ORIGINAL

IN THE SUPREME COURT OF FLORIDA

CASE NO.

CLEON GREENWOOD,
Petitioner,

vs.

STATE OF FLORIDA
Respondent.

****
ON APPEAL FROM THE FOURTH DISTRICT COURT OF APPEAL, FLORIDA
****

RESPONDENT'S BRIEF ON JURISDICTION

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

ETTIE FEISTMANN
Assistant Attorney General
Florida Bar No. 892830
1655 Palm Beach Lakes Boulevard
Suite 300
West Palm Beach, FL 33401-2299
Telephone: (561) 688-7759

Counsel for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATE CASES

MISCELLANEOUS

PRELIMINARY STATEMENT

The petitioner was the appellant in the appeal proceedings and the defendant at trial in the circuit court of the 19th Judicial Circuit in and for St. Lucie. The respondent, State of Florida, was the appellee in the Fourth District Court of Appeal and the prosecution in the trial court. In this brief, the parties will be referred to as they appear before this Honorable Court. The following symbols will be used: "A" Appendix.

STATEMENT OF THE CASE AND FACTS

The State adopts the majority opinion of the Fourth District Court of Appeal as its Statement of the Case and Facts (Appendix).

SUMMARY OF THE ARGUMENT

The discretionary jurisdiction of this Court should be declined under Article V, Section 3(b)(3) of the Constitution of the State of Florida and Rule 9.030(a)(2)(A)(iv), Florida Rules of Appellate Procedure. The decision of the Fourth District Court of Appeal does not expressly and directly conflict with a decision from this court, because the issues in both cases are different.

Further, this court should decline jurisdiction because although the fourth district relied on another case that it is currently pending before this court for review, it is pending for a different question of law than the one raised in this case.

ARGUMENT

PETITIONER IMPROPERLY INVOKES THE DISCRETIONARY JURISDICTION OF THIS COURT WHERE THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH A DECISION OF THIS COURT ON THE SAME QUESTION OF LAW.

Petitioner contends that the Fourth District Court of Appeal's decision in Greenwood v. State, 23 Florida Law Weekly D1882 (Fla. August 12, 1998), expressly and directly conflicts with this court's case of State v. Mancino, 714 So. 2d 429 (Fla. 1998). Respondent disagrees.

In Greenwood, on appeal from his conviction and sentence, petitioner raised an issue regarding entitlement to credit for time served. The fourth district affirmed the sentence, and held that the discrepancy between the oral pronouncement and the written judgment of sentence was not preserved for appellate review. 23 Florida Law Weekly at D1882. The fourth district however did not state the type of sentencing error petitioner was raising, i.e., whether it was an erroneous, unlawful or illegal sentence. Thus, implicit from the fourth district's opinion that the court did not regard the alleged error to be illegal.

In Mancino this court held that the failure to give credit for time served is cognizable in a rule 3.800 motion *if* the records reflect undisputed entitlement to the credit.[1] In Mancino this

[1]Rule 3.800(a) motions are limited to sentencing issues that "can be resolved as a matter of law without an evidentiary determination." State v. Callaway, 658 So. 2d 983 (Fla. 1995).

court also held that failure to grant proper credit is an illegal sentence.[2]

Thus, because the fourth district never determined that the entitlement was undisputed, and that the sentence was illegal, it is inaccurate to contend that there is an express and direct conflict between Mancino and Greenwood.

Further, even assuming petitioner's entitlement is undisputed and even assuming his sentence is illegal, there is still no conflict with Mancino. If petitioner's sentence is illegal, pursuant to Mancino, petitioner is entitled to raise this claim by a rule 3.800(a) motion to correct illegal sentence, which can be raised at any time in the trial court. There is nothing in the Greenwood opinion which is conflicting with the Mancino case.

In order for two decisions to be in "express" as well as "direct" conflict for the purpose of invoking this Court's discretionary jurisdiction under Art. V, § 3(b)(3), Fla. Const., and Fla. R. App. P. 9.030(a)(2)(A)(iv), the decisions should speak to the same point of law, in factual contexts of sufficient similarity to compel the conclusion that the result in each case would have been different had the deciding court employed the

---

[2]Respondent notes that Florida Criminal Rule of Procedure 3.800(a) provides that "[a] court may at any time correct an illegal sentence imposed by it or an incorrect calculation made by it in a sentencing guideline scoresheet." [Emphasis added]. Thus, petitioner should not litigate his case in this court, because he failed to exhaust other available remedies in the trial court.

reasoning of the other court. See generally Mancini v. State, 312 So. 2d 732 (Fla. 1975); Padovano, Florida Appellate Practice, § 2.10 ("a district court of appeal decision is reviewable only if it *expressly* conflicts with a decision of the Supreme Court or another district court of appeal" [e.s.]).

In Jenkins v. State, 385 So. 2d 1356, 1359 (Fla. 1980), this Court defined the limited parameters of its conflict review as follows:

> This Court may only review a decision of a district court of appeal that expressly and *directly* conflicts with a decision of another district court of appeal or the Supreme Court on the same question of law. The dictionary definitions of the terms "express" include: "to represent in words; to give expression to." "Expressly" is defined: "in an express manner." *Webster's Third New International Dictionary* (1961 ed. unabr.) (Emphasis in original).

Similarly, in Nielson v. City of Sarasota, 117 So. 2d 731, 734 (Fla. 1960) this Court stated that:

> When our jurisdiction is invoked pursuant to this provision of the Constitution we are not permitted the judicial luxury of upsetting a decision of a Court of Appeal merely because we might personally disagree with the so-called "justice of the case" as announced by the Court below. In order to assert our power to set aside the decision of the Court of Appeal on the conflict theory we must find in that decision a real, live and vital conflict within the limits above announced.

Nielson v. City of Sarasota, 117 So. 2d at 734-735. The State

contends that no such real, live and vital conflict exists. Here, without determining what kind of sentence petitioner's sentence is, the fourth district held that the alleged sentencing error was not preserved for appellate review. The fourth district did not hold that petitioner cannot raise this alleged error in a rule 3.800(a) motion. E.g. Jones v. State, 23 Florida Law Weekly D__ , Case No. 98-651 (Fla. 1st DCA October 21, 1998)(court affirmed without prejudice the denial of defendant's alleged entitlement for credit for him to present his claim by a rule 3.800(a) motion). Thus there is no conflict between Greenwood and Mancino.

Additionally, respondent contends that this court should deny jurisdiction based on Jollie v. State, 405 So. 2d 418 (Fla. 1981), because although the fourth district cited Hyden v. State, 715 So. 2d 960 (Fla. 4th DCA 1998) for support in Greenwood, it did so for the general proposition of lack of preservation. Further, although Hyden is pending before this court for review, the question of law for review is totally different.

In Hyden the fourth district certified conflict with Neal v. State, 688 So. 2d 392 (Fla. 1st DCA), review denied, 698 So. 2d 543 (Fla. 1997) because in Hyden the fourth district held that the imposition of a public defender's fee requires preservation in the trial court, while in Neal the first district permitted a fee issue to be raised without preservation as a fundamental error. The issue petitioner wants this court to review has nothing to do with preservation of a public defender's fee, and thus jurisdiction

should be denied.

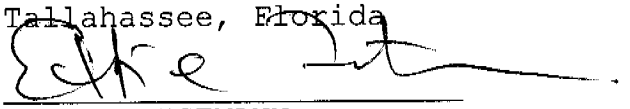
In any event, this certified conflict between the fourth and the first district is moot now, because last week in an *en banc* decision the first district receded from that portion of the holding of Neal that conflicted with Hyden. See Lock v. State, 23 Florida Law Weekly D__, Case No. 97-2431 (Fla. 1st DCA October 21, 1998)(en banc). Thus, since there is no conflict between Hyden and Nelson, review by this court may no longer be needed.

CONCLUSION

Wherefore, based of the foregoing arguments and the authorities cited therein, Respondent respectfully requests this Honorable Court to deny jurisdiction.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

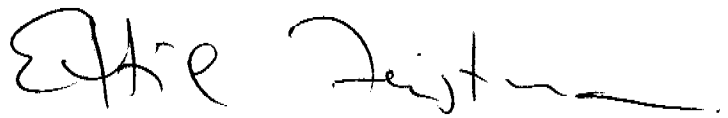


ETTIE FEISTMANN
Assistant Attorney General
Florida Bar No. 892830
1655 Palm Beach Lakes Boulevard
Suite 300
West Palm Beach, FL 33401-2299
(561) 688-7759

Counsel for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Answer Brief of Respondent" has been furnished by Courier to: Anthony Calvello, Assistant Public Defender, Criminal Justice Building, 421 Third Street, West Palm Beach, FL 33401, this October 26, 1998.



Counsel for Respondent