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IN THE SUPREME COURT OF FLORIDA

CLIFFORD DANIELS, :

Petitioner, :

vs. :

Case No.

STATE OF FLORIDA, :

Respondent. :

_____ :

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

BRIEF OF PETITIONER ON JURISDICTION

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FLORIDA BAR NO. 0143265

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PRELIMINARY STATEMENT

Petitioner, CLIFFORD DANIELS, was the Appellant in the Second District Court of Appeal and the defendant in the trial court. Respondent, the State of Florida, was the Appellee in the Second District Court of Appeal. The appendix to this brief contains a copy of the decision rendered September 14, 1990.

STATEMENT OF THE CASE AND FACTS

On September 26, 1985, the State Attorney for the Thirteenth Judicial Circuit in and for Hillsborough County, Florida, filed an information charging the Petitioner, Clifford Daniels, with delivery of marijuana in violation of section 893.13(1)(a)(2), Florida Statutes (1985), for an incident occurring on September 5, 1985. Mr. Daniels plead nolo contendere to the charge and was placed on 4 years of probation on November 18, 1985. Mr. Daniels' probation was violated on August 28, 1986, and he was replaced on probation for 3 years. Mr. Daniels violated his probation again when he failed to report to his probation officer, and he was sentenced to 5 years imprisonment with credit for 133 days served on September 18, 1987. This sentence was ordered to run consecutive to that imposed in a robbery charge.

On September 16, 1986, the State filed another information against Mr. Daniels charging him with robbery with a deadly weapon in violation of section 812.13(2)(b), Florida Statutes (1985), for an incident occurring on August 24, 1986. Mr. Daniels went to trial with a co-defendant on this charge on November 18, 1986, Acting Circuit Court Judge Bonanno presiding. The voir dire was conducted on November 18 (R264), but the jury was not sworn until November 20, 1986. Mr. Daniels was present for the voir dire, but he failed to appear for any other part of the trial. Over objection, the trial court continued on with the trial. During trial the judge instructed the jury that an element of robbery was a temporary or permanent intent to deprive. Both Mr.

Daniels and his co-defendant were found guilty as charged on November 21, 1986.

When Mr. Daniels was eventually located, he was sentenced to 9 years imprisonment with credit for time served of 101 days. The guidelines recommended 7 to 9 years. This sentence was ordered to run consecutive to the marijuana charge noted above. Sentencing occurred on September 18, 1987. Mr. Daniels timely filed his Notice of Appeal on September 22, 1987, on both the robbery and the marijuana charges and these notices were consolidated.

On appeal, Mr. Daniels raised three issues: (1) the trial of Mr. Daniels when Mr. Daniels disappeared before the jury was sworn, (2) instructing the jury that the taking in a robbery can be temporary or permanent, and (3) departing from the guidelines on a violation of probation case. The Second District Court of Appeal rejected all three arguments in its en banc September 14, 1990, decision. In that opinion it noted it might be in conflict with Supreme Court and District Court of Appeal case law, but did not directly admit its conflict as to the jury instruction issue. On the sentencing issue the Second District Court of Appeal cites a case that is presently before this Court on the same exact issue of departing from the guidelines on a violation of probation case due to past violations.

SUMMARY OF THE ARGUMENT

There are two grounds upon which jurisdiction can be taken in this case: (1) finding that the taking in a robbery can be with the intent to "temporarily" deprive another is in direct conflict with this Court and other District Court of Appeal case law that has held the taking must be with the intent to "permanently" deprive; and (2) finding that the trial court can depart from the guidelines on a violation of probation case not only conflicts with this Court and other District Court of Appeal case law but is also an issue presently pending before this Court on a certified question.

ARGUMENT

ISSUE I

WHETHER THE DECISION IN Daniels v. State, Case Numbers 87-2741 and 87-2742 (Fla. 2d DCA Sept. 14, 1990), IS IN CONFLICT WITH FLORIDA SUPREME COURT AND DISTRICT COURT OF APPEAL OPINIONS DEFINING WHAT CONSTITUTES A ROBBERY?

In Vaughn v. State, 460 So.2d 505 (Fla. 3d DCA 1984), the court stated, "[t]here is no doubt that the intent to permanently deprive another of property is an element of robbery" (emphasis added). In Green v. State, 414 So.2d 1171 at 1173 (Fla. 5th DCA), rev. denied, 422 So.2d 842 (Fla. 1982), the court stated in footnote 3 "there must be in robbery a specific intent to deprive the owner permanently of his property." (Emphasis added). And in Bell v. State, 394 So.2d 979 (Fla. 1981), this Court answered the following certified question in the affirmative: "Whether specific intent (i.e., the intent to permanently deprive the owner of property) is still a requisite element of the crime of robbery as now defined by section 812.13, Florida Statutes (1975)." (Emphasis added). When the Second District Court of Appeal refused to find permanent deprivation an element of robbery, it tried to distinguish the above cases by claiming that the "permanent" part of the definition was not important factually to the case at hand and was, therefore, only dicta. Petitioner disagrees with this opinion. Bell clearly defined robbery as to the intent needed and this definition has been consistently repeated and applied by other

District Court of Appeals. The Second District Court of Appeal is in direct conflict with this Court and those other District Court of Appeals on this issue.

ISSUE II

WHETHER THE ISSUE IN Daniels, supra,
ON ALLOWING DEPARTURES FROM THE
GUIDELINES ON PROBATION VIOLATION
CASES IS PRESENTLY PENDING BEFORE
THIS COURT IN ANOTHER CASE?

Mr. Daniels contested the guidelines departure on his probation violation case, but the Second District Court of Appeal upheld the sentence on the basis of Williams v. State, 559 So.2d 680 (Fla. 2d DCA 1990). That case contains a certified question¹ and is presently pending before this Court as Case No. 75,919. Inasmuch as this Court has the guidelines departure issue already before it, this Court should accept jurisdiction over Mr. Daniels' case. See, Jollie v. State, 405 So.2d 418 (Fla. 1981).

¹The certified question is:

HAS THE SUPREME COURT IN Ree v. State, 14 F.L.W. 565 (Fla. Nov. 16, 1989), and Lambert v. State, 545 So.2d 838 (Fla. 1989), RECEDED FROM THE HOLDINGS IN Adams v. State, 490 So.2d 53 (Fla. 1986), IN WHICH IT FOUND THAT WHERE A DEFENDANT, PREVIOUSLY PLACED ON PROBATION HAS REPEATEDLY VIOLATED THE TERMS OF HIS PROBATION AFTER HAVING HAD HIS PROBATION RESTORED, THAT A TRIAL COURT MAY USE THE MULTIPLE VIOLATIONS OF PROBATION AS A VALID REASON TO SUPPORT A DEPARTURE SENTENCE BEYOND THE ONE CELL BUMP FOR VIOLATION OF PROBATION UNDER Section 3.701(d)(14), Florida Statutes (1984)?

CONCLUSION

In light of the foregoing reasons, arguments, and authorities, Petitioner has demonstrated that conflict does exist with the instant decision and this Court and other District Court of Appeals so as to invoke discretionary review. Petitioner has also demonstrated that one of his issues is also presently pending before the Court so as to invoke discretionary review.

APPENDIX

PAGE NO.

1. Second District Court of Appeal opinion
filed September 14, 1990.

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