

IN THE FLORIDA SUPREME COURT

STATE OF FLORIDA,

Petitioner,

v.

Case No. 73,531

JEFFREY C. HIEBER,

Respondent.

FILED
SID J. WHITE

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

JUN 8 1989

CLERK, SUPREME COURT
By _____
Deputy Clerk

PETITIONER'S INITIAL BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

KATHERINE V. BLANCO
Assistant Attorney General
Florida Bar #327832
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602
(813) 272-2670

COUNSEL FOR PETITIONER

/aoh

TABLE OF CONTENTS

PAGE NO.

STATEMENT OF THE CASE AND FACTS.....1

SUMMARY OF THE ARGUMENT.....3

ARGUMENT.....4

ISSUE.....4

IN ACCORDANCE WITH THE OPINION OF THE THIRD DISTRICT COURT OF APPEAL IN STATE V. WILLIAMS, 463 So.2d 525 (Fla. 3d DCA 1985), THE STATE'S APPEAL OF A GUIDELINES DEPARTURE SENTENCE IS TIMELY WHEN TAKEN WITHIN FIFTEEN (15) DAYS OF THE WRITTEN ORDER SETTING FORTH THE REASONS FOR DEPARTURE, EVEN THOUGH THE NOTICE OF APPEAL WAS MORE THAN 15 DAYS AFTER RENDITION OF THE JUDGMENT AND SENTENCE.

CONCLUSION.....8

CERTIFICATE OF SERVICE.....8

TABLE OF CITATIONS

PAGE NO.

State v. Ealy,
533 So.2d 1173 (Fla. 2d DCA 1988)2

State v. Hieber,
14 F.L.W. 156 (Fla. 2d DCA,
Opinion filed Dec. 21, 1988) 1, 4

State v. Williams,
463 So.2d 525 (Fla. 3d DCA 1985) 4

OTHER AUTHORITIES

Fla. R. Crim. P. 3.701(d) 11. 3

Fla. R. App. P. 9.140(c)(1)(I) 3

Fla. R. App. P. 9.140(c)(1)(J)2, 5 ■ 6

STATEMENT OF THE CASE AND FACTS

This is an appeal by the State in a criminal case. The State of Florida appealed the trial court's downward departure from the sentencing guidelines. The Second District Court determined that the State's Notice of Appeal was untimely and, therefore, dismissed the appeal. State v. Hieber, 14 F.L.W. 156 (Fla. 2d DCA, Opinion filed December 21, 1988).

On February 16, 1987, the defendant, Jeffrey Hieber, appeared before the trial court for sentencing in Hillsborough Circuit County Court. The defendant had previously entered an enter an "open plea" to the charges of two counts of Armed Burglary, two counts of Grand Theft, Attempted First Degree Murder and Criminal Mischief. The stipulated scoresheet reflected a presumptive sentence of seventeen (17) to twenty-two (22) years incarceration. (R. 138, 143-144). At the sentencing hearing held on February 16, 1987, the trial court announced that it was departing downward from the sentencing guidelines and announced its rationale for the downward departure. The trial court then informed the parties that he would file a sentencing memorandum setting forth its reasons for departure. (R. 152, 153). The judgment and sentence documents were signed by the trial judge on February 16, 1987. (R. 57-58, 114-118). The judgments were recorded on March 11, 1987 and March 13, 1987. (R. 57; 114). In addition, the order placing the defendant on probation were filed with the circuit court on March 23, 1987. (R. 59, 119).

On April 29, 1987, the defense counsel submitted a memorandum of law in support of the trial court's downward departure from the guidelines. (R. 127, 128). On May 12, 1987, the trial court entered its written order setting forth its reasons for departure from the guidelines. On May 19, 1987, the State filed a notice of appeal of the downward departure. (R. 129, 130).

Rule 9.140 (c)(1)(J), Florida Rule of Appellate Procedure provides that the State may appeal a sentence imposed outside the range recommended by guidelines.

On December 21, 1988, the Second District Court held:

"

Because it is the sentencing itself which triggers the time for filing an appeal, and not the subsequent entry of the departure order, the state's notice is untimely and this court lacks jurisdiction to entertain their appeal. State v. Ealy, #87-3017 (Fla. 2d DCA September 2, 1988) {13 F.L.W. 20611. As in Ealy, we acknowledge that this result conflicts with State v. Williams, 463 So.2d 525 (Fla. 3d DCA 1985).

Appeal dismissed."

State v. Hieber, 14 F.L.W. 156
(Fla. 2d DCA, Opinion filed
December 21, 1988)

On May 12, 1989, this Court accepted jurisdiction.

SUMMARY OF THE ARGUMENT

In accordance with the opinion of the Third District Court of Appeal in State v. Williams, 463 So.2d 525 (Fla. 3d DCA 1985), the State's appeal of a guidelines departure sentence is timely when taken within fifteen (15) days of the written order setting forth the reasons for departure, even though the notice of appeal was more than 15 days after rendition of the judgment and sentence.

ARGUMENT

ISSUE

IN ACCORDANCE WITH THE OPINION OF THE THIRD DISTRICT COURT OF APPEAL IN STATE V. WILLIAMS, 463 So.2d 525 (Fla. 3d DCA 1985), THE STATE'S APPEAL OF A GUIDELINES DEPARTURE SENTENCE IS TIMELY WHEN TAKEN WITHIN FIFTEEN (15) DAYS OF THE WRITTEN ORDER SETTING FORTH THE REASONS FOR DEPARTURE, EVEN THOUGH THE NOTICE OF APPEAL WAS MORE THAN 15 DAYS AFTER RENDITION OF THE JUDGMENT AND SENTENCE.

The judgment and sentence documents were signed on February 16, 1987, they were recorded on March 11 and 13, 1987, the trial court's written order of departure was filed on May 12, 1987, and the State's notice of appeal was filed on May 19, 1987. In the instant case, the Second District Court ruled that the State's notice of appeal was untimely "[B]ecause, it is the sentencing itself which triggers the time for filing an appeal, and not the subsequent entry of the departure order. . . ." State v. Hieber, 14 F.L.W. 156 (Fla. 2d DCA, Opinion filed December 21, 1988) [reserved citation 541 So.2d 12081.

The State urges this Honorable Court to adopt the reasoning set forth by the Third District Court of Appeal in State v. Williams, 463 So.2d 525 (Fla. 3d DCA 1985). In Williams, the Court determined that the State's appeal, which was taken within fifteen days of the rendition of the order setting forth the written reasons for departure, was timely and the State's appeal

was not subject to dismissal. In doing so, the Third District Stated:

"Florida Rule of Criminal Procedure 3.701(d)11 requires that "[a]ny sentence outside of the guidelines must be accompanied by a written statement delineating the reasons for the departure." Where a sentence is imposed below the range recommended by the guidelines, the State is given the right to appeal. See Fla.R.App.P. 9.140(c)(1)(J). But unlike an appeal from an illegal sentence under Rule 9.140(c)(1)(I), where the illegality is manifest with the mere pronouncement of sentence, the propriety ~~ver non~~ of a sentence imposed outside of the recommended guideline range cannot be said to be known until the written reasons for the departure from the guidelines are given. The essence of an appeal under Rule 9.140(c)(1)(J) is not that the trial court departed from the guidelines, but rather that the reasons given by the trial court for departing from the guidelines do not

justify the departure. Thus, an appeal which precedes the filing of the written statement delineating the reasons for departure is premature."

463 So.2d 525-526.

The State may appeal a sentence imposed outside the range recommended by the guidelines. S924.07, Florida Statutes; Rule 9.140(c) (1)(J) Florida Rules of Appellate Procedure. The State must file its notice of appeal with the clerk of the lower tribunal within fifteen (15) days of rendition of the order to be reviewed. Rule 9.020(g) defines rendition of an order as the filing of a signed, written order with the clerk. The Committee Notes to Rule 9.020 discuss the broad definition given to the term "order" and state that this rule was intended to encourage the entry of written orders in every case.

In this case, the state relied in good faith on the trial court's announced intention to submit written reasons supporting the departure; and the State awaited the rendition of the trial court's order setting forth its reasons before filing the notice of appeal. In an appeal involving a downward departure sentence without written reasons, the appellate court is unduly burdened with two separate appeals: one in which the case is remanded for the belated entry of written reasons for the departure and a second appeal devoted to the validity of the reasons. The procedure followed by the State in this case obviated the need

for two separate appeals; it reduced the ultimate cost, time involved, appellate caseload, and avoided wasting scarce judicial resources. Here, as in Williams, supra, the State's notice of appeal, which was addressed to the trial court's order of departure, was timely filed.

CONSLUSION

Based on the foregoing reasons, arguments and authorites, Petitioner respectfully requests this Court to approve the decision of the Third District Court in Williams, reverse the decision of the Second District Court in the instant case, and remand this appeal to the District Court for consideration of the merits of the instant appeal.

Respectfully submitted

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

Katherine Blanco

KATHERINE V. BLANCO, 8327832
Assistant Attorney General
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602
(813) 272-2670

COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to STANFORD R. SOLOMON, ESQUIRE, of RUDNICK & WOLFE, 201 E. Kennedy Boulevard, Suite 1600, Tampa, Florida 33602 this 6th day of June, 1989.

K. Blanco

OF COUNSEL FOR PETITIONER