

11-1
IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,
Petitioner,

v.

ROGER DALE GORDON,
Respondent.

OCT 8 1987
CLERK OF THE SUPREME COURT
By _____
Deputy Clerk

CASE NO. _____

12/22/87

PETITIONER'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

On November 7, 1986, after having pled guilty to two counts of delivery of cocaine and one count of possession of less than 20 grams of marijuana, respondent appeared for sentencing (R 7-16). Respondent's recommended sentence under the sentencing guidelines was "community control or 12-30 months incarceration (R 8-9, 67-68). The sentencing judge imposed a sentence of 30 months in prison followed by 24 months community control on each felony count (R 13-15, 70-77). No reasons for imposing any alleged departure sentence were given, the court apparently determining that the sentence imposed was not a departure sentence.

The respondent appealed the sentence to the Fifth District Court of Appeal. Citing its previous decision in Hankey v. State, 505 So.2d 701 (Fla. 5th DCA 1987), the district court of appeal reversed, holding that where the recommended guidelines sentence is "community control or 12-30 months incarceration", a sentence of 30 months incarceration followed by 24 months community control is a departure sentence and written reasons for departure are required in order to justify the sentence. See, Gordon v. State, 12 F.L.W. 2086 (Fla. 5th DCA Aug. 27, 1987). The Fifth District Court of Appeal noted that its holding (respondent's argument on appeal) had been rejected in Francis v. State, 487 So.2d 348 (Fla. 5th DCA 1986), rev. denied, 492 So.2d 1332 (Fla. 1986).

This appeal by the state followed.

SUMMARY OF ARGUMENT

The decision of the Fifth District Court of Appeal, in this case, expressly and directly conflicts with a decision of another district court of appeal on the same issue of law. Additionally, the Fifth District Court of Appeal has twice certified conflict with the decision of another district court of appeal on an issue of law which is identical to the issue presented in this appeal. This court should exercise its discretionary jurisdiction and resolve the conflict between the two appellate courts.

POINT ON APPEAL

EXPRESS AND DIRECT CONFLICT EXISTS BETWEEN THE DECISIONS OF THE SECOND AND FIFTH DISTRICT COURTS OF APPEAL.

ARGUMENT

This court has jurisdiction pursuant to Article V, section 3(b)(3), Florida Constitution, and Florida Rule of Appellate Procedure 9.030(2)(A)(iv), to review the decision of the Fifth District Court of Appeal in Gordon v. State, 12 F.L.W. 2086 (Fla. 5th DCA Aug. 27, 1987), because Gordon expressly and directly conflicts with the decision of the Second District Court of Appeal in Francis v. State, 487 So.2d 348 (Fla. 2d DCA 1986).

In Francis, the Second District Court of Appeal held that the use of the term "community control or 12-30 months incarceration" was "not intended to make the second cell sentencing alternatives mutually exclusive but rather was designed to permit the imposition of either or both sanctions." Id. at 349. In Gordon, the Fifth District Court of Appeal expressly cited Francis, and held that the phrase "community control or 12-30 months incarceration" is intended to make the two alternatives mutually exclusive. Thus, it is clear that the Gordon decision expressly and directly conflicts with the decision in Francis.

Additionally, the Fifth District Court of Appeal has certified conflict with Francis, in Van Kooten v. State, 12 F.L.W. 2121 (Fla. 5th DCA Sept. 3, 1987) (on motion for rehearing), and Avera v. State, 12 F.L.W. 2127 (Fla. 5th DCA Sept. 3, 1987) (on motion for rehearing) both of which involved the same issue as is involved in the instant appeal. Review of these cases is

currently pending in this court.

Since express and direct conflict exists between the decision of the Fifth District Court of Appeal in Gordon, and the Second District Court of Appeal in Francis, this court should exercise its discretionary jurisdiction and resolve the conflict.

CONCLUSION

Based on the arguments and authorities presented herein, petitioner respectfully prays this honorable court exercise its discretionary jurisdiction in this cause.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Petitioner's Brief on Jurisdiction with attached Appendix has been furnished by mail to Daniel J. Schafer, Assistant Public Defender, 112 Orange Avenue, Suite A, Daytona Beach, Florida 32014, counsel for the respondent, this 7 day of October, 1987.



KEVIN KITPATRICK CARSON
COUNSEL FOR RESPONDENT