IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 88, 664

FILED
SID J WHITE
AUG 19 1996
CLERK, SUPREME COURT
By Chief Deputy Clerk

Fourth DCA Case No. 95-1346

WILIE JOHNSON,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

RESPONDENT'S BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

Petitioner was the Defendant and Respondent was the prosecution in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida. Petitioner was the Appellant and Respondent was the Appellee in the Fourth District Court of Appeal. In this brief, the parties shall be referred to as they appear before this Honorable Court of Appeal except that Appellee may also be referred to as the State.

In this brief, the symbol "A" will be used to denote the appendix attached hereto.

All emphasis in this brief is supplied by Respondent unless otherwise indicated.

SUMMARY OF THE ARGUMENT

Petitioner seeks review by this Court based on the fact that Gaber v. State, 662 So. 2d 422 (Fla. 3d DCA 1995) is currently pending before this Court, and that the Fourth District Court of Appeal acknowledged conflict with Morrow v. State, 656 So. 2d 579 (Fla. 1st DCA), rev. denied, 664 So. 2d 249 (Fla. 1995). The State submits this Court should decline to accept jurisdiction to review the instant, and the proper basis should be the Fourth District Court of Appeal's withholding of the issuance of mandate in this appeal pending resolution of the issue by this Court in Gaber. In Jollie v. State, 405 So. 2d 418, 420 (Fla. 1981), this Court suggested this is the procedure to be followed by the District Courts. Since the issue is already before the Court in Gaber, there is no need for this Court to accept jurisdiction over an additional case to answer the same issue already pending before the Court.

ARGUMENT

THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL IN THE INSTANT CASE SHOULD HAVE BEEN STAYED PENDING THIS COURT'S DECISION IN GABER V. STATE, 662 So. 2d 422 (Fla. 3d DCA 1995, rev. granted, __ So. 2d __ (Fla. Apr. 20, 1996)), THIS COURT NEEDS NOT ACCEPT YET ANOTHER CASE TO RESOLVE THE SAME ISSUE ALREADY PENDING.

Although this Court has jurisdiction to review the District Court's opinion in the instant case, (see Jollie v. State, 405 So. 2d 418 (Fla. 1981); Article V, §3(b)(3), Fla. Const.), the State submits that this Court should decline to take jurisdiction over the case.

The proper basis should be the Fourth District Court of Appeal's withholding of the issuance of mandate in this appeal pending resolution of the issue by this Court in Gaber. This is the procedure this Court suggested the District Courts follow when the issue is already pending before this Court, Jollie v. State, 405 So. 2d 418, 420 (Fla. 1981). Petitioner seeks review by this Court based on the fact that Gaber v. State, 662 So. 2d 422 (Fla. 3d DCA 1995) is currently pending before this Court. The State submits that simply because Gaber is pending here, there is no need for this Court to also take jurisdiction over the instant case.

Furthermore, while the Fourth District has acknowledged conflict with Marrow v. State, 656 So. 2d 579 (Fla. 1st DCA), rev. denied, 664 So. 2d 249 (Fla. 1995), this conflict was also this same basis of conflict which created jurisdiction in Gaber v. State, 662 So. 2d 422 (Fla. 3d DCA 1995). (see appendix) Thus it is unnecessary for this Court to accept jurisdiction over an additional case to answer the same issue already pending before the Court in Gaber.

CONCLUSION

WHEREFORE, based on the above and foregoing reasons and authorities cited therein, Respondent respectfully requests that the Petitioner's Application for Discretionary Review be DENIED.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing "Brief of Respondent on Jurisdiction" has been furnished by Courier to: PAUL PETILLO, Assistant Public Defender, Counsel for Petitioner, Criminal Justice Bldg./6th Floor, 421 Third Street, West palm Beach, FL 33401, on August 15, 1996.

Counsel for Respondent

IN THE SUPREME COURT OF THE STATE OF FLORIDA

WILIE JOHNSON,

Petitioner,

vs. CASE NO. 88664

STATE OF FLORIDA, 4TH DCA CASE NO. 95-1346

Respondent.

_____/

APPENDIX

TO RESPONDENT'S BRIEF ON JURISDICTION

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IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT JULY TERM 1996

WILLIE JOHNSON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 95-1346

Opinion filed July 17, 1996

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Robert J. Fogan, Judge; L.T. Case No. 93-19503CF10.

Richard L. Jorandby, Public Defender, and Paul E. Petillo, Assistant Public Defender, West Palm Beach, for appellant.

Robert A. Butterworth, Attorney General, Tallahassee; and Aubin Wade Robinson, Assistant Attorney General, West Palm Beach, for appellee.

POLEN, J.

Willie Johnson appeals his convictions and sentences for armed trespass, aggravated assault, and grand theft of a firearm. We affirm his convictions, but reverse on a sentencing issue.

On November 8, 1993, Kathy Thomas and Willie Johnson were discussing the possibility of their reunification. Thomas and Johnson were involved in the past, but Johnson had been in jail on charges unrelated to this appeal just prior to the night in question. About 10:00 p.m. that same evening, Jeffrey O'Connor arrived in his car. According to the testimony, O'Connor and Thomas had been romantically involved while Johnson was in prison. Upon his arrival, Thomas got into O'Connor's car and the two of them drove around the block.

Thomas and O'Connor returned and Johnson approached the car. Words were exchanged and Johnson reached inside the car and pulled out O'Connor's gun. According to Thomas, Johnson ordered both of them out of the car. Johnson ran to a nearby house and O'Connor ran down the street. Thomas stated that Johnson was pointing the gun at O'Connor.

The police arrived shortly thereafter and Johnson was arrested. He was tried and convicted of the above crimes, and this appeal ensued.

Johnson argues on appeal it was error to deny a requested instruction on voluntary intoxication. Yet at trial, he denied that he had been drinking. We find no error in the trial court's refusal to give the requested instruction.

Neither are we persuaded that there was a double jeopardy violation occasioned by appellant's convictions for both armed trespassing and grand theft of the same firearm. Gaber v. State, 662 So. 2d 422 (Fla. 3d DCA 1995), rev. granted, __ So. 2d __ (Fla. Apr. 20, 1996). We acknowledge conflict on this issue with Marrow v. State, 656 So. 2d 579 (Fla. 1st DCA), rev. denied, 664 So. 2d 249 (1995).

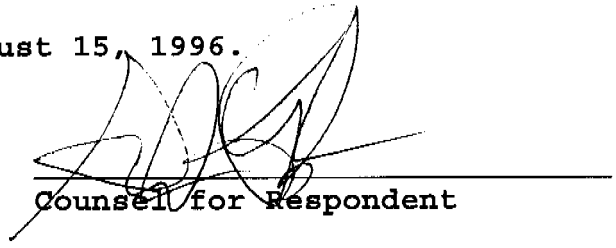
The only issue that requires reversal is the trial court's decision to impose a three-year firearm mandatory minimum sentence for armed trespass and grand theft. Under section 775.087(2)(a), Florida Statutes (1993), mandatory minimum sentencing does not apply to the offenses of grand theft or armed trespassing. As these two offenses are not specifically enumerated under the statute, it was error for the judge to use them as a basis for a mandatory three-year sentence, a point conceded by the state. Accordingly, we affirm the convictions, but remand for resentencing to delete the three-year mandatory minimum sentences.

GLICKSTEIN and SHAHOOD, JJ., concur.

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing " Appendix to Respondent's Brief on Jurisdiction" has been furnished by Courier to: PAUL PETILLO, Assistant Public Defender, Counsel for Petitioner, Criminal Justice Bldg./6th Floor, 421 Third Street, West palm Beach, FL 33401, on August 15, 1996.



Counsel for Respondent