IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

JOHN WARNER,

Respondent.

S.C. Case No. 94,842

DCA Case No. 97-2862

****

ON DISCRETIONARY REVIEW FROM THE
FOURTH DISTRICT COURT OF APPEAL

****

PETITIONER'S BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

Petitioner was the Appellant and Respondent was the Appellee in the Fourth District Court of Appeal. In this brief, the parties will be referred to as they appear before this Court, except that the Petitioner may also be referred to as "State" or "Prosecution."

STATEMENT OF THE CASE

An Information was entered against Respondent in the Seventeenth Judicial Circuit on October 21, 1996 (R 28-29). The charges were one count of Driving Under The Influence/Serious Bodily Injury/Unlawful Blood Alcohol Level; and two counts of Driving Under The Influence (a misdemeanor) (R 28-29).

Respondent entered a plea of guilty to all three counts (R 30, 31). Respondent's scoresheet totalled 114.4 points, which came out to a minimum of 65 months in prison and a maximum of 108 months in prison (R 37-39). The trial court imposed a downward departure over the objection of the State (T 23-24). Respondent was adjudicated on all three counts (R 33), and was sentenced to two years of community control, followed by three years of Drug Offender Probation on count one, and six months probation on counts two and three (concurrent to count one) (R 30, 33-36). Respondent was also given 364 days in the Broward County Jail with one day credit for time served, random drug urinalysis testing, DUI School, one year suspension of his driver's license, and fifty hours of community service (R 30-34). The trial court also reserved the right to impose restitution (R 30).

On the written scoresheet, the trial court's written reasons for the downward departure was that this was an isolated incident, and Respondent was 37 years old and had never been arrested prior to this incident (R 38). The court also checked off the following

reasons for departure on the form attached to the scoresheet: "[t]he capacity of the defendant to appreciate the criminal nature of the conduct or to conform that conduct to the requirements of law was substantially impaired;" "[d]efendant requires specialized treatment for addiction, mental disorder, or physical disability and the defendant is amenable to treatment;" and "[t]he offense was committed in an unsophisticated manner and was an isolated incident for which the defendant has shown remorse" (R 40).

The State filed a timely notice of appeal on August 11, 1997 (R 43-44). On appeal, Petitioner alleged that the trial court had erred in imposing a downward departure sentence over the objection of the State. Respondent alleged that the trial court's decision for a downward departure was valid. The Fourth District Court of Appeal issued an opinion on November 18, 1998, State v. Warner, 721 So. 2d 767 (Fla. 4th DCA 1998) reversing the sentence imposed by the trial court (See attached opinion). In that opinion, the Fourth DCA addressed the Fifth District's decision in State v. Gitto, 23 Fla. L. Weekly D1550 (Fla. 5th DCA June 26, 1998), disagreeing with Gitto "to the extent that it holds that a court can never, over the state's objection, advise a defendant of the sentence it would impose if the defendant pleads guilty to the charges filed by the state" (footnote omitted). State v. Warner, 721 So. 2d 767 (Fla. 4th DCA 1998).

On December 3, 1998, Petitioner moved for rehearing,

certification of conflict and for a question of great public importance with the Fourth DCA for the **limited** purpose of the Fourth DCA's holding as it refers to conflict with State v. Gitto. On January 5, 1998, the Fourth District denied Petitioner's motion. Mandate issued on January 22, 1998. Petitioner filed a Notice To Invoke Discretionary Jurisdiction with the Fourth District Court of Appeal on February 2, 1999, as well as a Motion to Stay Mandate And/Or Recall Mandate. This proceeding to invoke discretionary jurisdiction follows.

STATEMENT OF THE FACTS

According to the police report, on June 11, 1996 at 4:50 A.M., Appellee was driving a vehicle northbound on State Road 5 in Fort Lauderdale when he struck the rear of a 1991 GMC van at the corner of State Road 5 and State Road 84. This collision caused the GMC van to travel forward and hit the rear of a Chevrolet Caprice. The Caprice and GMC van were stopped at an intersection waiting for a red traffic signal to turn green. The occupant of the Caprice sustained injuries, was treated, and then released. The passenger of the GMC van sustained a broken leg. The driver of the GMC van sustained serious bodily injuries, including a fractured skull and a leg wound which developed a severe infection and required plastic surgery. Two blood samples were taken from Appellee shortly after the collision. The results indicated a blood alcohol level of .15 and .13 g% (R 26-27).

SUMMARY OF ARGUMENT

Petitioner contends that the Fourth District Court of Appeal's decision in State v. Warner, 721 So. 2d 767 (Fla. 4th DCA 1998), expressly and directly conflicts with the Fifth District Court of Appeal's decision in State v. Gitto, 23 Fla. L. Weekly D1550 (Fla. 5th DCA June 26, 1998), on the matter of when a trial court may advise a defendant of the sentence it would impose if the defendant pleads guilty to the charges filed by the state, and therefore this Court should accept jurisdiction to settle the conflict between the Fourth District Court of Appeal and the Fifth District Court of Appeal on this issue.

ARGUMENT

THE FOURTH DCA'S DECISION IN STATE V. WARNER EXPRESSLY AND DIRECTLY CONFLICTS WITH THE FIFTH DCA'S OPINION IN STATE V. GITTO.

To properly invoke the conflict jurisdiction of this Court, a Petitioner must demonstrate that there is express and direct conflict between the decision challenged therein, and those holdings of other Florida appellate courts or of this Court on the same rule of law so as to produce a different result than other state appellate courts faced with the substantially same facts. Article V, §3(b)(3), Fla. Const. (1980); Fla.R.App.P. 9.030(a)(2)(iv). This Court has stated that "conflict between decisions must be expressed and direct, i.e., it must appear within the four corners of the majority opinion." Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986). See The Florida Star v. B.J.F., 530 So. 2d 286 (Fla. 1988). In reference to Art. V, Sec. 3(b)(3), Florida Constitution, this Court has stated:

> Thus, it is not necessary that conflict actually exist for this Court to possess subject-matter jurisdiction, only that there be some statement or citation in the opinion that hypothetically could create conflict if there were another opinion reaching a contrary result. This is the only reasonable interpretation of this constitutional provision.

The Florida Star v. B.J.F., 530 So. 2d at 288.

It is not necessary that the district court of appeal's decision explicitly identify the conflicting appellate opinion, but

must at least address the legal principles that were applied as a basis for the decision. See Ford Motor Company v. Kikis, 401 So. 2d 1341 (Fla. 1981), on remand 405 So. 2d 1061 (1981).

This Court has held that a district court cannot thoroughly misapply a precedent of another court and then escape conflict certiorari review of its decision. See Gibson v. Avis Rent-a-Car System, 386 So. 2d 521 (Fla. 1980); Ascensio v. State, 497 So. 2d 640, 641 (Fla. 1986).

Further, 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. Jenkins v. State, 385 So. 2d 1356 (Fla. 1980). "Express" means to "represent in words" or "to give expression to". Jenkins v. State, 385 So. 2d 1356 (Fla. 1980). Thus, conflict jurisdiction is properly invoked when the district court announces a rule of law which conflicts with another district's, or when the district court applies a rule of law to produce a different result in a case which involves substantially the same facts of another case. Mancini v. State, 312 So. 2d 732, 733 (Fla. 1975).

Jurisdiction founded on "express and direct conflict" does not require that the district court below certify or even directly recognize the conflict. The "express and direct" requirement is met if it can be shown that the holding of the district court is in

conflict with another district court or the supreme court. See Hardee v. State, 534 So. 2d 706 (Fla. 1988).

It is Petitioner's contention that the Fourth District Court of Appeal's decision in State v. Warner, 721 So. 2d 767 (Fla. 4th DCA 1998), expressly and directly conflicts with the Fifth DCA's decision in State v. Gitto, 23 Fla. L. Weekly D1550 (Fla. 5th DCA June 26, 1998). See Section 3(b)(3) and 3(b)(4), Article 5, Florida Constitution; Rule 9.030(a)(2)(A)(iv), Florida Rules of Appellate Procedure.

The Fourth DCA discussed the application of State v. Gitto to the case below, the discussion culminating in the following conclusion:

> **We therefore respectfully disagree with Gitto** to the extent that it holds that a court can never, over the state's objection, advise a defendant of the sentence it would impose if the defendant pleads guilty to the charges filed by the state. (footnote omitted). Our holding is limited to cases in which the plea is to the charge determined by the prosecutor. The court cannot, over the state's objection, reduce the charge and accept a plea to the reduced charge. We note that Florida Rule of Criminal Procedure 3.170(h) requires the state's consent to a plea to lesser charges; however, rule 3.170 is silent on whether the state must consent where the plea is to the charges. (Emphasis added.)

State v. Warner, 721 So. 2d at 769 (Fla. 4th DCA 1998). This language clearly establishes that the Fourth DCA's opinion in Warner expressly and directly conflicts with the opinion in Gitto. Therefore, this Court has the authority to invoke its discretionary

jurisdiction to review this case. Petitioner urges this Court to review this case for the sole purpose of determining a unified view as to the issue raised in State v. Gitto, that is, whether a trial court has the authority, over the state's objection, to advise a defendant of a sentence if the defendant pleads guilty to the charges filed by the State.

It should be noted that on December 2nd, 1998, this Court declined to review the reversals in Harpin v. State and Perkins v. State, which stemmed from the Fifth DCA case State v. Gitto, where it was held that the trial court's acceptance of a plea over the prosecutor's objection was clear error which required outright reversal of any sentence entered in reliance on such a plea. The district court of appeal held that the trial court had no authority to strike the pleas.

CONCLUSION

WHEREFORE based on the foregoing arguments and authorities cited herein, the Appellee respectfully requests this Honorable Court to exercise its discretionary jurisdiction to review this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by U.S. Mail to: Michael J. Heise, Esq., 633 S. Andrews Ave., Third Floor, Fort Lauderdale, Florida 33301, on February 9th, 1999.

MYRA J. FRIED
Counsel for Appellee

APPENDIX

STATE of Florida, Appellant,
v.
John **WARNER**, Appellee.

No. 97-2862.

District Court of Appeal of Florida,
Fourth District.

Nov. 18, 1998.

Rehearing Denied Jan. 5, 1999.

Defendant pled guilty to three counts of driving under the influence (DUI) arising out of one episode. The Circuit Court, Broward County, Joyce Julian, J., accepted plea and entered downward departure sentence, and state appealed. The District Court of Appeal, Klein, J., held that downward departure sentence in DUI prosecution was not justified based on reasoning that offense was committed in unsophisticated manner and was isolated incident for which defendant showed remorse.

Reversed.

[1] CRIMINAL LAW ⚖273.1(2)
110k273.1(2)
Trial court is never bound to impose a specific sentence, even if the court has participated in the negotiations; if the trial judge decides not to impose the sentence committed to by the judge during plea discussions, the defendant is entitled to withdraw the plea.

[1] CRIMINAL LAW ⚖274(3.1)
110k274(3.1)
Trial court is never bound to impose a specific sentence, even if the court has participated in the negotiations; if the trial judge decides not to impose the sentence committed to by the judge during plea discussions, the defendant is entitled to withdraw the plea.

[2] CRIMINAL LAW ⚖273.1(2)
110k273.1(2)
Unlike trial courts, who are not bound to a specific sentence, agreements between the prosecutor and the defendant can be enforceable under contract law.

[3] CRIMINAL LAW ⚖273.1(4)
110k273.1(4)
Trial court can, even over the state's objection, advise a defendant of the sentence it would impose if the defendant pleads guilty to the charges filed by the state.

[4] CRIMINAL LAW ⚖273.1(2)
110k273.1(2)
Trial court cannot, over the state's objection, reduce the charge and accept a plea to a reduced charge. West's F.S.A. RCrP Rule 3.170(h).

[5] AUTOMOBILES ⚖359
48Ak359
Given state's strong public policy against driving under the influence (DUI), downward departure sentence in DUI prosecution was not justified based on reasoning that offense was committed in unsophisticated manner and was isolated incident for which defendant showed remorse. West's F.S.A. § 921.0016(3)(j).

[6] CRIMINAL LAW ⚖1309.1
110k1309.1
Trial court could not depart downward from sentencing guidelines based solely on proffered information without taking testimony or receiving other evidence. West's F.S.A. § 921.001(6).

***767** Robert A. Butterworth, Attorney General, Tallahassee, and Myra J. Fried, Assistant Attorney General, West Palm Beach, for appellant.

Michael J. Heise, Fort Lauderdale, for appellee.

***768** KLEIN, Judge.

After the trial court suggested the sentence it would impose in response to a plea to the charges, defendant, on a later date, pled guilty to three counts of driving under the influence arising out of one episode. The trial court accepted the plea and entered a downward departure sentence, as it had indicated it would, based on three mitigating factors in section 921.0016(4), Florida Statutes (1995). The state appeals, arguing that the court erred in entering the departure sentence over its objection. We reverse.

In State v. **Gitto**, 23 Fla. L. Weekly D1550, --- So.2d ---- (Fla. 5th DCA June 26, 1998), the Fifth

District Court of Appeal, en banc, held that the trial court has no authority to plea bargain with a defendant over the state's objection, and no authority to sentence a defendant in reliance on such a plea. The **Gitto** court relied on several cases from other jurisdictions, finding no Florida cases directly on point, and held:

> We conclude, consistent with courts of other jurisdictions, that the trial court has no power unilaterally to enter into a plea agreement with the defendant and that such an agreement cannot form the basis of a downward departure from the guidelines. The inability of the trial court to plea bargain with a defendant has its genesis in the doctrine of separation of powers, which is a cornerstone of our form of government. In Florida, the doctrine is incorporated in Article II, section 3, of the Florida Constitution.

Id. at D1551.

We have read the cases from other jurisdictions relied on by the fifth district. Although those cases contain language which can be interpreted as lending some support to the conclusion the court reached in **Gitto,** we find the cases to be factually distinguishable. [FN1]

> FN1. Young v. United States ex rel. Vuitton et Fils S.A., 481 U.S. 787, 107 S.Ct. 2124, 95 L.Ed.2d 740 (1987) was a contempt case in which the Supreme Court reversed the lower court's appointment of a special prosecutor who was not impartial. Commonwealth v. Corey, 826 S.W.2d 319 (Ky.1992) was a death penalty case in which the trial judge had allowed the defendant to plead guilty in the guilt phase with the agreement that the defendant could withdraw his plea if he was sentenced to life in prison or death in the penalty phase. In State v. Williams, 277 N.J.Super. 40, 648 A.2d 1148 (N.J.Super.Ct.App.Div.1994), the trial court had vacated a conviction and allowed the defendant to accept an earlier plea offer which was no longer open. In People v. Mikhail, 13 Cal.App.4th 846, 16 Cal.Rptr.2d 641 (1993), a successor judge had set aside a plea of guilty that had been negotiated with the prosecution and was approved by the original judge.

[1] Although the **Gitto** court characterized the trial court's conduct as engaging in "plea bargaining," 23 Fla. Weekly at D1551, a court is never bound to impose a specific sentence, even if the court has participated in the negotiations. Goins v. State, 672 So.2d 30 (Fla.1996). If the judge decides not to impose the sentence committed to by the judge during plea discussions, the defendant is entitled to withdraw the plea. Goins, 672 So.2d at 32.

[2] A "plea bargain" to us, connotes an "agreement or contract." American Heritage Dictionary 107 (1981). Unlike trial courts, who are not bound to a specific sentence, agreements between the prosecutor and the defendant can be enforceable under contract law. State v. Frazier, 697 So.2d 944, 945 (Fla. 3d DCA 1997)(state required to nolle pross charges against third persons per plea agreement); State v. Davis, 188 So.2d 24 (Fla. 2d DCA 1966)(enforcing prosecutor's agreement not to prosecute if defendant passed polygraph test).

In Davis v. State, 308 So.2d 27, 29 (Fla.1975), our supreme court observed:

> [I]t is true that plea discussions in which the trial judge is involved have been categorized as "delicate" and that American Bar Association in its Standards for Criminal Justice Relating to Guilty Pleas has concluded that the trial judge should not participate in such plea discussions until after a tentative plea agreement has been entered into between counsel for the parties. Nevertheless, we refrain from condemning the practice per se since we are confident that the trial judges of this state will take all necessary precautions to assure that defendants' rights are protected ***769** by appropriate safeguards. [footnote omitted]

See also Barker v. State, 259 So.2d 200, 204 (Fla. 2d DCA 1972)(In plea bargaining discussions, the court can discuss sentencing concessions such as giving less than the maximum sentence, probation as an alternative or concurrent sentences rather than consecutive. The state's concurrence is not essential, although it is desirable.).

[3][4] We therefore respectfully disagree with **Gitto** to the extent that it holds that a court can never, over the state's objection, advise a defendant of the sentence it would impose if the defendant pleads guilty to the charges filed by the state. [FN2] Our holding is limited to cases in which the plea is to the charge determined by the prosecutor. The court cannot, over the state's objection, reduce the charge and accept a plea to the reduced charge. We note that Florida Rule of Criminal Procedure 3.170(h) requires the state's consent to a plea to lesser charges; however, rule 3.170 is silent on whether the state must consent where the plea is to the

charges.

> FN2. We do agree with that portion of **Gitto** which holds that when the state is not a party to a plea agreement, the agreement itself cannot serve as a basis for a downward departure from the sentencing guidelines. State v. Kennedy, 698 So.2d 349 (Fla. 4th DCA 1997). That was not, however, the basis for the downward departure in this case.

[5][6] We now address the state's argument that there was an insufficient basis in the record to sustain the departure. The state argues that the trial court erred in departing without taking testimony or receiving other evidence. When the state pointed this out, the trial court responded that it was doing so based on proffered information. We agree with the state that a proffer is not evidence, and that the court erred in not taking evidence. See § 921.001(6), Fla. Stat. (1995)(the level of proof to establish a departure sentence is preponderance of the evidence); and State v. Baker, 713 So.2d 1027 (Fla. 2d DCA 1998).

One of the grounds for departure given by the trial court in this case was that "the offense was committed in an unsophisticated manner and was an isolated incident for which the defendant has shown remorse." § 921.0016(3)(j), Fla. Stat. Defendant, whose blood alcohol tested between . 13 and .15, ran into the rear of a vehicle which struck another vehicle at a red light, resulting in serious injuries. Given the state's strong public policy against DUI, [FN3] we conclude that this reason for departure is not available in this case. If this DUI could be considered an isolated incident, then all first DUI's by people having clean records could be considered such. Nor do we think that drunk driving can be "committed in an unsophisticated manner." Accordingly, on remand, this reason for departure will not be available.

> FN3. See Baker v. State, 377 So.2d 17 (Fla.1979); Ingram v. Pettit, 340 So.2d 922 (Fla.1976); Lindsay v. State, 606 So.2d 652 (Fla. 4th DCA 1992).

We are not deciding at this time the availability of the other reasons given by the trial court for departure; however, if the court does depart for other reasons they must be based on competent substantial evidence. Reversed.

DELL and GUNTHER, JJ., concur.

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