IN THE SUPREME COURT OF FLORIDA

CARL EUGENE WELCH,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 71,966

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DISCRETIONARY REVIEW OF THE DECISION OF
THE SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

	PAGE
SUMMARY OF THE ARGUMENT	1
ARGUMENT	
ISSUE I: WHETHER THE IMPOSITION OF COMMUNITY CONTROL, WHEN IT FOLLOWS A MAXIMUM GUIDELINE SENTENCE OF INCARCERATION, IS A DEPARTURE FROM THE GUIDELINES	2
ISSUE II: WHETHER A FINE WAS IMPOSED WITHOT THE REQUIRED STATUTORY FINDINGS (As stated by Petitioner)	3
CONCLUSION	6
CERTIFICATE OF SERVICE	6

TABLE OF CITATIONS

	PAGE
Ansin v. Thurston, 101 So.3d 808 (Fla. 1958)	3
Francis v. State, 487 So.2d 248 (Fla. 2d DCA 1986)	2
Jenkins v. State, 385 So.2d 1356 (Fla. 1980)	3
Johnson v. State, 511 So.3d 748 (Fla. 5th DCA 1987)	2
State v. Johnson, ___ So.2d ___, 13 F.L.W. 247 (Fla., Case No. 71, 193, Opinion filed March 31, 1988)	2
State v. Van Kooten, ___ So.2d ___, 13 F.L.W. 238, (Fla. Case nO. 71,170, Opinion filed March 31, 1988)	2
Van Kooten v. State, 512 So.2d 214 (Fla. 5th DCA 1987)	2

OTHER AUTHORITIES

Art. V, §3(b)(3), Fla. Const.	3
§814.014 Fla. Stat.	4
§921.005, (2)(a), Fla. Stat. (1985)	4

SUMMARY OF THE ARGUMENT

Resolution of Issue I is controlled by this Court's recent opinion in State v. Van Kooten, infra, and Issue II is not properly before this Court.

ARGUMENT

ISSUE I

WHETHER THE IMPOSITION OF COMMUNITY CONTROL, WHEN IT FOLLOWS A MAXIMUM GUIDELINE SENTENCE OF INCARCERATION, IS A DEPARTURE FROM THE GUIDELINES

This issue was recently decided in State v. Van Kooten, ___ So.2d ___, 13 F.L.W. 238, (Fla., Case No. 71,170, Opinion filed March 31, 1988) in which this Court approved the decision of the Fifth District in Van Kooten v. State, 512 So.2d 214 (Fla. 5th DCA 1987) which held that when the presumptive guideline sentence directs community control or incarceration, the imposition of both represents a departure from the sentencing guidelines, requiring proper reasons for the departure. In Van Kooten, this Court specifically disapproved the Second District Court's decision in Francis v. State, 487 So.2d 348 (Fla. 2d DCA 1986). Accord, State v. Johnson, ___ So.2d ___, 13 F.L.W. 247 (Fla., Case No. 71,193, Opinion filed March 31, 1988), affirming the decision of the Fifth District Court of Appeal in Johnson v. State, 511 So.2d 748 (Fla. 5th DCA 1987).

ARGUMENT

ISSUE II

WHETHER A FINE WAS IMPOSED WITHOUT THE REQUIRED STATUTORY FINDINGS (As stated by Petitioner)

This court has jurisdiction of this case based on certified conflict with Johnson v. State, 511 So.2d 748 (Fla. 5th DCA 1988). Art. V, §3(b)(3), Fla. Const. Accordingly, the only argument properly before this Court is presented in Issue I of Petitioner's Initial Brief. Petitioner's second claim was raised on direct appeal. The Second District Court did not discuss this issue in its opinion and Petitioner is improperly attempting to bootstrap his second claim to the sole issue which is properly before this Court.

The district courts of appeal were not created as intermediate appellate courts but rather as courts of final appellate jurisdiction. Ansin v. Thurston, 101 So.2d 808 (Fla. 1958). Thus, this Court may exercise its certiorari jurisdiction based on conflict only where a decision of a district court of appeal expressly and directly conflicts with a decision of another district court of appeal or this Court on the same question of law. Art. V, §3(b)(3), Fla. Const.; Jenkins v. State, 385 So.2d 1356 (Fla. 1980). For the reason, this Court cannot review, on the basis of conflict, a district court of appeal decision which merely affirms per curiam a defendant's conviciton. Jenkins v. State, supra at 1359. The Second District Court's refusal to address this issue in its opinion was tantamount to a per curiam affirmance on this claim. Petitioner is not entitled to

a second appeal of an issue already found to be without merit by the Second District and rejected without opinion.

Assuming, arguendo, this claim is properly subject to review, it nevertheless must fail.

Section 921.005, Florida Statute, (1985) sets forth the cirteria for sentencing defendants who committed crimes before October 1, 1983. Section 921.005(2)(a) provides:

> A court shall sentence a defendant to pay a fine unless it finds that the defendant is unable or will be unable to pay the fine and the imposition of a fine will not prevent the defendant from being rehabiliated or from making restitution to the victim of this crime.

The Petitioner, Carl Welch, violated §814.014, Florida Statutes by committing a grand theft on August 8, 1982. On March 28, 1983, Welch was placed on five years probation for the grand theft; and, on September 24, 1986, Welch plead guilty to violating his probation. At the sentencing hearing on October 15, 1986, the trial court announced, without objection, that:

> "As a term and condition of the community control you will pay the fine of $1,000 as earlier ordered into the Fine and for future Fund of Lee County, no less than $100 per month, commencing your first month after you are released from custody."
>
> (Emphasis added)
>
> (R. 36).

Page 6 of the record on appeal contains a copy of the original order placing Welch on probation and this order, dated March 28, 1983, reflects the original imposition of the $1,000 fine. The court's order in October of 1986, merely affirms the imposition of this fine and authorizes the collection of the funds

on a monthly basis. The Petitioner's failure to challenge the imposition of the $1,000 fine as a condition of his original probation in 1983 precluded the belated consideration of this unobjected-to claim on direct appeal in 1987.

CONCLUSION

Respondent requests this Court to strike Issue II of Petitioner's brief as not properly before this Court on conflict jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a ture and correct copy of the foregoing has been furnished by U.S. Mail to STEPHEN KROSSCHELL, Assistant Public Defender, Polk County Courthouse, P. O. Box 9000 - Drawer PD, Bartow, Florida 33830 this 12th day of April, 1988.

K Blanco

OF COUNSEL FOR RESPONDENT