IN THE SUPREME COURT OF FLORIDA

KEMAR ROCHESTER,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

Case No. SC12-1932

L.T. Case No. 4D10-512

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ON DISCRETIONARY REVIEW FROM THE FOURTH DISTRICT COURT OF APPEAL

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RESPONDENT'S BRIEF ON JURISDICTION

PAMELA JO BONDI
ATTORNEY GENERAL
Tallahassee, Florida

CELIA A. TERENZIO
BUREAU CHIEF, W. PALM BEACH
Florida Bar No. 0656879
RICHARD VALUNTAS
Assistant Attorney General
Florida Bar No. 151084
1515 North Flagler Drive, #900
West Palm Beach, FL 33401
(561) 837-5000
CrimAppWPB@MyFloridaLegal.com

Counsel for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Authority Cited **Page Number**

Case Law

Other Authorities

PRELIMINARY STATEMENT

The respondent, State of Florida, was the prosecution in the trial court and the appellee before the Fourth District Court of Appeal. The respondent will be referred to herein as "the State." The petitioner, Kemar Rochester, was the defendant in the trial court and the appellant before the Fourth District Court of Appeal. The petitioner will be referred to as "petitioner."

STATEMENT OF THE CASE AND FACTS

Petitioner was charged with lewd or lascivious molestation against a child under the age of twelve. The State made a pretrial plea offer that would have reduced the charge against petitioner so that he could avoid a minimum sentence of twenty-five years in prison. In exchange for a guilty plea to a lesser charge, petitioner would have received seven and one-half years in prison followed by seven and one-half years of sex offender probation. Petitioner rejected the State's offer and proceeded to trial. The jury found petitioner guilty as charged.

Petitioner subsequently filed a motion for downward departure under section 921.0026(2)(j) of the Florida Statutes (2007). Rochester v. State, 2012 WL 3192726, *1 (Fla. 4th DCA Aug. 8, 2012). Petitioner argued that a downward departure should be granted because (1) his crime was committed in an unsophisticated manner, (2) it was an isolated incident, and (3) he had shown remorse for the crime. Id. The trial court denied petitioner's motion for downward

departure because such a sentence was impermissible under section 775.082(3)(a)4 of the Florida Statutes (2007). The trial court sentenced petitioner to twenty-five years in prison, but the written sentence does not state that it is a "minimum mandatory" sentence.

On appeal, petitioner argued that the trial court had the discretion to grant a downward departure sentence under section 921.0026(2)(j) of the Florida Statutes. The Fourth District disagreed with petitioner's argument because there are only two possible sentences for an adult who molests a child under the age of twelve: life in prison or a split sentence of not less than twenty-five years imprisonment followed by probation for the remainder of the offender's natural life. § 775.082(3)(a)4, Fla. Stat. (2007). The Fourth District affirmed petitioner's sentence, concluded that the Florida Legislature intended to impose a mandatory minimum sentence for adult offenders who molest a child under the age of twelve, and certified conflict with the Second District's decision in Montgomery v. State, 36 So. 3d 188 (Fla. 2d DCA 2010). Rochester, 2012 WL 3192726 at *4.

SUMMARY ARGUMENT

This Court should decline to review the instant case because there is no express and direct conflict between this case and the Second District Court of Appeal's opinion in Montgomery v. State, 36 So. 3d 188 (Fla. 2d DCA 2010).

Accordingly, this Court should not exercise its jurisdiction to hear this case. The State does not contest this Court's authority over the instant case.

ARGUMENT

THERE IS NO BASIS FOR DISCRETIONARY REVIEW OF THE DECISION OF THE DISTRICT COURT

Petitioner seeks to invoke the discretionary jurisdiction of this Court pursuant to Article V, section 3(b)(3), of the Constitution of the State of Florida.[1] (JB. 5). Specifically, petitioner contends the Fourth District's decision in the instant case conflicts with the Second District's decision in Montgomery v. State, 36 So. 3d 188 (Fla. 2d DCA 2010). For the reasons set forth below, there is no conflict and this Court should not exercise jurisdiction over this case.

Petitioner claims the opinion in this case conflicts with the Second District's decision in Montgomery. Such an argument is misplaced because Montgomery is factually distinguishable from this case. In Montgomery, the defendant was sentenced to twenty-five years in prison followed by sex offender probation for the rest of his life. The defendant's sentence stated that it was a minimum mandatory sentence "if required" by statute. Montgomery, 36 So. 3d at 188. On appeal, the Second District affirmed the defendant's judgment and sentence. Id. However, the

[1] Although the Fourth District certified conflict with a decision from the Second District, petitioner does not seek to invoke this Court's discretionary jurisdiction under Article V, section 3(b)(4) of the Florida Constitution.

State conceded that the defendant's sentence was not a "minimum mandatory" sentence relative to gain time, early release, etc. Id. at 188-189. The Second District agreed with the State's concession and noted, in dicta, that if there were any ambiguity in the applicable statute, it must be construed in favor of the defendant. Id. at 189.

The instant case is clearly distinguishable from Montgomery because it involved petitioner's attempt to receive a sentence of less than twenty-five years in prison for molesting a child under the age of twelve. The defendant in Montgomery, in contrast, never argued that he could be sentenced to less than twenty-five years in prison for molesting a child under the age of twelve. Unlike Montgomery, the State did not make any concession in this case. Finally, the pertinent issue in Montgomery was whether the defendant's sentence was a "minimum mandatory" sentence for purposes of gain time, early release, etc., not whether an adult can receive less than twenty-five years in prison for molesting a child under the age of twelve.

The law is clear that if the two purportedly conflicting cases are distinguishable in their controlling factual elements, then no conflict jurisdiction exists. Kyle v. Kyle, 139 So. 2d 885, 887 (Fla. 1962); Department of Revenue v. Johnston, 442 So. 2d 950 (Fla. 1983)(where case was before this Court on apparent conflict, but case was distinguishable on its facts, this Court would discharge

jurisdiction). Simply put, conflict jurisdiction does not exist over a case when it is factually distinguishable from the case it allegedly conflicts with. Ackers v. State, 614 So. 2d 494, 495 (Fla. 1993). Because the instant case and Montgomery are factually distinguishable, the Court should not exercise its jurisdiction over this case.

The only issue petitioner raised before the Fourth District was whether the trial court "erred in concluding that it could not downward depart from the mandatory minimum sentence of twenty-five years in prison followed by a term of probation for life for a violation of section 800.04(5)(b)." Rochester, 2012 WL 3192726 at *1. The Second District's decision in Montgomery does not have anything to do with a downward departure sentence. Instead, Montgomery addressed whether the defendant's sentence was a "minimum mandatory" sentence for purposes of gain time, early release, etc. Montgomery, 36 So. 3d at 188-189. Thus, the Court should not exercise jurisdiction over this case because the decisions in Montgomery and Rochester do not expressly and directly conflict on the same question of law. Art. V, § 3(b)(3), Fla. Const. (the Court has discretionary jurisdiction to review a district court decision "that expressly and directly conflicts with a decision of another district court of appeal ... on the same question of law").

CONCLUSION

WHEREFORE based on the foregoing arguments and authorities cited herein, the State respectfully requests this Honorable Court decline to accept jurisdiction over this case.

Respectfully submitted,

PAMELA JO BONDI
ATTORNEY GENERAL
Tallahassee, Florida

_____
CELIA A. TERENZIO
Bureau Chief, West Palm Beach
Florida Bar No.: 0656879

_____
RICHARD VALUNTAS
Assistant Attorney General
Florida Bar No.: 0151084
1515 North Flagler Drive, #900
West Palm Beach, FL 33401
(561) 837-5000
CrimAppWPB@MyFloridaLegal.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this brief has been furnished via email (appeals@15.state.us & iseldin@ pd15.state.fl.us) to Ian Seldin, Assistant Public Defender, on October 1, 2012.

_____
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief has been prepared with Times New Roman 14 point type and complies with the font requirements of Rule 9.210.

_____

RICHARD VALUNTAS
Assistant Attorney General