IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. Case No. 96,522

CHARLES W. CUMMINGS,

Respondent.
_____/

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

BRIEF OF PETITIONER ON JURISDICTION

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STATEMENT REGARDING TYPE

The size and style of type used in this brief is 12-point Courier New, a font that is not proportionately spaced.

TABLE OF CASES

OTHER AUTHORITIES

STATEMENT OF THE CASE AND FACTS

On September 20, 1997, Respondent was arrested for aggravated assault. The arrest affidavit indicates he pointed a steak knife at the victim not having the intent to kill although he stated he was going to kill her while pointing the knife at her. (R. 1) On October 6, 1997, the State filed its two count Information charging Respondent in Count I with aggravated assault and, in Count II, with battery. (R. 7-8) On October 23, 1997, the State filed its notice of Respondent's qualifications as a prison releasee reoffender pursuant to Section 775.082, Fla. Stat. (R. 10) On November 7, 1997, the victim of these two crimes, Rhonda Knight signed a notarized statement indicating she did not want to prosecute or participate in this matter. (R. 11) On January 26, 1999, an initial sentencing hearing was held. (R. 38-51) Respondent's mother addressed the court and advised that Respondent has a daughter with the victim, and all three of them lived with her for several months. (R. 40-41) Although she had previously signed a statement indicating she did not want to prosecute this matter (R. 11), at the hearing, Rhonda Knight, the victim in this case further stated:

> "Charles has been in and out of jail from the time in which he has been about 14 years old. He has gotten off on a lot of charges. He has been given probation. He has never finished the probation. He was not out of prison for three years before he met me. He got out in December of 1995. We met in January .... no, he got out in December of 1994, we met Janu-

> ary, 1995. He was only out of prison a month before he met me.
>
> I honestly feel that he deserves the complete five years. He has never paid for the crimes that he has committed, and what he did against me could have put my daughter in so much jeopardy. Had she been there that evening, God, I don't even want to think about what might have happened to her. I don't want him in my life. He has done too much damage to me." (R. 43)

Ms. Knight further advised the court that Respondent had continued to write to her "the fact that he has continued to write to me and saying even if I want to kill you, I have all the information to do it." (R. 44) The court indicated its position that Respondent had to accept either 48 months or go to trial. (R. 44-45) After a recess, counsel advised the court that Respondent felt that 48 months was too much. The proceedings were concluded and reset for trial for February 2nd (R. 49-50), at which time a change of plea and sentencing took place. (R. 52-68) On that date, Respondent signed a change of plea form, entering his plea of nolo contendre (R. 17-18) and was sentenced to 48 months imprisonment on Count I, (R. 21-22), and to time served on Count II. (R. 23-24) He further received 502 days credit for time served on Count I. (R. 25) Respondent's guideline scoresheet totaled 57.4 points with a sentence range from 22.05 prison months to 36.75 prison months and recommended sentence of 29.4 prison months. (R. 26-27)

The court advised Respondent it was willing to sentence him under the guidelines. The prosecutor objected to the court's

failing to impose a prison reoffender sentence. The prosecutor provided the documentation required and noted the victim had already been heard. (R. 61-62) After accepting the plea from Respondent (R. 63-65), the court sentenced him as previously indicated (48 months DOC plus credit for time served) and stated:

> "This sentence is imposed under the sentencing guidelines and not under Section 775.0821 part (8)(D)(1)(d), Fla. Stat. indicating in my mind that there are extenuating circumstances that exist which would include the imposition of a prisoner reoffender sentence. This sentence as previously noted is imposed over the objection of the state attorney's office. (R. 66)

The State filed a direct appeal from this sentence, and on August 20, 1999, the Second District Court of Appeal issued its Opinion affirming the sentence imposed by the trial court. In that Opinion, the court cited cases from the First and Third District Courts of Appeal which it noted were in conflict, with its Opinion.

On September 3, 1999, a Notice to Invoke this Court's discretionary jurisdiction and a Motion to Stay Mandate was filed in the Second District Court of Appeal. The Motion to Stay was granted on September 22, 1999.

SUMMARY OF THE ARGUMENT

The Prison Releasee Re-offender statute leaves no discretion to the trial court to decline imposition of the mandatory sentences provided for in the statute where the State seeks such sentencing and the defendant qualifies for such sentencing.

Because the Opinion of the Second District Court of Appeal cited cases it acknowledged were in conflict and because this issue is now pending before this Honorable Court, jurisdiction should be accepted to resolve inter district conflict.

ARGUMENT

ISSUE I

THE OPINION OF THE SECOND DISTRICT COURT OF APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH OPINIONS FROM BOTH THE FIRST AND THIRD DISTRICT COURTS OF APPEAL; MCKNIGHT V. STATE, 727 So.2D 314 (3RD DCA 1999) AND WOODS V. STATE, 24 FLW D831 (1st DCA 1999).

On August 20, 1999, the Second District Court of Appeal issued its Opinion in the instant case affirming Respondent's sentence based on its prior opinion in State v. Cotton, 728 So.2d 251 (2nd DCA 1998) review granted, now pending before this Court under Case Number 94,996 (a trial court has responsibility to exercise sentencing discretion under the Prison Releasee Reoffender Act) noting that both McKnight v. State, 727 So.2d 314 (3rd DCA 1999) and Woods v. State, 24 FLW D831 (1st DCA 1999) hold to the contrary.

The conflict between the Second District and the Third and First Districts is blatant since the courts in both Woods and McKnight, supra, held that a trial court does not have sentencing discretion under the Act.

CONCLUSION

WHEREFORE based on the foregoing, this Honorable Court should exercise its discretionary jurisdiction to resolve this conflict in application of judicial discretion under the Prison Releasee Reoffender act.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Megan Olson, Assistant Public Defender, P. O. Drawer PD, Bartow, Florida 33831 this 6th day of October, 1999.

COUNSEL FOR PETITIONER

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

STATE OF FLORIDA,

Appellant,

v.

CHARLES WESLEY CUMMINGS,

Appellee.

Case No. 99-00519

Opinion filed August 20, 1999.

Appeal from the Circuit Court for Pinellas County; Brandt C. Downey, III, Judge.

Robert A. Butterworth, Attorney General, Tallahassee, and Erica M. Raffel, Assistant Attorney General, Tampa, for Appellant.

James Marion Moorman, Public Defender, and Megan Olson, Assistant Public Defender, Bartow, for Appellee.

PER CURIAM.

Affirmed. See State v. Cotton, 728 So. 2d 251 (Fla. 2d DCA 1998), review granted, 24 Fla. L. Weekly No. 26 at ii (Fla. June 11, 1999). But see Woods

v. State, 24 Fla. L. Weekly D831 (Fla. 1st DCA Mar. 26, 1999); McKnight v. State, 727 So. 2d 314 (Fla. 3d DCA 1999) (both cases recognizing conflict).

ALTENBERND, A.C.J., and NORTHCUTT and SALCINES, JJ., Concur.