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FILED
SID J. WHITE
SEP 8 1992
CLERK, SUPREME COURT.
By _____
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

THOMAS SHEPPARD , :

Petitioner ,

vs .

80 418
Case No. 80,265

STATE OF FLORIDA,

Respondent. :

_____ .

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

BRIEF OF PETITIONER ON JURISDICTION

JAMES MARION MOORMAN
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TENTH JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

Petitioner, THOMAS SHEPPARD, was the Respondent in the Second District Court of Appeal and the defendant in the trial court. The State of Florida was the Petitioner in a petition for writ of certiorari to the Second District Court of Appeal. The appendix to this brief contains a copy of the decision rendered August 21, 1992.

STATEMENT OF THE CASE AND FACTS

On April 29, 1991, the State filed an information charging Mr. Sheppard with robbery in violation of section 812.13, Florida Statutes (1989), occurring on April 6, 1991. In November 1991 Mr. Sheppard had a jury trial; and on November 14, 1991, Mr. Sheppard was found guilty as charged. At the time the trial court should have sentenced Mr. Sheppard, Mr. Sheppard attacked the constitutionality of the amendments to the habitual offender statute. The trial court agreed with Mr. Sheppard's argument and held the amendments to the statute unconstitutional. Because the State needed out-of-state convictions for which to habitualize Mr. Sheppard, the trial court's ruling prohibited imposing a habitual offender sentence. Instead of sentencing Mr. Sheppard to a guidelines sentence, however, the trial court stayed sentencing Mr. Sheppard while the State appealed the trial court's order finding the statute unconstitutional via a petition for writ of certiorari.

On August 21, 1992, the Second District Court of Appeal issued an opinion granting the State's petition by finding the statute amendments constitutional. In so holding the Second District Court of Appeal recognized it was in conflict with Johnson v. State, 589 So.2d 1370 (Fla. 1st DCA 1991), rev. granted, State v. Johnson, Nos. 79,150 and 79,204 (Jan. 14, 1992).

SUMMARY OF THE ARGUMENT

Because the Second District Court of Appeal's opinion in this case conflicts with the opinion set forth by the First District Court of Appeal on the same exact issue, the opinion declares valid a state statute, and this issue is presently pending in this Court, this Court should accept jurisdiction over this case.

ARGUMENT

ISSUE I

WHETHER THE DECISION IN STATE V. SHEPPARD, CASE NO. 92-0970 (FLA. 2D DCA AUG. 21, 1992), IS IN CONFLICT WITH ANOTHER DISTRICT COURT OF APPEAL AS TO THE CONSTITUTIONALITY OF THE AMENDMENTS TO THE HABITUAL OFFENDER STATUTE?

The issue of conflict is very clear in this case. The First District Court of Appeal in Johnson has declared the amendments to the habitual offender statute unconstitutional and the Second District Court of Appeal in Mr. Sheppard's opinion has declared the same amendments constitutional. Although the Second District Court of Appeal did not use the magic word of "certifying" direct conflict (which would have done away with the necessity of a jurisdictional brief), it did "recognize" their conflict with Johnson. Thus, conflict does exist; and this Court has jurisdiction to take this case under Florida Rule of Appellate Procedure 9.030(2)(A)(iv).

Because the Second District Court of Appeal's opinion expressly declares valid a state statute, this Court also can accept jurisdiction of this case based on Florida Rule of Appellate Procedure 9.030(2)(A)(i).

Last but not least, because Johnson is presently pending before this Court on the issue of the constitutionality of the amendments to the habitual offender statute, this Court should

accept Mr. Sheppard's case. See Jollie v. State, 405 So.2d 418
(Fla. 1981).

CONCLUSION

In light of the foregoing reasons, argument, and authorities, Petitioner has demonstrated that conflict does exist with the instant decision and the First District Court of Appeal so as to invoke discretionary review. Petitioner has also demonstrated that this Court can accept jurisdiction due to the fact that the instant opinion declares valid a state statute and that the issue raised by the instant opinion is already pending before this Court.

APPENDIX

PAGE NO.

1. Second District Court of Appeal opinion
rendered August 21, 1992.

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

IN THE DISTRICT COURT OF APPEAL OF FLORIDA SECOND DISTRICT

STATE OF FLORIDA, Petitioner, v. THOMAS SHEPPARD, Respondent.

CASE NO. 92-00970

Opinion filed August 21, 1992.

Petition for Writ of Certiorari to the Circuit Court for Charlotte County; Darryl C. Casanueva, Judge.

Robert A. Butterworth, Attorney General, Tallahassee, and William I. Munsey, Jr., Assistant Attorney General, Tampa, for Petitioner.

James Marion Moorman, Public Defender, and Deborah R. Brueckheimer, Assistant Public Defender, Bartow, for Respondent.

AUG 21 1992

PER CURIAM.

The state has filed a petition for writ of certiorari to review the circuit court's order finding Chapter 89-280, Laws of Florida, amending section 775.084, Florida Statutes, unconstitutional because it violates the single subject rule of

AI

CERTIFICATE OF SERVICE

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

Respectfully submitted,

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