

IN THE FLORIDA SUPREME COURT

STATE OF FLORIDA,)
)
)
 Petitioner,)
)
 v.)
)
 JEFFREY C. HIEBER,)
)
 Respondent.)

Case No. 73,531

FILED
SID J. WHITE

JAN 27 1989

DISCRETIONARY REVIEW OF THE DECISION OF
THE DISTRICT COURT OF APPEAL CLERK, SECOND DISTRICT OF FLORIDA
Deputy Clerk

BRIEF OF PETITIONER ON JURISDICTION

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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)

SUMMARY OF THE ARGUMENT

In the instant opinion rendered on December 21, 1988, the Second District Court of Appeal stated: ". . . We acknowledge that this result conflicts with State v. Williams, 463 So.2d 525 (Fla. 3d DCA 1985)." Accordingly, the State respectfully requests that this Court exercise its discretionary jurisdiction to review the instant appeal on the basis of the express acknowledgment of conflict among the District Courts of Appeal.

ARGUMENT

ISSUE

THIS COURT SHOULD EXERCISE ITS DISCRETIONARY JURISDICTION TO REVIEW THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL IN STATE V. HIEBER 14 F.L.W. 156 (Fla. 2d DCA, CASE NO. 87-1478, OPINION FILED DECEMBER 21, 1988) WHICH EXPRESSLY AND DIRECTLY CONFLICTS WITH STATE V. WILLIAMS, 463 So.2d 525 (FLA. 3d DCA 1985) .

As the Second District Court acknowledged in its opinion, the dismissal of the State's appeal in the instant case on the ground that the State's Notice of Appeal was untimely filed is in conflict with State v. Williams, 463 So.2d 525 (Fla. 3d DCA 1985).

In Williams, the Third District Court held that the State's Notice of Appeal was timely filed where it was filed within fifteen (15) days of the trial court's written order setting forth the reasons for departure from the sentencing guidelines. In doing so, the Third District Court noted that "[T]he 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 reasons for departure is premature." 463 So.2d at 525-526.

Because the decision of the Second District Court dismissing the state appeal on the grounds that the State's notice was untimely is in conflict with the Third District Court, the State respectfully requests this court exercise its discretionary jurisdiction to review and resolve the conflict among the appellate courts of this state.

CONSLUSION

Based on the foregoing reasons, arguments and authorites, Petitioner respectfully requests this Court to exercise its discretionary jurisdiction in this case.

Respectfully submitted

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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 25th day of January, 1989.

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