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IN THE SUPREME COURT OF FLORIDA

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THOMAS D. HALL
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OMAR WILSON,)
)
 Petitioner,)
)
 vs.)
)
 STATE OF FLORIDA,)
)
 Respondent.)
 _____)

Case No. SC01-2083

PETITIONER'S BRIEF ON JURISDICTION

CAREY HAUGHWOUT
Public Defender
15th Judicial Circuit of Florida

ALLEN J. DeWEESE
Assistant Public Defender
Attorney for Omar Wilson
Criminal Justice Building/6th Floor
421 3rd Street
West Palm Beach, Florida 33401
(561) 355-7600
Florida Bar No. 237000

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PRELIMINARY STATEMENT

Petitioner was the defendant at trial and the appellant in the Fourth District Court of Appeal. Respondent was the prosecution and the appellee.

In the brief, the parties will be referred to as they appear before this Honorable Court.

STATEMENT OF THE CASE AND FACTS

The facts which follow are from the opinion of the Fourth District Court of Appeal affirming Petitioner's community control revocation. The opinion was filed August 15, 2001 (Appendix), and Notice of Intent to Invoke Discretionary Jurisdiction was filed September 13, 2001.

On the date of the final revocation hearing, the trial judge offered Petitioner a plea bargain to the bottom of his guidelines - 128 months in prison, in exchange for admitting the violation. Petitioner's attorney advised the court that Petitioner would enter an open plea. Apparently the trial judge did not hear that the plea was open and began a colloquy concerning a plea to 128 months. When counsel clarified that Petitioner was entering an open plea and would present evidence to support a downward departure the court withdrew its offer and instructed that the case be set for a final hearing.

After a break the case was called up for a final hearing. Petitioner was questioned by counsel to confirm that he did not want to accept the court's offer and wanted a final hearing. The court interjected:

THE COURT: And my advice to you was the court's offer was the bottom of the guidelines and in my opinion you should have taken it.

The revocation hearing proceeded and Petitioner was found guilty. Community control was revoked and Petitioner was sentenced to 150 months.

Petitioner successfully argued on appeal that he had to be resentenced under Heggs v. State, 759 So. 2d 620 (Fla. 2000). He also contended on appeal that the sentence greater than the plea bargain offered by the court was vindictive and that he should be resentenced by another judge. The District Court, while reversing for resentencing under Heggs, held that Petitioner was not improperly penalized for rejecting the plea offer, and that he could be resentenced by the same judge.

SUMMARY OF ARGUMENT

Petitioner was punished for exercising his right to a trial by a sentence greater than what he was offered for a plea before trial. The Fourth District's decision affirming the greater sentence was counter to decisions from this Court and from the First, Third and Fifth Districts stating that one cannot be punished with a greater sentence for exercising the right to a trial.

ARGUMENT

THE DECISION OF THE FOURTH DISTRICT CONFLICTS WITH DECISIONS OF THIS COURT AND OF THE FIRST, THIRD AND FIFTH DISTRICTS HOLDING THAT A DEFENDANT MAY NOT BE PUNISHED FOR EXERCISING HIS RIGHT TO A TRIAL BY A SENTENCE GREATER THAN THAT OFFERED FOR A PLEA BEFORE TRIAL.¹

The decision of the Fourth District in this case conflicts with the decisions discussed below. The conflict is express and direct and appears on the face of the court's opinion, and therefore confers jurisdiction on this Court. Art. V, § 3(b)(3), Fla. Const.; Fla.R.App.P. 9.030(a)(2)(A)(iv); see also, Jenkins v. State, 385 So. 2d 1356 (Fla. 1980).

In the instant case the Fourth District held that Petitioner was not punished for exercising his right to a trial where he received a greater sentence after trial, 150 months, than the sentence offered by the court before trial, 128 months.

In City of Daytona Beach v. Del Percio, 476 So. 2d 197, 205 (Fla. 1985), this Court stated:

... While the judge's discussion suggests he may also have imposed the sentence because he believed Moore lied during the trial, the proper method of imposing punishment for perjury would be through a separate prosecution. Conflicting evidence inheres in most trials, and to allow imposition of a harsher sentence merely because the trial judge believes the evidence supporting his finding of guilt, would create a catch-22 - the defendant may not be punished for his exercising of the right to trial but may be

¹This argument is similar to that in the pending petition for review in Abukareem Eltaher v. State, Supreme Court Case No. SC01-657.

punished for his lack of candor during the trial.

In State v. Warner, 762 So. 2d 507, 514 (Fla. 2000), this Court stated that even in plea bargaining, sentencing may not hinge on the exercise of the right to a trial.

In Cavallaro v. State, 647 So. 2d 1006 (Fla. 3rd DCA 1994), the Third District stated, "A party's decision to go to trial rather than accept a plea bargain is not punishable by the imposition of a harsher sentence as to do so would impinge on the constitutional right to trial by jury."

In Byrd v. State, 26 Fla. L. Weekly D1954 (Fla. 5th DCA August 10, 2001), the Fifth District reversed for a sentence within what the court offered before trial because the trial court showed no reason why its pre-trial evaluation of the appropriate sentence for the offense was in error. The greater sentence was presumed vindictive.

In Simpson v. State, 26 Fla. L. Weekly D1593 (Fla. 1st DCA June 26, 2001), the First District found the trial judge's "standard policy" of refusing to consider post-trial release, after a defendant "rolled the dice" by going to trial and losing, to be an indefensible sanction for asserting the right to a trial.


The instant decision conflicts with the above decisions disallowing a greater sentence after trial. This Court must exercise the jurisdiction conferred in this case by the conflict in order to resolve it and to reaffirm the essential constitutional right to trial without punishment for its exercise at sentencing.

CONCLUSION

Based on the foregoing arguments and the authorities cited therein, Petitioner respectfully requests this Court to accept review.

Respectfully Submitted,


CAREY HAUGHWOUT
Public Defender
15th Judicial Circuit of Florida



ALLEN J. DeWEESE
Assistant Public Defender
Attorney for Omar Wilson
Criminal Justice Building/6th Floor
421 3rd Street
West Palm Beach, Florida 33401
(561) 355-7600
Florida Bar No. 237000

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier to Barbara A. Zappi, Assistant Attorney General, 110 S.E. 6th Street, 9th Floor, Ft. Lauderdale, Florida 33301 this 19th day of September, 2001.



ALLEN J. DeWEESE
Counsel for Petitioner

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately this 19th day of September, 2001.



ALLEN J. DeWEESE
Counsel for Petitioner