

FILED
SID J. WHITE

IN THE SUPREME COURT OF FLORIDA

FEB 15 1989

CLERK, SUPREME COURT

By _____ Deputy Clerk *pt*

BRENDA FOX,)
)
Petitioner,)

vs.

CASE NO. _____
(4th DCA #88-2314)

DISTRICT COURT OF APPEAL,)
FOURTH DISTRICT,)
STATE OF FLORIDA,)
Respondent.)

PETITION FOR WRIT OF PROHIBITION

The petitioner, BRENDA FOX, seeks a writ of prohibition absolute to prevent the District Court of Appeal, Fourth District, from acting without jurisdiction to review an order entered by the Circuit Court, Seventeenth Judicial Circuit, State of Florida. As shown below, petitioner has no other adequate remedy at law, and thus invokes the jurisdiction of this Court pursuant to Article V, Section 3(b)(7), of the Florida Constitution, and Rule of Appellate Procedure 9.100.

1. This petition seeks a writ of prohibition absolute directed to the District Court of Appeal, Fourth District, to prevent said tribunal from acting without jurisdiction to review a downward departure from the sentencing guidelines. The State of Florida filed a notice of appeal on August 26, 1988, to review a sentence imposed upon petitioner on July 18, 1988. Conformed copies of portions of the record referred to in this petition are attached hereto as an Appendix. Appendix - 1 shows that the sentence of seven years incarceration was imposed July 18, 1988. Appendix - 2 shows that the state's notice of appeal from the sentence was filed August 26, 1988.

2. The sentence, a guideline departure, was supported by an order entered August 8, 1988, and filed August 11, 1988 (Appendix - 3).

3. The appealable order in the present case was the sentence imposed outside the range recommended by the sentencing guidelines. See Florida Rule of Appellate Procedure 9.140(c)(1) (J). This sentence was imposed July 18, 1988, although notice of appeal was not filed until August 26, 1988.

Florida Rules of Appellate Procedure 9.140(c)(2) requires that the notice of appeal be filed "within 15 days of rendition of the order to be reviewed" when the state seeks an appeal in a criminal case. Appeal must be taken from imposition of the sentence, which is the order to be reviewed. The merits of an order explaining or justifying the sentence comes into consideration as part of an appeal only when the sentence itself is the subject of a timely appeal.

4. Petitioner filed a motion to dismiss the appeal in the District Court of Appeal, Fourth District on these grounds (Appendix - 4). A response was filed by the state, and a reply to the response was filed by petitioner (Appendix - 5-6). On January 4, 1989, the district court denied the motion to dismiss (Appendix - 7).

A motion for rehearing was filed with the district court of appeal, and a response to the motion was filed by the state (Appendix - 8-9). The district court denied the motion for rehearing on February 8, 1989 (Appendix - 10).

5. As petitioner showed in the District Court of Appeal, there is inconsistency among the District Courts of Appeal concerning the timeliness of notices filed by the state to appeal from guideline departure sentences when the notice is filed more than 15 days from entry of the sentence. The Second District Court of Appeal in State v. Ealy, 533 So.2d 1173 (Fla. 2d DCA 1988), held that a notice of appeal must be filed timely from the entry of the written sentence, and a notice of appeal is not timely filed in the Second District if it is filed from entry of a subsequently entered order setting forth reasons for imposition of the departure sentence. A conflicting decision had been entered by the Court in State v. Williams, 463 So.2d 525 (Fla. 3d DCA 1985), which held that the state may file a timely notice

from an order stating reasons for departure even when said notice is out of time as a notice to appeal the actual sentence. The court in State v. Ealy, supra, certified conflict between its decision and that of the Third District Court of Appeal in State v. Williams. However, it appears that jurisdiction of this Court was not invoked to review the decision in State v. Ealy, despite the acknowledgment of conflict on this issue.

6. The petitioner herein has no other adequate remedy at law because prohibition exists only to prevent or forestall actions in excess of jurisdiction. Prohibition cannot be used to revoke an order that has been entered. Southern Records and Tape Service v. Goldman, 502 So.2d 413 (Fla. 1987); Sparkman v. McClure, 498 So.2d 892 (Fla. 1986).

Once the district court below issues a decision the remedy by prohibition will no longer be available. Jurisdiction to review any final opinion entered by the district court on the merits of the sentence will be reviewable only in the event that the District Court of Appeal either certifies a question of law to this Court or writes an opinion that reflects express and direct conflict on the merits of its decision. Article V, Section 3(b), Florida Constitution. Accordingly, no reliable and effective or predictable remedy exists except the remedy sought herein. The district court did not indicate that jurisdiction would be further considered as part of its merits review.

7. The respondent may argue, as it did below, that until the written reasons are filed that a party does not know whether a meritorious appeal will lie. However, the party does know that the right to appeal the sentence exists at the time the departure sentence is imposed. The jurisdictional requirements simply do not permit time to reflect upon the merits of a subsequent order because it is the sentence that is being appealed. The sentence is the final order affecting the party, and as such the rules recognize it as the subject of an appeal when it is a departure sentence. Unless the rules governing jurisdictional filing

requirements are applied as they have been promulgated, a departure sentence could never be reviewed when a court fails to enter written reasons. The right to appeal is therefore precisely measured from imposition of the departure sentence.

WHEREFORE, a substantial issue of law is raised on which the District Courts of Appeal have directly and expressly issued conflicting decisions. The jurisdiction of court below does not exist because a notice of appeal was not timely filed from the entry of the appealable order.

Accordingly, petitioner requests the issuance of a Rule Nisi directing respondent to show cause why a rule absolute in prohibition should not be issued.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEKEBY CERTIFY tnat a true copy of the foregoing was furnished by courier, to JOAN FOWLER, Assistant Attorney General, Elisha Newton Dimick Building, Suite 204, 111 Georgia Avenue, West Palm Beach, Florida 33401, and to CLYDE L. HEATH, Clerk, Fourth District Court of Appeal, P.O. Drawer A, West Palm Beach, Florida 33402, this 14th day of February, 1989.



LOUIS G. CARRES
Assistant Public Defender