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SID J. WHITE

JUL 15 1998

CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

DAVID R. LEONARD,

Petitioner,

v.

Case No. 93,332

STATE OF FLORIDA,

Respondent.

_____ /

**DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT**

BRIEF OF RESPONDENT ON JURISDICTION

**ROBERT A. BUTTERWORTH
ATTORNEY GENERAL**

**HELENE S. PARNES
Assistant Attorney General
Florida Bar No. 0955825
2002 North Lois Avenue, Suite 700
Tampa, Florida 33607-2366
(813) 873-4739**

COUNSEL FOR RESPONDENT

TABLE OF CONTENTS

Page No.

SUMMARY OF THE ARGUMENT 1

ARGUMENT 2

ISSUE I 2

WHETHER THE DECISION IN LEONARD V. STATE, CASE
NO. 96-4245 (Fla. 2d DCA June 10, 1998), CONFLICTS WITH
THE FLORIDA SUPREME COURT AND DISTRICT COURT OF
APPEAL OPINIONS AS TO WHETHER §924.051(4) PROHIBITS
THE STATUTORY MAXIMUM ON DIRECT APPEAL
WITHOUT A CONTEMPORANEOUS OBJECTION?

(As stated by Petitioner)

CONCLUSION 4

CERTIFICATE OF SERVICE 4

TABLE OF AUTHORITIES

CASES

Page No.

Amendments to the Florida Rules of Appellate Procedure,
685 So. 2d 773 (Fla. 1996) 2

Ortiz v. State,
696 So. 2d 916 (Fla. 5th DCA 1997) 2

Smith v. State,
529 So. 2d 1106 (Fla. 1988) 3

Stone v. State,
688 So. 2d 1006 (Fla. 1st DCA) *rev. denied*, 697 So. 2d 512 (Fla. 1997) 3

White v. State,
531 So. 2d 711 (Fla. 1988) 3

Zimmerman v. State,
554 So. 2d 670 (Fla. 2d DCA 1990) 3

OTHER AUTHORITIES

Section 924.051(4), Florida Statutes (Supp. 1996) 2

Florida Rule of Criminal Procedure 3.800(a) 2

SUMMARY OF THE ARGUMENT

The Second District Court of Appeal is not in conflict with this Court. Since the Fifth District is in conflict with this Court, this Court should not accept jurisdiction of this appeal.

ARGUMENT

ISSUE I

WHETHER THE DECISION IN LEONARD V. STATE, CASE NO. 96-4245 (Fla. 2d DCA June 10, 1998), CONFLICTS WITH THE FLORIDA SUPREME COURT AND DISTRICT COURT OF APPEAL OPINIONS AS TO WHETHER §924.051(4) PROHIBITS THE STATUTORY MAXIMUM ON DIRECT APPEAL WITHOUT A CONTEMPORANEOUS OBJECTION?

(As stated by Petitioner)

In the instant case, the Second District Court of Appeal held, as follows:

Because Leonard pleaded guilty to the underlying offense and failed to bring this error to the trial court's attention first, pursuant to section 924.051(4), Florida Statutes (Supp. 1996), we are without jurisdiction to entertain this issue on direct appeal. Therefore, we dismiss this appeal without prejudice to Leonard to seek correction of this possible error by filing a motion pursuant to Florida Rule of Criminal Procedure 3.800(a).

Although the Fifth District Court of Appeal in Ortiz v. State, 696 So. 2d 916 (Fla. 5th DCA 1997) held that the legality of a sentence is an appealable issue even though the defendant plead guilty or no contest and failed to object to the sentence **nor filed a motion to correct it**, the Second District follows this Court's analysis in the Amendments to the Florida Rules of Appellate Procedure, 685 So.2d 773 (Fla. 1996), which clearly states that a defendant who pleads guilty or no contest without reserving a legally dispositive issue to "nevertheless appeal a sentencing error, providing it has been timely preserved by motion to correct the sentence." Amendments, 685 So.2d at 774. Since the Fifth District, not the Second District, is in conflict with this Court, this Court should not accept jurisdiction of this appeal.¹

¹This Court should note that the Fourth District in Thompson v. State, 708 So. 2d 289 (Fla. 4th DCA 1998) has certified the following question as one of great public importance to this Court:

UNDER SECTION 924.051(3), (4), FLORIDA STATUTES (SUPP. 1996) AND

Further, discretionary review of this appeal is not warranted since the sentence was legal. Petitioner's sentence constituted an upward departure sentence, and the trial court filed written reasons: "stipulated plea negotiated at request of victims' families - [defendant] avoids minimum mandatory life sentence." An upward departure sentence is justified when a defendant voluntarily agrees to a negotiated plea. White v. State, 531 So. 2d 711 (Fla. 1988)(where defendant voluntarily pleads guilty, and agreed-to sentencing range constitutes an upward departure, sentence was properly imposed); Smith v. State, 529 So. 2d 1106 (Fla. 1988)(approving upward departure sentence based upon plea bargain, where bargain had been knowingly and voluntarily entered after consultation with counsel); Zimmerman v. State, 554 So. 2d 670 (Fla. 2d DCA 1990)(defendant's negotiated plea was a valid reason for departure).

RULE OF APPELLATE PROCEDURE 9.140(b)(2)(B)(iv), IS THE FAILURE TO PRESERVE AN ALLEGED SENTENCING ERROR FOR APPEAL FOLLOWING A GUILTY PLEA A JURISDICTIONAL IMPEDIMENT TO AN APPEAL WHICH SHOULD RESULT IN A DISMISSAL OF THE APPEAL, OR IS IT A NON-JURISDICTIONAL BAR TO REVIEW WHICH SHOULD RESULT IN AN AFFIRMANCE?

The Fourth District agrees with the First District's holding in Stone v. State, 688 So.2d 1006 (Fla. 1st DCA), *rev. denied*, 697 So.2d 512 (Fla. 1997), that the "preservation requirements of Chapter 924 are not jurisdictional."

CONCLUSION

Based on the foregoing facts, argument, and citations of authority, Respondent respectfully requests that this Honorable Court deny jurisdiction for review of the decision of the Second District Court of Appeal.

Respectfully submitted,

**ROBERT A. BUTTERWORTH
ATTORNEY GENERAL**



HELENE S. PARNES
Assistant Attorney General
Florida Bar No. 0955825
2002 N. Lois Ave., Ste. 700
Westwood Center
Tampa, Florida 33607-2366
(813) 873-4739

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to A. Victoria Wiggins, Assistant Public Defender, Public Defender's Office, Post Office Box 9000 -- Drawer PD, Bartow, Florida 33831, this 13th day of July, 1998.



COUNSEL FOR RESPONDENT

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

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

DAVID LEONARD,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 96-04245

Opinion filed June 10, 1998.

Appeal from the Circuit Court for
Hillsborough County; Cynthia Holloway,
Judge.

James Marion Moorman, Public Defender,
and A. Victoria Wiggins, Assistant Public
Defender, Bartow, for Appellant.

Robert A. Butterworth, Attorney General,
Tallahassee, and Helene S. Parnes,
Assistant Attorney General, Tampa,
for Appellee.

PER CURIAM.

In this direct appeal, David Leonard challenges, as illegal, the thirty-year sentence he received when the probation he was serving on a second-degree felony was revoked. See §§ 775.082(3)(c), 800.04, Fla. Stat. (1987). No other issues are

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raised. Because Leonard pleaded guilty to the underlying offense and failed to bring this error to the trial court's attention first, pursuant to section 924.051(4), Florida Statutes (Supp. 1996), we are without jurisdiction to entertain this issue on direct appeal. Therefore, we dismiss this appeal without prejudice to Leonard to seek correction of this possible error by filing a motion pursuant to Florida Rule of Criminal Procedure 3.800(a).

Dismissed.

ALTENBERND, A.C.J., and FULMER and CASANUEVA, JJ., Concur.