

IN THE FLORIDA SUPREME COURT

**FILED**

SID J. WHITE,

NOV 20 1989

CLERK, SUPREME COURT

By \_\_\_\_\_

ROBERT LEWIS MILLER,

Petitioner,

v.

Case No.

STATE OF FLORIDA

Second District Court #87-1500

Respondent.

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

**BRIEF OF RESPONDENT ON JURISDICTION**

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SUMMARY OF THE ARGUMENT

Petitioner has not demonstrated that the Second District expressed direct conflict with Ortagus, infra. Ortagus was decided on a question of law different from that in this case.

The Second District clearly distinguished its decision herein from Mayo v. State. Such distinguishment does not confer conflict jurisdiction upon this Court. All other cases that purport to hold that a departure is invalid if it rests upon acts for which a defendant has not been charged are factually different from the instant case and are not decided on the same question of law as presented to the Second District.

ARGUMENT

ISSUE I

WHETHER THE INSTANT DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH ORTAGUS V. STATE, 500 SO.2D 1367 (FLA. 1ST DCA 1987).

Petitioner fails to grasp the meaning of "express and direct conflict" and how the concept serves to confer jurisdiction upon this Court.

In Jenkins v. State, 385 So.2d 1356 (Fla. 1980), this Court laid down the standard for "conflict review" of decisions by the district courts:

The pertinent language of Section 3(b)(3), as amended April 10, 1980, leaves no room for doubt. This Court may only review a decision of a district court of appeal that expressly and directly conflicts with a decision of another district court of appeal or the Supreme Court on the same question of law. The dictionary definitions of the term "express" include: "to represent in words"; "to give expression to." "Expressly" is defined: "in an express manner." (Citations omitted).

In the instant case, it is clear from the face of the district court's decision that the court most assuredly expressed no conflict with any decision of a district court or this Court. Not only did the district court not even mention Ortagus v. State, 500 So.2d 1367 (Fla. 1st DCA 1987), it found harmless

error based upon its distinguishment of the instant case from Smith v. State, 539 So.2d 514 (Fla. 2d DCA 1989). The Second District reasoned that a jury's inherent pardon power was not endangered because no evidence supporting a defense of excusable homicide was adduced at trial and that Petitioner had, in effect, already received the benefit of the jury's mercy because he was convicted of an offense which was one step removed from second degree murder and for which he received a full jury instruction.

Though Petitioner has not so written, he still wishes for this Court to determine that it was fundamental error for the trial court to have not given the "long form" justifiable and excusable homicide instruction regardless of the evidence (or lack of it) adduced at trial. Ortagus does not reach the issue of whether it is error to not give the long form justifiable and excusable homicide instruction where no evidence supporting such a defense is adduced at trial. Ortagus only holds that it is error to fail to give the justifiable and excusable homicide instruction (apparently, regardless of form) along with an instruction for manslaughter. Sub judice, the trial court gave the short form justifiable and excusable homicide instruction along with the manslaughter instruction, (R. 994, 995) whereas in Ortagus, no such instruction was given in direct connection with the manslaughter instruction. Thus, in the instant case, the Second District concluded that it was not fundamental error to fail to give the long form justifiable and excusable homicide instruction along with the manslaughter instruction. In Ortagus,

the district court found fundamental error where the trial court failed to give any justifiable and excusable homicide instruction along with a manslaughter instruction. Accordingly, given the facts and mode of the jury instructions that the Second District considered in this case, as compared to those in Ortaqus, it is not possible to conclude that the Second District in any way expressed direct conflict with the First District on the very same question of law.

ISSUE II

WHETHER THE SECOND DISTRICT'S DECISION CONFLICTED WITH OTHER DECISIONS WHICH HELD THAT (1) FLAGRANT DISREGARD FOR THE SAFETY OF OTHERS WAS AN INHERENT COMPONENT OF MANSLAUGHTER, AND (2) GUIDELINES DEPARTURES MAY NOT BE JUSTIFIED BY REFERENCE TO FACTORS FOR WHICH THE DEFENDANT HAS BEEN ACQUITTED OR NOT BEEN CHARGED.

Once again, Petitioner wholly fails to grasp the concept of express and direct conflict. He argues that the Second District expressed direct conflict with Mayo v. State, 518 So.2d 458 (Fla. 1st DCA 1988). Far from it, the court distinguished Mayo from the instant case. Petitioner has not cited, and Respondent cannot find, any decisional law conferring distinguishment jurisdiction upon this Court. Merely because Petitioner disagrees with the appellate court's reasoning does not mean that any kind of conflict has been directly expressed!

Petitioner finds conflict between the instant case and Felts v. State, 537 So.2d 955 (Fla. 1st DCA 1988). Such, however, is not the case. Petitioner makes the blanket assertion that a departure cannot be based on factors relating to offenses for which a defendant is not charged. However, the rule announced in Felts is that a departure cannot be upheld when it involves circumstances for which a conviction was not obtained. If one follows Petitioner's sound reasoning to its illogical conclusion, it would mean that if any conceivable crime could be charged as a result of the danger posed to people other than the immediate victims, then a departure based upon a great risk of injury or

death to a large number of persons may never constitute a valid reason for departure. Such faulty reasoning points out why Felts states its rule in terms of convictions rather than charges.<sup>1</sup> Sub judice, Petitioner was not charged with, nor convicted of any crimes related to those other motorists whose lives and safety he endangered. Obviously, he was not charged or convicted for manslaughter against such other motorists. Accordingly, the Second District followed the rule in Felts because the departure was not based upon actual chargeable crimes for which the state failed to obtain, a conviction.

In McIntyre v. State, 539 So.2d 603 (Fla. 3rd DCA 1989), the district court did state, in a footnote, that the uncharged crimes of reckless driving in a fleeing situation could not be used to depart. However, as authority for such a rule, they cited to Banzo v. State, 464 So.2d 620 (Fla. 2d DCA 1985). In Banzo, the state may very well have been able to obtain a conviction for a higher drug offense than what was actually charge. Accordingly, failure to obtain such a conviction where the state, quite arguably could, if not should have done **so**, was found not to be a valid reason for departure. Sub judice, Petitioner argues that because culpable negligence should or could have been charged, it was improper to depart. However, Petitioner fails to note that culpable negligence may not have

<sup>1</sup> In Felts, the State was not able to obtain a conviction on the factor used for departure because the crimes occurred in Georgia.)

been chargeable against "others" because, based upon double jeopardy principles, the same acts that would have supported such a conviction were subsumed in the crime for which he was ultimately convicted. Thus, unlike, the situation in Banzo and McIntyre,<sup>2</sup> where the reasons for departure constituted crimes that should have been charged, it would have simply been improper herein to obtain an additional conviction for culpable negligence against others. Accordingly, the Second District's decision herein is not in conflict with McIntyre.

Next, Petitioner strains to find a clear expression of conflict based upon the holding in Pendelton v. State, 493 So.2d 1111 (Fla. 1st DCA 1986). The holding in Pendelton clearly states that it was improper for the court to have departed due to its belief that the defendant should have been found guilty of murder. Such constituted a departure based upon a crime for which a conviction was clearly not obtained. However, in the instant case, the Second district merely asserted that if danger to others was a sufficient reason for departure in a second degree murder case, then it should also be a valid reason for departure based upon the facts supporting a conviction for manslaughter in this case. Thus, the Second District did not even come close considering whether the trial court departed because it believed that Petitioner should have been convicted of

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The state failed to charge the defendant with the additional and separate crime of reckless driving while fleeing from the scene of a single criminal episode in which he committed burglary and auto theft)

second degree murder. Accordingly, the instant case and Pendelton were not decided on the same question of law.


So to, the same reasoning applies to Vanover v. State, 498 So.2d 899 (Fla. 1989). In Vanover, this Court invalidated a departure because the trial court considered the unfounded higher crime in its decision to depart. Herein, the Second District never expressed any such view. Neither did the trial court. Though Petitioner boldly asserts, because he was acquitted of second degree murder, that his conduct could not possibly rise to the level sufficient to support a departure for creating a serious risk to others, he fails to see that the district court never, as in Vanover or Pendelton, employed a disbelief in the wisdom of the jury's verdict to support the departure. Accordingly, the instant case and Vanover were not decided on the same question of law. Petitioner's bootstrapping argument that an application of valid departure reasons for second degree murder is tantamount to employing an acquittal for second degree murder as a valid reason to depart for a manslaughter conviction only points out that the Second District most assuredly did not express any direct conflict with the decision cited by Petitioner .

CONCLUSION

For the above stated reasons, Respondent urges this court not to accept jurisdiction of this case pursuant to Rule 9.030(a)(2)(iv) of the Florida Rules of Appellate Procedure because the district court has not expressed any conflict with an opinion of this Court or another district court of appeal.

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 STEPHEN KROSSCHELL, Assistant Public Defender, P. O. Box 9000 - Drawer PD, Bartow, Florida 33830 this 16th day of November, 1989.

  
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OF COUNSEL FOR RESPONDENT