IN THE SUPREME COURT OF FLORIDA

CASE NO. 83,845

SABRINA RAHMINGS,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent,

ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF RESPONDENT ON JURISDICTION

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

PAULETTE R. TAYLOR
Assistant Attorney General
Fla. Bar No. 0992348
Department of Legal Affairs
401 N. W. 2nd Avenue, Suite N921
P.O. Box 013241
Miami, Florida 33101
(305) 377-5441

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INTRODUCTION

Petitioner, Sabrina Rahmings, was the Appellant below in the Third District Court of Appeal and Defendant in the trial court. Respondent, the State of Florida, was the Appellee in the court below and the prosecution in the trial court. The parties will be referred to as they stand before this Honorable Court.

STATEMENT OF THE CASE AND FACTS

This is a petition for discretionary review of a decision of the Third District Court of Appeal which affirmed, in part, Petitioner's upward departure sentence. Rahmings v. State, 19 Fla. L. Weekly D1038 (Fla. 3rd DCA May 10, 1994). (App. A).

A jury found Petitioner guilty of two counts of armed robbery, one count of aggravated battery, and one count of burglary. Id. Petitioner requested a furlough to tend to some personal matters prior to sentencing. Id. The trial judge granted the furlough in exchange for Petitioner's agreement to a 40-year sentence which would be mitigated upon Petitioner's return on the agreed upon date. Petitioner testified that she understood the agreement and would abide by its terms. Id. Petitioner was released and returned as agreed. Petitioner subsequently requested, and was granted, two more furloughs under the same conditions as the first agreement for furlough. Petitioner did not return after the third furlough. The court sentenced Petitioner to the agreed 40 year sentence. The court indicated, as its reason for imposing the upward departure sentence, that Petitioner "waived guidelines to get furlough - failed to turn herself in." Id. Appellant appealed to the Third District Court of Appeal.

On appeal Petitioner argued that under Williams v. State, 500 So. 2d 501 (Fla. 1986), an upward departure sentence cannot

be based on a defendant's failure to appear for sentencing, even if the failure to appear resulted in the breach of a furlough agreement. Petitioner attempted to distinguish Quarterman v. State, 527 So. 2d 1380 (Fla. 1988), which affirmed an upward departure sentence based on a defendant's breach of a furlough agreement which was negotiated as part of a plea agreement. Petitioner argued that Quarterman applies only to furlough agreements which are contained in plea agreements.

In rejecting Petitioner's argument, the appellate court opined that the rationale of Quarterman focused on the knowing and voluntary nature of the agreement. The court reasoned therefore, that, because the furlough agreement in the instant case was knowingly and voluntarily entered into, under Quarterman, the agreement is enforceable. The court concluded:

> [W]e read Quarterman as approving a departure sentence based upon the failure to appear, when the sentence is the result of a knowing and voluntary agreement entered into by the defendant and the court. Whether or not one of the elements of such an agreement is a guilty plea is not dispositive of the agreement's enforceability.

Rahmings, 19 Fla. L. Weekly at 1037.

This petition for discretionary review followed.

POINT ON APPEAL

WHETHER THE DECISION BELOW EXPRESSLY AND DIRECTLY CONFLICTS WITH THIS COURT'S DECISION IN WILLIAMS V. STATE, 500 SO. 2D 501 (FLA. 1986), RECEDED FROM IN QUARTERMAN V. STATE, 527 SO. 2D 1380 (FLA. 1988).

SUMMARY OF THE ARGUMENT

The decision below does not "expressly and directly" conflict with the decision of this Court in Williams or Quarterman. Thus, this Court may not exercise discretionary jurisdiction to review the decision below.

ARGUMENT

THE DECISION BELOW DOES NOT EXPRESSLY AND DIRECTLY CONFLICTS WITH THIS COURT'S DECISION IN WILLIAMS V. STATE, 500 SO. 2D 501 (FLA. 1986), RECEDED FROM IN QUARTERMAN V. STATE, 527 SO. 2D 1380 (FLA. 1988).

"Conflicts between decisions must be express and direct, i.e., it must appear within the four corners of the majority decision." Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986). Petitioner alleges that he is entitled to discretionary jurisdiction because the decision below conflicts with Williams v. State, 500 So. 2d 501 (Fla. 1986), receded from in Quarterman v. State, 527 So. 2d 1380 (Fla. 1988). The decision below does not conflict with Williams or Quarterman

The defendant in Williams entered into a plea agreement. At the plea hearing the court informed the defendant that he would be sentenced under the guidelines if, inter alia, he returned for sentencing on the specified date. Williams, 500 So. 2d at 501-502. The defendant agreed to this condition. Id. At 502. The defendant did not return for sentencing and the court imposed an upward departure sentence. Id. The court indicated defendant's failure to return for sentencing as its reason for imposing the departure sentence. Id. The issue in that case was "whether a defendant's failure to appear for sentencing constitutes a clear and convincing reason for departure from the guidelines." Id.

In addressing that issue, this Court held that "departing from the guidelines because a defendant has failed to appear is not permissible as it does not constitute a clear and convincing reason for departure". Id. This Court held further that, "a defendant's acquiescence cannot confer authority on the court for such departure". Id.

In reaching this conclusion this Court noted that failure to appear for sentencing, in a criminal case, is itself a criminal offense, with a statutory maximum penalty of five years in prison. Id. Thus, this Court reasoned, to allow a departure sentence solely on a defendant's failure to appear for sentencing would circumvent the statute and maximum penalty because it would permit the trial court to sentence the defendant for an offense for which the defendant had not been convicted, and it would permit the trial court to impose a sentence in excess of the statutory maximum for that offense. Id. at 502-503.

In Quarterman, this Court approved an upward departure sentence which was based on a defendant's breach of a furlough agreement. In that case, the defendant requested the furlough prior to entering his guilty plea. Quarterman, 527 So. 2d at 1381. The guilty plea was tendered with the understanding that the defendant would show up for sentencing on the agreed to date. Id. The court ascertained that the defendant understood the terms and agreed to them. Id. The defendant failed to show up as agreed, and the court imposed an upward departure sentence. Id.

The court indicated that the departure sentence was based, inter alia, on the defendant's agreement to the sentence if he failed to appear. Id.

In approving that departure sentence, this Court found that the sentence was based, in part, on the plea agreement itself, and that the conditions were accepted as an "integral part of the bargain itself." Id. at 1382. This decision expressly receded from Williams, to the extent that under Williams, a defendant could not agree to a departure sentence in the context of a furlough agreement. Id. This Court recognized that Williams is limited to the situation where the sole basis for the departure sentence is that the defendant "failed to appear for sentencing". Id.

In the instant case, the appellate court, relying on Quarterman held that the furlough agrement in this case was enforceable because it was a mutual agreement between Petitioner and the court, and it was knowingly and voluntarily entered into. In reaching this conclusion, the court reasoned that because Quarterman focused on the knowing and voluntary nature of the agreement, in this respect, the furlough agreement in this case is indistinguishable from the plea agreement in Quarterman, and distinguishable from cases such as Logue v. State, 547 So. 2d 351 (Fla. 3d DCA 1989), and Williams, where the court imposed the sentence and the defendant acquiesced. Rahmings, 19 Fla. L. Weekly D1039.

This decision does not conflict with Williams and is in harmony with Quarterman. Although Williams involved a plea agreement, in that case, there was no "agreement" between that defendant and the court regarding the defendant's failure to appear for sentencing. That court imposed that condition on the defendant as a prerequisite to a guidelines sentence. In contrast, the defendant in Quarterman requested the furlough and expressly agreed to the terms offered by the court in granting the furlough. Thus, the agreement was mutual knowing and voluntary.

Unlike the agreement in Williams, the agreement in the instant case was a mutual agreement. Like the defendant in Quarterman, petitioner requested the furlough and expressly agreed to waive sentencing under the guidelines as a penalty for breaching the agreement. Petitioner understood this condition prior to entering into the agreement, and voluntarily accepted it. The furlough agreement was therefore mutual, knowing and voluntary; thus, distinguishable from Williams, and indistinguishable from the agreement in Quarterman.

Consequently, the appellate court's holding below, that the instant furlough agreement is enforceable, does not conflict with Williams, and is in harmony with Quarterman.

Thus, because the decision below does not conflict with Williams or Quarterman, no basis exists for the exercise of discretionary jurisdiction by this Court.

CONCLUSION

Based on the foregoing argument and cited authorities, Respondent respectfully requests that this Court deny the petition.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

P.R. Taylor

PAULETTE R. TAYLOR
Assistant Attorney General
Fla. Bar No. 0992348
Department of Legal Affairs
P.O. Box 013241
Miami, Florida 33101
(305) 377-5441

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing **BRIEF OF RESPONDENT ON JURISDICTION** was furnished by mail to LOUIS CAMPBELL, Assistant Public Defender, 1320 N.W. 14th Street, Miami, Florida 33125 on this 29th day of June 1994.

P.R. Taylor

PAULETTE R. TAYLOR
Assistant Attorney General

/gp

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

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JANUARY TERM, 1994

SABRINA RAHMINGS,	**	
Appellant,	**	
vs.	**	CASE NO. 93-983
THE STATE OF FLORIDA,	**	
Appellee.	**	

Opinion filed May 10, 1994.

An Appeal from the Circuit Court of Dade County, Robbie M. Barr, Judge.

Bennett H. Brummer, Public Defender, and Louis Campbell, Assistant Public Defender, for appellant.

Robert A. Butterworth, Attorney General, and Paulette R. Taylor, Assistant Attorney General, for appellee.

Before SCHWARTZ, C.J., and JORGENSON and LEVY, JJ.

LEVY, Judge.

Sabrina Rahmings, the defendant, appeals her upward departure sentence, which was imposed after she breached a presentencing furlough agreement. We affirm in part, reverse in part, and remand.

APP. A.

After a jury trial, the defendant was convicted of two counts of armed robbery, one count of aggravated battery, and one count of burglary. The defendant sought a furlough prior to sentencing in order to tend to some personal matters. The trial judge agreed to furlough the defendant, but only after imposing a 40-year sentence which would be mitigated upon the defendant's return on the agreed upon date. The defendant took the stand and testified that she understood the agreement, and would appear as required. The defendant was released, and subsequently returned as required. A second furlough was later granted on the same conditions, and the defendant again returned as required. Upon her return from the second furlough, the defendant requested an extension of the furlough, which was also granted on the same conditions.

The defendant failed to return as required from this extension of her second furlough. She was not present in the courtroom when her case was called, nor when it was again called at the end of the trial court's calendar. After a search of the ladies' room and the area adjacent to the courtroom failed to locate her, she was sentenced to 40 years pursuant to the agreement. Since 40 years constituted an upward departure sentence, the written reason for departure given on her scoresheet was "waived guidelines to get furlough - failed to turn herself in." The defendant is currently incarcerated under this sentence, and now appeals.

In Quarterman v. State, 527 So. 2d 1380 (Fla. 1988), the Supreme Court approved using a defendant's failure to appear after an agreed-upon furlough as a justification for an upward departure

sentence. Quarterman, 527 So. 2d at 1382. There is no question that the defendant in this case knowingly and voluntarily entered into the furlough agreement with the court. Having clearly breached the agreement, the trial court properly sentenced the defendant pursuant to its terms. See Harris v. State, 608 So. 2d 898 (Fla. 3d DCA 1992).

The defendant, however, attempts to distinguish Quarterman, and contends that her sentence must be reversed based upon Williams v. State, 500 So. 2d 501 (Fla. 1986), and our holding in Harris v. State, 524 So. 2d 1104 (Fla. 3d DCA 1988), which relied upon Williams. Williams and Harris each stood for the proposition that a defendant's failure to appear in court could not itself justify an upward departure sentence, even if the failure to appear constituted the breach of a furlough agreement. Williams, 500 So. 2d at 503; Harris, 524 So. 2d at 1104. Williams, however, was expressly receded from in Quarterman. Quarterman, 527 So. 2d at 1382. We consider this an implicit overruling of our Harris (524 So. 2d 1104) decision.

In attempting to distinguish Quarterman, the defendant points out that the furlough agreement in Quarterman had been entered as part of a plea bargain in that case. Hence, the defendant contends, Quarterman receded from Williams only as to those situations where a furlough agreement is part of a negotiated plea bargain. Therefore, since she was convicted after a jury trial, and not as the result of a plea bargain, Quarterman is inapplicable and Williams controls. We disagree.

The rationale of Quarterman focused not on the fact that a guilty plea had been entered, but on the existence of an agreement between the defendant and the court. As pointed out in Quarterman, the conditions of the furlough "were accepted as 'an integral part of the bargain itself.'" Quarterman, 527 So. 2d at 1382 (quoting Williams, 506 So. 2d at 51). Clearly, it was the knowing and voluntary nature of the agreement which justified its use as a reason for the departure sentence. See also White v. State, 531 So. 2d 711, 714 (Fla. 1988)(where defendant voluntarily pleads guilty, and agreed-to sentencing range constitutes an upward departure, sentence was properly imposed); Smith v. State, 529 So. 2d 1106, 1107 (Fla. 1988)(approving upward departure sentence based upon plea bargain, where bargain had been knowingly and voluntarily entered after consultation with counsel); Jacobs v. State, 522 So. 2d 540, 541 (Fla. 3d DCA)(upward departure sentence proper as part of negotiated plea), rev. denied, 531 So. 2d 1353 (Fla. 1988). Consequently, we read Quarterman as approving a departure sentence based upon the failure to appear, when the sentence is the result of a knowing and voluntary agreement entered into by the defendant and the court. Whether or not one of the elements of such an agreement is a guilty plea is not dispositive of the agreement's enforceability.

Were we to only enforce furlough agreements when entered as part of a plea bargain, trial courts would rarely, if ever, grant a furlough to a defendant who had been convicted by a jury. In effect, we would be penalizing defendants who had exercised their right to a jury trial, by severely curtailing their opportunity

for a presentencing furlough. Additionally, we would be creating an incentive for defendants to forego jury trials, a result we deem improper.

Today's ruling does not conflict with our holding in Logue v. State, 547 So. 2d 351 (Fla. 3d DCA 1989). In Logue, we reversed a sentence entered after a defendant failed to return from a furlough. The opinion recited that "the trial judge told the defendant that he would be sentenced to fifty-six years, which would be mitigated to twelve years if he returned for sentencing after a furlough." Logue, 547 So. 2d at 352 (emphasis added). Since the sentence in Logue was given at the trial judge's direction, and not as part of a knowing and voluntary agreement by the defendant, it was properly reversed, and is consistent with today's ruling.

Although we approve enforcement of the furlough agreement in this case, resentencing is nevertheless necessary because the defendant improperly received a general sentence, instead of being sentenced individually as to each count. See Johnson v. State, 624 So. 2d 807 (Fla. 3d DCA 1993). In resentencing the defendant in accordance with the breached furlough agreement, the trial court should be cognizant of the statutory maximums for each of the offenses. See §§ 784.045(2), 775.082(3)(c), Fla. Stat. (1991).

Affirmed in part, reversed in part, and remanded.