

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

PETITIONER,

v.

CASE NO. 77,612

MARIO ROA,

RESPONDENT.

FILED
SIO J. WHITE
APR 5 1981
CLERK, SUPREME COURT
By _____
Deputy Clerk

ON APPEAL FROM THE SECOND DISTRICT
COURT OF APPEAL, STATE OF FLORIDA

RESPONDENT'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

The Second District Court of Appeal examined the three reasons provided by the trial court when the trial court departed upward in sentencing Respondent. (Roa v. State, 16 FLW D222, Fla. 2d DCA 1991). The court found that two of the reasons for departure factually were inapplicable to Respondent's case, and that the third reason for departure was an invalid reason.

SUMMARY OF THE ARGUMENT

The Second District Court of Appeal examined the three reasons provided by the trial court when the trial court departed upward in sentencing Respondent. The court ruled on Reason 1 that although it previously had held that multiple violations of probation could support an upward departure, Respondent's case was factually distinguishable from this prior ruling.

The court found that Reason 2 was not supported by the facts of the case or the case law, and that Reason 3 was an invalid reason for departure from the sentencing guidelines.

The decision of the Second District Court of Appeal is not in conflict with with cases from this Court nor from the Fifth District Court of Appeal. Additionally, inasmuch as the court relied on Williams, a case pending before this Court, the reliance was to state that the departure reason may be a valid reason to depart, but not under the facts of the instant case.

ARGUMENT

THE DECISION BELOW RELIES ON A CASE CURRENTLY
PENDING BEFORE THIS COURT, AND CONFLICTS WITH
CASES FROM THIS COURT AND THE FIFTH DISTRICT
(As stated by Petitioner)

The decision of the Second District Court of Appeal does not conflict with cases from this Court nor from the Fifth District Court of Appeal. Moreover, to the extent that the decision relies upon a case pending before this Court, the issue before this Court would not affect the result below. Therefore, this Court should decline to review the decision of the Second District Court of Appeal.

The trial court listed three reasons for his upward departure from the sentencing guidelines:

1. The Defendant is not amenable to probation because of the number of his violations of probation and community control.
2. The Defendant is not amenable to probation because of the timing of these violations.
3. The Defendant is extremely dangerous.

(R. 34). In reversing the upward departure sentence, the Second District Court of Appeal examined each of the reasons in light of the record from the trial court.

On Reason 1, the court cited Williams v. State, 559 So.2d 680 (Fla. 2d DCA 1990), a case pending before this Court, for the proposition that multiple violations of probation may be upheld as a valid reason for an upward departure. However, the court found in Respondent's case that "there have not been multiple violations of probation and community control." The fact that the Williams case is pending before this Court has no bearing on

Respondent's case because the Second District Court of Appeal found that multiple violations did not occur.

On Reason 2, the court found that it was not supported by the facts of Respondent's case nor by the case law. On Reason 3, the court found the reason to be invalid.

The decision of the Second District Court of Appeal is not in conflict with cases from this Court nor from the Fifth District Court of Appeal. Additionally, since the Court found that there had not been multiple violations of probation and community control, this Court's decision in Williams will have no bearing on Respondent's case.

Therefore, this Court should decline to review the decision of the Second District Court of Appeal in this case.

CONCLUSION

Based upon the foregoing arguments and authorities, this Court should decline to review the decision of the Second District Court of Appeal in this case.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to David R. Gemmer, Esquire, Assistant Attorney General, 2002 N. Lois Avenue, Seventh Floor, Tampa, Florida 33607, by United States Mail, postage pre-paid, this 3rd day of April, 1991.



HOWARD J. SHIFKE