departure. However, other district courts have found this to be a valid reason to depart.

ARGUMENT

ISSUE I

WHETHER THE DECISION IN STATE V. HERRIN, Case No, 89-1389 15 F.L.W. D231 (Fla. 2d DCA Jan. 19, 1990), IS IN CONFLICT WITH FLORIDA SUPREME COURT AND DISTRICT COURT OF APPEAL OPINIONS HOLDING THAT SUBSTANCE ABUSE IS A VALID REASON TO DEPART DOWNWARD FROM THE SENTENCING GUIDELINES?

Mr. Herrin was convicted and sentenced for possession of cocaine within a thousand feet of a school. In sentencing Mr. Herrin, the trial judge departed downward from the sentencing guidelines because he found that Mr. Herrin suffered from substance abuse. The trial court cited Barbera, supra, for support. Barbera simply states that intoxication or substance abuse is a clear and convincing reason for a downward departure. Id. Following Barbera, other district courts have held on numerous occasions that substance abuse or drug dependency is a valid reason to depart downward, & e.g., State v. Winter, 549 So.2d 1170 (Fla. 4th DCA 1989); State v. Joseph, 543 So.2d 405 (Fla. 4th DCA 1989); State v. Bledsoe, 530 So.2d 94 (Fla. 3d DCA 1989); State v. Salony, 528 So.2d 404 (Fla. 3d DCA 1988), review denied, 531 So.2d 1355 (Fla. 1988); State v. Whitten, 524 So.2d 1114 (Fla. 4th DCA 1988); State v. Francis, 524 So.2d 1172, 1173 (Fla. 4th DCA 1988); State v. Wilson, 523 So.2d 179 (Fla. 3d DCA 1988); State v. Mesa, 520 So.2d 328 (Fla. 3d DCA 1988); State v. Dauahtry, 505 So.2d 537, 539 (Fla. 4th DCA 1987), review dismissed, 511 So.2d 999 (Fla. 1987).

The Second District Court of Appeal reversed Mr. Herrin's sentence holding that a defendant must demonstrate more than drug or alcohol dependency or intoxication at the time of the offense. The court held that "where competent and substantial evidence reflects that alcohol or drugs, or a combination thereof, so clouded the defendant's mind at the time that he committed the crime as to impair his judgment, but without rising to the level of incompetence or insanity, that factor may support a mitigation of the sentence." State v. Herrin, 15 F.L.W. at D232. The court admitted that the "other district courts have not construed the Barbera holding as limited as we believe it should be construed." Id. at D232. Therefore, it is clear that express and direct conflict exists between this case and the line of cases following Barbera. This court should exercise its discretion and review the instant case because it goes against a clear, established pattern of decisions.

The trial court also listed that Mr. Herrin was "amenable to rehabilitation." The Second District Court of Appeal held that in their view "no case in Florida" permits a downward departure for that reason. Id. However, it appears that other District Courts have indeed permitted downward departures based on a defendant's chances for rehabilitation. See, e.g., State v. Whidden, 15 F.L.W. D78 (Fla. 1st DCA Dec. 29, 1989); State v. Lacey, 15 F.L.W. D99 (Fla. 4th DCA Dec. 20, 1989); State v. Forbes, 536 So.2d 356 (Fla. 3d DCA 1988); State v. Morales, 522 So.2d 464 (Fla. 4th DCA 1988). Therefore, express and direct conflict exists between Herrin, and

other District Courts of Appeal requiring this court to exercise its discretion to review the instant case.

CONCLUSION

In light of the foregoing reasons, arguments and authorities, petitioner has demonstrated that conflict does exist with the instant decision, the Florida Supreme Court and the District Courts of Appeal so as to invoke discretionary review of this Court.

APPENDIX

Decision rendered January 19, 1990 A1

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 16th day of February, 1990.

Respectfully submitted,

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