63,382

IN THE SUPREME COURT OF FLORIDA

THOMAS RAPHAEL FASENMYER,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

CASE NO._____

FILED

MAR 9 1983

SID J. WHITE
CLERK SUPREME COURT

By_____
Chief Deputy Clerk

PETITION FOR DISCRETIONARY REVIEW
PURSUANT TO RULE 9.030(a)(2)(A)(iv)
FLORIDA RULES OF APPELLATE PROCEDURE

PETITIONER'S BRIEF ON JURISDICTION

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JURISDICTION BRIEF

COMES NOW the Petitioner, THOMAS RAPHAEL FASENMYER, by and through his undersigned attorney, and invokes the discretionary jurisdiction of this Honorable Court pursuant to Rule 9.030(a)(2)(A)(iv), Florida Rules of Appellate Procedure, vigorously alleging the decision of the First District Court of Appeal in the case of Fasenmyer v. State, 8 FLW 279 (January 4, 1983, Case No. AL-454, Rehearing Denied February 7, 1983 is in direct conflict with its own decision in Brown v. State, 264 So.2d 29 (Fla 1 DCA 1972); with its sister appellate court's decision in Herring v. State, 411 So.2d 966(Fla. 3 DCA 1982); with this Honorable Supreme Court's decision in Troupe v. Rowe, 283 So.2d 857 (Fla. 1973); and with controlling federal law in this Circuit, Chandler v. United States, 468 F.2d 834 (5th CCA 1972).

STATEMENT OF THE CASE

On September 30, 1980, after a second re-trial and re-conviction of:

Count I: Breaking & Entering While Armed with a Dangerous Weapon;

Count II: Grand Theft;

Count III: Display of a Firearm During Commission of a Felony.

the Petitioner was sentenced to:

Count I: Fifty (50) years with credit for 7 years 94 days already served;

Count II: Five (5) years concurrent with Count I;

Count III: Merged with Count I. No sentence imposed.

On September 29, 1981, the First District Court of Appeal reversed and vacated judgment and sentence for Count I, finding insufficient admissible evidence of "Breaking" and remanded to the trial court for imposition of judgment of Entering Without Breaking and resentence accordingly. The decision clearly announced it did NOT affect Counts II and III. 413 So.2d 33.

On April 21, 1982, the trial court entered a new judgment on all counts and imposed sentences to wit:

Count I: Five (5) years;

Count II: Five (5) years consecutive to Count I;

Count III: Fifteen (15) years consecutive to Counts II and III.

On January 4, 1983, the First District Court of Appeal affirmed the trial court's new sentencing array. 8 FLW 279.

A R G U M E N T

This Honorable Court should accept jurisdiction in this case because the decision of the appellate court affirming the trial court's new sentencing array is in direct conflict with the decision of the court in Brown v. State, supra, where it was held that an unattacked legal sentence could not be disturbed when correcting another, illegal sentence.

The Fasenmyer court noted that Brown held: "There are, of course, various exceptions to this rule..." and held that the instant case warranted an "exception" to the Brown rule. But the Fasenmyer court took the words in Brown out of context; the "exceptions" noted by the Brown court were to the rule that a trial court is generally without power to set aside a criminal judgment after it has been partly satisfied by a defendant. The "exception" in Brown has nothing to do with the rule that an unattacked legal sentence could not be disturbed when correcting a different, illegal sentence.

The Fasenmyer court further held that Herring v. State, supra, distinguished Brown, but that is not so. To the contrary, Herring reenforced the rule announced in Brown:

> "The cases which hold that an unattacked legal sentence cannot be disturbed when an illegal sentence is set aside and a new sentence imposed arise in a setting where a sentence on one count is legal and the sentence on another, illegal. In that context, the legal sentence is considered untouchable because it is self-contained. The error of Kennedy-Duggins, carried on in Pahud, is to pervert the "part legal-part illegal" rule by applying it to a single sentence on a single count and to declare that there is some vestigial legal part to an illegal sentence which must remain undisturbed when the illegal sentence is set aside." Id. at 969 (Emphasis added).

The Fasenmyer decision is further in direct conflict with this Honorable Court's decision in Troupe v. Rowe, supra, which held that it is pantently unconstitutional to increase a sentence once service of that sentence had begun. The appellate court apparantly distinguished that case simply by failing to address it in its decision.

The Fasenmyer decision is in direct conflict with controlling federal law of this Circuit announced in United States v. Chandler, supra, which held that it is unconstitutional to increase a valid sentence while correcting a different, invalid sentence.

The Fasenmyer court adopted and relied on the decision of the Court in United States v. Busic (3rd CCA 1981) 639 F.2d 940, as a "better reasoned" decision than Chandler, supra. While the court may have preferred Busic to Chandler, it is legally inconsequential since unless and until the newly-created Eleventh Circuit Court of Appeals announces otherwise, Chandler is controlling in this Circuit, and binding on Florida courts.

Further, Busic can be distinguished two ways from Fasenmyer:

1. In Busic, the appellate court, compelled to vacate sentence for one count on remand from the United States Supreme Court, conferred upon itself authority to vacate sentences for both counts and remanded to the trial court for sentencing de novo. In Fasenmyer, only Count I was vacated by the appellate court and its decision made it plain only Count I was affected.

No court in Florida has ever vacated the judgments and sentences imposed for Counts II and III on September 30, 1980. The imposition of new judgments and new sentences for Counts II and III by the trial court on April 21, 1982, actually has caused Fasenmyer to be under two judgments and two sentences for Counts II and III.

2. The Busic court rejected the widely accepted rule that it was unconstitutional to alter a sentence once service had begun. But even the Busic court held that a sentence fully served could not be changed. Count II of the instant case was fully served and expired when the trial court changed it from concurrent with Count I to consecutive to Count I on April 21, 1982, thus breathing life into a sentence already dead (expired).

The decision of the Fasenmyer court is even in conflict with the decision upon which it relies, United States v. Busic, supra.

C O N C L U S I O N

Clear conflict having been amply demonstrated, this Honorable Court should accept discretionary jurisdiction to clarify and announce correct law.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petitioner's Brief on Jurisdiction has been furnished to: Mr. Lawrence A. Kaden, Assistant Attorney General, Department of Legal Affairs, Suite 1501 THE CAPITOL, Tallahassee, Florida 32301, by U.S. Mail on this 3RD day of March, 1983.

Attorney