ORIGINAL

IN THE SUPREME COURT OF FLORIDA

CASE NO. 95,451

DCA CASE NO. 98-2874

STATE OF FLORIDA,

Petitioner,

-vs-

LEVON SHILLINGFORD,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

BRIEF OF PETITIONER ON JURISDICTION

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INTRODUCTION

Petitioner, **THE STATE OF FLORIDA**, was the prosecuting authority in the trial court and the Appellant in the Fourth District Court of Appeal. Respondent, **LEVON SHILLINGFORD**, was the Defendant in the trial court and the Appellee in the Fourth District Court of Appeal. The parties shall be referred to as Petitioner and Respondent in this brief, except that Petitioner may also be referred to as the "State" and Respondent may also be referred to as "Defendant". The symbol "App." followed by a letter, colon and page number, if necessary, refers to the appendix to this brief, which contains a conformed copy of the slip opinion of the Fourth District Court of Appeal in the instant cause.

CERTIFICATE OF TYPE SIZE AND STYLE

Counsel for the Respondent, the State of Florida, hereby certifies this brief is printed in 12 point Courier New font as required by this Court's administrative order of July 13, 1998.

STATEMENT OF THE CASE AND OF THE FACTS

Respondent was charged in the Circuit Court of the Seventeenth Judicial Circuit of Florida with delivery of cocaine in violation of sections 893.13(2)(a)4. and 893.13(1)(a)1., Florida Statutes (1997). A hearing was held before the Honorable Peter M. Weinstein on July 28, 1998. (App. A:1). Defense counsel informed the court

Defendant had two prior felonies and asked if the court would consider a sentence of six months in the Broward County Jail. The trial judge responded, "[M]y understanding is your plea will be adjudication, six months Broward County Jail." (App. A:1).

A plea colloquy followed. Defendant was advised of his rights, and he waived his rights. (App. A:1-2). The court then asked the State to summarize the facts upon which the charge was predicated. After the State's recitation of the facts, the State objected, based on the separation of powers doctrine, to the court's extending a plea. (App. A:1). Defendant did not take any exception to the facts as summarized and entered a plea of no contest. (App. A:1-2). The court accepted Defendant's plea, adjudicated him guilty, and sentenced him to six months Broward County Jail. (App. A:2). The transcript reflects there was no discussion regarding where Defendant scored on the sentencing guidelines scoresheet.

Based upon the decision in State v. Gitto, 23 Fla. L. Weekly D1550 (Fla. 5th DCA June 26, 1998) (App. B), the State timely appealed to the Fourth District Court of Appeal. Defendant moved to dismiss, arguing, *inter alia*, that because his guideline scoresheet points put him in the discretionary range, his sentence was neither unlawful nor a departure. Defendant argued the appeal

should be dismissed because the appellate court lacked jurisdiction to review a legal sentence. The State argued, *inter alia*, that the sentence was "illegal" because the trial court contemplated Defendant's offer, even going so far as to determine the voluntariness of the plea, prior to taking any evidence. That is, under Gitto, *supra*, and Tilghman v. Culver, 99 So. 2d 282 (Fla. 1957), cert. den., 356 So. 2d 953 (1958) (App. C), the procedure employed by the trial court rendered the sentence "illegal".

The Fourth District Court of Appeal dismissed the appeal and the State moved for reconsideration/clarification. After due deliberation, the court issued an opinion on Petitioner's motion for reconsideration/clarification. The court held the State could not appeal the action of the trial court and dismissed the State's appeal.

The State now seeks discretionary review by this Court on the grounds the Fourth District Court of Appeal herein is in express and direct conflict with this Honorable Court in Tilghman v. Culver and the Fifth District Court of Appeal in State v. Gitto. A copy of the opinion of the Fourth District Court of Appeal is attached hereto. (App. A).

QUESTION PRESENTED

WHETHER THE FOURTH DISTRICT COURT OF APPEAL'S DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISIONS OF THIS COURT IN TILGHMAN V. CULVER, 99 SO. 2D 953 (1957), CERT. DEN., 356 SO. 2D 953 (1958), AND THE FIFTH DISTRICT COURT OF APPEAL IN STATE V. GITTO, 23 FLA. L. WEEKLY D1550 (Fla. 5TH DCA JUNE 26, 1998) ON THE SAME QUESTION OF LAW?

SUMMARY OF THE ARGUMENT

In order to invoke the conflict jurisdiction of this court, a Petitioner must demonstrate there is express and direct conflict between the decision being challenged and 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 substantially the same facts. Here, the Fourth District Court of Appeal specifically stated 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 declined to follow its precedent. The Fifth District Court of Appeal decided Gitto on constitutional grounds, citing and quoting this Court's opinion in Tilghman v. Culver, 99 So. 2d 282 (Fla. 1957), cert. den., 356 So. 2d 953 (1958).

This Honorable 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) and Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986).

ARGUMENT

THE FOURTH DISTRICT COURT OF APPEAL'S DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISIONS OF THIS COURT IN TILGHMAN V. CULVER, 99 SO. 2D 282 (FLA. 1957), CERT. DEN., 356 SO. 2D 953 (1958), AND THE FIFTH DISTRICT COURT OF APPEAL IN STATE v. GITTO, 23 FLA. L. WEEKLY D1550 (FLA. 5TH DCA JUNE 26, 1998) ON THE SAME QUESTION OF LAW.

Discretionary jurisdiction of this Honorable Court may be exercised to review, among other matters, decisions of district courts of appeal which expressly and directly conflict with a decision of this Court or of another district court of appeal on the same question of law. Article V, Section 3(b)(3), Fla. Const.; Fla. R. App. P. 9.030(a)(2)(A)(iv). Decisions are considered to be in express and direct conflict when the conflict appears within the four corners of the majority decisions. Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986). Neither the record itself nor the dissenting opinion may be used to establish jurisdiction. Id.

Here, the Fourth District disagreed with Gitto and, in effect, Tilghman v. Culver to the extent it holds 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, and found it did not have jurisdiction to review the sentence it described as "lawful". Petitioner respectfully submits

the Fourth District erred and respectfully asks this Honorable Court to address the issue of whether a trial court can negotiate and accept a plea without a factual basis and over the State's objection.

The Fifth District decided Gitto on constitutional grounds, opining that entry of departure sentences also concerns the power of the trial court to enter into a plea agreement with the defendant, as the sentences there were reached by plea negotiations between the trial judge and the defendant. Accordingly, the Fifth District held the downward departure sentences were a subissue: The decision turned on constitutional grounds.

> 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.

State v. Gitto, *supra* (emphasis added) (App. B). The Gitto decision expressly states that a trial court cannot bind itself to a sentencing agreement with a defendant.

> Courts cannot bind themselves to agreements such as that shown by this record. To countenance such would require too high a

> price for administrative efficiency. The judge is an instrument of the law charged with meting out just punishment to convicted men. Just punishment is that which fits the circumstances of the crime and the particular criminal; therefore, expediency has no place in formulating the judge's act.

Id. citing Tilghman v. Culver, 99 So. 2d 282 (Fla. 1957), cert. den., 356 So. 2d 953 (1958). Further,

> . . .the trial court's acceptance of a plea over the prosecutor's objection is clear error which requires outright reversal of any sentence entered in reliance on such a plea. ...It is immaterial whether the trial court articulated valid reasons for departure in imposing sentence on these defendants, since the court's involvement in plea negotiations has tainted the entire sentencing process.

Id. (citations omitted).

In holding as it did, the Fourth District overlooked the very real and highly significant issue raised by the Fifth District in Gitto: 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 only the prosecutor's. The defendant is "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]).

In this case, the trial court and the Defendant negotiated a plea over the State's objection and without a factual basis for the plea, such was in express conflict with this Court's opinion in Tilghman v. Culver and the Fifth District's opinion in State v. Gitto. That error was compounded when the Fourth District dismissed Petitioner's appeal. Thus, this Honorable Court has jurisdiction and it can and should review the decision of the Fourth District Court of Appeal on conflict grounds. Reaves v. State.

CONCLUSION

WHEREFORE, based on the foregoing arguments and cited authorities, Petitioner respectfully requests this Honorable Court to exercise its discretionary jurisdiction and rule on the merits.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **BRIEF OF PETITIONER** was mailed to **MARCY K. ALLEN**, Esquire, Assistant Public Defender, Criminal Justice Building, 421 Third Street, 6th Floor, West Palm Beach, Florida 33401 on this 30th day of April 1999.

BARBARA A. ZAPPI
Assistant Attorney General