IN THE SUPREME COURT OF THE STATE OF FLORIDA,

STATE OF FLORIDA,

Petitioner/Appellant

v.

ESTEVAN FIGUEROA,

Respondent/Appellee.

Case No. 95,087

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*
ON APPEAL FROM THE FOURTH DISTRICT COURT OF APPEAL
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INITIAL BRIEF OF PETITIONER/APPELLANT ON THE MERITS

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Case No. 95,087
State of Florida v. Estevan Figueroa

CERTIFICATE OF INTERESTED PERSONS

Counsel for the Petitioner/Appellant certifies that the following persons or entities may have an interest in the outcome of this case:

1. Honorable Ilona M. Holmes
   Circuit Court Judge, Seventeenth Judicial Circuit of Florida
   (trial judge)

2. Joseph A. Tringali, Esq., Assistant Attorney General
   Office of the Attorney General, State of Florida
   Robert Butterworth, Attorney General
   (appellate counsel for State, Petitioner/Appellant)

3. Paul Renner, Esq., and Ken Gillespie, Esq., Assistant State Attorney(s),
   Office of the State attorney, Seventeenth Judicial Circuit
   Michael J. Satz, State Attorney
   (trial counsel for State, Petitioner/Appellant)

4. Estevan Figueroa
   (Respondent/Appellee)

5. Browning-Ferris Industries, Inc.
   (Complainant/Victim)

6. Louis Pironti, Esq., Assistant Public Defender(s)
   Office of the Public defender, Seventeenth Judicial Circuit
   Alan R. Schreiber, Public Defender
   (trial counsel for Respondent/Appellee)

7. Margaret Good-Earnest, Esq., Assistant Public Defender
   Office of the Public Defender, Fifteenth Judicial Circuit
   Richard Jorandby, Public Defender
   (appellate counsel for Respondent/Appellee)

CERTIFICATE OF TYPE FACE AND FONT

Counsel for the Petitioner/Appellant hereby certifies, pursuant to this Court's Administrative Order of July 13, 1998, that the type used in this brief is Times Roman 14 point proportionally spaced font.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Cited **Page Number**

STATE CASES

FLORIDA CONSTITUTION

STATUTES

PRELIMINARY STATEMENT

Petitioner/Appellant was the appellant in the Fourth District Court of Appeal and the prosecution in the Criminal Division of the Circuit Court of Seventeenth Judicial Circuit of Florida.

Respondent/Appellee was the appellee in the Fourth District Court of Appeal and the defendant in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit of Florida.

In this brief, the parties will be referred to as they appear before this Court, except that Petitioner/Appellant may also be referred to as the "prosecution" or the "State."

The following symbols will be used:

R = Record on Appeal

T = Transcript

STATEMENT OF THE CASE AND FACTS

Respondent, Estevan Figueroa was charged in the Circuit Court of the Seventeenth Judicial Circuit of Florida with three counts of burglary of a structure, three counts of grand theft, and one count of possession of burglary tools (R 4-6). He appeared in the Circuit Court, Hon. Ilona M. Holmes presiding, on August 11, 1998, at which time the following discussion took place among the trial judge, the prosecutor and the defense attorney:

> THE COURT: Well, what does he score, Mr. Gillespie or Mr. Renner?
>
> MR. RENNER (the prosecutor): He scores up to a year in state prison, Judge, discretionary. It's 35.2 points.
>
> THE COURT: 35.2 points. And what are his priors?
>
> MR. GILLESPIE (the prosecutor): No prior record, Judge.
>
> THE COURT: No prior record?
>
> MR. GILLESPIE: No.
>
> THE COURT: *I'm willing to withhold and put him on probation.*
>
> MR. PIRONTI (defense counsel): Judge, I think he would be amenable to that.
>
> MR. RENNER: I would object to that.
>
> THE COURT: Objection based on what?

MR. RENNER: Based upon separation of powers, Judge.

(T 4).

Following a plea colloquy in which Respondent was advised of his rights, he plead no contest to the court (T 12). The trial judge withheld adjudication and sentenced Appellee within the guidelines (R 13-16) to 18 months probation over the objection of the State (T 13; 15).

Following the entry of the plea and sentencing by the court, the trial judge entered a written order entitled "Order Overruling State's Objection to Court Plea" (R 10-11) and the State timely appealed to the Florida Fourth District Court of Appeal (R 17-18).

Respondent, through the Office of the Public Defender, moved to dismiss Petitioner's appeal in the Fourth District, contending that because the sentence which was imposed on Respondent was not an 'illegal sentence' within the meaning of §924.07(1)(I), (1995), and, therefore, the State could not appeal. The Fourth District agreed, and dismissed the appeal by the State. The State then filed a notice to invoke the discretionary jurisdiction of this Court.

This Court accepted jurisdiction on May 6, 1999 and dispensed with oral argument pursuant to Florida Rule of Appellate Procedure 9.320. This brief follows.

SUMMARY OF THE ARGUMENT

A trial court may not agree in advance to a sentence without the knowledge of the case possessed by the prosecutor or without the benefit of having heard evidence at trial. While a defendant is presumptively 'entitled' to a guideline sentence, the state is also entitled -- based on facts which only the state may know -- to argue for an upward departure. A sentence which is imposed as the result of an constitutional violation is itself illegal.

Judicial discretion, unrestrained by principle, by methodology and by standards is contrary to our rule of law. It would substitute rule by the whim of judges.

ARGUMENT

THE FOURTH DISTRICT COURT OF APPEAL ERRED IN HOLDING THE STATE'S APPEAL OF THE TRIAL COURT SHOULD BE DISMISSED. THE TRIAL COURT ERRED BY ENGAGING IN PLEA NEGOTIATIONS WITH THE APPELLEE OVER THE OBJECTION OF THE STATE, AND THE RESULT SENTENCE, EVEN THOUGH IT WAS WITHIN THE GUIDELINES WAS 'ILLEGAL.'

Petitioner, the State of Florida, respectfully submits the Florida Fourth District Court of Appeal erred when it held the State did not have the right to appeal the action of the trial judge who, citing the holding of *State v. Gitto, et al,* 23 Fla. L. Weekly D1550 (Fla. 5th DCA June 26, 1998), discussed her intended sentence with a defendant prior to his entry of a no-contest plea, and then accepted that plea over the objection of the State.

In so doing, the trial judge distinguished the case at bar from *Gitto* saying "in that all five cases consolidated for appeal [in *Gitto*] were downward departures . . ." and "[t]he portion of *Gitto* which discusses plea negotiations by the court is mere dicta." The Fourth District agreed with the trial court and added the observation that *Gitto* did not discuss the issue of jurisdiction.

Petitioner respectfully submits that both the Fourth District and the trial court missed the essential holding of *Gitto.* In fact, in *Gitto* the Fifth District Court of Appeal

wrote a well-reasoned, *en banc* opinion in which it thoroughly explored the reason for the constitutional separation of powers between the executive branch, represented by the office of the prosecutor, and the judicial branch, represented by the trial judge. Going far beyond "mere dicta" the Fifth District noted that the "role of the judiciary in the plea bargaining process is limited . . ." and that "[w]hile the judiciary has the power to accept or reject a plea, (citation omitted), the court's role is a secondary one, designed as a safeguard against excess on either side." Thus, said the Fifth District, "for the trial court *to agree in advance* to a sentence without the knowledge of the case possessed by the prosecutor or without the benefit of having heard evidence at trial, is error." (emphasis added).

Petitioner conceded in the Fourth District, and concedes here, that the facts of the case at bar are different in the one respect mentioned by the trial judge -- that is, the case at bar does not involve a downward departure. And, clearly, there are district court opinions which hold that a sentence within the guidelines is not subject to appellate review. *Preston v. State,* 641 So.2d 169, 171 (Fla. 3d DCA 1994). And in *State v. Warner,* 721 So.2d 767 (Fla. 4th DCA 1998), the Fourth District specifically said, "[w]e . . . respectfully disagree with *Gitto* to the extend that it hold that a trial 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."

However, the reasoning of the trial court, and, respectfully, the Fourth District Court, overlooks the very real issue raised by the Fifth District in *Gitto:* that by engaging in a sentencing discussion based on nothing more than the 'title' of a crime, the trial court injects itself into the bargaining process without the special knowledge which at that point is in the hands only of the prosecutor. Certainly, the defendant is presumptively 'entitled' to a guideline sentence; but the state is also entitled -- based on facts which only the state may know -- to argue for an upward departure. In the words of Chief Justice Cardozo, "But justice, though due to the accused, is due to the accuser also. * * * We are bound to keep the balance true." (quoted in *Bell v. State,* 262 So. 2d 244, 245 [Fla. 4th DCA 1972]).

In the recent case *State v. Mancino,* 714 So.2d 429, 433 (Fla. 1998) this Court once again explained the distinction between an 'illegal sentence' and an 'unlawful' or 'erroneous' sentence. The Court could not have made it clearer when it said, "A sentence that patently fails to comport with statutory or constitutional limitations is by definition 'illegal'." And in *Avatar Development Corp. v. State,* 723 So.2d 199 (Fla. 1998) the Court reiterated that "Article II, section 3 declares a strict separation of the three branches of government and that: 'No person belonging to one branch shall exercise any powers appertaining to either of the other two branches....'" Simply stated, Petitioner submits the sentence imposed in the case at bar was 'illegal' because it was arrived at in violation

of the most basic precepts of the Florida Constitution: the precept dealing with separation of powers. And, like the sentence in *Mancino,* the illegality is apparent in the record and easily correctable by the appellate court.

Respondent may very well ask, of course, "Where is the prejudice?," arguing that he pled 'no contest' and was sentenced as provided by law, period. To that argument Petitioner responds, "The prejudice is in not giving the state the opportunity to exercise its role in the judicial process. In *Rigabar v. Broome,* 658 So.2d 1038, 1041 (Fla. 4th DCA 1995) Fourth District Court of Appeal said:

> Discretion unrestrained by principle, by methodology and by standards is contrary to our rule of law. It would substitute rule by the whim of judges. Discretion exercised without guiding principles or standards is without rudder or anchor and is subject to prevailing tides and winds and little else. Judicial discretion exists not for its own sake but merely because it is impossible to set down a single rule to govern all procedural questions that arise in judicial proceedings.

Petitioner respectfully submits the principle at stake in the case at bar is the corollary of that in *Rigabar*: if the defendant has a right to plead guilty without judicial interference, the state must have an equal and identical right to prosecute, free from the ability of a trial judge to 'short-circuit' the process on little more than a whim. Petitioner respectfully contends that in the case at bar the trial court overstepped its bounds by announcing a sentence and inviting the defendant to plead guilty. The trial court erred,

and, respectfully, the Fourth District compounded that error by interpreting the definition of 'illegal sentence' too narrowly. Petitioner's appeal should not have been dismissed in the Fourth District, and the trial court's order should have been reversed and the case remanded for further proceedings in accordance with the law.

CONCLUSION

WHEREFORE based on the foregoing arguments and authorities cited herein, Petitioner/Appellant prays for an order of this Court to reversing the Fourth District Court of Appeal's decision, and for such other and further relief as to the Court may seem just and proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing "Initial Brief of Petitioner/Appellant on the Merits" has been furnished by courier to MARGARET GOOD-EARNEST, Esq., Assistant Public Defender, The Criminal Justice Building, 421 Third Street, 6th Floor, West Palm Beach, FL 33401 on August 18, 2000.

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