IN THE SUPREME COURT OF THE STATE OF FLORIDA,

STATE OF FLORIDA,

Petitioner,

v.

ESTEVAN FIGUEROA,

Respondent.

Case No. 95,087

****

ON APPEAL FROM THE FOURTH DISTRICT COURT OF APPEAL

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PETITIONER'S AMENDED BRIEF ON JURISDICTION

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CERTIFICATE OF FONT SIZE

Counsel for the Petitioner, the STATE OF FLORIDA, hereby certifies this brief is printed in 12 point Courier New font as provided in this Court's administrative order of July 13, 1998,

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PRELIMINARY STATEMENT

Petitioner was the prosecution in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida, and the appellee in the Florida Fourth District Court of Appeal. Respondent was the defendant in the trial court and the appellant in the district court.

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."

The following symbols will be used;

R = Record on Appeal

T = Transcripts

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. 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.

(emphasis added).

Following a plea colloquy in which Respondent was advised of his rights, he pled no contest to the court. The trial judge withheld adjudication and sentenced Respondent within the guidelines to 18 months probation over the objection of the state.

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."

The state timely appealed to the Fourth District Court of Appeal, and Respondent moved to dismiss, arguing, *inter alia,* that sections 924.07 and 924.071 Florida Statutes (1995) did not permit the state to appeal from a sentence which was within the sentencing guidelines and was not illegal. The state argued that under the holding of *State v. Gitto,* 23 Fla. L. Weekly D1550 (Fla. 5th DCA June 26, 1998) the sentence was "illegal" even though it was within the guidelines because the trial court did not have the procedural authority to impose it.

After due deliberation, the Fourth District Court of Appeal issued a written opinion on Respondent's motion to dismiss. The court said that "*Gitto* is inapposite here because it does not discuss the issue of jurisdiction and a close reading of the opinion reveals that the opinion reveals that the district court had jurisdiction in that case because each of the consolidated cases involved the imposition of a downward departure sentence." The court further noted it had previously "disagree[d] with the

holding of *Gitto* to the extent that the opinion held 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" and held the state could not appeal the action of the trial court in the case at bar. The Fourth District then dismissed the state's appeal. The state now seeks review by this Court.

A copy of the Fourth District Court of Appeal's decision is attached hereto.

SUMMARY OF THE ARGUMENT

In order to 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. At bar, the Fourth District Court of Appeal specifically stated that it "disagreed" with the decision of the Fifth District Court of Appeal in *State v. Gitto,* 23 Fla. L. Weekly D1550 (Fla. 5th DCA June 26, 1998) and refused to follow it as precedent. The Fifth District Court of Appeal said that it had decided *Gitto* on constitutional grounds. This Court has jurisdiction to review the decision of the Fourth District Court of Appeal on the basis of conflict under Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv).

ARGUMENT

THIS COURT HAS JURISDICTION TO REVIEW THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL WHEREIN IT DISMISSED THE STATE'S APPEAL FROM A TRIAL COURT'S IMPOSITION OF A GUIDELINES SENTENCE FOLLOWING A PLEA WHICH HAD BEEN ENTERED OVER THE STATE'S OBJECTION WHEN THE TRIAL COURT HAD ADVISED THE DEFENDANT OF THE SENTENCE IT WOULD IMPOSE PRIOR TO THE ENTRY OF THE PLEA.

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 appeal within the four corners of the majority opinion." *Reaves v. State*, 485 So. 2d 829, 830 (Fla. 1986). A petitioner's own interpretation of "conflict" is simply not enough.

In the case at bar, the Fourth District Court of Appeal specifically held "*[State v.] Gitto*[1] is apposite here because it does not discuss the issue of jurisdiction and a close reading of the opinion reveals that the district court had jurisdiction in that case because each of the consolidated cases involved the

[1]23 Fla. L. Weekly D1550 (Fla. 5th DCA June 26, 1998)

imposition of a downward departure sentence." The Fourth District Court went on to say it "disagreed 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." Petitioner respectfully submits the Fourth District erred.

The Fifth District Court of Appeal could not have been more clear in stating that its *Gitto* decision was based on constitutional grounds. It specifically stated the five consolidated cases "*ostensibly* involve the entry of downward departure sentences." The court then added, "However, *they also concern the power of the trial court to enter into a plea agreement with the defendant,* since they sentences were reached by plea negotiations between the trial judge and the defendant." (emphasis added). Thus, the Fifth District clearly held that the downward departure was at best a side issue; that the main thrust of its decision was on constitutional grounds:

> We conclude, consistent with courts of other jurisdictions, that the trial court has no power to unilaterally enter into a plea agreement with the defendant and that such an agreement cannot form the basis of a downward departure. (footnote omitted) The inability of the trial court to plea bargain with a defendant *has its genesis in the doctrine of separation of powers* which is the cornerstone of our form of government.

State v. Gitto, id. (emphasis added).

In holding as it did, the Fourth District Court overlooked the very real and highly significant 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, a 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, "[J]ustice, 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]).

Petitioner submits in the case at bar the trial court impermissibly and unconstitutionally injected itself into the adversarial process. It prejudiced the state by not giving the state the opportunity to exercise its proper role in the proceedings. That error was compounded by the Fourth District Court of Appeal which dismissed Petitioner's appeal contrary to the Fifth District's clear language in *Gitto,* supra. Accordingly, Petitioner's submits this Court has jurisdiction and that it can and should review the decision of the Fourth District Court of Appeal on conflict grounds.

CONCLUSION

WHEREFORE based on the foregoing arguments and the authorities cited herein, Petitioner respectfully contends the decision of the Fourth District Court of Appeal is in error; it is in conflict with decisions of this Court and other district courts. Therefore, this Court should exercise its discretionary jurisdiction and rule in the premises.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Petitioner's Amended Brief on Jurisdiction" was sent by United States mail to DAVID McPHERRIN, Assistant Public Defender, The Criminal Justice Building, 431 Third Street, 6th Floor, West Palm Beach, FL 33401 on March 23, 1999.

JOSEPH A. TRINGALI,
Assistant Attorney General
Counsel for Petitioner

APPENDIX

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT JANUARY TERM 1999

STATE OF FLORIDA,

Appellant,

v.

ESTEVAN FIGUEROA,

Appellee.

CASE NO. 98-3025

Opinion filed February 24, 1999

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Ilona Holmes, Judge; L.T. Case No. 98-11483CF10A.

Robert A. Butterworth, Attorney General, Tallahassee, and Joseph A. Tringali, Assistant Attorney General, West Palm Beach, for appellant.

Richard Jorandby, Public Defender, and David McPherrin, Assistant Public Defender, West Palm Beach, for appellee.

ON MOTION TO DISMISS

PER CURIAM.

The state appeals a final sentencing order imposing a legal sentence which was entered over the state's objection after the trial court advised appellee, Estevan Figueroa, that if he pled to the crimes charged it would be willing to withhold adjudication of guilt and place him on probation. Appellee seeks dismissal of the appeal on the basis that the state does not have the right to appeal such an order. We agree.

The state, in support of its contention that it may appeal the order presently under review, argues that under the Fifth District Court of Appeal's decision in State v. Gitto, 23 Fla. L. Weekly D1550 (Fla. 5th DCA June 26, 1998), the doctrine of separation of powers precludes the trial court from entering into a plea agreement with the defendant. Gitto is inapposite here because it does not discuss the issue of jurisdiction and a close reading of the opinion reveals that the district court had jurisdiction in that case because each of the consolidated cases involved the imposition of a downward departure sentence. The state was permitted to appeal under Florida Statute section 924.07(1)(i), (1995). As a note, in State v. Warner, 721 So. 2d 767, 769 (Fla. 4th DCA 1998), this court "disagree[d] 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."

In State v. F. G., 630 So. 2d 581 (Fla. 3d DCA 1993), aff'd, 638 So. 2d 515 (Fla. 1994), the state appealed final disposition orders in juvenile delinquency cases arguing that claimed procedural errors leading up to the entry of the orders rendered the dispositions "illegal"for purposes of a state appeal under Florida Statute section 39.069(1)(b)(5), (1991). The district court held that the claim of such procedural error does not render the disposition illegal and, therefore, the appeals should be dismissed. The supreme court agreed and adopted the district court's opinion.

Similarly, in State v. Riley, 648 So. 2d 825 (Fla. 3d DCA 1995), the third district dismissed an appeal by the state in which the state argued that the trial court rendered an illegal sentence when it refused to make habitual defender findings as required under section 775.084, Florida Statutes, (1993). The court held that, as in F. G., the procedural error does not make the sentence illegal under section 924.07(1)(e), Florida Statutes, (1993). The trial court's error did not fall within any provision under which the state can appeal.

Finally, in an appeal almost identical to the one

at issue, the first district held that Florida Rule of Appellate Procedure 9.140(c) and section 924.07 do not authorize the state to appeal when the trial court enters into its own plea agreement with the defendant. See State v. Hewitt, 702 So. 2d 633 (Fla. 1st DCA 1997).

Appeal dismissed.

FARMER, SHAHOOD and HAZOURI, JJ., concur

NOT FINAL UNTIL THE DISPOSITION OF ANY TIMELY FILED MOTION FOR REHEARING.

SID J. WHITE, CLERK
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3/23/99 filed 3/22/99

STATE OF FLORIDA
VS.
ESTEVAN FIGUEROA

CASE NO. 95,087

I have this date received the below-listed pleadings or documents:

Petitioners Brief on Jurisdiction, original and five copies. Your brief did not contain an appendix which this Court requires on all initial briefs. All that we require in the appendix is a copy of the DCA opinion. Your brief also did not contain a Certificate of Font Size pursuant to this Court's Administrative Order of July 13, 1998 requiring 10 characters per inch. Your brief has 16 characters per inch. Please amend your brief according. Your brief is due immediately, original and five copies and original and five copies of your appendix. If you have any questions, please advise.

Please make reference to the case number in all correspondence and pleadings.

Most cordially,

Clerk, Supreme Court

ALL PLEADINGS SIGNED BY AN ATTORNEY MUST INCLUDE THE ATTORNEY'S FLORIDA BAR NUMBER.

SJW/bh

cc: Mr. David McPherrin