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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

Case No. 74,294

CHESTER T. BYERS,

Respondent.

FILED
SID J. WHITE
SEP 22 1989
CLERK, SUPREME COURT
By
Deputy Clerk

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

BRIEF OF RESPONDENT ON THE MERITS

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT
FLORIDA BAR NO. 0143265

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PRELIMINARY STATEMENT

The Petitioner, The State of Florida, was the plaintiff in the trial court and the Appellant in the District Court of Appeal, Second District. The Respondent, Chester T. Byers, was the defendant in the trial court and the Appellee in the Second District.

Petitioner seeks review of the Second District's order dismissing eight state appeals from guidelines departure sentences. There are eight separate records on appeal which shall be identified by Second District Case Number, the letter "R", and the appropriate page numbers. References to the appendix to this brief are designated by "A" and the page number.

STATEMENT OF THE CASE AND FACTS

The Respondent, Chester T. Byers, accepts the Petitioner's statement of the case and facts in the Brief of Petitioner on the Merits with the following corrections and additions:

In Second District Case No. 88-2488, the trial court adjudicated Respondent guilty of five counts of lewd assault upon a child. (No. 88-2488, R28) The court sentenced Respondent on count one to five years in prison, followed by two years community control, followed by eight years probation. (No. 88-2488, R30) On count two, the court suspended a fifteen year prison sentence consecutive to count one. (No. 88-2488, R32) On counts three, four, and five the court imposed consecutive terms of fifteen years probation for each count. (No. 88-2488, R29) The record on appeal for Second District Case No. 88-2488 does not contain an amended notice of appeal. (No. 88-2488, R1-37)

In Second District Case No. 88-2489, the trial court imposed three consecutive terms of fifteen years probation to be served consecutive to the penalties in Case No. 88-2488. (No. 88-2489, R21, 22) In Second District Case No. 88-2490, the trial court imposed two concurrent terms of fifteen years probation to be served consecutive to the penalties in Case No. 88-2488. (No. 88-2490, R21, 22) In Second District Case No. 88-2491, the court imposed a fifteen year term of probation consecutive to the penalties in Case No. 88-2488. (No. 88-2491, R28, 29) In Second

District Case No. **88-2492,** the court imposed three concurrent fifteen year terms of probation consecutive to the penalties in Case No. **88-2488.** (No. **88-2492, R25, 26)** In Second District Case No. **88-2494,** the court imposed three concurrent fifteen year terms of probation consecutive to the penalties in Case No. **88-2488.** (No. **88-2494, R32, 33)** In Second District Case No. **88-2495,** the court imposed two concurrent fifteen year terms of probation consecutive to the penalties in Case No. **88-2488.** (No. **88-2495, R19, 20)** In Second District Case No. **88-2496,** the court imposed a fifteen year term of probation consecutive to the penalties in Case No. **88-2488.** (No. **88-2496, R22, 23)**

SUMMARY OF THE ARGUMENT

The State had the statutory right to appeal the departure sentences imposed by the trial court, but was required to file its notices of appeal within fifteen days after the judgments and sentences were rendered. Petitioner's argument that the written reasons for departure constitute the order to be appealed must be rejected. Otherwise, neither the State nor the defendant could appeal an illegal departure sentence if the court failed to enter reasons for departure. Since the notices of appeal in this case were filed more than fifteen days after the judgments and sentences were rendered, the District Court of Appeal, Second District lacked jurisdiction and correctly dismissed the appeals.

ARGUMENT

ISSUE I

THE DISTRICT COURT OF APPEAL, SECOND DISTRICT DID NOT ERR IN FINDING THE STATE'S NOTICES OF APPEAL UNTIMELY.

The right to appeal from a final judgment is prescribed by statute. State v. Pettis, 520 So.2d 250, 252 (Fla. 1988). The State of Florida's right to appeal a guidelines departure sentence is provided by section 927.07(1)(i), Florida Statutes (1987):

> (1) The state may appeal from:
>
> * * *
>
> (i) A sentence imposed outside the range recommended by the guidelines authorized by s. 921.001.

The time limit for filing an appeal is prescribed by rules adopted by this Court. Art. V, § 2(a), Fla. Const. The State of Florida is required to file its notice of appeal within fifteen days of rendition of the order to be reviewed. Fla. R. App. P. 9.140(2). The time limit for filing a notice of appeal is jurisdictional, and an untimely appeal must be dismissed. Lampkin-Asam v. District Court of Appeal, 364 So.2d 469 (Fla. 1978).

In this case, the guidelines departure sentences were imposed, and the final judgments were rendered on August 5, 1988. (No. 88-2488, R28-32; No. 88-2489, R21-22; No. 88-2490, R28-32; No. 2491, R28-29; No. 88-2492, R25-26; No. 88-2494, R32-33; No. 88-2495, R19-20; No. 88-2496, R22-23) The State filed its notices of appeal nineteen days later on August 24, 1988. (No. 88-2488, R33;

No. 88-2489, R33; No. 88-2490, R24; No. 88-2491, R32; No. 88-2492, R29; No. 88-2494, R35; No. 88-2495, R22; No. 88-2496, R27) The trial court entered written orders stating its reasons for departure on September 9, 1988. (No. 88-2488, R35-37; No. 88-2489, R25-27; No. 88-2490, R26-28; No. 88-2491, R34-36; No. 88-2492, R31-33; No. 88-2494, R37-39; No. 88-2495, R24-26; No. 88-2496, R29-31) In seven of the eight cases, the State filed amended notices of appeal on September 22, 1988. (No. 88-2489, R28; No. 88-2490, R29; No. 88-2491, R37; No. 88-2492, R34; No. 88-2494, R40; No. 88-2495, R27; No. 88-2496, R33)

The District Court of Appeal, Second District dismissed the State's appeals as untimely because the notices of appeal were filed more than fifteen days after the judgments and sentences were rendered. (R1-2) Relying upon the Third District's conflicting decision in State v. Williams, 463 So.2d 525 (Fla. 3d DCA 1985), Petitioner argues that the time for filing a notice of appeal from a guidelines departure sentence should run from the date the written order stating reasons for departure is filed rather than from the date the sentence is rendered.

Both the decision in Williams and the Petitioner are wrong. Section 927.07(1)(i), Florida Statutes (1987), grants the State the right to appeal the departure sentence, not the order stating reasons for departure. State v. Hieber, 541 So.2d 1208 (Fla. 2d DCA 1988); State v. Ealy, 533 So.2d 1173, 1174 (Fla. 2d DCA 1988). Similarly, the defendant has the right to appeal a departure sentence under section 924.06(1)(e), Florida Statutes

(1987).

The legislature chose wisely in making the departure sentence the order to be appealed rather than the reasons for departure. If no appeal could be filed until the trial court entered written reasons for departure, neither the State nor the defendant would be able to appeal an illegal departure sentence unsupported by reasons for departure. Trial courts could avoid complying with the guidelines in any case by refusing to enter written reasons for departure above or below the guidelines.

Moreover, Petitioner is wrong in arguing that it is necessary to review the written reasons for departure before deciding whether to appeal a departure sentence. Petitioner did not wait to conduct such a review in this case. The State's original notices of appeal were filed on August 24, 1988, sixteen days before the trial court stated its reasons for departure in writing on September 9, 1989. Obviously, the State knew that it was aggrieved by the departure sentences without regard to the trial court's written reasons. Surely the State would have wanted its appeal even if the trial court had never entered written reasons for departure.

Since the State filed untimely appeals more than fifteen days after the judgments and sentences were rendered, the Second District correctly determined that it lacked jurisdiction and dismissed the appeals. See Lampkin-Asam v. District Court of Appeal. The order dismissing the appeals should be affirmed.

CONCLUSION

Respondent respectfully requests this Honorable Court to affirm the Second District's order dismissing Petitioner's untimely appeals.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert Butterworth, Room 804, 1313 Tampa St., Tampa, FL 33602, (813) 272-2670, on this 20th day of September, 1989.

Respectfully submitted,

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