

IN THE SUPREME COURT OF OF FLORIDA

FILED

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JUN 28 1985

CLERK, SUPREME COURT.

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Chief Deputy Clerk

CASE NO. 84-1644

67166

STATE OF FLORIDA,
Petitioner,

vs.

PAUL JOSEPH COTE,
Respondent.

RESPONDENT'S ANSWER BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

The Petitioner, the State of Florida, was the Appellee in the Fourth District Court of Appeal and the Prosecution in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida. The Respondent was the Appellant and the Defendant, respectively, in the lower courts. In the brief, the parties will be referred to as they appear before this Honorable Court.

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's Statement of the Case and Facts.

POINT INVOLVED

WHETHER THIS HONORABLE COURT SHOULD DECLINE TO EXERCISE ITS DISCRETIONARY JURISDICTION IN THIS CAUSE ON THE ISSUE OF WHETHER A TRIAL JUDGE IS REQUIRED TO SET FORTH IN WRITING THE REASONS FOR DEPARTURE FROM THE PRESUMPTIVE GUIDELINE SENTENCE BECAUSE AN INDEPENDENT GROUND FOR RELIEF EXIST AT BAR [RESTATED].

SUMMARY OF THE ARGUMENT

Although the Fourth District Court of Appeal reversed and remanded Respondent's sentence pursuant to Boynton v. State, supra, the Fourth District clearly articulated an additional ground for relief. In Tucker v. State, 464 So.2d 211, 212 (Fla. 3d DCA 1985), the Court held that an incorrectly calculated minimum - maximum sentence range under the guidelines constitutes an erroneous base upon which the trial court exercised its discretion in aggravating the sentence, and requires reversal for resentencing, even in the absence of a contemporaneous objection. Thus this Honorable Court should decline to exercise its discretionary jurisdiction in this cause.

ARGUMENT

THIS HONORABLE COURT SHOULD DECLINE TO EXERCISE ITS DISCRETIONARY JURISDICTION IN THIS CAUSE ON THE ISSUE OF WHETHER A TRIAL JUDGE IS REQUIRED TO SET FORTH IN WRITING THE REASONS FOR DEPARTURE FROM THE PRESUMPTIVE GUIDELINE SENTENCE BECAUSE AN INDEPENDENT GROUND FOR RELIEF EXIST AT BAR [RESTATED].

Petitioner has invoked this Honorable Court's "conflict" jurisdiction under Article V, Section 3(b)(3) of the Florida Constitution and Fla.R.Crim.P. 9.030(a)(2)(A)(iv). Without expressly conceding the issue of jurisdiction, Respondent agrees that in light of Jollie v. State, 405 So.2d 418, 420 (Fla. 1981) this Honorable Court may have jurisdiction to review this cause because conflict exists between the instant decision considered in conjunction with Boynton v. State, 10 F.L.W. 795 (Fla. 4th DCA, March 27, 1985), rev. granted, State v. Boynton, No. 66,971 (Fla. 1985). However this "conflict" would be restricted to the issue whether a trial judge is required to set forth in writing the reasons for departing from the presumptive guideline sentence.

Notwithstanding the above, Respondent suggests that this Honorable Court should decline to exercise its discretionary jurisdiction on the ground requested by Petitioner. The district courts of appeal "are and were meant to be courts of final, appellate jurisdiction." Lake v. Lake, 103 So.2d 639 (Fla. 1958). The present discretionary review under Article V, Section 3(b)(3) like the former review by certiorari is a "writ of grace as distinguished from one of right...." Lake at 642.

In the instant case, Cote v. State, 10 F.L.W. 1156 (Fla. 4th DCA, May 8, 1985) [See Appendix], the Fourth District did remand the cause on the authority of its Boynton decision but also stated:

Our recent decision in Boynton v. State, 10 F.L.W. 795 (Fla. 4th DCA, March 27, 1985), however, requires us to remand the case to the trial judge so that he may provide a written statement delineating his reasons for departure. In the event the trial judge elects not to provide a written statement, appellant must be resentenced under the guidelines in effect when he committed the crimes (December 16, 1983), and not under the amended guidelines which became effective on July 1, 1984. See Miller v. State, 10 F.L.W. 989 (Fla. 4th DCA, April 17, 1985).

Accordingly, we reverse and remand this cause to the trial court with directions to either provide a written statement delineating the reasons for departure, or to resentence appellant.

10 F.L.W. at 1157. (e.s.)

The Fourth District after reviewing this cause articulated this relief for Appellant. The Fourth District also denied the State's Motion To Stay Mandate. In Tucker v. State, 464 So.2d 211, 212 (Fla. 3d DCA 1985) the Court held that an incorrectly calculated minimum - maximum sentence range under the guidelines constitutes an erroneous base upon which the trial court exercised its discretion in aggravating the sentence, and requires reversal for resentencing, even in the absence of a contemporaneous objection. See also Higgs v. State, 10 F.L.W. 1369 (Fla. 3d DCA, June 4, 1985). At bar, there was an erroneous base from which the trial court departed from the presumptive guideline sentence. This is the independent ground for relief granted to

Respondent in this cause which Petitioner overlooks. In addition, the issue as to whether an oral pronouncement can substitute for a written order of departure under Fla.R.Crim.P. 3.701(d)(11) will be decided in the Boynton case presently pending review before this Court. Therefore this Honorable Court should decline to accept jurisdiction in this cause.

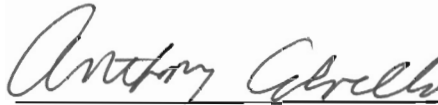
CONCLUSION

WHEREFORE, based on the foregoing reasons and authorities cited herein, Respondent respectfully requests that this Honorable Court decline jurisdiction of the instant case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Respondent's Answer Brief on Jurisdiction has been furnished to ROBERT L. TEITLER, Assistant Attorney General, Elisha Newton Dimick Building, Suite 204, 111 Georgia Avenue, West Palm Beach, Florida 33401, by courier this 26th day of June, 1985.



Of Counsel