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MAY 24 1995
CLERK, SUPREME COURT
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IN THE SUPREME COURT OF FLORIDA

KIT GOINS,

Petitioner,

v. CASE NO. 85,651

STATE OF FLORIDA,

Respondent.

______________________________/

RESPONDENT'S BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

Petitioner, Kit Goins, defendant and appellant below, will be referred to herein as "Petitioner." Respondent, the State of Florida, will be referred to herein as "the State." References to the opinion of the First District's opinion below, which is contained in the appendix attached hereto, will be by the symbol "A" followed by the appropriate page number(s).

JURISDICTIONAL STATEMENT

Article V. Section 3(b)(3) of the Florida Constitution provides, in pertinent part, as follows:

> The Supreme Court . . . [m]ay review any decision of a district court of appeal . . . that expressly and directly conflicts with a decision of another district court of appeal . . . on the same question of law.

The conflict between decisions "must appear within the four corners of the majority decision," and "[n]either a dissenting opinion nor the record itself can be used to establish jurisdiction." Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986). Further, it is the "conflict of decisions, not conflict of opinions or reasons that supplies jurisdiction for review by certiorari." Jenkins v. State, 385 So. 2d 1356, 1359 (Fla. 1980).

STATEMENT OF THE CASE AND FACTS

The State is in substantial agreement with the petitioner's version of the case and facts.

SUMMARY OF ARGUMENT

Due to the brevity of the argument a summary is not included.

ARGUMENT

ISSUE

DOES THE DECISION BELOW EXPRESSLY AND DIRECTLY CONFLICT WITH THE DECISIONS OF THE SECOND DISTRICT COURT IN PERRY V. STATE, 510 So. 2d 1083 (Fla. 2d DCA 1987); RODRIGUEZ V. STATE, 610 So. 2d 476 (Fla. 2d DCA 1992); and, KIEFER V. STATE, 295 So. 2d 688 (Fla. 2d DCA 1974).

The First District's holding that "[w]hen the trial court does not participate in the plea negotiations or promise the defendant that it will impose the recommended sentence, it is under no duty to provide the defendant with a clear opportunity to withdraw his or her plea at sentencing when it decides to impose a sentence greater than that recommended in the plea agreement" does not expressly or directly conflict with the cited decisions of the Second District. The Second District's decision in Perry v. State, 510 So. 2d 1083 (Fla. 2d DCA 1987) is based upon the Second District's decision in Kiefer v. State, 295 So. 2d 688 (Fla. 2d DCA 1974). The decision in Kiefer is based upon the decision and language of Barker v. State, 259 So. 2d 200 (Fla. 2d DCA 1972). Kiefer, at 689. In Barker, the Second District held that

> if a trial judge concurs in a plea bargain, or enters into a plea discussion which contemplates sentence or charge concessions and which culminates in a guilty plea as a result thereof, but he later decides that final disposition should not include such concessions as may be contemplated in the bargain or discussion, it is his affirmative duty to so advise the defendant before sentencing and to call upon the defendant to either affirm or withdraw his plea entered as a result of the contemplated concessions.

Id. at 200 (emphasis in original).[1]

Hence, the basis of the decision in Kiefer, and thus Perry, is that when a trial court has had a role in the plea negotiations and later determines not to accept the agreement it must take affirmative action to allow the defendant to withdraw the plea. The facts of the three cases cited by the petitioner support this holding:

> It was understood that there was to be a pre-sentence investigation, and if as a result the court concluded that probation could not be granted, appellant would be permitted to withdraw his plea.

Kiefer, 295 So. 2d at 689.

> At the initial sentencing hearing the trial court, the assistant state attorney, and the appellant's counsel agreed that the appellant would receive two years' incarceration in exchange for his plea of nolo contendere.

Perry, 510 So. 2d at 1084.

> At the plea hearing, all parties and the trial court understood that Mr. Rodriguez's plea was conditioned upon a guidelines sentence of not more than 22 years' imprisonment.

Rodriguez, 610 So. 2d at 477.[2]

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[1] In Kiefer, the Second district also cites to Brown v. State, 245 So. 2d 41 (Fla. 1971)(a case where the defendant was mislead into pleading guilty by misrepresentations made by his counsel as to counsel's understanding of the trial court's intended sentence), and Sanders v. State, 268 So. 2d 553 (Fla. 2d DCA 1972)(a case in which the trial judge was involved in the plea negotiations and indicated he would impose a lenient sentence of five years' probation if the defendant pled guilty to manslaughter).

Because these cases are all grounded on the trial court's involvement in the plea negotiations there is no conflict with the First District's decision that when the trial court has not taken part in the plea negotiations or promised to impose the recommended sentence there is no duty to provide the defendant a clear opportunity to withdraw the plea.

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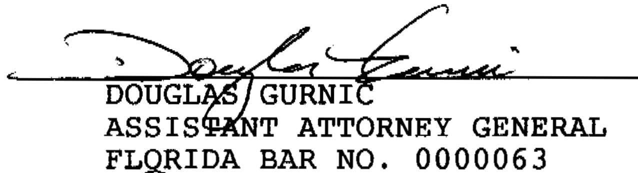
[2] In its decision in Rodriguez, the Second district cited to Perry, supra, and Dunkel v. State, 432 So. 2d 201 (Fla. 2d DCA 1983)(a case where the defendant pled guilty based upon the trial court's advising him to anticipate a maximum possible sentence of one year in county jail).

CONCLUSION

Review should be denied.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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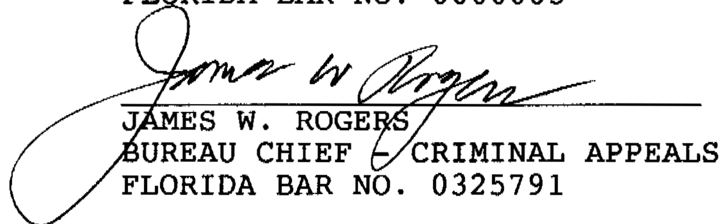

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to MARK EVAN FREDERICK, counsel for petitioner, 737 Highway 98 East, Suite 1, P.O. Box 385, Destin, Florida 32540, this 24th day of May, 1995.

DOUGLAS GURNIC
Assistant Attorney General

IN THE SUPREME COURT OF FLORIDA

KIT GOINS,

Petitioner,

v. CASE NO. 85,651

STATE OF FLORIDA,

Respondent.

_____________________________/

APPENDIX

Opinion of the First District Court of Appeal affirming the decision of the trial court, April 13, 1995.

IN THE DISTRICT COURT OF APPEAL,

FIRST DISTRICT, STATE OF FLORIDA

KIT GOINS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED.

CASE NO. 94-864

Opinion filed April 13, 1995.

An appeal from the Circuit Court for Okaloosa County.
Jack R. Heflin, Judge.

Mark Evan Frederick, P.A., Destin, for Appellant.

Robert A. Butterworth, Attorney General, Douglas Gurnic, Assistant Attorney General, Tallahassee, for Appellee.

ERVIN, J.

Because appellant failed to move to withdraw his plea when the trial court imposed a sentence greater than that recommended in the plea agreement, we affirm appellant's convictions and sentences. When the trial court does not participate in the plea negotiations or promise the defendant that it will impose the recommended sentence, it is under no duty to provide the defendant with a clear

opportunity to withdraw his or her plea at sentencing when it decides to impose a sentence greater than that recommended in the plea agreement. Lepper v. State, 451 So. 2d 1020, 1021 (Fla. 1st DCA 1984). And see Perkins v. State, 647 So. 2d 202 (Fla. 1st DCA) (in order for court to properly consider voluntariness of plea on direct appeal, trial court must have been asked to resolve the issue in a prior motion to withdraw), review denied, 648 So. 2d 723 (Fla. 1994); Robinson v. State, 373 So. 2d 898 (Fla. 1979) (appeal from plea should never be a substitute for motion to withdraw plea). In so ruling, we note our apparent conflict with Perry v. State, 510 So. 2d 1083 (Fla. 2d DCA 1987) (where trial court cannot honor plea agreement, it must affirmatively take action to permit the defendant the opportunity to withdraw the plea -- no motion to withdraw required). And see Rodriguez v. State, 610 So. 2d 476 (Fla. 2d DCA 1992); Kiefer v. State, 295 So. 2d 688 (Fla. 2d DCA 1974).

We affirm, however, without prejudice to appellant raising the issue in a motion for postconviction relief. See Eggers v. State, 624 So. 2d 336 (Fla. 1st DCA 1993).

AFFIRMED.

MINER and WOLF, JJ., CONCUR.