IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

FSC NO.

CHRISTOPHER WILLIAMS,

Respondent.
_____/

PETITIONER'S BRIEF ON JURISDICTION

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

DALE E. TARPLEY
ASSISTANT ATTORNEY GENERAL
Florida Bar No. 0872921
Westwood Center
2002 N. Lois Avenue, Suite 700
Tampa, Florida 33607
(813) 873-4739

COUNSEL FOR PETITIONER

/cmf

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OTHER AUTHORITIES:

STATEMENT OF THE CASE AND FACTS

The respondent, appellant below, appealed the trial court's sentence of two (2) years community control followed by two (2) years probation imposed for manufacture of cannabis and possession of drug paraphernalia.

On or about April 7, 1993 the respondent was charged by information with manufacture of cannabis, possession of cannabis, and possession of drug paraphernalia. (R. 1) The state dropped the possession of cannabis count and respondent pled nolo contendere to manufacture of cannabis and possession of drug paraphernalia. (R. 7) Pursuant to a negotiated plea (R. 9, 29-31), respondent was sentenced to two (2) years community control followed by two (2) years probation on the manufacture charge, and one year probation on the possession of paraphernalia charge to run concurrent to the probation on count one (1). (R. 25) The guidelines range was any nonstate prison sanction. (R. 27)

On appeal to the Second District, respondent, citing Thompson v. State, 617 So. 2d 411 (Fla. 2d DCA 1993), argued that the trial court erred in imposing a sentence of two (2) years and submitted that the sentence in the instant case was not a departure sentence pursuant to Thompson.[1] In its brief, the

[1] Respondent's reliance on Thompson for the proposition that the sentence in the instant case was not a departure was misplaced. Thompson held merely that it was not a departure to impose a sentence of incarceration under section 921.001(5), Florida Statutes, where the guidelines recommended any nonstate prison sanction.

state responded that the sentence was imposed pursuant to a negotiated plea, that the two (2) years sentence was permitted by Section 948.01(4), Florida Statutes (1991) (which provides for a sentence of community control for up to two (2) years) and that respondent has waived his right to appeal by accepting the benefits of the sentence order.

The Second District reversed respondent's sentence on March 10, 1995 holding, in pertinent part:

> A plea bargain between the state and the defendant is a valid reason to depart from the guidelines. Quarterman v. State, 527 So. 2d 1380 (Fla. 1988); State v. Esbenshade, 493 So. 2d 487 (Fla. 2d DCA 1986). However, even under these circumstances the sentencing document must reflect a reason for departure. No reason is stated in the court's written sentencing order. Because no written reason was given for the departure sentence, we reverse the sentence imposed. On remand, the trial court must comply with our Thompson decision.

Williams v. State, No. 94-00570, slip. op. at 3 (2d DCA March 10, 1995).

It is this portion of the opinion which, the state contends, expressly and directly conflicts with the decision of this Honorable Court and other district courts of appeal.

JURISDICTIONAL STATEMENT

The Florida Supreme Court has discretionary jurisdiction to review a decision of a district court of appeal that expressly and directly conflicts with a decision of the supreme court or another district court of appeal on the same point of law. Art. V §3(b)(3) Fla. Const. (1980); Fla. R. App. P. 9.030(a)(2)(A)(iv).

SUMMARY OF THE ARGUMENT

Petitioner, the State of Florida, alleges conflict between the holding in the instant case and this Honorable Court's decision in Smith v. State, 529 So. 2d 1106 (Fla. 1988). Smith held that a negotiated plea agreement is sufficient reason to depart from the sentencing guidelines without any stated reasons for the departure. In addition, the decision in the instant case conflicts with those of the First, Third and Fifth District Courts of Appeal.

ARGUMENT

THE DECISION OF THE SECOND DISTRICT IN THIS CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THIS COURT IN SMITH V. STATE, 529 SO. 2D 1106 (FLA. 1988) AS WELL AS DECISIONS OF OTHER DISTRICT COURTS OF APPEAL.

In Smith v. State, 529 So. 2d 1106 (Fla. 1988), this Honorable Court confronted the issue of whether a plea agreement was an adequate reason for exceeding the sentencing guidelines. In holding that it was, this Court ruled that "[o]nce a plea agreement is negotiated which specifies the permissible sentence, the agreement is binding and is sufficient without any stated reasons to justify a departure from the presumptive sentence." Id. at 1107 (e.s.).

It is this holding which, the state suggests, is in conflict with the decision in the case sub judice, in which the district court held:

> A plea bargain between the state and the defendant is a valid reason to depart from the guidelines. Quarterman v. State, 527 So. 2d 1380 (Fla. 1988); State v. Esbenshade, 493 So. 2d 487 (Fla. 2d DCA 1986). However, even under these circumstances the sentencing document must reflect a reason for departure. No reason is stated in the court's written sentencing order. Because no written reason was given for the departure sentence, we reverse the sentence imposed. On remand, the trial court must comply with our Thompson decision.

Williams, slip. op. at 3 (e.s.).[2]

As is clear from the above quoted portion of the opinion, the District Court felt compelled to reverse because no written reasons were given for the departure sentence. This conflicts not only with this Court's holding in Smith, but also with various holdings of District Courts of Appeal. See e.g., Reynolds v. State, 598 So. 2d 188 (Fla. 1st DCA 1992) (negotiated plea agreement valid reason for departure without any written reasons); Hammond v. State, 591 So. 2d 1119 (1st DCA), appeal after remand, 608 So. 2d 127 (Fla. 1st DCA 1992) (same); Casmay v. State, 569 So. 2d 1351 (Fla. 3d DCA 1990)(same); Hicks v. State, 559 So. 2d 1265 (Fla. 3d DCA 1990) (same); Smith v. State, 553 So. 2d 748 (Fla. 5th DCA 1989)(same).

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[2] Although the district court's opinion does not reference any district court or supreme court decision with which it conflicts, such a reference is not necessary to create an "express" conflict under Article V, section 3(b)(3), Florida Constitution. Ford Motor Co. v. Kikis, 401 So. 2d 1341 (Fla. 1981).

CONCLUSION

In light of the foregoing facts, arguments, and authorities, Petitioner respectfully requests that this Honorable Court exercise its discretionary jurisdiction under art. V, §3(b)(3), Fla. Const., to resolve the conflict outlined above.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

DALE E. TARPLEY
Assistant Attorney General
Florida Bar No. 0872921
Westwood Center, Suite 700
2002 North Lois Avenue
Tampa, Florida 33607
(813) 873-4739

ROBERT J. KRAUSS
Senior Assistant Attorney General
Chief of Criminal Law, Tampa
Florida Bar No. 0238538
Westwood Center, Suite 700
2002 North Lois Avenue
Tampa, Florida 33607
(813) 873-4739

COUNSELS FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to John C. Fisher, Esq., Assistant Public Defender, Public Defender's Office, P.O. Box 9000, Drawer P.D., Bartow, Florida 33830 on this 31st day of May, 1995.

Don Tingley
OF COUNSEL FOR PETITIONER

IN THE SUPREME COURT OF FLORIDA

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_____/

APPENDIX

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

DALE E. TARPLEY
Assistant Attorney General
Florida Bar No. 0872921
Westwood Center, Suite 700
2002 N. Lois Avenue
Tampa, Florida 33607-2366
(813) 873-4739

COUNSEL FOR PETITIONER

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

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

CHRISTOPHER WILLIAMS, Appellant,	)	
v.	)	CASE NO. 94-00570
STATE OF FLORIDA, Appellee.	)	

Opinion filed March 10, 1995.

Appeal from the Circuit Court for Polk County; Charles B. Curry, Judge.

James Marion Moorman, Public Defender, and John C. Fisher, Assistant Public Defender, Bartow, for Appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Dale E. Tarpley, Assistant Attorney General, Tampa, for Appellee.

QUINCE, Judge.

Appellant, Christopher Williams, appeals the trial court's sentence of two years' community control followed by two years' probation imposed for manufacture of cannabis. He also challenges some of the conditions of probation contained in the

written sentencing order. Because the trial court did not give a written reason for the departure sentence, we remand for resentencing. The trial court must also strike special conditions of probation not orally pronounced at sentencing.

Appellant was charged by information with manufacture of cannabis, possession of cannabis and possession of drug paraphernalia. The state dropped the possession of cannabis count, and pursuant to negotiations, appellant pled nolo contendere to the other two counts. In the plea agreement and at sentencing, appellant agreed to two years' community control acknowledging this was a departure from the guidelines. The recommended sentence, under the recommended range and the permitted range of the sentencing guidelines, is any nonstate prison sanction. Appellant was sentenced to two years' community control followed by two years' probation on the manufacturing offense and one year probation on the possession count to run concurrent with the community control.

Appellant argues the two years' community control portion of his sentence should be reversed because it exceeds the maximum which can be imposed when the guidelines range is any nonstate prison sanction. We held in Thompson v. State, 617 So. 2d 411 (Fla. 2d DCA 1993), that a trial court is limited to twenty-two months' community control when the guidelines range is any nonstate prison sanction. See also § 948.01(4), Fla. Stat. (1991). However, Thompson did not involve a situation where the defendant had negotiated for a particular sentence.

A plea bargain between the state and the defendant is a valid reason to depart from the guidelines. Quarterman v. State, 527 So. 2d 1380 (Fla. 1988); State v. Esbenshade, 493 So. 2d 487 (Fla. 2d DCA 1986). However, even under these circumstances the sentencing document must reflect a reason for departure. No reason is stated in the court's written sentencing order. Because no written reason was given for the departure sentence, we reverse the sentence imposed. On remand, the trial court must comply with our Thompson decision.

Appellant also challenges some of the conditions of probation contained in the written sentencing order. We strike the following conditions: 1) appellant must not use intoxicants to excess; 2) appellant must submit to and pay for random testing for alcohol; 3) appellant shall not consume, possess, or associate with persons who use alcohol or frequent places where alcohol is the main source of business; 4) appellant must submit to and pay for an evaluation to determine whether or not he has any treatable alcohol problem,[1] and 5) appellant must pay for any drug or alcohol treatment program. These are special conditions of probation which must be orally pronounced at sentencing. See Nunez v. State, 633 So. 2d 1146 (Fla. 2d DCA 1994); Tomlinson v. State, 645 So. 2d 1 (Fla. 2d DCA 1994); Nank v. State, 646 So. 2d 762 (Fla. 2d DCA 1994). Since these conditions were not orally pronounced, they must be stricken.

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[1] These same conditions were imposed in regard to illegal drugs but are valid conditions of probation.

This case is remanded to the trial court for resentencing consistent with Thompson and to strike the special conditions of probation not orally pronounced.

RYDER, A.C.J., and ALTENBERND, J., Concur.