

095w/app

IN THE SUPREME COURT OF FLORIDA

JAMES DICK, .
Petitioner, .
vs. .
STATE OF FLORIDA, :
Respondent. .
_____ .

Case No. 80219
FILED 8/24
SID J. WHITE
JUL 31 1992
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By _____
Chief Deputy Clerk

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

BRIEF OF PETITIONER ON JURISDICTION

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

JENNIFER Y. FOGLE
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NUMBER 628204

Public Defender's Office
Polk County Courthouse
P. O. Box 9000--Drawer PD
Bartow, FL 33830
(813) 534-4200

ATTORNEYS FOR PETITIONER

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PRELIMINARY STATEMENT

Petitioner, JAMES DICK, was the Appellant in the Second District Court of Appeal and the defendant in the trial court. Respondent, the State of Florida, was the Appellee in the Second District Court of Appeal. The Appendix to this brief contains a copy of the decision rendered by the appellate court on June 26, 1992.

STATEMENT OF THE CASE AND FACTS

Between May 7 and May 28, 1991, the State Attorney of the Twentieth Judicial Circuit in Charlotte County filed four informations charging the Petitioner, James Dick, with burglaries and thefts occurring on April 14, 15, and 16, 1991.

On August 19, 1991, Mr. Dick entered a plea of no contest to the charges in exchange for an agreement with the court to a sentence within the recommended guidelines range and an agreement that no community control would be imposed.

On October 4, 1991, the trial court sentenced the Petitioner in trial court case number 91-241 to thirty months in prison followed by ten years on probation on the charge of burglary of a dwelling, and to a concurrent term of thirty months in prison followed by two years on probation on the charge of grand theft. In trial court case numbers 91-294, 91-240, and 91-244, the court imposed concurrent terms of ten years on probation on the charges of burglary of a dwelling and sixty days in jail on the petit theft charges. Mr. Dick's guideline scoresheet recommended a sanction of twelve to thirty months in prison.

Defense counsel objected to the sentences imposed in case numbers 91-294, 91-240, and 91-244 on the basis they were not consistent with the requirements of the sentencing guidelines, and precluded the receipt of credit for time served.

On all probationary terms the court imposed as special conditions of probation: (1) the prohibition against the Petitioner being in any place that offers for use, sale, or distribution

any controlled substance as defined by Chapter 893 as it reads or is amended to read; and (2) the prohibition against the Petitioner drinking more than two beers or two ounces of alcohol a day or requiring total abstinence from alcohol if his probation officer deems it necessary.

On appeal Mr. Dick argued that the court's sentencing scheme was contrary to the intent of the guidelines and that the conditions of probation were impermissible. The Second District Court of Appeal affirmed the sentence on June 26, 1992, on the basis of State v. Tripp, 591 So.2d 1055 (Fla. 2d DCA 1991) (Supreme Court Case # 79,176), which contains a certified question presently pending before this Court. The Second District also declined to address the conditions of probation on the basis no objection was made at sentencing.

SUMMARY OF THE ARGUMENT

Jurisdiction of **this case should be accepted** on the basis that the instant **decision presents an issue already pending before this Court on a certified question.**

ARGUMENT

ISSUE

WHETHER THE **ISSUE** IN Dick v. State,
Case No. 91-03500 (Fla. 2d DCA June
26, 1992), **ASSERTING A SENTENCE**
IMPOSED IN VIOLATION OF THE INTENT
OF THE SENTENCING GUIDELINES, **IS**
PRESENTLY **PENDING** BEFORE **THIS COURT**
IN ANOTHER CASE?

Mr. Dick contested the trial court's sentencing method, but the Second District Court of Appeal upheld the sentence on the basis of State v. Tripp, 591 So.2d 1055 (Fla. 2d DCA 1991). Tripp contains a certified question¹ and is presently pending before this Court as Case No. 79,176. Inasmuch as this Court has the sentencing issue already before it, jurisdiction over Mr. Dick's case should be accepted. See, Jollie v. State, 405 So.2d 418 (Fla. 1981).

¹ The certified question is:

**IF A TRIAL COURT IMPOSES A TERM OF PROBATION
ON ONE OFFENSE CONSECUTIVE TO A SENTENCE OF
INCARCERATION ON ANOTHER OFFENSE, CAN JAIL
CREDIT FROM THE FIRST OFFENSE BE DENIED ON A
SENTENCE IMPOSED AFTER A REVOCATION OF PROBA-
TION ON THE SECOND OFFENSE?**

CONCLUSION

In light of **the** foregoing **reasons, arguments,** and authorities, Petitioner has demonstrated that **the** instant issue **is presently** pending **before** the **Court** so as to invoke discretionary review.

APPENDIX

PAGE NO.

1. Decision of Second District Court of Appeal
in Dick v. State, Case No. 91-3500 (Fla. 2d
DCA June 26, 1992)

A

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

JAMES DICK,
Appellant,
v.
STATE OF FLORIDA,
Appellee.

Case No. 91-03500

Opinion filed June 26, 1992.

Appeal from the Circuit Court
for Charlotte County;
Darryl C. Casanueva, Judge.

James Marion Moorman, Public
Defender, and Jennifer Y. Fogle,
Assistant Public Defender,
Bartow, for Appellant.

Robert A. Butterworth, Attorney
General, Tallahassee, and Donna
A. Provonsha, Assistant Attorney
General, Tampa, for Appellee.

PER CURIAM.

Affirmed. See State v. Tripp, 591 So. 2d 1055 (Fla. 2d
DCA 1991); Larson v. State, 572 So. 2d 1368, 1371 (Fla. 1990).

CAMPBELL, A.C.J., and HALL and ALTENBERND, JJ., Concur.

Received By
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Appellate Division
Public Defenders Office

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Donna A. Provonsha, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 30th day of July, 1992.

Respectfully submitted,



JENNIFER Y. FOGLE
Assistant Public Defender
Florida Bar Number 628204
P. O. Box 9000 - Drawer PD
Bartow, FL 33830

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT
(813) 534-4200

JYF/mlm