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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC01-2083

DCA CASE NO. 4D99-3398

OMAR WILSON,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

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

BRIEF OF RESPONDENT ON JURISDICTION

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INTRODUCTION

Petitioner, **OMAR WILSON,** was the Defendant in the trial court and the Appellant in the Fourth District Court of Appeal. Respondent, **THE STATE OF FLORIDA**, was the prosecuting authority 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 "Defendant" and Respondent may also be referred to as the "State". 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.

STATEMENT OF THE CASE AND OF THE FACTS

Defendant was charged in the Circuit Court of the Seventeenth Judicial Circuit of Florida with manslaughter with a firearm, and was sentenced to two years community control followed by five years probation. (App. A:1). The State later alleged Defendant violated his community control by failing to remain confined to his approved residence. (A:1).

On the date of his final hearing before the Honorable Sheldon M. Schapiro, Defendant indicated he wished to enter an open plea and admission to the violation. (A:1). The trial judge asked Defendant if anyone had promised him anything other than the fact

the court would revoke his probation, adjudicate him guilty if he hadn't previously been adjudicated guilty, and sentence him to 128 months state prison, with credit for time served. (A:1). Defense counsel then interjected he would like for the court to hear from Defendant. (A:1). The court asked what the purpose of hearing from Defendant would be since 128 months was the bottom of the guidelines and he couldn't go any lower. Counsel answered they were asking that Defendant be reinstated [to community control]. (A:1).

The judge stated he thought there was an agreement; counsel said no, it was an open plea. (A:1). When defense counsel said Defendant still wanted to admit to the violation, the trial court immediately said it would not go any lower than the 128 months and that they would go to a final hearing. (A:1). Defendant conferred with counsel. When counsel told the court Defendant did not want to accept the court's offer of 128 months, the court withdrew the offer. (A:1).

After a recess, defense counsel announced he was ready to proceed to a final hearing. (A:1-2). The court asked Defendant if that was what he wanted to do, go to a final hearing. Defendant responded, "Yes, sir," and said he did not want to accept the court's offer of 128 months. (A:2). The judge told Defendant the offer was the bottom of the guidelines, and in his opinion Defendant should have taken it. (A:2).

The violation of probation hearing commenced. The court heard testimony from Defendant's community control officer (T:6-27), from Defendant (T:27-32), and from Defendant's girlfriend (T:32-36). At the end of the hearing, the trial court found Defendant willfully violated his community control. (A:2). Then, without commenting on the rejected plea offer, the trial court revoked Defendant's community control and sentenced him to 150 months in state prison. (A:2). His sentencing guidelines ranged from 128.625 months to 214.375 months. (A:2).

Defendant's point on appeal was that his sentence was presumptively vindictive because the trial judge offered a plea settlement to the bottom of the guidelines but imposed a greater sentence after he rejected that offer. (A:2). The Fourth District Court of Appeal disagreed with Defendant's claim and cited to Mitchell v. State, 521 So. 2d 185 (Fla. 4th DCA 1988), in which they previously explained:

> Absent a demonstration by the defendant of judicial vindictiveness or punitive action, a defendant may not complain simply because he received a heavier sentence after trial. A disparity between the sentence received and the earlier offer will not alone support a finding of vindictiveness. ...Having rejected the offer of a lesser sentence, [the defendant] assumes the risk of receiving a harsher sentence. Were it otherwise, plea bargaining would be futile. Id. at 190 (citations omitted).

(A:2-3).

The court found the plea offer was given and was voluntarily rejected and the trial judge made no remarks which would give any indication the harsher sentence was being imposed as a punitive measure for rejecting the previous offer. (A:3). In addition, the court noted although the judge reiterated the plea offer at the start of the hearing, he did not refer to it again at sentencing, or even at resentencing. (A:3). The court thus held Defendant was not improperly penalized for rejecting the plea offer, and may be resentenced by the same judge. (A:3).

Defendant now seeks discretionary review by this Court on the grounds the Fourth District Court of Appeal herein is in express and direct conflict with opinions of this Honorable Court in City of Daytona Beach v. Del Percio, 476 So. 2d 197 (Fla. 1985), State v. Warner, 762 So. 2d 507 (Fla. 2000), and the decision of the district courts of appeal in Cavallaro v. State, 647 So. 2d 1006 (Fla. 3d DCA 1994), Byrd v. State, 26 Fla. L. Weekly D1954 (Fla. 5th DCA Aug. 10, 2001) and Simpson v. Campbell, 26 Fla. L. Weekly D1593 (Fla. 1st DCA June 26, 2001). 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 CITY OF DAYTONA BEACH V. PERCIO, 476 SO. 2D 197 (FLA. 1985) AND STATE V. WARNER, 762 SO. 2D 507 (FLA. 2000), AND THE DECISIONS OF THE DISTRICT COURTS OF APPEAL IN CAVALLARO V. STATE, 647 SO. 2D 1006 (FLA. 3D DCA 1994), BYRD V. STATE, 26 FLA. L. WEEKLY D1954 (FLA 5TH DCA AUG. 10, 2001) AND SIMPSON V. CAMPBELL, 26 FLA. L. WEEKLY D1593 (FLA. 1ST DCA JUNE 26, 2001) 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 the plea offer was given and was voluntarily rejected, and the trial judge made no remarks which would give any indication the harsher sentence was being imposed as a punitive measure for rejecting the previous offer.

The appellate courts deciding City of Daytona Beach v. Percio Cavallaro v. State, Byrd v. State, and Simpson v. Campbell determined the trial judges' comments there clearly showed that harsher sentences were imposed because those defendants exercised their right to go to trial rather than accept a plea bargain.

Here, however, the Fourth District Court found the plea offer was voluntarily rejected and the trial judge made no remarks that indicated the harsher sentence was being imposed as a punitive measure for rejecting the previous offer.

As an express and direct conflict does not exist between the cases Petitioner relies on and the decision of the Fourth District Court of Appeal, this Honorable Court should exercise its discretion to decline discretionary jurisdiction 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 DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH THE DECISIONS OF THIS COURT IN CITY OF DAYTONA BEACH V. DEL PERCIO, 476 SO. 2D 197 (FLA. 1985) AND STATE V. WARNER, 762 SO. 2D 507 (FLA. 2000), AND THE DECISIONS OF THE DISTRICT COURTS OF APPEAL IN CAVALLARO V. STATE, 647 SO. 2D 1006 (FLA. 3D DCA 1994), BYRD V. STATE, 26 FLA. L. WEEKLY D1954 (FLA. 5TH DCA AUG. 10, 2001) AND SIMPSON V. CAMPBELL, 26 FLA. L. WEEKLY D1593 (FLA. 1ST DCA JUNE 26, 2001) 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 Court of Appeal determined the plea offer was given and was voluntarily rejected, and the trial judge made no remarks which would give any indication the harsher sentence was being imposed as a punitive measure for rejecting the previous offer.

In City of Daytona Beach v. Del Percio, 476 So. 2d 197, 205 (Fla. 1985), this Court noted disparate sentences between those of equal culpability, for instance when one defendant plea bargains for a lesser punishment while the other goes to trial, are not per se indicative the harsher sentence is an impermissible punishment for exercising the right to trial. There were several defendants in Del Percio. Del Percio and others pled nolo contendere and received no fines or penalties. Defendant Moore chose to go to trial and was fined $500. This Court stated the trial judge's reasoning demonstrated Moore's exercise of the right to trial was a factor in sentencing. This Court commented the judge's discussion suggested he may also have imposed the sentence because he believed Moore lied during the trial; however, this Court found nothing other than the trial court distinguished Moore from the others, and thus held, as a matter of law, that she could not be sentenced any more harshly than they. Id. at 206.

The issue in State v. Warner, 762 So. 2d 507 (Fla. 2000) was whether judicial participation in the plea bargaining process was permissible. Accordingly, Warner is inapplicable to the question presented here.

In Cavallaro v. State, 647 So. 2d 1006 (Fla. 3d DCA 1994), the trial judge commented at sentencing that Cavallaro had not accepted responsibility for his actions, and complained because he had failed to accept a plea bargain. The Third District noted that at trial,

defendant did not put on any evidence or witnesses, but merely argued the State had failed to meet its burden of proof. Id. at 1007 n.1. The Third District thus held the trial court could not impose a harsher sentence for defendant's decision to go to trial rather than to accept the plea bargain.

The trial judge in Byrd v. State, 26 Fla. L. Weekly D1954 (Fla. 5th DCA Aug. 10, 2001) clearly indicated that defendant's sentence would vary depending on the choice he made when she stated, "He certainly won't get that low if he goes to trial." There was no such comment by the trial judge here. Petitioner's reliance on Simpson v. Campbell, 26 Fla. L. Weekly D1593 (Fla. 1st DCA June 26, 2001), is also misplaced. The trial judge in Simpson had a "standard policy" of not permitting a defendant who "rolls the dice" and goes to trial and is convicted by a jury to remain on bond. There was no "standard policy" in the courtroom of the trial judge in this case.

The controlling facts and issues raised before the respective appellate courts giving rise to the appeals in each of the cases relied upon by Petitioner are dissimilar in material respects to the instant case. Accordingly, there is no express and direct conflict between this case and the above cited cases so as to produce a different result than other state appellate courts faced with substantially the same facts. Hence, this Honorable Court should exercise its discretion to decline to review the instant cause.

CONCLUSION

WHEREFORE, based on the foregoing arguments and cited authorities, Petitioner respectfully requests this Honorable Court to decline to accept discretionary jurisdiction.

Respectfully Submitted,

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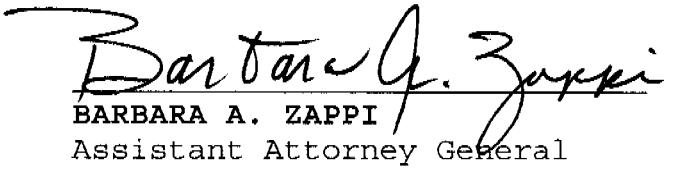
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **BRIEF OF RESPONDENT** was mailed to **ALLEN J. DeWEESE**, Esquire, Assistant Public Defender, Criminal Justice Building, 421 Third Street, 6th Floor, West Palm Beach, Florida 33401 on this 1st day of October 2001.



BARBARA A. ZAPPI
Assistant Attorney General

CERTIFICATE OF FONT AND TYPE SIZE

Counsel for Respondent hereby certifies this brief is formatted to print in Courier New 12-point font and complies with the requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

BARBARA A. ZAPPI
Assistant Attorney General

IN THE SUPREME COURT OF FLORIDA

CASE NO. _____

DCA CASE NO. 4D99-3398

OMAR WILSON,

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-vs-

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Respondent.

APPENDIX TO
BRIEF OF RESPONDENT ON JURISDICTION

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EXHIBIT A

AG

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT JULY TERM 2001

RECEIVED
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AUG 15 2001
CRIMINAL DIVISION
WEST PALM BEACH

OMAR WILSON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 4D99-3398

Opinion filed August 15, 2001

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Sheldon M. Schapiro, Judge; L.T. Case No. 96-8170 CF10A.

Carey Haughwout, Public Defender, and Karen Ehrlich, Assistant Public Defender, West Palm Beach, for appellant.

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

POLEN, C.J.

Omar Wilson timely appeals his sentence of 150 months imprisonment for violating his community control. We affirm, but remand for resentencing.

Wilson originally pled no contest to a charge of manslaughter with a firearm, and was sentenced to two years community control followed by five years probation. The state later alleged that Wilson violated his community control by failing to remain confined to his approved residence. On the date of his final hearing, he indicated that he wished to enter an open plea and admission to the violation. The following exchange then occurred:

THE COURT: Has anyone promised you anything other than the fact [the] court would revoke your probation, adjudicate you guilty if you haven't been previously adjudicated guilty, sentences you to 128 months Florida state prison with credit for time served. Do you understand that?

[DEFENSE COUNSEL]: Your honor, before you pronounce sentence, I would like the court to hear from Mr. Wilson and hear from his fiancé.

THE COURT: What is the purpose of that since this is the bottom of the guidelines and I can't go any lower than the bottom?

[DEFENSE COUNSEL]: Well, your Honor, what we would be asking, for you to reinstate Mr. Wilson.

THE COURT: I thought there was an agreement.

[DEFENSE COUNSEL]: It's an open plea, your Honor.

THE COURT: No.

[DEFENSE COUNSEL]: He still wants to admit to the violation.

THE COURT: No. Go to a final hearing. Set it down for a final hearing. Let's proceed.

[DEFENSE COUNSEL]: Could I have a moment, your Honor?

THE COURT: That's all right. Court withdraws the offer.

****

[DEFENSE COUNSEL]: Good morning again. Emilio Benitez on behalf of Mr. Wilson on page 3.

THE COURT: Are you ready to proceed to

final hearing?

[DEFENSE COUNSEL]: Yes, your honor.

Before that, I'd like to address Mr. Wilson.

Mr. Wilson, that's what you want to do? You want to go to a final hearing; is that correct?

[WILSON]: Yes, sir.

[DEFENSE COUNSEL]: You don't want to accept the court's offer of 128 months; is that correct?

[WILSON]: No.

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. Is that –

[WILSON]: Excuse me?

THE COURT: Okay. Let's proceed. Let's swear in the defendant.

At the end of the hearing, the trial court found that Wilson wilfully violated his community control. The court then, without commenting on the rejected plea offer, revoked his community control and sentenced him to 150 months in prison. His sentence guidelines had ranged from 128.625 months to 214.375 months.

Prior to filing the initial brief in this appeal, Wilson, on August 23, 2000, filed in the trial court a motion to correct sentence, alleging that he was improperly sentenced under unconstitutional amendments to the 1994 sentencing guidelines. See Trapp v. State, 760 So. 2d 924, 928 (Fla. 2000); Heggs v. State, 759 So. 2d 620, 627 (Fla. 2000). Sixty-five days later, the court, pursuant to the motion, resentenced him to 114.37 months, the top of his guideline range, but never entered a written order to that effect. The court, however, a few weeks later, asked the state to respond to Wilson's motion to correct sentencing error. In its response, the state argued that the motion was deemed denied because it had been pending for more than sixty days without a ruling, see Kimbrough v. State, 766 So. 2d 1255 (Fla. 5th DCA 2000), and, therefore, Wilson must seek relief by way of his pending appeal. The trial court then agreed with the state and denied Wilson's motion. This appeal followed.

We initially hold that this case should be remanded for resentencing. Florida Rule of Criminal Procedure 3.800(b) expressly provides that the trial court must rule on a motion to correct sentencing error within sixty days of filing or the motion is deemed denied. Fla. R. Crim P. 3.800(b). Once the sixty days has passed with no action on the motion, the trial court's jurisdiction ends. Hart v. State, 773 So. 2d 1263, 1264 (Fla. 1st DCA 2000). Here, the trial court did not orally resentence Wilson pursuant to Heggs until sixty-five days after his rule 3.800 motion. Because the trial court no longer had jurisdiction to resentence Wilson, and it is undisputed that he was originally sentenced pursuant to the unconstitutional amendments to the 1994 sentencing guidelines, we remand this case for another resentencing pursuant to Heggs. See id.; Cliatt v. State, 773 So. 2d 610, 611 (Fla. 5th DCA 2000); Kimbrough, 766 So. 2d at 1257.

We disagree, however, with Wilson's contention that his original sentence was vindictive and, therefore, he should, on remand, be resentenced by a different trial judge. A defendant may not be subjected to a more severe punishment for exercising his constitutional right to stand trial. Mitchell v. State, 521 So. 2d 185, 187 (Fla. 4th DCA 1988) (Hersey, C.J.; Letts and Walden, JJ., concur). However, as previously explained by this court:

> Absent a demonstration by the defendant of judicial vindictiveness or punitive action, a defendant may not complain simply because he received a heavier sentence after trial. A disparity between the sentence received and the earlier offer will not alone support a finding of

vindictiveness. . . . Having rejected the offer of a lesser sentence, [the defendant] assumes the risk of receiving a harsher sentence. Were it otherwise, plea bargaining would be futile.
Id. at 190 (citations omitted).

Here, the plea offer was given and was voluntarily rejected. The trial judge made no remarks which would give any indication that the harsher sentence was being imposed as a punitive measure for rejecting the previous offer. Although the judge reiterated the plea offer at the start of the hearing, he did not refer to it again at sentencing, or even at the resentencing. See, e.g., Gallucci v. State, 371 So. 2d 148, 150 (Fla. 4th DCA 1979); Johnson v. State, 679 So. 2d 831, 832-33 (Fla. 1st DCA 1996). Accordingly, we hold that Wilson was not improperly penalized for rejecting the plea offer, and may be resentenced by the same judge. See Mitchell, 521 So. 2d at 190.

AFFIRMED, and remanded for resentencing.

GROSS and TAYLOR, JJ., concur.

NOT FINAL UNTIL THE DISPOSITION OF ANY TIMELY FILED MOTION FOR REHEARING.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **APPENDIX TO BRIEF OF RESPONDENT** was mailed to **ALLEN J. DeWEESE**, Esquire, Assistant Public Defender, Criminal Justice Building, 421 Third Street, 6th Floor, West Palm Beach, Florida 33401 on this 1st day of October 2001.

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