IN THE SUPREME COURT OF FLORIDA

CASE NO. 84,832

GEORGE SINKS,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

****

ON APPEAL FROM THE CIRCUIT COURT OF APPEAL
OF THE STATE OF FLORIDA, FOURTH DISTRICT

****

RESPONDENT'S BRIEF ON JURISDICTION

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

MELYNDA L. MELEAR
Assistant Attorney General
Florida Bar No. 765570
1655 Palm Beach Lakes Blvd.
Third Floor
West Palm Beach, Florida 33401
Telephone: (407) 688-7759

Counsel for Appellee/Respondent

TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER AUTHORITIES

PRELIMINARY STATEMENT

Respondent was the Appellee in the District Court of Appeal and prosecution in the trial court. Petitioner was the Appellant in the appeal proceedings and the defendant at trial.

The following symbols will be used:

"A" Appendix

STATEMENT OF THE CASE AND FACTS

The State adopts the majority opinion of the Fourth District court of Appeal as its Statement of the Case and Facts (A. 1-3).

SUMMARY OF ARGUMENT

The rule of law applied by the District Court below, and the facts of the instant case, do not expressly and directly conflict with the rules of law and/or facts of the two cases cited by Petitioner. As such, no basis for conflict certiorari jurisdiction exits. Nor is there any basis for jurisdiction under Jollie v. State, 405 So. 2d 418 (Fla. 1981). The Fourth District did not rely on Gilyard v. State, 636 So. 2d 134 (Fla. 2d DCA 1994), review pending No. 83,619, as controlling authority.

ARGUMENT

THE DECISION BELOW DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH THE DECISIONS CITED BY PETITIONER, AND DOES NOT RELY ON A CASE PENDING REVIEW AS CONTROLLING AUTHORITY.

Petitioner contends that the Fourth District's decision below expressly and directly conflicts with the rule of law announced in two other cases, one by the Fifth District Court of Appeal and one by this Court. However, consideration of this Court's past pronouncements, coupled with an objective reading of the decision involved, will confirm that no conflict, and hence no basis for jurisdiction, exists.

In order for two court decisions to be in express and direct conflict for the purpose of invoking this Court's discretionary jurisdiction under Rule 9.030(a)(A)(iv), Fla.R.App.P., the decisions should speak to the same point of law, in factual contexts of sufficient similarity to permit the inference that the result in each case would have been different had the deciding court employed the reasoning of mandatory authority. See generally Mancini v. State, 312 So. 2d 732 (Fla. 1975). In Jenkins v. State, 385 So. 2d 1356, 1359 (Fla. 1980), this Court defined the limited parameters of its conflict review as follows:

> This Court may only review a decision of a district court of appeal that expressly and directly conflicts with a decision of another district court of appeal or the Supreme Court on the same question of law. The dictionary definitions of the terms 'express' include "to represent in words; to give expression to.' "Expressly" is defined: 'in an express manner.' New International Dictionary (1961 ed. unabr.)

See also Reaves v. State, 485 So. 2d 829 (Fla. 1986); see generally Ansin v. Thurston, 101 So. 2d 808 (Fla. 1958); Withlacoochee River Electronic Co-op v. Tampa Electric Co., 158 So. 2d 136 (Fla. 1963). This Court has in general granted conflict certiorari review over decisions in which the conflict has been acknowledged in the opinion of the district court. See, e.g., Barnes v. State, 426 So. 2d 1274 (Fla. 1st DCA 1982), reversed and remanded, State v. Barnes, 441 So. 2d 626 (Fla. 1983). While the district court cannot thoroughly misapply a precedent of this Court and then escape conflict certiorari review of its decision, see Gibson v. Avis Rent-a-Car System, 386 So. 2d 520 (Fla. 1980) and Acensio v. State, 497 So. 2d 640 (Fla. 1986), that is not what happened here. "Obviously two cases cannot be in conflict if they can be validly distinguished." Morningstar v. State, 405 So. 2d 778, 783 (Fla. 4th DCA 1981), Anstead J. concurring, affirmed, 428 So. 2d 220 (Fla. 1982).

In Knepfer v. State, 635 So. 2d 160 (Fla. 5th DCA 1994), the Fifth District did not specifically address the point made by the Fourth District, that combination sentences are not permitted where the guidelines call for sentences in the disjunctive. Hence, the Fifth District never rejected the Fourth District's position in this case. More than likely, the parties never raised the instant issue, for sentencing in Knepfer was pursuant to an agreement between the Appellant and the State.

Not only is the case before this court not in conflict with State v. Davis, 630 So. 2d 1059 (Fla. 1994), but the Fourth District actually relied on the language of State v. VanKooten,

522 So. 2d 830, 830-31 (Fla. 1988) as quoted in Davis, 630 So. 2d at 1059, "that when the presumptive guideline sentence directs community control or incarceration, the imposition of both represents a departure from the sentencing guidelines, requiring proper written reasons for departure" (A. 2)(emphasis supplied in instant opinion). The Fourth District then determined that the prohibition reaffirmed in Davis does not apply to the facts of this case (A. 2-3).

The facts of the case herein are distinguishable from those in Davis. In Davis, the permitted guidelines range was any nonstate prison sanction to three and a half years imprisonment. Here, though, the permitted range allowed only a choice of years of incarceration (A. 3); any nonstate prison sanction was not an option. In Davis, then, the Court was presented with a guidelines range calling for disjunctive sentences. 630 So. 2d at 1060 (any non-state prison sanction includes probation, county jail, or any nonincarcerative disposition). On the other hand, in this case the guidelines allowed only one type of disposition, incarceration.

Additionally, in Davis, the certified question before this Court was whether a combination sentence is impermissible even if it does not exceed the statutory maximum. This Court was not asked to decide the issue considered by the Fourth District in the instant case. Thus Davis, like Knepfer, cannot reasonably be said to be in direct and express conflict with the instant opinion.

The State disagrees that this Court has jurisdiction under Jollie v. State, 405 So. 2d 418 (Fla. 1981) to review this case. In Jollie, this Court held that it had jurisdiction to review an opinion which "cites as controlling a case that is pending review...." The Fourth District did not cite Gilyard v. State, 636 So. 2d 134 (Fla. 2d DCA 1994), review pending, No. 83, 619, as "controlling" authority. Rather, it relied on language in State v. Davis, 630 So. 2d at 1059-60 and State v. VanKooten, 527 So. 2d at 830-31 (A. 2).

The Fourth District cited Gilyard only for additional support (A. 3) That fact is clear from the Court's use of the introductory signal "See also." The Bluebook, a Uniform System of Citation § 1.2(a)(15th Ed.1991) explains:

> See also cited authority court's rules additional source material that supports the proposition. "See also" is commonly used to cite an authority supporting a proposition when authorities that state or directly support the proposition already have been cited or discussed...

(emphasis in book).

Not one of the Jollie cases which this Court has accepted and has specifically cited to Jollie, has a district court used the signal "See also" before referencing the case pending review or reversed by this Court. see, e.g., Williams v. State, 639 So. 2d 614 (Fla. 1994) ("on authority of"); Steele v. State, 626 So. 2d 653 (Fla. 1993) ("affirmed" followed by citation); Branch v. State, 626 So. 2d 653 (Fla. 1993) ("on authority of"); State v. Rhodes, 623 So. 2d 470 (Fla. 1993)("on authority of "); Mitchell v. State, 620 So. 2d 1009 (Fla.

1993)("affirmed" followed by citation); Dowling v. State, 605 So. 2d 465 (Fla. 1992)("affirmed" followed by citation); State v. Parker, 601 So. 2d 1193 (Fla. 1992) ("affirmed" followed by citation); Taylor v. State, 601 So. 2d 540 (Fla. 1992)("on the authority of"); Nelms v. State, 596 So. 2d 441 (Fla. 1992)("on the authority of"); Jackson v. State, 586 So. 2d 1061, 1062 (Fla. 1991)("on the authority of"); Stupak v. Winter Park Leasing, Inc., 585 So. 2d 283 (Fla. 1991)("on the authority of"); Hamman v. Worling, 549 So. 2d 188 (Fla. 1989)("on the authority of"); Childers v. Hoffman LaRouche, Inc., 540 So. 2d 102 (Fla. 1989)("affirmed" followed by citation); State v. Lofton, 534 So. 2d 1148 (Fla. 1988)("see" followed by citation);[1] McDaniel v. State, 515 So. 2d 985 (Fla. 1987)("we agree" followed by reason based on citation); State v. Brown, 475 So. 2d 1 (Fla. 1985)("for reason set forth in substantially identical case"); Ramsey v. State, 474 So. 2d 1193 (Fla. 1985)("on the authority of"); Jollie ("see" followed by citation).

---

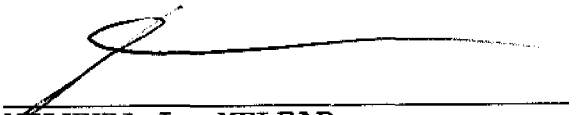
[1] The Bluebook, supra, at § 1.2(a), explains that "See" means "clearly supports" and is used instead of no signal when the proposition is not directly stated, but obviously flows from the cited authority.

CONCLUSION

Since no conflict between the decision at bar and other appellate decisions or any other basis of jurisdiction, has been established, Respondent asks this Court to decline to accept jurisdiction in this case.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

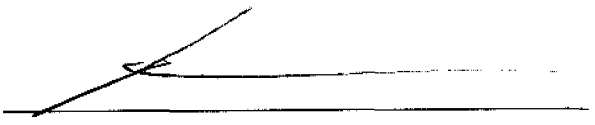


MELYNDA L. MELEAR
Assistant Attorney General
Florida Bar No. 765570
1655 Palm Beach Lakes Blvd.
Third Floor
West Palm Beach, Florida 33401
(407) 688-7759

Counsel for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing "Respondent's Brief on Jurisdiction" has been furnished by courier to: **MARGARET GOOD EARNEST**, Assistant Public Defender, 421 3rd Street, West Palm Beach, Florida 33401 this 28th day of December, 1994.



Of Counsel

/br

APPENDIX

93-1611

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT
JULY TERM 1994

GEORGE SINKS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 93-3388.

L.T. CASE NO. 92-1112.

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

Opinion filed November 2, 1994

Appeal from the Circuit Court for Indian River County; Paul B. Kanarek, Judge.

Richard L. Jorandby, Public Defender, and Debra Moses Stephens, Assistant Public Defender, West Palm Beach, for appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Sarah B. Mayer, Assistant Attorney General, West Palm Beach, for appellee.

ON MOTION FOR REHEARING

PER CURIAM.

Having affirmed the trial court's revocation of community control and the sentence it imposed thereafter, notwithstanding both parties' contentions that we may have overlooked their supplemental briefs in which they agree we are bound by State v. Davis, 630 So. 2d 1059 (Fla. 1994), and State v. VanKooten, 522 So. 2d 830 (Fla. 1988), we deny appellant's motion for rehearing.

Appellant was originally convicted of a lewd and lascivious act upon a child and sentenced to two years community control followed by ten years probation.

The trial court concluded, and we agreed by our Per Curiam Affirmed, that appellant was in willful violation of his community control. In doing so, the trial court noted that it believed appellant was a danger to other young boys in the community, and explained to appellant that the original sentence imposed was designed to provide "the most amount of supervision to make sure that this wouldn't happen again. But as soon as you got out of jail, you decided you didn't, at least until you decided you got your life in order, weren't going to be under any supervision and that's exactly what I wanted to try and stop from happening by my [original community control] sentence."

Appellant's community control and probation were revoked and appellant was sentenced to four years imprisonment to be followed by two years community control and eight years probation. The parties contend that appellant was improperly sentenced to both incarceration and community control. We disagree.

"[W]hen the presumptive guideline sentence directs community control or incarceration, the imposition of both represents a departure from the sentencing guidelines, requiring proper written reasons for the departure." VanKooten, 522 So. 2d at 830-31; accord Davis, 630 So. 2d at 1059-60. We read these cases, however, to apply only where the guidelines sentencing range

presents mutually exclusive disjunctive sentencing alternatives. See also Gilyard v. State, 636 So. 2d 134 (Fla. 2d DCA 1994).

In the instant case, appellant's sentence was imposed after revocation of his community control, which permitted the trial judge to sentence appellant within the next higher cell without a written reason for departure. Florida Rule of Criminal Procedure 3.701(d)(14) provides:

> (14) Sentences imposed after revocation of probation or community control must be in accordance with the guidelines. The sentence imposed after revocation of probation or community control may be included within the original cell (guidelines range) or may be increased to the next higher cell (guidelines range) without requiring a reason for departure.

In this case, the next higher cell provides for a recommended sentencing range of three and one-half to four and one-half years incarceration and a permitted sentencing range of two and one-half to five and one-half years incarceration. This next highest cell does not involve "disjunctive sentences." Accordingly, the trial court did not err in sentencing appellant to both incarceration and community control without a written reason for departure.

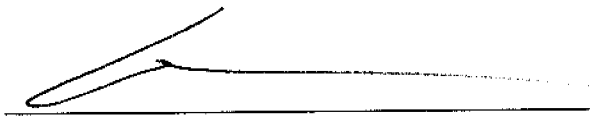
GLICKSTEIN and GUNTHER, JJ., concur.
STONE, J., dissents with opinion.

STONE, J., dissenting.

Acknowledging some uncertainty as to the limits of the VanKooten reasoning as applied in State v. Davis, 630 So. 2d 1059 (Fla. 1994), I nevertheless conclude that Davis applies to this sentence. I would therefore grant rehearing, reverse the sentence, and remand for resentencing with leave to consider whether there are grounds for departure.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing "Appendix to Respondent's Brief on Jurisdiction" has been forwarded by courier to: **MARGARET GOOD EARNEST,** Assistant Public Defender, 421 3rd Street, West Palm Beach, Florida 33401 this **28th** day of December, 1994.



Of Counsel

/pas