

045

IN THE SUPREME COURT OF FLORIDA

BARRY ALLAN WILLIAMS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. 67,369
Appeal No. 84-2701

FILED
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BRIEF OF RESPONDENT
ON JURISDICTION

JIM SMITH
ATTORNEY GENERAL

ROBERT J. KRAUSS
Assistant Attorney General
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602
(813) 272-2670

Counsel for Respondent

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v.)	Case No. 67,369
)	Appeal No. 84-2701
STATE OF FLORIDA,)	
)	
Respondent.)	
_____)	

PRELIMINARY STATEMENT

Petitioner seeks to invoke the jurisdiction of this Court pursuant to Article V. Section III(b)(3) of the Florida Constitution and Florida Rule of Appellate Procedure 9.030(a)(2)(A)(IV).

In this brief, BARRY ALLAN WILLIAMS will be referred to as the "Petitioner" and the STATE OF FLORIDA will be referred to as the "Respondent."

STATEMENT OF THE CASE AND FACTS

Respondent, the State of Florida, accepts the statement of the case and facts as submitted by Petitioner in his brief on jurisdiction.

SUMMARY OF THE ARGUMENT

This Honorable Court should decline to exercise its discretionary jurisdiction in this case inasmuch as there is no conflict between the instant case and the decisions of the First District Court of Appeal in Harms v. State, 454 So.2d 689 (Fla. 1st DCA 1984) and Parker v. State, 465 So.2d 1361 (Fla. 1st DCA 1985). Both Harms and Parker are distinguishable from the instant cause and, additionally, the trial court sub judice did not solely rely on Petitioner's failure to appear as a reason for departing from the presumptive guideline sentence.

ARGUMENT

ISSUE

WHETHER THE DECISION IN WILLIAMS
v. STATE, So.2d (Fla. 2d DCA
1983), CASE NO. 84-201, OPINION
FILED JUNE 19, 1985 [10 F.L.W.
1543], IS AN EXPRESS AND DIRECT
CONFLICT WITH HARMS v. STATE,
454 So.2d 689 (Fla. 1st DCA 1984),
AND PARKER v. STATE, 465 So.2d
1361 (Fla. 1st DCA 1985).

In its decision below, the Florida District Court of Appeal, Second District, expressly ruled that Petitioner's reliance upon the decisions rendered by the First District Court of Appeal in Harms v. State, 454 So.2d 689 (Fla. 1st DCA 1984), and Parker v. State, 465 So.2d 1361 (Fla. 1st DCA 1985), was clearly misplaced. Inasmuch as the decisions in Harms and Parker are materially distinguishable from the instant cause, this Court should not exercise its discretionary jurisdiction where no conflict among decisions appears.

In Harms, supra, the court held that a defendant's failure to appear for a scheduled sentencing upon revocation of probation did not constitute forfeiture or waiver of the right to affirmatively select to be sentenced pursuant to the guidelines. Harms had pled guilty in 1982 to a charge of dealing in stolen property and his probation was revoked. Because the sentencing did not take place until after the effective date of the guidelines, Harms had the option to affirmatively select to be sentenced pursuant to the guidelines. The court held that because the rule expressly provided that the defendant had the

option to select the guidelines, failure to appear at a prior sentencing did not operate as a forfeiture or waiver of the right to elect the guidelines. Also, the court determined that the trial court could not depart from the guidelines solely because of the defendant's failure to appear because that "would permit the trial court to do indirectly, by deviation, what he cannot do directly by denying election of the rules initially based solely on a prior failure to appear." (Harms, Id. at 690) Thus, the court in Harms was concerned with the ability of the defendant to affirmatively select conditions of sentence in accordance with the guidelines and does not deal with the situation presented to the Second District below, that is, whether the failure to appear at a scheduled sentencing hearing is sufficient reason for departure from the guidelines where the trial court has expressly warned the Appellant that such a result would insue upon failure to appear.

In Parker, supra, the court observed in footnote 2 that in Parker and in Harms the records did not suggest that the defendant's failure to appear was willful and intentional or otherwise motivated by a desire to secure the application of the Rule 3.701 sentencing guidelines. Sub judice, however, the record affirmatively reflects that Petitioner willfully and intentionally failed to appear for sentencing.

Perhaps the most significant reason for asserting that there is no conflict among the above cited cases is the fact that Petitioner was not sentenced solely because he had failed to appear.


Specifically, Petitioner's agreement to appear at sentencing was one of the conditions of his plea, a condition which was breached when Petitioner willfully and intentionally failed to appear. Thus, as Judge Schoonover opined, where a defendant, as a condition of the acceptance of his plea, agrees to a departure from the presumptive guidelines sentence in the event he fails to appear for sentencing, the trial court may validly depart from the guidelines when that defendant willfully fails to appear. There is no conflict between the instant case and Harms and Parker.

CONCLUSION

Based upon the foregoing and in the absence of any express and direct conflict, this Honorable Court should decline to accept jurisdiction of the above styled cause.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL



ROBERT J. KRAUSS
Assistant Attorney General
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602
(813) 272-2670

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Robert C. Hill, Attorney for Petitioner, P. O. Box 1086, 2115 Main Street, Fort Myers, Florida 33902, this ~~8th~~ day of August, 1985.



OF COUNSEL FOR RESPONDENT