

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

JANUARY TERM 2010

JOSEPH J. WILKINS,

Appellant,

v.

Case No. 5D09-4175

STATE OF FLORIDA,

Appellee.

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Opinion filed February 12, 2010

3.800 Appeal from the Circuit
Court for Marion County,
Jonathan Ohlman, Judge.

Joseph J. Wilkins, Milton, pro se.

Bill McCollum, Attorney General,
Tallahassee, and Douglas T. Squire,
Assistant Attorney General, Daytona
Beach, for Appellee.

COHEN, J.

Joseph Wilkins appeals an order dismissing his motion to mitigate his sentence as untimely. We treat this appeal as a petition for writ of certiorari, see Eberheart v State, 5 So. 3d 791 (Fla. 5th DCA 2009), grant the petition, and quash the order.

Wilkins was sentenced on August 6, 2009, to eighteen months in the Department of Corrections for cultivating cannabis and possession with intent to sell or deliver cannabis. Forty-nine days later, on September 24, 2009, Wilkins filed a motion to

mitigate his sentence, alleging that he was amenable to supervision, this was his first felony conviction, the guidelines called for a non-prison sanction, the offense was committed in an unsophisticated manner, and was an isolated incident. The motion was file stamped by the clerk of the circuit court on September 28th, fifty-three days after Wilkins was sentenced.

On October 27, 2009, the circuit court entered an order dismissing Wilkins' motion because it believed it did not have jurisdiction to modify his sentence because "more than sixty days have past (sic) since the imposition of the sentence." At the time of entry of the order, the trial judge did not have the benefit of our decision in Graham v State, 2009 WL 5150303 (Fla. 5th DCA 2009), which is dispositive.

Accordingly, we grant the petition for writ of certiorari and quash the order dismissing the motion to mitigate sentence.

PETITION GRANTED; ORDER QUASHED.

MONACO, C.J. and EVANDER, J., concur.