

IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. SC07-1020

ANTHONY FRANCIS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent,

RESPONDENT'S BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

Petitioner was the defendant and Respondent was the prosecution in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida. Petitioner was the Appellant and Respondent was the Appellee in the Fourth District Court of Appeal ("Fourth District"). In this brief, the parties shall be referred to as they appear before this Honorable Court except that Respondent may also be referred to as the State.

STATEMENT OF THE CASE AND FACTS

Petitioner was convicted on open plea to charges of possession of cocaine and cannabis and driving without a license. Although Petitioner's score sheet reflected that the lowest possible sentence he could receive was 20.9 months in prison, Petitioner moved for a downward departure of his sentence. He received a sentence of six months in jail, with one hundred and forty (140) days credit. The State appealed the sentencing order. On May 2, 2007, the Fourth District Appeal reversed the trial court's order remanding for a new sentencing, in which the trial court should clarify its oral reasons for the downward departure in a written order. See, Appendix.

The pertinent facts as they appear in the opinion of the Fourth District are as follows:

Accordingly, as the State correctly argues, the trial court erred by failing to provide written reasons for the downward departure. We therefore reverse and remand. While the trial court orally addressed some possible foundations for the departure, we are unable to discern from the record the exact bases for the departure and whether those reasons legally justify departure from the guidelines. On resentencing, the court should clarify its oral reasons in a written order and may again depart from the guidelines if it finds legally sufficient reasons. See State v. Teal, 831 So.2d 1254 (Fla. 2d DCA 2002); State v. Shorter, 814 So.2d 1117 (Fla. 4th DCA 2002).

Francis v. State, 954 So.2d 755 (Fla. 4th DCA 2007).

The instant Notice to Invoke Discretionary Jurisdiction

followed.

SUMMARY OF THE ARGUMENT

This Court should decline jurisdiction. The portion of the Fourth District opinion which Petitioner cites as conflict with the Second District Court of Appeal is dicta, not the actual holding in the case. Further, the Fourth District Court of Appeal is consistent with the Second District Court of Appeal in it's decision of Maybin v. State, 884 So. 2d 1174 (Fla. 2nd DCA 2004) and Petitioner has not cited any other decisions in express and direct conflict with the instant decision which would support the invocation of discretionary jurisdiction. Rule 9.030(a)(2)(A), Fla. R. App. P.

ARGUMENT

**THERE IS NO BASIS FOR DISCRETIONARY
JURISDICTION TO REVIEW THE DECISION OF THE
FOURTH DISTRICT.**

Rule 9.030(a)(2)(A), Fla. R. App. P. states that discretionary jurisdiction of this Court may be sought to review decisions of district courts of appeal that

- (i) expressly declare valid a state statute;
- (ii) expressly construe a provision of the state or federal constitution;
- (iii) expressly affect a class of constitutional or state officers
- (iv) expressly and directly conflict with a decision of another district court of appeal or of the supreme court on the same question of law;
- (v) pass upon a question certified to be of great public importance
- (vi) are certified to be in direct conflict with decisions of other district courts of appeal;

In the instant case, Petitioner seeks to invoke the discretionary jurisdiction of this Court pursuant to Rule 9.030(a)(2)(A)(iv), Fla. R.App. P. However, there is no conflict in this case as the only issue was the question of whether the trial court had properly articulated on the record the reasons for its downward departure of sentence. When the Fourth District concluded it had not and remanded for resentencing with specific instructions for the trial court to

clarify its oral reasons in a written order, that was the basis of the decision.

Respondent contends that the portion of the Fourth District opinion which Petitioner references is no more than dicta. The fact that the Fourth District Court of Appeal offered dicta in its Opinion regarding an insufficient trial court order does not confer jurisdiction. Dicta has no precedential value because it was wholly unnecessary to the holding of a case. State ex rel. Biscayne Kennel Club v. Board of Business Regulation, 276 So.2d 823 (Fla. 1973)("The statement of the District Court of Appeal in its opinion ... was not essential to the decision of that court and is without force as precedent."); see also, Ciongoli v. State, 337 So.2d 780, 782 (Fla. 1976)(failing to find conflict between appellate districts for purposes of supreme court jurisdiction where alleged conflict was based on statements wholly unnecessary to the district court's decision); Hillsborough County Aviation Authority v. Hillsborough County Governmental Employees Ass'n, Inc., 482 So.2d 505,509 (Fla. 2d DCA 1986)(Court held that it would not certify this case to the Florida Supreme Court as the conflict arose from dicta).

Pursuant to Art. V, § 3(b)(3), Fla. Const., this Court has the jurisdiction to review a decision of a district court of appeal which "expressly and directly" conflicts with a decision

of this Court or another district court of appeal. Kyle v. Kyle, 139 So.2d 885, 887 (Fla. 1962); Nielson v. City of Sarasota, 117 So.2d 731 (Fla. 1960); Mancini v. State, 312 So.2d 732, 733 (Fla. 1975).

However, under the facts of this case, the Fourth DCA actually recognized the prior decision of this Court in Trotter v. State, 825 So.2d 362 (Fla. 2002). The pertinent portion of the Fourth District opinion is as follows:

We similarly reject Francis's contention that, regardless of the merits of the State's arguments on appeal, he cannot be resentenced because he completed the six-month sentence imposed during the pendency of this appeal. See Trotter v. State, 825 So.2d 362, 366 (Fla.2002) (holding that double jeopardy is not implicated in a resentencing following an appeal and stating that a defendant cannot have an expectation of finality in a sentence that is the subject of an appeal).

Francis v. State, 954 So.2d 755 (Fla. 4th DCA 2007).

Maybin v. State, 884 So.2d 1174 (Fla. 2nd DCA 2004) which Petitioner cites as being in conflict with the Fourth District is distinguishable from the instant case in that the appellant in Maybin had already served his sentence when the State finally filed a 3.800(a) motion.

Here, the Petitioner's sentence was on appeal. In fact, the Fourth District is in accord with the Second District and there is consistency in the decisions of the Second and Fourth

Districts on this issue. See Sneed v. State, 749 So. 2d 545 (Fla. 4th DCA 2000)(held where defendant had already completed his sentence of time served by the time the court realized its mistake, appellant's sentence had already been served and double jeopardy would attach).

Insofar as the precedential value of Trotter, it is neither incompatible with nor inapposite of Maybin and Sneed. In the clear absence of a basis for discretionary jurisdiction, this Court should decline review.

CONCLUSION

WHEREFORE, based on the foregoing arguments and the authorities cited therein, Respondent respectfully requests this Court DECLINE Petitioner's request for discretionary review over the instant cause.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Respondent's Brief on Jurisdiction" has been furnished to: David John McPherrin, Assistant Public Defender, 15th Judicial Circuit of Florida, 421 Third Street/6th Floor, West Palm Beach, Florida 33401 on July 17, 2007.

MITCHELL A. EGBER

CERTIFICATE OF TYPE SIZE AND STYLE

In accordance with Fla. R. App. P. 9.210, the undersigned hereby certifies that the instant brief has been prepared with 12 point Courier New Type.

MITCHELL A. EGBER