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IN THE SUPREME COURT OF FLORIDA

GREGORY MCKNIGHT, :

Petitioner, :

vs. Case No. 90-3255

STATE OF FLORIDA, : 79,889

Respondent. :

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

BRIEF OF PETITIONER ON JURISDICTION

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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TOPICAL INDEX TO BRIEF

	PAGE NO.
STATEMENT OF THE CASE AND FACTS	1
SUMMARY OF THE ARGUMENT	2
ARGUMENT	3
ISSUE I	
THE OPINION OF THE SECOND DISTRICT COURT OF APPEALS IS IN DIRECT CON-FLICT WITH A DECISION OF ANOTHER DISTRICT COURT OF APPEALS.	3
CONCLUSION	5
APPENDIX	6
CERTIFICATE OF SERVICE	7

TABLE OF CITATIONS

CASES	PAGE NO.
King v. State, No.91-00036 (Fla. 2d DCA Mar. 4, 1992)	1-3
King v. State, 17 F.L.W. D662 (Fla. 2d DCA Mar. 4, 1992)	3
McKnight v. State, 17 F.L.W. D711 (Fla. 2d DCA Mar. 11, 1992)	3
State v. Kendrick, 17 F.L.W. D812 (Fla. 5th DCA Mar. 27, 1992)	2, 3

STATEMENT OF THE CASE AND FACTS

Petitioner Gregory McKnight was found guilty at a non-jury trial of burglary and grand theft. (R14, 15) He scored Any Non-State Prison Sanction on his Sentencing Guidelines Scoresheet. (R16, 17) The trial judge sentenced him to two five year concurrent terms of probation as an habitual offender. (R15, 18, 19, 44) He filed a notice of appeal on September 20, 1990. (R20, 21)

On March 11, 1992, the District Court of Appeals, Second District, reversed. The court based its reversal on a failure to formally introduce into evidence certified copies of prior convictions. The court went on to hold that it was not error to sentence Petitioner to probation under the Habitual Offender Statute, citing to its recent opinion in King v. State, No.91-00036 (Fla. 2d DCA Mar. 4, 1992).

Petitioner filed a Notice to Invoke Discretionary Jurisdiction of this Court on April 9, 1992.

SUMMARY OF THE ARGUMENT

In its opinion, the district court held that probation is an appropriate sentence when habitualizing a felony defendant. The court relied on its recent opinion in King. In that case, the court held that a sentencing judge can find a defendant to be an habitual felony offender and sentence the defendant to probation if that does not constitute an improper downward departure from the sentencing guidelines. On the other hand, in State v. Kendrick, 17 F.L.W. D812 (Fla. 5th DCA Mar. 27, 1992), the District Court of Appeals, Fifth District, held that straight probation is not a sentencing option when a defendant is habitualized. The two district courts are in conflict and this Court should resolve that conflict.

ARGUMENT

ISSUE I

THE OPINION OF THE SECOND DISTRICT COURT OF APPEALS IS IN DIRECT CONFLICT WITH A DECISION OF ANOTHER DISTRICT COURT OF APPEALS.

In its opinion in the present case, the District Court of Appeals, Second District, held that probation is an appropriate sentence when habitualizing a felony defendant. McKnight v. State, 17 F.L.W. D711 (Fla. 2d DCA Mar. 11, 1992). The court relied on its recent en banc opinion in King v. State, 17 F.L.W. D662 (Fla. 2d DCA Mar. 4, 1992). In that case, the court held that a sentencing judge can find a defendant to be an habitual felony offender and sentence the defendant to probation if that does not constitute an improper downward departure from the sentencing guidelines.

On the other hand, in State v. Kendrick, 17 F.L.W. D812 (Fla. 5th DCA Mar. 27, 1992), the District Court of Appeals, Fifth District, recently held that straight probation is not a sentencing option when a defendant is habitualized. The issue involved concerns the interrelationship of the perhaps most important sentencing options available to a trial judge, habitualization, sentencing pursuant to the guidelines, incarceration, and probation. Further, as Judge Lehan stated in his concurring opinion in King, in which he proposed the certification of two questions to this Court, habitualization and probation appear to be as legally

inconsistent as oil and water. The majority confessed that there is some confusion in regard to the present issue, stating:

> In reaching our conclusions herein, we have examined carefully the numerous decisions of the appellate courts of this state that have at least in part addressed the issues that concern us.. .we have not been able to harmonize all of those decision, nor all of our own decisions...

The two district courts for the Second District and Fifth District are in direct conflict and this Court should resolve that conflict.

CONCLUSION

This Court should take conflict jurisdiction of this cause and reverse the decision of the District Court of appeals, Second District.

APPENDIX

	PAGE NO.
1. Opinion of Second District Court of Appeals of Florida filed March 11, 1992	A-1

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

GREGORY McKNIGHT,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 90-03255

Opinion filed March 11, 1992.

Appeal from the Circuit Court for Hillsborough County: Harry Lee Coa, 111, Judge.

James Marion Moorman, Public Defender, and John S. Lynch, Assistant Public Defender, Bartow, for Appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Elaine L. Thompson, Assistant Attorney General, Tampa, for Appellee.

PER CURIAM.

Although we find no merit in appellant's contention that it was error to impose probation in sentencing him under the habitual offender statute, King v. State, No. 91-00036 (Fla. 2d DCA Mar. 4, 1992), we must reverse and remand for further proceedings. The appellant waived presentation of the

presentence investiga ion report but did ask that certified copies of the prior convictions be placed in the court file. The record does not indicate that certified copies of the prior convictions were produced, and therefore, there is no indication that the trial court made the required findings concerning prior convictions. See West v. State, 583 So. 2d 394 (Fla. 2d DCA 1991). We, accordingly, remand so that the trial court may either make the required findings or, if the requisite prior convictions do not exist, resentence him.

Reversed and remanded with instructions.

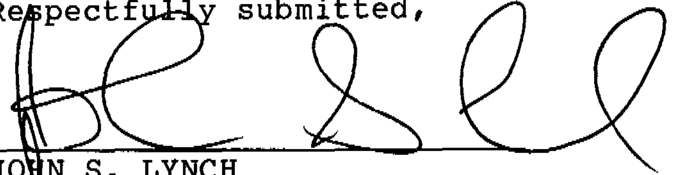
SCHOONOVER, C.J., and THREADGILL and HALL, JJ., Concur.

-2-

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Elaine L. Thompson, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 17th day of April, 1992.

Respectfully submitted,



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