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IN THE SUPREME COURT OF FLORIDA

CHARLES HOWARD GIPSON,

Petitioner,

v.

CASE NO. 80,367

2 DCA CASE NO. 91-01177

STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW OF THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL

BRIEF OF RESPONDENT ON JURISDICTION

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

KATHERINE V. BLANCO
Assistant Attorney General
Florida Bar No. 327832
Westwood Center
2002 N. Lois Avenue, Suite 700
Tampa, Florida 33607
(813) 873-4739

COUNSEL FOR RESPONDENT

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SUMMARY OF THE ARGUMENT

Where a party seeks discretionary review of a district court of appeal decision in this Court based on conflict, it must be shown that the decision to be reviewed expressly and directly conflicts with the decision of another district court of appeal or this Court on the same question of law.

In the instant case, the Second District Court issued a *per curium* affirmance without opinion, citing "Boomer v. State, 596 So.2d 730 (Fla. 2d DCA 1992); contra Wood v. State, 593 So.2d 557 (Fla. 5th DCA 1992)." Thus, the Petitioner invokes the discretionary jurisdiction of this Court on the basis of alleged conflict with Wood and the fact that Boomer is currently pending before this Honorable Court. (Florida Supreme court Case #79,638; oral argument scheduled February 5, 1992).

The trial court has the discretion to impose concurrent or consecutive sentences and statutorily mandated sentences take precedence. The petitioner in this case, as well as the defendants in Boomer and Wood, were subject to two separate kinds of sentences. Imposing the guidelines sentence to run consecutive to the statutory habitual offender sentences was not illegal.

ARGUMENT

ISSUE

WHETHER THE "CITATION PCA" OPINION OF THE SECOND DISTRICT COURT OF APPEAL IN GIPSON v. STATE, (Fla. 2d DCA, Case No. 91-01177, Opinion filed July 24, 1992) EXPRESSLY AND DIRECTLY CONFLICTS WITH WOOD v. STATE, 593 So.2d 557 (Fla. 5th DCA 1992)

The district courts of appeal were not created as intermediate appellate courts but rather as courts of final appellate jurisdiction. Ansin v. Thurston, 101 So.2d 808 (Fla. 1958). Thus, where a party seeks discretionary review of a district court of appeal decision in this Court based on conflict, it must be shown that the decision to be reviewed expressly and directly conflicts with the decision of another district court of appeal or this Court on the same question of law. Article V, §3(b)(3), *Florida Constitution*; Jenkins v. State, 385 So.2d 1356 (Fla. 1980); Rule 9.030(a)(2)(A)(iv), Florida Rules of Appellate Procedure.

In the instant case, the Second District Court issued a *per curiam* affirmance without opinion, citing "Boomer v. State, 596 So.2d 730 (Fla. 2d DCA 1992); contra Wood v. State, 593 So.2d 557 (Fla. 5th DCA 1992)." Thus, Petitioner invokes the discretionary jurisdiction of this Court on the basis of alleged conflict with Wood and the fact that Boomer is currently pending before this Honorable Court. (Florida Supreme Court Case #79,638; oral argument scheduled February 5, 1992).

The State recognizes that a district court's *per curium* opinion which cites a decision that is either pending review or has been reversed by the Supreme Court constitutes *prima facie* express conflict.[1] Jollie v. State, 405 So.2d 418 (Fla. 1981); Nelms v. State, 596 So.2d 441 (Fla. 1992).

The effect of the 1988 amendment to §775.084, Florida Statutes was to remove habitual offender sentences from the sentencing guidelines. Consequently, the habitual offender sentences at issue cannot be considered departures. In the instant Gipson case, as well as in Wood and Boomer, the defendants received non-guidelines habitual offender sentences and consecutive guidelines sentences. In all three cases, the defendants were clearly subject to two separate kinds of sentences.

In Wood, the opinion indicates that the Fifth District would not have found an improper sentence if the life sentence were to run prior to the habitual felony offender sentence. Furthermore, the court specifically notes that, upon remand, the trial court may consider the imposition of a departure sentence. Wood, 593 So.2d at 557-558.

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[1] A *per curium* decision, which cites a case pending before this court only on the jurisdictional question, does not constitute *prima facie* conflict. *See e.g.*, State v. Lofton, 534 So.2d 1148 (Fla. 1988); Harrison v. Hyster Co., 515 So.2d *1279* (Fla. 1987) ["Pending review" means that this court must have accepted the citation PCA for review. The fact that the citation PCA is pending on a notice to invoke discretionary jurisdiction, not yet acted upon by the court, does not give rise to jurisdiction. Padovano, *Florida Appellate Practice,* Volume *2*, 82.10 (1991)}

The trial court has the discretion to impose concurrent or consecutive sentences under §775.021(4)(a) and 8921.16, Florida Statutes (1989). Further, mandatory sentences take precedence. Rule 3.701(d)(9), Florida Rules of Criminal Procedure. The petitioner in this case, as well as the defendants in Boomer and Wood, were subject to two separate kinds of sentences. Imposing the guidelines sentence to run consecutive to the statutory habitual offender sentences was not illegal.

CONCLUSION

Based upon the foregoing facts, arguments and authorities, this Court should decline to exercise its discretionary jurisdiction in this case.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

PEGGY A. QUINCE
Assistant Attorney General
Florida Bar No. 0261041

KATHERINE V. BLANCO
Assistant Attorney General
Florida Bar No. 327832
2002 N. Lois Avenue, Suite 700
Tampa, Florida 33607-2366
(813) 874-4739

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. mail to Cecilia Traina, Assistant Public Defender, P. O. Box 9000, Drawer PD, Bartow, Florida this 29th day of September, 1992.

OF COUNSEL FOR RESPONDENT