IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

FSC NO. 85,784

CHRISTOPHER WILLIAMS,

Respondent.
_____/

PETITIONER'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

In this brief, the Respondent, Christopher Williams, will be referred to by name or as the defendant. The Petitioner will be referred to as the State.

Citations to the original record on appeal will be made by the letter "R" and the appropriate page number.

STATEMENT OF THE CASE AND FACTS

The defendant 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 defendant 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 the defendant pled nolo contendere to manufacture of cannabis and possession of drug paraphernalia. (R. 7) Pursuant to a negotiated plea (R. 9, 29-31), the defendant 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, the defendant, 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] Defendant'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

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 the defendant had waived his right to appeal by accepting the benefits of the sentence order.

The Second District reversed the defendant'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). The state's Motion For Rehearing was denied April 28, 1995. The Notice to Invoke Discretionary Jurisdiction was timely filed on or about May 24, 1995.

It is above cited 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.

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impose a sentence of incarceration under section 921.001(5),

SUMMARY OF THE ARGUMENT

The decision under review should be quashed and conformed to this court's opinion in Smith v. State, infra, where the court stated that a negotiated plea agreement which specifies the permissible sentence is binding and sufficient without any stated reasons to justify a departure from the presumptive sentence. The Second District's reliance upon State v. Esbenshade, infra, for the proposition that written reasons are required despite the fact that the departure is pursuant to a plea bargain in the record appears to be misplaced. In Casmay v. State, infra, the Third District distinguished the case relied upon by the Esbenshade court and it follows that Esbenshade was also distinguished.

The state further submits that the defendant could plea bargain for the two (2) year term of community control since Thompson v. State, infra, is distinguished because it involved a guidelines sentence. Finally, the state seeks review due to concern with the decision as precedent as opposed to its impact on the particular defendant.

Florida Statutes, where the guidelines recommended any nonstate prison sanction.

ARGUMENT

THE DECISION UNDER REVIEW SHOULD BE QUASHED SINCE A VOLUNTARY PLEA AGREEMENT WHICH IS A PART OF THE RECORD ON APPEAL FULLY JUSTIFIES SUCH A DEPARTURE AND NEGATES THE PURPOSE OF PLACING THE REASON FOR DEPARTURE ON THE SENTENCING DOCUMENT BECAUSE IT IS APPARENT ON THE RECORD THAT A PLEA BARGAIN WAS THE REASON FOR DEPARTURE.

The state sought discretionary review of the instant case because the reason for reversal below, the absence of a written reason for departure on the sentencing document where the departure resulted from a plea bargain, appeared, upon examination, to be at odds with this court's decisions in Smith v. State, 529 So. 2d 1106 (Fla. 1988), White v. State, 531 So. 2d 711 (Fla. 1988) and various decisions of District Courts of Appeal.[2]

The Second District's reliance on Quarterman v. State, 527 So. 2d 1380 (Fla. 1988) and State v. Esbenshade, 493 So. 2d 487 (Fla. 2d DCA 1986) for the proposition that a written reason is

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[2] 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).

required for a guidelines departure pursuant to a plea bargain appears to be misplaced.

In Smith, this court addressed the following question of great public importance:

> IS A PLEA AGREEMENT, PROVIDING ONLY FOR A SENTENCE WITHIN A TERM LESS THAN A STATUTORY MAXIMUM FOR A SINGLE CHARGED OFFENSE, AN ADEQUATE REASON FOR EXCEEDING GUIDELINES UP TO THE AGREED MAXIMUM WITHOUT STATING REASONS OTHER THAN THE FACT OF THE AGREEMENT?

Id. at 1106. Upon consideration, the court answered the certified question in the affirmative finding 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.

In the instant case, as in Smith, the defendant negotiated a plea agreement for a sentence in excess of the guidelines recommended and permitted ranges, but for a term less than the statutory maximum in order to avoid jail time. (R. 15) Although the plea agreement itself indicates the plea is to a recommended range (R. 30), at the sentencing hearing it was recognized that the disposition was above guidelines. (R. 15) As in Smith, the plea agreement is binding and sufficient without stated reasons to justify departure from the presumptive sentence.

The Second District's authority for reversal appears to be based upon Esbenshade where the court reversed a downward

departure based on a plea bargain because the reason for departure was not reduced to writing as required by State v. Jackson, 478 So. 2d 1054 (Fla. 1985). 493 So. 2d at 488. It appears, however, that the Esbenshade court misread Jackson.

In Casmay v. State, 569 So. 2d 1351 (Fla. 3d DCA 1990) the Third District rejected a defendant's assertion that his bargained for sentences were illegal because the trial court did not state in writing any reason for departing from the guidelines. The court stated:

> We reject this contention and affirm based on the authority of Smith v. State, 529 So. 2d 1106 (Fla. 1988):
>
> > "Once 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 [sentencing guidelines] sentence."
>
> Id. at 1107 (emphasis added). In accord therewith, the Second District Court of Appeal has similarly held that no written reasons need be given to justify a sentencing guidelines departure where, as here, the sentence is imposed pursuant to a valid plea-bargain agreement. Long v. State, 540 So. 2d 903 (Fla. 2d DCA 1989); Davis v. State, 528 So. 2d 521 (Fla. 2d DCA), rev. denied, 536 So. 2d 243 (Fla. 1988). We entirely agree.
>
> Moreover, we do not read Pope v. State, 561 So. 2d 554 (Fla. 1990) and State v. Jackson, 478 So. 2d 1054 (Fla. 1985) to compel a contrary result. Although both decisions require the trial court to give written reasons for a sentencing-guidelines departure

> at the time sentence is imposed, neither case holds that this requirement attains where the departure is imposed pursuant to a valid plea-bargain agreement; indeed, Smith holds quite to the contrary. Where, as here, a sentencing-guidelines departure is imposed pursuant to a valid plea agreement, no stated reasons, written or oral, are necessary to justify the subject departure; a voluntary plea agreement spread out on the record for all the world to see fully justifies such a departure. See Fla. R. Crim. P. 3.172(c)(vii).

569 So. 2d at 1352-53. Thus, the Casmay court was clearly able to distinguish Jackson as inapposite to the situation in which the departure is imposed pursuant to a valid plea-bargain agreement. It follows that Esbenshade is also distinguished.

The state further submits that under section 948.01(4), Florida Statutes (1991) the defendant could permissibly plea bargain for two (2) years community control. The Second District correctly realized that Thompson v. State, 617 So. 2d 411 (Fla. 2d DCA 1993) is distinguished where the defendant has negotiated for a particular sentence. As this court has stated in Crawford v. State, 567 So. 2d 428, 429 (Fla. 1990) "[f]or any one offense, community control may be imposed for a maximum of two years." See also Goss v. State, 608 So. 2d 541 (Fla. 3d DCA 1992); Sipp v. State, 604 So. 2d 576 (Fla. 5th DCA 1992); Alvarez v. State, 593 So. 2d 289 (Fla. 2d DCA 1992).

The defendant, in his jurisdictional brief, argued that the question before the court for discretionary review was moot since

community control had been revoked and he had been resentenced to three (3) years imprisonment. The state, however, is not concerned with the individual rights of the defendant. The state is concerned with the effect of the lower court's decision as precedent. As this court recognized in Ansin v. Thurston, 101 So. 2d 808, 811 (Fla. 1958) "[a] limitation of review to decisions in 'direct conflict' clearly evinces a concern with decisions as precedents as opposed to adjudications of the rights of particular litigants." The decision below should be quashed and conformed to Smith because the plea bargain was sufficient in itself to justify the guidelines departure.

The state respectfully requests that the court quash the decision of the lower court to the extent that it required written reasons for departure other than the plea bargain itself.

CONCLUSION

In light of the foregoing facts, arguments, and authorities, the court should quash the decision of the lower court because the plea bargain in itself justified the departure.

Respectfully submitted,

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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 John C. Fisher, Esq., Assistant Public Defender, Public Defender's Office, P.O. Box 9000, Drawer P.D., Bartow, Florida 33830 on this 30th day of August, 1995.

OF COUNSEL FOR PETITIONER