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IN THE SUPREME COURT OF FLORIDA

ORIGINAL

STATE OF FLORIDA,

Petitioner,

vs. CASE NO. 95,451

LEVON SHILLINGFORD,

Respondent.
_____/

RESPONDENT'S BRIEF IN OPPOSITION OF JURISDICTION

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PRELIMINARY STATEMENT

Respondent was the appellee in the Fourth District Court of Appeal and the defendant in the trial court. Petitioner was the appellant and prosecution in the lower courts. In this brief the parties will be referred to as they appear before this Honorable Court.

In accordance with the Florida Supreme Court Administrative Order, issued on July 13, 1998, and modeled after Rule 28-2(d), Rules of the United States Court of Appeals for the Eleventh Circuit, counsel for the State of Florida, Respondent hereby certifies that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately.

STATEMENT OF THE CASE AND FACTS

Respondent relies upon the following facts set forth in the decision of the Fourth District Court of Appeal in State v. Shillingford, Slip. Op. Case No. 98-2874 (Fla. 4th DCA March 24, 1999).

Respondent pled no contest to delivery of cocaine. A guideline scoresheet was prepared which required imposition of any non state prison sanction. The court sentenced respondent to 6 months in the county jail. Petitioner filed a notice of appeal and respondent moved to dismiss. Respondent explained that the court did not have jurisdiction to consider the appeal because respondent received a lawful sentence and the state does not have the right to appeal a lawful sentence. The Fourth District Court of Appeal agreed and dismissed the appeal.

Petitioner moved for reconsideration/clarification and for rehearing *en banc*. The district court denied the motions by written opinion and reaffirmed the order of dismissal on the ground that the sentence was lawful. The court also rejected the state's suggestion that the sentence was somehow potentially illegal where the court advises the defendant of the sentence it intends to impose prior to acceptance of the plea. Forewarning a defendant of the outcome of the plea does not render the procedure unlawful. State v. Shillingford, Slip. Op. Case No. 98-2874 (Fla. 4th DCA March 24, 1999).

SUMMARY OF ARGUMENT

The decision of the Fourth District Court of Appeal in State v. Shillingford, Slip. Op. Case No. 98-2874 (Fla. 4th DCA March 24, 1999), relied upon by petitioner to invoke the conflict jurisdiction of this Court, is not in 'express and direct' conflict with the decision of the Fifth District Court of Appeal in State v. Gitto, 24 Fla. L. Weekly D1105 (Fla. 5th DCA June 26, 1998)(corrected opinion). Without addressing its jurisdiction to entertain the state's appeal, the Gitto court vacated the defendant's downward departure sentence on the ground that the trial court violated the separation of powers doctrine when it advised him of the sentence he would receive before his plea was entered. By contrast, in Shillingford, the appellate court dismissed petitioner's appeal of respondent's guideline sentence on the ground that the state did not have the right to appeal from a lawful sentence. Thus, Shillingford and Gitto involved dissimilar controlling facts and decided different points of law. As an express and direct conflict does not exist between the two cases, this Court should exercise its discretion to decline discretionary review.

ARGUMENT

THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL IN STATE v. SHILLINGFORD DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL IN STATE v. GITTO WHERE THE CASES INVOLVE DIFFERENT SETS OF FACTS AND THE DECISIONS RELY UPON DIFFERENT RULES OF LAW.

"Conflict" jurisdiction may be invoked when the decision of a district court announces a rule of law in express conflict with one previously announced by this Court or another district court or the district court applies a settled rule of law to produce a different result in a case that involves facts substantially the same as those found in a decision of this Court or another district court. See Mancini v. State, 312 So. 2d 732, 733 (Fla. 1975). The test for accepting review under this provision is "not whether we [the Supreme Court] would necessarily have arrived at a conclusion different from that reached by the District Court. The constitutional standard is whether the decision of the District Court on its face collides with a prior decision of this Court, or another District Court, on the same point of law so as to create an inconsistency or conflict among precedents." Kincaid v. World Insurance Co., 157 So. 2d 517, 518 (Fla. 1963). The conflict must be of such magnitude "that if the later decision and the earlier decision were rendered by the same court the former would have the effect of overruling the latter." Kyle v. Kyle, 139 So. 2d 885, 887 (Fla. 1962). However, "[i]f the two cases are distinguishable

in controlling factual elements or if the points of law settled by the two cases are not the same, than no conflict can arise." Id. at 887.

The controlling facts giving rise to the appeals in State v. Shillingford and State v. Gitto are dissimilar in a material respect. This factual dissimilarity is responsible in part for the divergent outcomes.

In the consolidated cases addressed in State v. Gitto, 24 Fla. L. Weekly D 1105 (Fla. 5th DCA June 26, 1998) (corrected opinion), each of the 5 defendants received a downward departure sentence over objection by the prosecution. Each of the defendants was advised by the trial court of the sentence he would receive before entering his pleas. Relying upon the separation of powers doctrine, the Gitto court reached the merits of the state's appeal and vacated the sentences stating, "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."

By contrast, Mr. Shillingford's guideline scoresheet called for imposition of non-state prison sanctions and the court sentenced him accordingly to 6 months in the county jail. While the state is entitled by statute to appeal a downward departure sentence, it has no such right to appeal a sentence imposed in accordance with the guideline range. See, Section 924.07(i), Fla.Stat.; Fla. R. App. P. 9.140(c)(1)(K). Thus, the Fourth

District Court of Appeal correctly dismissed the instant appeal for lack of subject matter jurisdiction.

While the Fourth District generously explained that the court's procedure of advising the defendant in advance of the sentence it would impose upon entry of a plea was not improper, these statements are *dicta* in that the basis of the order of dismissal was the court's determination that the state did not have the right to appeal a lawful guideline sentence.

Respondent is mindful that this Court has accepted jurisdiction in State v. Figueroa, 728 So. 2d 787 (Fla. 4th DCA 1999), review granted, Case No. 95,087 (Fla. May 6, 1999), based upon conflict with Gitto. Respondent, however, respectfully suggests that review was improvidently granted in Figueroa.

As in the instant case, Mr. Figueroa received a lawful guideline sentence. Upon the defendant's motion, the appellate court dismissed the state's appeal of the lawful sentence based upon lack of jurisdiction. The outcome was based upon strict construction of the state's statutory right to appeal and did not reach the merits of the state's claim that the trial court acted improperly by accepting the defendant's plea. Figueroa did not announce a rule of law in conflict with one previously announced in Gitto, nor did it apply a settled rule of law to facts substantially similar to those found in Gitto to produce a different result.

As there is no express and direct conflict between

Shillingford and Gitto as to either matters of fact or law, this Court should exercise its discretion to decline to review the instant cause.

CONCLUSION

Because there is no express and direct conflict, this Court should deny the petition for discretionary review.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by mail, to BARBARA A. ZAPPI, Assistant Attorney General, 110 SE 6th Street, 10th Floor, Ft. Lauderdale, Florida 33301, this 25 day of MAY, 1999.

MARCY K. ALLEN
Assistant Public Defender

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs. CASE NO. 95,451

LEVON SHILLINGFORD,

Respondent.
_____/

APPENDIX TO

RESPONDENT'S BRIEF IN OPPOSITION OF JURISDICTION

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

STATE OF FLORIDA,

Appellant,

v.

LEVON SHILLINGFORD,

Appellee.

CASE NO. 98-2874

Opinion filed March 24, 1999

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Peter M. Weinstein, Judge; L.T. Case No. 97-12250 CF10A.

Robert A. Butterworth, Attorney General, Tallahassee, and Barbara A. Zappi, Assistant Attorney General, Fort Lauderdale, for appellant.

Richard L. Jorandby, Public Defender, and Marcy K. Allen, Assistant Public Defender, West Palm Beach, for appellee.

ON MOTION FOR RECONSIDERATION/CLARIFICATION AND MOTION FOR REHEARING EN BANC OF ORDER GRANTING MOTION TO DISMISS

STEVENSON, J.

By order dated January 29, 1999, this court granted appellee's motion to dismiss the appeal filed by the State. We deny the State's motion for rehearing en banc, grant the motion for reconsideration/clarification, and write to briefly explain the reason for the dismissal.

Appellee was charged with delivery of cocaine and pled no contest to the charge. Appellee's score sheet reflected a point total of 35.2 which, under the guidelines and absent a departure, called for any nonstate prison sanction, including community control. *See* Fla. R. Crim. P. 3.703(d)(27)(1997). The trial court sentenced appellee to a six-month jail sentence, and the State filed the instant appeal.

Appellee filed a motion to dismiss the appeal, asserting that his sentence of six months in the county jail was within the guidelines, was not a departure sentence, and was, therefore, neither unlawful nor illegal; hence, the State could not appeal. *See* Fla. R. App. P. 9.140(c)(1)(j)-(k)(limiting the State's right to appeal sentencing orders to only those orders which impose unlawful or illegal sentences and those sentences outside of the range permitted by the sentencing guidelines). In response to appellee's motion to dismiss, the State advises that its challenge to the sentence, which is lawful on its face, arises from the State's objection to the procedure the trial court used in accepting the plea. Here, the State takes issue with the trial court's telling the defendant what sentence the court intended to impose prior to the actual entry of the plea and prior to hearing the State's factual basis for the plea. We grant the motion to dismiss because this court has previously held that such a procedure by the trial court is proper. *See State v. Warner*, 721 So. 2d 767 (Fla. 4th DCA 1998).

The following colloquy occurred at the hearing:
THE COURT: State of Florida versus Levon Shillingford.
[DEFENSE COUNSEL]: This was placed on recall. I spoke with him. He is charged with delivery of cocaine, two prior felonies.
Would Your Honor consider six months Broward County Jail?
THE COURT: Are you representing Mr. Shillingford?
[DEFENSE COUNSEL]: I am.
(Whereupon, a discussion was held at sidebar outside the hearing of the jury.)

THE COURT: We'll be taking pleas in a little while.

(Whereupon, the case was put on recall.)

THE COURT: Mr. Shillingford, my understanding is your plea will be adjudication, six months Broward County Jail.

Thereafter, the trial judge did a full plea inquiry as required by the rules of criminal procedure.

In *Warner*, this court quoted *Davis v. State*, 308 So. 2d 27, 29 (Fla. 1975), where the supreme court stated:

> [I]t is true that plea discussions in which the trial judge is involved have been categorized as "delicate" and that the 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 by appropriate safeguards. [footnote omitted].

Id. at 768-69.

The panel, in *Warner*, went on to disagree with a portion of the decision in *State v. Gitto*, 23 Fla. L. Weekly D1550 (Fla. 5th DCA June 6, 1998), *review denied sub nom. Perkins v. State*, No. 93,618 (Fla. Dec. 2, 1998), *and review denied sub nom. Harpin v. State*, No. 93,620 (Fla. Dec. 2, 1998), and held that a trial court can, 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.[1] The court, in *Warner*, pointed out that its holding was limited to cases where the plea is to the offense charged by the prosecutor.

Lastly, we reject the State's contention that the sentence is potentially illegal because the trial court told the defendant what sentence it would give prior to hearing the State's factual basis for the plea. No matter how ill-advised such a practice may be in any particular case, the sentence is not rendered illegal thereby. The trial court is required to take the factual basis only upon entry of the plea. *See* Fla. R. Crim. P. 3.170(k). Furthermore, as the court pointed out in *Warner*, the trial judge is never bound to impose the sentence that it suggests it would give if a plea were entered. However, if the judge decides not to give the suggested sentence, the defendant would be entitled to withdraw the plea. *See* 721 So. 2d at 768.

Accordingly, the appeal by the State from the lawful sentence imposed in this case is DISMISSED.

DELL and KLEIN, JJ., concur.

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[1]The opinion, in *Warner*, "agree[d] 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." 721 So. 2d at 769 n.2.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Appendix to Respondent's Brief in Opposition of Jurisdiction has been furnished by mail, to BARBARA A. ZAPPI, Assistant Attorney General, 110 SE 6th Street, 10th Floor, Ft. Lauderdale, Florida 33301, this 25 day of MAY, 1999.

Marcy K

MARCY K. ALLEN
Assistant Public Defender