IN THE SUPREME COURT OF FLORIDA

CARLOS A. PIMENTEL,

Petitioner,

v.

Case No. 76,044

STATE OF FLORIDA,

Respondent.
_____/

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

BRIEF OF RESPONDENT ON JURISDICTION

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SUPPLEMENTAL STATEMENT OF THE CASE AND FACTS

This statement is included to avoid potential confusion about the decision offered for review and its relationship to Williams v. State, 15 F.L.W. D912 (Fla. 2d DCA, April 4, 1990), pending in this Court as Case No. 75,919. There are statements and omissions in Petitioner's Brief on Jurisdiction and Motion To Consolidate which could be misleading without further information, and other cases are pending on the same issue which are not mentioned.

The decision this Court is asked to review addresses a joint proceeding in which the trial court revoked Petitioner's probation in two cases and imposed consecutive fifteen year departure sentences. The trial court's reasons are set out in an order applicable to both cases. The reasons are as Petitioner describes them except that the fourth numbered reason includes an aspect he apparently overlooked, that Petitioner was on probation in two different cases when he committed the specified offense.

The thirty year sentence Petitioner discusses was the total of the two fifteen year sentences, but the Second District did not affirm both under Williams as Petitioner might seem to suggest. One was affirmed on that ground, but the other was reversed because the probation revocation in that case was held to have been improper.

The holding of Williams, which the Second District cited as authority for affirming one of Petitioner's sentences, was

essentially that guidelines departures are permissible where there are multiple violations of probation. The court certified the question in Williams as one of great public importance, and this Court has accepted jurisdiction. Petitioner is seeking review in the instant case based on the status of Williams.

The Second District has certified the same question in a number of cases. Counsel for the parties worked together to identify such cases, stay the mandates, and consolidate the cases in the Second District and in this Court. For some reason, Petitioner has followed a different procedure in the instant case, filing a jurisdictional brief and a motion to consolidate in this Court and only a notice in the Second District. Lead counsel for Respondent in the consolidated Williams cases advises that nothing done in those cases would seem to affect this case, at least as long as it remains separate. The undersigned has not seen a mandate in this case or a motion to stay it or an order staying it and is uncertain of the status.

SUMMARY OF THE ARGUMENT

The instant cases cites authority that is pending review in this Court and it may be reviewed on that basis, but the authority Petitioner gives for such review has no logical application because the case that was cited here is pending on a certified question and conflict is not suggested. If the Court has addressed the question in any decision or rule to date, Petitioner has not cited it and Respondent has not found it otherwise. The Court has granted review in such circumstances, but not necessarily for reasons that would suggest that here.

If jurisdiction is accepted, the Court may review the decision in its entirety or only the portion that is directly related to the certified question. Likewise, the Court may review this case separately or together with those cases in which the relevant question was certified. In determining such matters, the Court should be aware that the issues in this case are not factually or legally identical to those in the controlling case as Petitioner suggests. They are not particularly similar, even if only the sentence is considered.

ARGUMENT

ISSUE

THE CONSOLIDATED REVIEW SOUGHT WOULD BE PROPER BUT THE ADVISABILITY IS LESS CLEAR THAN PETITIONER SUGGESTS.

The decision Petitioner asks the Court to review in the instant case is the Second District's affirmance of a departure sentence on the authority of that court's earlier decision in Williams v. State, 15 F.L.W. D912 (Fla. 2d DCA, April 4, 1990). In Williams, the Second District held guidelines departure permissible where there were multiple violations of probation, but certified that holding as a question of great public importance. This Court has accepted jurisdiction, and the matter is now pending as Supreme Court Case No. 75,919. Petitioner asks this Court to review the instant case on that basis, and to consolidate it with Williams.

As explained in Respondent's supplemental case and fact statement, the Second District certified the Williams question in a number of other cases, which were collected and consolidated at that level and placed under the stewardship of a lead counsel for each party to economize efforts and ensure that the cases are all parallel and their status the same in both courts. Petitioner could presumably have achieved the result he seeks in this case by following the procedures already established for cases involving the Williams issue. Respondent does not know why a different procedure was used in this instance and is not certain that what Petitioner asks in the instant case is altogether appropriate.

Petitioner asserts that review is proper under Jollie v. State, 405 So.2d 418 (Fla. 1981), because the instant opinion cites Williams, which the Court has accepted for review. He has moved to consolidate this case with Williams, asserting that the issues are factually and legally identical. Respondent does not question the Court's authority to do as Petitioner asks, but neither result is as obvious as he suggests.

Petitioner's reliance on Jollie is not entirely novel, but the logic of applying the rule of that case to this decision would seem questionable, and the Respondent has found no discussion of the question at all. The rule in Jollie is that citation of a controlling case that is pending review is prima facie evidence of conflict. The decision is presumptively reviewable on that basis. The logic is obvious when the decision cited is itself before the Court because of conflict.

That is not the situation here, however. Williams is pending review because the holding was certified as a question of great public importance. There might in fact be cases that conflict with Williams and with the instant decision, but Petitioner has not alleged conflict as to this case or Williams, and conflict would not be assumed when a question is certified. The question certified might well be novel. Logic therefore suggests that citing a decision that is pending on a certified question would not be evidence of conflict as to the later decision.

Respondent recognizes that the same policy may apply in both situations, that it may be just as important to permit review when the controlling decision is pending on a certified question as when it is pending because of conflict, and that the Jollie rule might be interpreted logically in a way that would cover both. Citation to a case in which the same question is certified might, for example, be seen as evidence that the question is also important in the later case. On the other hand, there is already a method for obtaining review when a relevant issue has been certified. Certification can be obtained in the later case as well. If that procedure is seen as more beneficial to one court or both than the direct procedure arguably permitted by Jollie, this Court might conclude that the rule should not be expanded.

If this Court has addressed the question, Respondent has not found the discussion. The Court has applied the rule in the manner Petitioner suggests on at least one occasion. In State v. Brown, 475 So.2d 1 (Fla. 1981), the Court cited Jollie as authority for accepting jurisdiction of a decision that cited a case pending on a certified question, and this may have occurred on other occasions. The jurisdictional basis for review of the decision cited is not always specified. Respondent would assume, however, that the logic of applying Jollie to certified questions might not have been brought to the Court's attention, or that the petition might have anticipated the question and shown that the citation really was evidence of conflict in that particular case. The distinction between the situation here and that to which

Jollie speaks is therefore noted here in the event the Court may wish to consider it.

Petitioner's assumption that the instant case and Williams are interchangeable is far more questionable than his reliance on Jollie. The suggestion in his motion to consolidate that the issues in the two cases are factually and legally identical is simply wrong. They share a common issue, each involved additional probation violations that the guidelines would not have taken into account, and the district court did not suggest that any other, more specific facts were necessary to the affirmance of the departure in either. Beyond that, however, there is no particular similarity between the cases at all. Sentencing is not the only issue in this case, and even the sentencing issues might differ if this Court disagrees with the rationale of the Second District. The facts of this case are unusual, and the issues are all susceptible to resolution on that limited basis.

The instant case has a revocation issue not present in Williams which arose out of the same unusual circumstances which led to the departure sentence, and the facts could determine the outcome of either issue or both. Each time Petitioner was arrested, he used a different name, was sentenced as a first offender, disappeared, and left his probation officers and the court to look for nonexistent people at incorrect addresses. The aliases and cases began to be connected after his third arrest, but not all at once. When the third set of offenses was charged

as a violation of probation in the first case, the second case was still separate. It was soon tied in and transferred, and the cases were administered jointly thereafter.

Petitioner's probation in the first two cases was revoked because of the later offenses and consecutive fifteen year departure sentences imposed by a joint order following what everyone involved, defense counsel specifically included, understood to be a joint proceeding applicable to both cases. The Second District affirmed the sentence in the first case, citing Williams, but concluded that revocation was improper in the other. The affidavit charging the third set of offenses as a probation violation had not been amended to include the second case number or duplicated for that file. The Second District applied the general rule requiring a violation to be charged by affidavit, but the facts were argued and another court might decide the case in terms of actual notice, express waiver, estoppel, or other fact-specific grounds.

While this issue may not be reached, it is noted in the event the Court does not wish to consider only one of two identical sentences imposed in a joint proceeding and by a joint order, in what the trial court considered to be two essentially identical cases calling for identical results, and ignore the other; or to question the district court's ruling where it supported the trial court's effort and let the ruling stand where it was in derogation of the lower court's effort.

The facts could be significant to the outcome of this case even if the Court addresses only the sentencing issue. The violations, the stated reasons for departure, and the circumstances otherwise are not the same in this case and Williams. The differences were unimportant under the rationale employed by the Second District and will be unimportant here if the holding of Williams is affirmed. If this Court reverses, however, specific facts could determine the validity of the sentence in this case and any or all of the other cases which share the same issue. The Court could determine that multiple violations would support departures in some instances, depending upon the violations that would otherwise go unpunished, and the results here, in Williams, and in other such cases might differ. Likewise, the Court could determine that the departure was proper in one case or another because of some other factor, like the fact that Petitioner here was on probation in two cases at once, or because of some entirely different reason the trial court stated in that case.

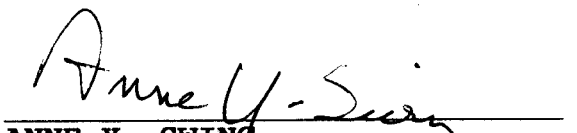
Respondent does not suggest that the instant case cannot be reviewed in conjunction with Williams and the common issue resolved in that context. The undersigned is not familiar with all the cases involving the Williams issue, but would assume that some of those already consolidated may well have additional issues, potentially significant facts, or both, just as this case does. Respondent would simply note that the considerations are not as limited as Petitioner suggests.

CONCLUSION

Respondent respectfully requests this Honorable Court to take the foregoing considerations into account in determining whether to comply with Petitioner's requests.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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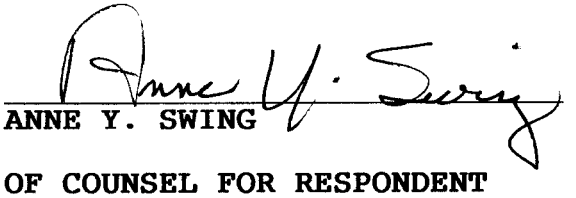
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to STEPHEN KROSSCHELL, ESQUIRE, Assistant Public Defender, Polk County Courthouse, P. O. Box 9000 - Drawer PD, Bartow, Florida 33830 , this 14th day of June, 1990.



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