

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

FSC NO.

2D DCA NO. 2D02-2092

MICHAEL JOVAN BARNES,

Respondent.

_____ /

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

BRIEF OF PETITIONER ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

On October 27, 1999, the defendant, Michael Jovan Barnes, was charged by information with vehicular homicide in violation of section 782.071(1), Florida Statutes (1999), a third-degree felony. The offense was alleged to have occurred on April 4, 1999. (R. 2,3)

On March 11, 2002, a plea hearing was convened before the Honorable William J. Nelson. (R. 21-32) Defense counsel announced his client had been charged with vehicular homicide. She indicated there had been a plea conference and the court had agreed to a downward departure in the case. She indicated her client, the defendant, would be entering a plea. (R. 23) De-fense counsel related the facts of the case:

Mr. Barnes was driving a car. He was -- and there was a car accident; there were four people in the car. There was one fatality in that car. At the scene what had happened was he was passing some cars in a lane that is a turn lane, some barriers were up ahead, he swerved to avoid the barriers, also avoid other cars, and his car flipped over. A pas-senger in the car directly behind him was fatally injured in the car accident. When the police arrived they found Mr. Barnes on the side of the road upset about his passen-gers and the injuries that were sustained in that accident.

(R. 23, 24) Defense counsel then stated they were asking for a downward departure based on the accident being an isolated

inci-dent. There were no allegations of driving under the influence.

The offense was done in an unsophisticated manner; the defendant felt remorse. She mentioned State v. VanBebber in which the Court stated that a downward departure is warranted in DUI manslaughter cases where it is an isolated incident.

(R. 24)

The state objected to a departure on the record. The court responded there was nothing to object to until the sentencing actually took place. (Id.) The court wished the record to reflect that the case was an unusual one, that the parties had had discussions about the case, that the family members for both sides would be present at the sentencing, and at sentencing certain rulings would be made regarding downward departure.¹ (R. 25) The trial court conducted the plea colloquy and accepted the defendant's guilty plea. (R. 30)

The sentencing hearing was convened April 29, 2002. (R. 41-66) At the hearing the victim's mother, Alicia Gardner, testified on behalf of the state. (R. 43-50) Rhonda Lynch,

¹The defendant entered the plea based on an agreement with the trial court. The court had agreed to depart from the Criminal Punishment Code lowest permissible sentence of 111.0 prison months and impose a sentence of ten years imprisonment, suspended, in lieu of fifteen years probation with half early out. (R. 25)

the vic-tim's aunt, also testified on behalf of the state. (R. 50-52) The defense then called the defendant's mother, Judy Barnes, on behalf of the defendant. (R. 53-57) The defendant testified on his own behalf. (R. 57-58)

The court then asked counsel if they had any arguments to make before it imposed the sentence. Defense counsel advised she had a copy of State of Florida versus Paul VanBebber. She asked the court to depart downward based on VanBebber. The offense was an isolated act committed in an unsophisticated way for which the defendant felt great remorse. (R. 59) The offense was also an isolated incident. The defendant had no prior record before committing the offense; he had never been arrested. (Id.) In the three years since the offense the defendant, her client, had retained a job, worked, been close with his family. The defen-dant had his family's support. (Id.)

Defense counsel repeated she was asking for a downward de-parture based on the fact the offense was an isolated incident committed in an unsophisticated manner for which the defendant has shown remorse. She explained the defendant had not shown remorse prior to sentencing because, she, as his attorney, had advised him to not make any direct gestures to

anyone regarding the case. Defense counsel was certain the defendant's previous lawyer had advised the defendant in the same manner. (Id.)

The state responded that it was familiar with the VanBebber case, and that it is on appeal to the Florida Supreme Court. (R. 59) According to the state, there were three considerations in the VanBebber case: whether the DUI manslaughter, or in the instant case, vehicular homicide, was committed in an unsophisticated manner, whether it was an isolated incident, and whether the defendant had shown remorse. (R. 59, 60) According to the state:

Judge, it's the state's position that vehicular homicide and DUI manslaughter are never committed in a sophisticated manner except for the intent to get into a car and drive in the sense that it's not an intent crime that is similar to murder where you go out and you plan to kill somebody. So in that sense, Judge, vehicular homicide is never a sophisticated crime, other than since they're sophisticated enough to get into a car which they know can cause death and damage if driven in a reckless manner.

The state will -- would object to any below guidelines sentence and we do ask for a guidelines sentence in this case.

(R. 60) Thus, the state's position at sentencing was vehicular homicide can never be committed in an unsophisticated manner. The state objected to any below guidelines disposition. (Id.)

After addressing the parties, the court stated the record should reflect the sentence is not a guideline sentence, but a below guideline sentence. (R. 63) The court made a finding the defendant had no prior record. The court then stated "... that this was done -- and I somewhat agree with the state. I don't know how you can have an unsophisticated accident because I don't know what a sophisticated accident is, but I'll say the words because that's what has to be said." The court made a further finding the offense was an isolated incident. It determined there was remorse in the matter. (R. 64)

The court then adjudicated the defendant guilty of vehicular homicide, a "second-degree" felony, and imposed a sentence of ten years DOC, suspended the sentence, and placed the defendant on fifteen years probation. The court announced it would consider a petition for early termination of probation. (Id.) The court announced other terms and conditions of the sentence. (R. 64, 65) The state objected to the departure once again for the record (R. 66) and appealed the downward departure to the Second District Court of Appeal. (R. 69)

On April 2, 2003 the Second District affirmed the departure based on *State v. VanBebber*, 805 So. 2d 918 (Fla. 2d

DCA 2001). (Appendix) *VanBebber* is currently pending in this Court, Case No. SC01-2558.

SUMMARY OF THE ARGUMENT

The Second District's decision below expressly referenced as controlling authority *State v. VanBebber, infra*, a case which is currently pending in this Court. As a consequence, the reference to the *VanBebber* decision constitutes prima facie express conflict allowing the Court to exercise its jurisdiction.

ARGUMENT

THE COURT SHOULD ACCEPT DISCRETIONARY JURISDICTION SINCE THE LOWER COURT'S DECISION REFERENCING A DECISION WHICH IS CURRENTLY PENDING IN THE COURT CONSTITUTES PRIMA FACIE EXPRESS CONFLICT FOR PURPOSES OF JURISDICTION.

The State of Florida respectfully requests the Court to accept jurisdiction in the instant case. The Second District's decision referenced the *VanBebber* decision which is currently pending with the Court. In *Jollie v. State*, 405 So. 2d 418 (Fla. 1981) the Court found:

Prior to the 1980 amendment, a PCA decision which referenced another district court decision that this Court had reversed or quashed was prima facie grounds for conflict jurisdiction. This long-standing policy decision was in effect well before the "record proper" doctrine was conceived and adopted in *Foley v. Weaver Drugs*, 177 So. 2d 221 (Fla. 1965). The reasoning behind that policy decision continues to have validity. Common sense dictates that this Court must acknowledge its own public record actions in dispensing with cases before it. We thus conclude that a district court of appeal per curiam opinion which cites as controlling authority a decision that is either pending review in or has been reversed by this Court continues to constitute prima facie express conflict and allows this Court to exercise its jurisdiction. (e.s.)

Id. at 420. Thus, because the Second District's decision referenced the *VanBebber* decision, and that decision is

currently pending in this Court, there is prima facie express conflict for purposes of jurisdiction. In *VanBebber*, the Second District certified conflict with the Fourth District's decision in *State v. Warner*, 721 So. 2d 767 (Fla. 4th DCA 1998).

The Honorable Court should accept jurisdiction of the case.

CONCLUSION

The Honorable Court should accept discretionary jurisdiction. The state must preserve its right to relief if *VanBebber* is disapproved.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the fore-oiing has been furnished by U.S. Mail to Kevin Briggs, Esq., Public Defender's Office, Polk County Courthouse, P.O. Box 9000-Drawer PD, Bartow, Florida 33831 on this ____ day of May, 2003.

OF COUNSEL FOR PETITIONER

CERTIFICATE OF COMPLIANCE

The size and style of type used in this brief is 12-point Courier New, a font that is not proportionately spaced.

OF COUNSEL FOR PETITIONER