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IN THE SUPREME COURT OF FLORIDA

CASE NO. 00933

DCA NO. 99-47

CHARLES BRYANT,
Petitioner,

-vs-

THE STATE OF FLORIDA,
Respondent.

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

INTRODUCTION

This a petition for discretionary review on the grounds that the decision of the Third District Court of Appeal conflicts with decisions this Court and other district courts of appeal. The symbol “A” is used to designate references to the appendix to this brief.

STATEMENT OF THE CASE AND FACTS

The trial court in the instant case imposed a departure guideline sentence. Neither a written order supporting the departure, nor a motion to correct sentence

based upon the trial court's failure to enter a written order was ever filed.

On appeal, petitioner raised the trial court's failure to enter a written order supporting the departure sentence as grounds to vacate the sentence and remand the case to the lower court for re-sentencing within the guidelines. The Third District affirmed the sentence and issued the following per curiam decision:

Affirmed, State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986); Jordan v. State, 728 So. 2d 748 (Fla. 3d DCA 1998), review granted, 735 So. 2d 1285 (Fla. 1999); Weiss v. State, 720 So. 2d 1113 (Fla. 3d DCA 1998), review granted, 729 So. 2d 396 (Fla. 1999).

SUMMARY OF THE ARGUMENT

The Third District Court of Appeal relied upon *Jordan v. State*, 728 So. 2d 748 (Fla. 3d DCA 1998) *rev. granted*, 735 So. 2d 1285 (Fla. 1999), and *Weiss v. State*, 720 So. 2d 1113 (Fla. 3d DCA 1998), *rev. granted*, 729 So. 2d 396 (Fla. 1999), to deny relief in this case. Both decisions are before this court on discretionary review based upon conflict. Therefore, this court should accept discretionary jurisdiction in this case as well.

ARGUMENT

THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL IN THIS CASE, RELYING ON *JORDAN v. STATE*, 728 So. 2d 748 (Fla. 3d DCA 1998) *rev. granted*, 735 So. 2d 1285 (Fla. 1999) AND *WEISS v. STATE*, 720 So. 2d 1113 (Fla. 3d DCA 1998), *rev. granted*, 729 So. 2d 396 (Fla. 1999), CONFLICTS WITH DECISIONS RENDERED BY THIS COURT AND OTHER DISTRICT COURTS OF APPEAL.

In the instant case, the trial court imposed a departure guideline sentence. The trial court did not enter a written order supporting the departure and a motion to correct the sentence was never filed. Relying on *Jordan v. State*, 728 So. 2d 748 (Fla. 3d DCA 1998), *review granted*, 735 So. 2d 1285 (Fla. 1999) and *Weiss v. State*, 720 So. 2d 1113 (Fla. 3d DCA 1998), *review granted*, 729 So. 2d 396 (Fla. 1999), the Third District denied relief and affirmed the sentence.

Both *Jordan* and *Weiss* are before this court on discretionary review. In *Jordan*, the court ruled that the appellant could not raise the trial court's failure to file a written order supporting the departure sentence because the point was not preserved and was not fundamental error. *Jordan v. State*, 728 So. 2d at 752. In *Weiss*, the district court held that the trial court's failure to file a timely written order supporting the departure was not cognizable on appeal because "it was not raised below, see *Jordan*, -- So. 2d at --, 23 FLW at D213 1-33, and because, even if it had been, the

meaningless procedural hiccup involved could constitute no more than non-prejudicial, harmless error. " *Weiss v. State*, 720 So. 2d at 1115.

Both decisions conflict with decisions from this court, as well as other district court decisions, which have consistently reversed, remanded and ordered re-sentencing within the guidelines where a trial court fails to file a timely written order supporting an upward departure. These cases have not required a showing of prejudice. *State v. Colbert*, 660 So. 2d 701 (Fla. 1995)(trial court commits per se reversible error when it orally pronounces reasons for departure from sentencing guidelines at sentencing hearing but does not contemporaneously file written reasons); *Ree v. State*, 565 So. 2d 1329 (Fla. 1990) (same); *Pope v. State*, 561 So. 2d 554 (Fla. 1990)(holding that proper action when trial court fails to file written reasons is reversal, remand and re-sentencing within the guidelines); *Donaldson v. State*, 722 So. 2d 177, 189 (Fla. 1998) ("Where the trial judge fails to provide written reasons for the departure sentence, the Appellate court must reverse with instructions to resentence the defendant in accordance with the sentencing guidelines without possibility of departure. "), citing *Owens v. State*, 598 So. 2d 64 (Fla. 1992); *Blair v. State*, 598 So. 2d 1068 (Fla. 1992) (same); *Evans v. State*, 696 So. 2d 368 (Fla. 1st DCA 1996) (departure sentence impermissible without timely written order even though failure to file reasons was due to misfiling which may not have been

attributable to sentencing court); *Hooks v. State*, 656 So. 2d 624 (Fla. 1st DCA 1995) (trial court's failure to comply with requirements in imposing upward departure warrant reversal); *Wright v. State*, 617 So. 2d 837 (Fla. 4th DCA 1993) (trial court's failure to file timely, written reasons for departure sentence required re-sentencing with no possibility of departure); *Wilcox v. State*, 664 So. 2d 55 (Fla. 5th DCA 1995) (same); *Carridine v. State*, 721 So. 2d 818 (Fla. 4th DCA 1998) (same).

In addition, *Wiess* and *Jordan* conflict with the second district's decisions in *Demon v. State*, 711 So. 2d 1225 (Fla. 2d DCA 1998), and *Bain v. State*, 730 So. 2d 26 (Fla. 2d DCA 1999), which hold that the Criminal Reform Act does not preclude raising an unpreserved sentencing error if the appellate court's jurisdiction to review has been properly invoked. *Wiess* and *Jordan* specifically hold that the Criminal Reform Act precludes raising an unpreserved sentencing error. *Wiess v. State*, 720 So. 2d at 1115; *Jordan v. State*, 728 So. 2d at 753.

Consequently, in light of the fact that the cases relied upon by the Third District are presently before this court, and that conflict exists between these decisions and decisions from this court as well as decisions from other district courts, this court should accept jurisdiction based upon conflict.

CONCLUSION

Based on the foregoing facts, authorities and arguments, petitioner requests that this Court exercise its discretionary jurisdiction and take review of this case.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail to the Office of the Attorney General, 401 N.W. Second Avenue, Miami, Florida 33128, this 11th day of May, 2000.


ROSA C. FIGAROLA
Assistant Public Defender



APPENDIX

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

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT
JANUARY TERM, A.D. 2000

CHARLES BRYANT,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

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* * CASE NO. 3D99-47

** LOWER
TRIBUNAL NO. 97-39023

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Opinion filed March 15, 2000.

An Appeal from the Circuit Court for Dade County, Gill S. Freeman, Judge.

Bennett H. Brummer, Public Defender, and Rosa C. Figarola, Assistant Public Defender, for appellant.

Robert A. Butterworth, Attorney General, and Consuelo Maingot, Assistant Attorney General, and Michael Terrell, Legal Intern, for appellee.

Before LEVY, GERSTEN and SORONDO, JJ.

PER CURIAM.

Affirmed. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986); Jordan v. State, 728 So. 2d 748 (Fla. 3d DCA 1998), review granted, 735 So. 2d 1285 (Fla. 1999); Weiss v. State, 720 So. 2d 1113 (Fla. 3d DCA 1998), review granted, 729 So. 2d 396 (Fla. 1999).