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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

CECIL B. STACEY,

Respondent.

_____ /

Case No.: 66,447

FILED

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CLERK, SUPREME COURT

Chief Deputy Clerk

PETITIONER'S BRIEF ON THE MERITS

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v.

CASE NO.: 66,447

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PRELIMINARY STATEMENT

Cecil B. Stacey, the criminal defendant and appellant below in Stacey v. State, 461 So.2d 1000 (Fla. 1st DCA 1984), will be referred to herein as Respondent. The State of Florida, the prosecution and appellee below, will be referred to herein as Petitioner.

Inasmuch as there was no appearance for Petitioner in the court below, undersigned counsel is not in possession of a copy of the "record proper" in the form that it will be transmitted to this Court by the First District. Consequently, to avoid confusion and for the convenience of the Court an appendix containing those portions of the record pertinent to the resolution of the instant issue has been attached hereto. Undersigned counsel has verified with the clerk of the lower court that the materials contained in the appendix are also contained in

the record the lower court will be transmitting to this Court. Citations to the appendix will be indicated parenthetically as "A" with the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

Respondent was found guilty of robbery with a fire-arm and sentenced to 99 years in prison. The trial court retained jurisdiction for the first one-third of the sentence (A 1). Thereafter, Respondent perfected an appeal to the First District. Evidently, Respondent's counsel filed an Anders brief and Respondent filed a pro se brief. The cause was affirmed. Stacey v. State, 421 So.2d 824,825 (Fla. 1st DCA 1982).

Subsequently, Respondent filed a motion for post-conviction relief which apparently was technically deficient (A 17). A second corrected motion was filed (A 3-9) raising as grounds for relief (1) that the trial court erred in retaining jurisdiction over his sentence because Florida Statutes § 947.16(3) (Supp. 1978) was effective after the date of his offense and (2) ineffective assistance of trial counsel (A 7). The trial court denied Respondent's motion finding that the retention of jurisdiction issue was unreviewable because Respondent did not object to retention at sentencing (See A 22-28) and the issue was not raised on direct appeal, and that the allegations concerning the ineffectiveness claims were refuted by the record and even if true, were legally insufficient (A 1,2).

Respondent then appealed denial of his motion for post-conviction relief to the lower tribunal which found that neither Respondent's failure to object to retention at sentencing, nor his failure to raise the issue on direct appeal precluded review via a Rule 3.850 motion. Specifically, the court held:

Stacey's failure to object to retention of jurisdiction at sentencing does not preclude review by way of a Rule 3.850 motion. Cofield v. State, 453 So.2d 409 (Fla. 1st DCA 1984). Nor does his failure to raise the issue on direct appeal preclude review by way of a Rule 3.850 motion because, under Cofield and Fredricks v. State, 440 So.2d 433 (Fla. 1st DCA 1983), he was precluded from raising the issue on direct appeal absent objection at sentencing. [Footnote omitted.]

(A 2). Accordingly, the lower court reversed and remanded the cause for an evidentiary hearing on the retention issue but left intact the trial court's ruling on the ineffectiveness claim (A 1,2).

Thereafter, Petitioner timely filed in the lower court its Notice to Invoke Discretionary Jurisdiction (A 45) and submitted its Brief on Jurisdiction to this Court on January 28, 1985. By Order of May 22, 1985, this Court accepted jurisdiction of the cause. Petitioner's Brief on the Merits follows.

SUMMARY OF ARGUMENT

Petitioner argues that the lower court erred in reversing the trial court's denial of Respondent's motion for post-conviction relief as to the retention of jurisdiction issue and in remanding the cause for an evidentiary hearing thereon because said ruling was predicated upon the erroneous conclusion that Respondent's failure to object to ex post facto application of the retention statute at sentencing, and his failure to raise the issue on direct appeal, did not preclude review of the issue via a Rule 3.850 motion.

ARGUMENT

ISSUE

THE LOWER COURT ERRED IN HOLDING THAT NEITHER RESPONDENT'S FAILURE TO OBJECT TO RETENTION OF JURISDICTION AT SENTENCING, NOR HIS FAILURE TO RAISE THE ISSUE ON DIRECT APPEAL PRECLUDED REVIEW VIA A MOTION FOR POST-CONVICTION RELIEF PURSUANT TO FLA.R.CRIM.P. 3.850.

The First District's reversal of the trial court's order denying Respondent's Rule 3.850 motion for post-conviction relief and remand of the cause for an evidentiary hearing on the retention of jurisdiction issue is patently erroneous. In so ruling, the lower court held that Respondent's failure to object to ex post facto application of the retention statute, Section 947.16(3), Florida Statutes (Supp. 1978), at sentencing, and his concomitant failure to raise the issue on direct appeal, did not preclude review of the issue via a Rule 3.850 motion. This holding is contrary to and cannot stand in the face of this Court's substantial body of decisional authority as well as the Second District's decisions in Pedroso v. State, 420 So.2d 908 (Fla. 2d DCA 1982) and Adams v. State, 462 So.2d 884 (Fla. 2d DCA 1985).

This Court has unequivocally established that where issues are raised in collateral proceedings which could have been presented on direct appeal or were presented and determined on direct appeal, or which were waived at trial by lack of objection or waived on appeal by lack of argument, such issues are completely foreclosed and are not subject to collateral attack. Armstrong v. State, 429 So.2d 287 (Fla. 1983); Booker v. State, 441 So.2d 148 (Fla. 1983); Hargrave v. State, 396 So.2d 1127 (Fla. 1981); Meeks v. State, 382 So.2d 673 (Fla. 1980); Adams v. State, 380 So.2d 432 (Fla. 1980); Henry v. State, 377 So.2d 692 (Fla. 1979); Sullivan v. State, 372 So.2d 938 (Fla. 1979); Spinkelink v. State, 350 So.2d 85 (Fla. 1977), cert denied, 434 U.S. 960 (1977); Ford v. Wainwright, 451 So.2d 471 (Fla. 1984); McCrae v. Wainwright, 439 So.2d 868 (Fla. 1983).¹ In fact, the trial court, though incorrectly cited, properly relied upon this Court's decision in Adams v. State, supra, to deny Respondent relief (A 17).

¹The foregoing principle has been codified in Fla.R.Crim.P. 3.850, as amended, which provides:

This rule does not authorize relief based upon grounds which could have or should have been raised at trial and, if properly preserved, on direct appeal of the judgment and sentence.

Indeed, this Court's adoption of Rule 3.850, as amended, is the best evidence that the Court will not condone a State version of the federal habeas corpus merry-go-round.

In Pedroso v. State, supra, the appellant was adjudicated guilty of armed robbery and sentenced to thirty years imprisonment with the trial court retaining jurisdiction over the first third of the sentence. He appealed the conviction but not the sentence and the district court affirmed the cause without a written opinion. Subsequently, the appellant filed a Rule 3.850 motion alleging that the trial judge did not state the reasons for retaining jurisdiction with particularity as required by Florida Statutes § 947.16(3)(a) (1979). The trial judge denied the motion and the district court affirmed, holding that:

A Rule 3.850 motion is not a substitute for direct appeal . . . In other words, where issues raised on a Rule 3.850 motion could have been or were raised on direct appeal, denial of the motion is proper . . . Appellant could have raised the retention of jurisdiction issue on direct appeal. Thus, the issue is not now cognizable for collateral attack. (Citations omitted.)

We respectfully disagree with our sister court's decision in Sawyer v. State, 401 So.2d 939 (Fla. 1st DCA 1981), dismissing a direct appeal alleging improper retention of jurisdiction without prejudice to raise the issue on a Rule 3.850 motion.

Id. at 908. Similarly, in the Second District's case of Adams v. State, supra, Adams sought correction of his sentence because the court retained jurisdiction

for one third of his sentence without stating with individual particularity its justifications for doing so as required by Florida Statutes § 947.16(3)(a). The trial judge denied Adams' Rule 3.800 motion on the basis that he had previously denied a motion to correct illegal sentence and that the Second District had decided the issue in affirming the judgment and sentence. The District Court affirmed holding:

Although neither the trial judge nor this court has ever considered the illegality of the court's retaining jurisdiction without stating the justification with individual particularity, the appellant could have raised this issue on direct appeal. He is now precluded from raising this issue via a Rule 3.800 motion. Pedroso v. State, 420 So.2d 908 (Fla. 2d DCA 1982). See also, State v. Snow, 462 So.2d 455 (Fla. 1985). [Emphasis added.]

Id. at 462 So.2d 885.

At this point, Petitioner again notes, as it did in its jurisdictional brief, that in this Court's recent decision in State v. Snow, 462 So.2d 455 (Fla. 1985), the Court granted discretionary review on the ground that the First District's decision in Snow v. State, 443 So.2d 1074 (Fla. 1st DCA 1984), was in express and direct conflict with Pedroso v. State, supra. In Snow v. State, supra, the appellant challenged his sentence claiming that the trial court erred in retaining jurisdiction

without stating the reasons for doing so with individual particularity as required by Florida Statutes § 947.16(3) (1981). The district court declined to consider the retention issue because it had not been raised in the trial court and dismissed the appeal without the prejudice to appellant's raising the issue in a Rule 3.850 motion.

[Emphasis added.] State v. Snow, supra, at 455,456.

This Court quashed the district court's decision and remanded the cause for consideration of the retention issue on the merits. In so ruling, this Court did not address the issue of whether the district court should have dismissed the appeal without prejudice to raise the retention issue in a Rule 3.850 motion. Rather, this Court found, on the authority of State v. Rhoden, 448 So.2d 1013 (Fla. 1984), that Snow's failure to object in the trial court did not preclude his raising the issue on direct appeal because the putative sentencing error concerned a failure to follow the mandatory requirements of the retention statute. State v. Snow, supra. at 457. Thus, to the extent Pedroso holds that a defendant's failure to object to retention at trial and/or raise the issue on direct appeal precludes review of the issue collaterally, said holding was not disapproved by this Court in State v. Snow, supra, and remains good law in conformity with the litany of this Court's decisions cited above.

In sum, Respondent failed to object at trial to the ex post facto application of the retention statute. Since the issue does not involve alleged noncompliance with a mandatory statutory requirement, Respondent's procedural default cannot be excused on the authority of State v. Rhoden, supra. Consequently, Respondent was barred from raising the issue on direct appeal. As a result, he was also barred from raising the issue collaterally, as the trial court correctly concluded. Accordingly, this Court should quash the opinion of the court below and thereby reaffirm the viability of the contemporaneous objection rule and the procedural default doctrine for, as Chief Justice Boyd so succinctly put it:

There is good reason for requiring defendants to register their objections with the trial court. A defendant should not be allowed to subject himself to a court's jurisdiction and defend his case in hope of an acquittal and then, if convicted, challenge the court's jurisdiction on the basis of a defect that could have been easily remedied if it had been brought to the court's attention earlier. Neither the common law nor our statutes favor allowing a defendant to use the resources of the court and then wait until the last minute to unravel the whole proceeding.

State v. King, 426 So.2d 12,15 (Fla. 1982). See also State v. Scott, 439 So.2d 219,220 (Fla. 1983), where this Court held that "[i]t would be wasteful of the

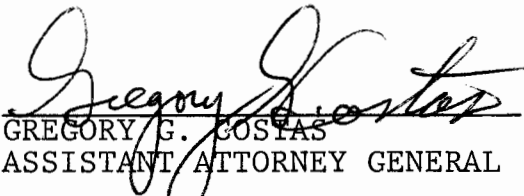
court's time and of the limited resources of the appellate system to deny the sentencing judge the benefits of contemporaneous objections to a sentence and the concomitant opportunity to correct errors at the sentence hearing."

CONCLUSION

Based upon the foregoing argument and the authority cited herein, the lower court's decision reversing the trial court's denial of Respondent's motion for post-conviction relief on the retention issue should be quashed and the Order denying the motion for post-conviction relief should be affirmed.

Respectfully submitted:

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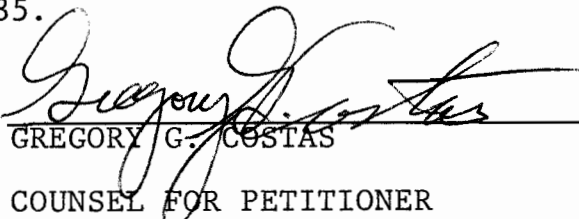
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing Petitioner's Brief on the Merits was forwarded to Cecil B. Stacey, Prisoner # 080178, Post Office Box 221 2T-16, Raiford, Florida, 32083, on this 3rd day of June, 1985.


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