

IN THE SUPREME COURT OF THE STATE OF FLORIDA

SYE CHRISTOPHER JENKINS,)
)
 Petitioner,)
)
 vs.) CASE NO.)
)
 STATE OF FLORIDA,)
)
 Respondent.)

FILED
SID J. WHITE
JUN 18 1994
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

PETITIONER'S BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

Petitioner was the Defendant in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida and the Appellant in the District Court of Appeal, Fourth District. In the brief the parties will be referred to as they appear before this Honorable Court.

The symbol "R" will denote the Record on Appeal.

STATEMENT OF THE CASE

The state attorney for the Seventeenth Judicial Circuit charged by information that petitioner robbed Richard Dyle, and that in the course of the robbery "there was carried a firearm or other deadly weapon." The case was tried before a jury, which found petitioner "guilty as charged in the information of robbery." The trial court adjudged petitioner guilty and sentenced him to imprisonment for a term of seventy-five years, retaining jurisdiction over one-third of the sentence, and imposing a three-year mandatory term.

Petitioner appealed his conviction and sentence to the Fourth District Court of Appeal. That court affirmed the conviction and sentence except to strike out the three-year mandatory minimum. Jenkins v. State, ___So.2d___ (Fla. 4th DCA March 21, 1984) Case No. 83-975 [9 F.L.W. 652]. Petitioner thereafter unsuccessfully moved for rehearing, and then filed the instant petition for certiorari review.

STATEMENT OF THE FACTS

Petitioner and two other men entered a convenience store together. While in the store, the other two men robbed the clerk at gunpoint. Then petitioner left with one of the men, while the other man remained behind briefly and robbed a store customer. The court of appeal held the foregoing evidence sufficient to sustain the conviction, saying: "...the evidence was adequate for the jury to find that appellant was a participant in the robbery. The fact that one other than appellant carried the gun does not preclude a finding that appellant was guilty of robbery with a firearm." 9 F.L.W. 652.

At the sentencing hearing, there was no discussion of retention of jurisdiction except for the following:

THE COURT: Seventy-five years State Prison, retain jurisdiction for one-third. That doesn't say you can't be paroled but they can't parole you without contacting me though. You've got thirty days if you want to appeal though. Advise the Court and you'll be appointed a lawyer.

MR. JULIAN [Defense counsel]: Your Honor, two things. I'd like to object to the retention of jurisdiction on the grounds that there hasn't been an adequate showing to retain jurisdiction.

Additionally, I would ask the Court to declare him indigent for purposes of appeal.

(R 142).

The court of appeal said of the foregoing:

[Appellant] suggests first that the circuit court erred in retaining jurisdiction over the appellant for the first one-third of the sentence without stating the grounds therefor with the particularity required by Section 947.16(3), Florida Statutes (1981). The record shows that the circuit court failed to follow

the statute; however, the point is not preserved for appellate purposes because appellant made no objection at the time, Whitehead v. State, ___ So.2d ___, Case No. 82-2039, (Fla. 4th DCA, opinion filed February 15, 1984); Hernandez v. State, 425 So.2d 213 (Fla. 4th DCA 1983); McFadden v. State, 423 So.2d 456 (Fla. 4th DCA 1982), and because the error is not of fundamental proportions. Whitehead, supra.

9 F.L.W. 652.

ARGUMENT

THIS COURT SHOULD REVIEW THE DECISION OF THE
LOWER COURT IN THE EXERCISE OF ITS CERTIORARI
JURISDICTION.

This Court has jurisdiction to review, by certiorari, any decision of a district court of appeal which expressly and directly conflicts with a decision of another court of appeal or of this Court on the same question of law. Article 5, Section 3(b)(3), Florida Constitution (amended 1980). The decision at bar is such a decision and this Court should review it in the exercise of its certiorari jurisdiction.

A. Sentencing. In State v. Rhoden, ___So.2d___ (Fla. April 5, 1984), Case No. 62,918 [9 F.L.W. (S.Ct.) 123], this Court wrote:

The contemporaneous objection rule, which the state seeks to apply here to prevent respondent from seeking review of his sentence, was fashioned primarily for use in trial proceedings. The rule is intended to give trial judges an opportunity to address objections made by counsel in trial proceedings and correct errors. See Simpson v. State, 418 So.2d 984 (Fla. 1982), cert. denied, 103 S.Ct. 801 (1983); State v. Cumbie, 380 So.2d 1031 (Fla. 1980); Clark v. State, 363 So.2d 331 (Fla. 1978). The rule prohibits trial counsel from deliberately allowing known errors to go uncorrected as a defense tactic and as a hedge to provide a defendant with a second trial if the first trial decision is adverse to the defendant. The primary purpose of the contemporaneous objection rule is to ensure that objections are made when the recollections of witnesses are freshest and not years later in a subsequent trial or a post-conviction relief proceeding. The purpose for the contemporaneous objection rule is not present in the sentencing process because any error can be corrected by a simple remand to the sentencing judge. If the state's argument is followed to its logical end, a defendant could be sentenced to a term of years greater than

the legislature mandated and, if no objection was made at the time of sentencing, the defendant could not appeal the illegal sentence.

9 F.L.W. (S.Ct.) at 124.

The instant decision of the court of appeal directly and expressly conflicts with Rhoden since the instant decision applies the contemporaneous objection rule to sentencing proceedings.

B. Sufficiency of evidence. The evidence in this case was that petitioner was at the scene of a crime and fled with one of the perpetrators. Several district courts have held such evidence insufficient to sustain a conviction. See, e.g., Morgan v. State, 355 So.2d 149 (Fla.1st DCA 1982), Miller v. State, 420 So.2d 631 (Fla. 2d DCA 1982), J.L.B. v. State, 396 So.2d 761 (Fla. 3d DCA 1981). Thus the instant opinion conflicts with decisions of the other courts of appeal since it holds such evidence sufficient to sustain petitioner's conviction.

As a matter of policy, this Court should accept jurisdiction in this cause because there seems to be a general disparity between decisions of the Fourth District Court and of the Third District Court in determining the legal sufficiency of evidence in criminal or juvenile proceedings. Compare the result in In the Interest of G.B.S., 417 So.2d 1181 (Fla. 4th DCA 1982) with that in D.M. v. State, 435 So.2d 977 (Fla. 3d DCA 1983). Petitioner respectfully submits that an apparent contradiction between the standard for sufficiency of the evidence set forth in Rose v. State, 425 So.2d 521 (Fla. 1982) and the standard set forth in, e.g., McArthur v. State, 351 So.2d 972 (Fla. 1977) and

Huff v. State, 437 So.2d 1087 (Fla. 1983) is responsible for a certain amount of confusion in this state as to the appropriate standard of review as to the sufficiency of evidence to sustain a conviction. Accordingly, it would be worthwhile for this Court to accept jurisdiction over this case in order to clarify the issue in the furtherance of uniformity of decisional law in this state.

CONCLUSION

This Court should review the decision of the lower court in the exercise of its certiorari jurisdiction.

Respectfully Submitted,

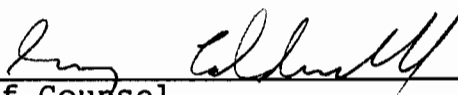
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to RUSSELL S. BOHN, Assistant Attorney General, 111 Georgia Avenue, West Palm Beach, Florida, by courier, this 6th day of JUNE, 1984.



Of Counsel