IN THE SUPREME COURT OF FLORIDA

DERRICK ACKERS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

_____/

CASE NO. 80,036
5th DCA CASE NO. 91-735

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL,

FIFTH DISTRICT

RESPONDENT'S JURISDICTIONAL BRIEF

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

NANCY RYAN
ASSISTANT ATTORNEY GENERAL
Fla. Bar #765910
210 N. Palmetto Ave.
Suite 447
Daytona Beach, FL 32114
(904) 238-4990

COUNSEL FOR RESPONDENT

TABLE OF CONTENTS

PAGES:

TABLE OF AUTHORITIES

CASES: PAGES:

OTHER AUTHORITIES:

SUMMARY OF ARGUMENT

The decision in this case is not in direct conflict with a decision of this court or of another district court, and this court should accordingly decline to review it. The rule of Jollie v. State, 405 So.2d 418 (Fla. 1981), is inapplicable to this case, as the district court issued a written opinion.

ARGUMENT

THE PETITIONER HAS NOT SHOWN EXPRESS AND DIRECT CONFLICT BETWEEN DECISIONS.

The petitioner, Derrick Ackers, argues that the decision in this case expressly and directly conflicts with the decisions of the Second District Court of Appeal in King v. State, 597 So.2d 309 (Fla. 2d DCA 1992) and Staten v. State, 595 So.2d 1112 (Fla. 2d DCA 1992). The petitioner also argues that the rule of Jollie v. State, 405 So.2d 418 (Fla. 1981), applies to this case, and that accordingly this court "automatically has discretionary jurisdiction to review" the district court's decision. The state submits that neither contention is correct, and that this court need not and should not exercise its discretion in this matter.

As to conflict, King involved an appeal from an order revoking community control. The Second District Court held that it could not review the original order granting community control at that late date, then went on in dictum to announce the view that the trial courts may impose probation after habitualizing a defendant. Dictum is not binding authority, and accordingly cannot be the basis for the direct conflict between decisions referred to in Article V, Section 3(b)(3), Fla.Const. See Ciongoli v. State, 337 So.2d 780 (Fla. 1976).

Moreover, the rationale of the decision in this case is that the Legislature's apparent intent in Section 948.01, Florida Statutes, was to authorize probation *in lieu of a sentence* in appropriate cases, while its apparent intent in Section 775.084 was to authorize an expanded range of *sentences* in a different set

of appropriate cases. Accord State v. Kendrick, 596 So.2d 1153 (Fla. 5th DCA 1992). As King involved community control rather than probation, the decisions in this case and in King resolved distinct issues. Community control is a sentence. Cf. §948.001(1), Fla.Stat., with §948.001(3); see §948.01(3). See also Committee Note to Rule 3.701 (d)(13); Skeens v. State, 556 So.2d 1113 (Fla. 1990).

In Staten, the court issued a one-paragraph opinion stating "the court did not err in placing Staten on probation despite the fact he also was declared a habitual felony offender." That brief opinion does not establish whether Mr. Staten was placed on straight probation or received a probationary split sentence. See generally Poore v. State, 531 So.2d 161 (Fla. 1988). As King involved a sentence, and as the opinion in Staten does not establish whether the decision involved a sentence or not, this case is in direct conflict with neither. See Department of Revenue v. Johnston, 442 So.2d 950 (Fla. 1983) (no direct conflict between factually distinguishable cases).

Moreover, this case, like Kendrick, supra, involved a state appeal from a downward departure from the sentencing guidelines; King and Staten were appeals by defendants from what they alleged to be illegal sentences. The decisions can be harmonized on the principle announced in Weiner v. State, 562 So.2d 392 (Fla. 5th DCA 1990): that a defendant's claim that he received an illegally lenient sentence is "unique and frivolous."

The petitioner's reliance on Jollie, supra, is also misplaced. Mr. Ackers argues that

> [i]t is well-established that where a District Court of Appeal cites a decision as controlling, which decision is currently pending review before the Florida Supreme Court, this Court automatically has discretionary jurisdiction to review the case. See Jollie v. State.

(Petitioner's jurisdictional brief at 6) This court has jurisdiction to review any decision that is accompanied by a written opinion establishing the point of law on which the decision rests. The Florida Star v. B.J.F., 530 So.2d 286, 288-9 (Fla. 1988). In accordance with the intent of the framers of Article V, Section 3 of the Florida Constitution, this court has exercised its discretion to review only those decisions which are either in express and direct conflict with other decisions, or which are in another category referred to in Article V, Section 3. Id. Jollie v. State, supra, holds that once a district court explicitly notes conflict in one case, it can "pair" other cases for review with that case by issuing a per curiam decision without opinion, citing the case in which it noted conflict. Jollie, 405 So.2d at 420; see also The Florida Star, supra, 530 So.2d at 288, n.3. Jollie is inapplicable to this case, as the Fifth District Court wrote an opinion. That opinion does not establish that the decision in this case is in direct conflict with any other decision, and this court should accordingly decline to exercise its discretion to review this matter.

CONCLUSION

The Respondent requests this court to decline to exercise its discretion to review this matter.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

NANCY RYAN
ASSISTANT ATTORNEY GENERAL
FLA. BAR # 765910
210 N. Palmetto Avenue
Suite 447
Daytona Beach, FL 32114
(904) 238-4990

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

A true and correct copy of the foregoing Jurisdictional Brief has been delivered by hand to Assistant Public Defender Paolo G. Annino at 112-A Orange Avenue, Daytona Beach, Florida 32114, this 1st day of July, 1992.

NANCY RYAN
Assistant Attorney General