

FILED

IN THE SUPREME COURT OF FLORIDA SID J. WHITE

FEB 18 1960 C

CHARLES EDWARD BASS,
Petitioner,

CLERK, SUPREME COURT

By _____ *pl*
Chief Deputy Clerk

VS.

CASE NO. 68,230

STATE OF FLORIDA,
Respondent.

_____ /

PETITIONER'S BRIEF ON JURISDICTION

CHARLES EDWARD BASS
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ISSUES ON JURISDICTION

I.

WHETHER THIS COURT HAVE JURISDICTION OF THIS CASE BECAUSE THE OPINION ISSUED BY THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, DIRECTLY AND EXPRESSLY CONFLICT WITH McRAE V. STATE, 437 so.2d 1388 (Fla. 1983), AND STEPHENS V. STATE, 478 so.2d 419 (Fla. 3rd DCA 1985), ON THE SAME POINT OF LAW.

II.

WHETHER THIS COURT HAVE JURISDICTION OF THIS CASE WHERE THE OPINION ISSUED BY THE DISTRICT COURT OF APPEAL, FIRST DISTRICT DIRECTLY AND EXPRESSLY CONFLICT WITH STATE V. RHODEN, 448 so.2d (Fla. 1984), STYLES V. STATE, 465 so.2d 1369 (Fla. 2nd DCA 1985), REYNOLDS V. STATE, 429 so.2d 1331 (Fla. 5th DCA 1983), SANDERS V. STATE, 386 so.2d 256 (Fla. 5th DCA 1980), SKINNER V. STATE, 366 so.2d 486 (Fla. 3rd DCA 1979), AND STEPHENS V. STATE, 478 so.2d 419 (Fla. 3rd DCA 1985), ON THE SAME POINT OF LAW.

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IN THE SUPREME COURT OF FLORIDA

CHARLES EDWARD BASS,
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VS.

CASE NO. 68,230

STATE OF FLORIDA,
Respondent.

_____ /

PETITIONER'S BRIEF ON JURISDICTION

PRELIMINARY STATEMENT

Petitioner was the Appellant below and will be referred to as such unless his actual last name is used.

Respondent was the Appellee below and will be referred to as Respondent. The parties will be referred to as they stood in the style of this case.

Reference to the attached appendix shall be by the letters "App." followed by the appropriate page number in parentheses.

SUMMARY OF THE ARGUMENT

I.

The District Court of Appeal, First District, rendered an opinion in direct conflict with this Court's opinion in McRae v. State, 437 so.2d 1388 (Fla. 1983), where it was held : "ordinary trial error" are not appropriate in post-conviction proceedings pursuant to Rule 3.850, Fla. R. Cr. P., and any matters which could have been raised on direct appeal is foreclosed under the rule. The District Court applied the McRae principles in the instant case. This discussion announced a new rule of law at variance with the McRae opinion because fundamental error was not foreclosed under McRae, Supra. Here, the District Court applied McRae and reached a results in express conflict with another District Court on the same point of law. Stephens v. State, 478 so.2d 419 (Fla. 3rd DCA 1985). Misapplication of legal principles handed down by this Court provides jurisdiction. Compare, Bass v. State, 478 so.2d 461 (Fla. 1st DCA 1985).

Next, the District Court, even though Petitioner raised a different ground and the first post-conviction motion was dismissed as legally insufficient on its face, concluded that the second motion was barred. The conflict is apparent in that McRae, Supra, explicitly provides, in two prongs, that the restriction does not apply ". . . where the previous motion was

summarily denied or dismissed for legal insufficiency." And, a motion ". . . stating substantially different legal grounds is permitted" 437 so.2d 1390. Thus, the conflict between McRae, Supra, and the instant case is the differences in the results reached in cases substantially the same. Art.V, Sect. 3(b)(3), Fla. Const. (1980).

II.

Even though Petitioner's second post-conviction motion raised substantially a different ground than the first motion; the first motion was not decided on the merits, and the second motion alleged an illegal sentence as the new ground. The First District Court concluded that the second motion was barred because the illegal sentence should have been raised on direct appeal. (App. 3 and 4)

Conflict jurisdiction is generated by Bass, Supra, in that the opinion of the First District Court announced a new rule of law where an illegal sentence is alleged on post-conviction motions. Additionally the First District Court applied the contemporaneous objection bar to the facts of the instant case involving fundamental error to produce a different results than State v. Rhoden, 448 so.2d 1031, 1016 (Fla. 1984) ("The purpose for the contemporaneous objection rule is not present in the sentencing process . . .").

Because the First District Court's opinion discusses the basis upon which that Court reached the decision to affirm the trial court's summary dismissal coupled with the legal principle applied to the instant case to produce a different results by relying on a decision at variance with the case under review, and the announcement of a new rule of law which conflict with prior decisions of this Court provides jurisdiction. Ford Motor Co. v. Kikis, 401 so.2d 1341, 1342 (Fla. 1981).

FACTS AND CIRCUMSTANCES OF THE CASE

The instant controversy stem from a second motion for post-conviction relief filed by Petitioner-- alleging an illegal sentence in excess of law as the sole new ground for relief.

Petitioner had been convicted of Count-I : Burglary of Occupied Dwelling while Armed with A Deadly Weapon; Count-II: Armed Robbery With Use of Deadly Weapon; Count-III : Aggravated Battery With Use of A Deadly Weapon, to wit, a shotgun; and Count-IV : Grand Theft, in the Circuit Court, Third Judicial Circuit, Hamilton County, Florida. On December 10, 1980, after a jury trial, the Circuit Court imposed sixty years on Count-II Thirty years on Count-I ; Fifteen years on Count-III, with the mandatory minimum of three years on Counts I, II, III; Five years on Count-IV without a mandatory minimum.

A direct appeal was had and affirmed without an opinion by the District Court of Appeal, First District on January 27, 1981.

Petitioner filed his first post-conviction motion on December 3, 1981, alleging 1) Ineffective Assistance of Counsel; 2) Denial of Sanity Hearing; 3) Double Jeopardy; 4) Denial of Fair Trial; and 5) The Trial Court Did Not Have Jurisdiction To Impose Any Three Year Mandatory Sentence. On the 12th of May 1982 the trial Court denied the first motion on the grounds that : "The motion is insufficient on its face as a matter of law."

(App.-1). An appeal of that summary denial was had and affirmed by the First District Court of Appeal on September 21, 1982.

The second motion for post-conviction relief was filed on the 24th of July 1984 in the trial court. On the 10th of December 1984 the trial court entered an Order denying the second motion as successive (App.-2). On appeal from the latter denial, the First District Court on rehearing held : "Since appellant's second motion raises an issue which could have been addressed on direct appeal, the order of the trial court denying the motion is affirmed." (App.-3) (footnote omitted)

In the original decision had in the appeal below, the First District Court held :

In the instant case, not only does appellant's second motion state substantially different grounds for relief than his first motion but the first motion was also not adjudicated on its merits. Therefore, we reverse and remand for the trial court to consider the merits of the second motion. Id.

(App.-4)

Based on an apparent conflict, jurisdiction is sought in this Court.

ARGUMENT ON JURISDICTIONAL ISSUES :

I. THE DECISION OF THE DISTRICT COURT OF APPEAL IN PETITIONER'S CASE DIRECTLY AND EXPRESSLY CONFLICT WITH McRAE V. STATE, AND STEPHENS V. STATE.

The opinion and decision reached by the District Court of Appeal, First District in Petitioner's case directly and expressly conflict with the legal principles announced in McRae v. State, Supra, thereby invoking the jurisdiction of the Court pursuant to Art. V, Sect. 3(b)(3), Fla. Const.(1980). Petitioner urge jurisdiction in this Court on the grounds that the opinion of the First District Court misapplied McRae v. State, Supra, to arrive at a results contrary to that case. This contrary results announced a new rule of law materially at variance with the McRae opinion.

As the opinion of the First District Court reveals, Petitioner's first motion for post-conviction relief was denied summarily without an evidentiary hearing as insufficient on its face. (App.-3 and 4) In line with McRae; supra, the District Court noted that the second motion for post-conviction relief alleged a different ground-- fundamental error in sentencing. Although at this juncture Petitioner's case is indistinguishable from the McRae holding that a second motion is permitted where the prior determination was not on the merits and the second

motion stated substantially a different ground, the District Court nevertheless affirmed dismissal of the second motion. Since the District Court reached a contrary results in the face of the clear mandate of McRae, Supra, jurisdiction is clear, direct and expressed. That is, the First District Court announced a rule of law which conflict with previously announced by the Supreme Court. Nielsen v. City of Sarasota, 177 so.2d 731,734 (Fla. 1960). In this case, the new rule of law created by the First District Court's opinion is essentially that second post-conviction motion may be summarily denied even if the first motion was not adjudicated on the merits and, even if the second motion raises a totally new ground for relief.

At this juncture the McRae holding controls the instant case, but the First District Court announcement of the new rule of law altered the state of the law and the results reached in this case. The announcement of such a new rule of law must flow from this Court, not the District Courts. State v. Lott, 286 so.2d 565,566 (Fla. 1973), and Hoffman v. Jones, 280 so.2d 431,434 (Fla. 1973).

Next, the District Court cited McRae, Supra, for the holding "Matters which could have been raised on direct appeal may not be considered by motion under 3.850." (citations omitted) Petitioner submit that, McRae, Supra, is at variance with the instant case at this juncture in that fundamental error

is at issue in the present case. Just like Smith v. State, 453 so.2d 388 (Fla. 1984), cited by the District Court, fundamental error was not the issue. Simply put, the District Court misapplied the law.

This Court has certiorari jurisdiction based on conflict when a district court of appeal misapplies the law by rlying on a decision which involves a situation materially at variance with the one under review. (citation omitted)

* * *

The Court below relied on a case with facts materially distinguishable from those of the case at bar and thus misapplied the law.

Gibson v. Avis Rent-A-Car System, Inc., 386 so.2d 520,521(Fla. 1980).

Then, in reaching the decision the First District Court expressly and directly created a conflict in cases on the District Court level. The state of the law involving legal principles on substantially the same facts at bar was announced by the Third District Court of Appeal in Stephens v. State, 478 so.2d 419,420 (Fla. 3rd DCA 1985). No more than one week later the First District Court announced a contrary holding and results. Both Courts were dealing with a second 3.850 motion alleging different grounds than the first motion based on an unlawful sentence. Ironically, both Courts of Appeal relied on McRae, Supra, in discussing the legal principles involved. Compare, Bass v. State, 478 so.2d 461 (Fla. 1st DCA 1985).

The fact that the First District Court quoted from the Amendment to Rule 3.850 and did not notice fundamental error in the sentencing process does not distinguish Bass and Stephens, Supra. Both cases are factually identical. It just so happens that the First District Court in quoting the new Amendment to Rule 3.850 actually announced a Rule change to the Court Rules beyond that Court's authority. Hoffman v. Jones, Supra. The direct and express conflict between Bass and Stephens clearly invokes this Court's duty and responsibility to maintain uniformity of principles and practices under conflict jurisdiction. Tyus v. Apalachicola Northern Railroad Co., 130 so.2d 580,585 (Fla. 1961).

THE DECISION OF THE DISTRICT COURT OF APPEAL DIRECTLY AND EXPRESSLY CONFLICT WITH THE CASES OF STATE V. RHODEN,
II. STYLES V. STATE, REYNOLDS V. STATE,
SANDERS V. STATE, SKINNERS V. STATE,
AND STEPHENS V. STATE.

Petitioner contend that the opinion announced in his case by the First District Court of Appeal directly and expressly conflict vertically with State v. Rhoden, Supra, and several opinions horizontally on the District Court level. In Bass, Supra, the Court below acknowledged that Petitioner newly raised claim involved an illegal sentence, however, the District Court held :

Matters which could have been raised on direct appeal may not be considered by motion under Rule 3.850. (citations omitted)

* * *

Since appellant's second motion raises an issue which could have been addressed on direct appeal, the order of the trial court denying the motion is affirmed.

(footnote omitted)

Bass, Supra, 478 so.2d 461-62.

Here, it is clear the First District Court applied the contemporaneous objection bar to the facts of this case which alleged an illegal sentence. The holding below is not only a misapplication of the contemporaneous bar, but is a direct and express conflict with State v. Rhoden, Supra, where the same legal principle was addressed :

Further, the State asserts that the failure to object is a waiver of the right for purposes of appeal and in any post-conviction proceedings. We reject these arguments.

* * *

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.

Rhoden, Supra, at 448 so.2d 1016; This discussion by the First District Court of Appeal in applying the bar to sentencing error is sufficient to cause conflict jurisdiction in this Court. See, Ford Motor Co. v. Kikis, 401 so.2d 1341,1342 (Fla. 1981).

Similarly, the misapplication of the contemporaneous bar to the instant case present a sufficient conflict where fundamental error is at issue. Gibson v. Avis Rent-A-Car System, Inc., Supra.

Under the First District Court rationale, fundamental error would be subjected to the contemporaneous bar on post-conviction motions in conflict with Styles v. State, 465 so.2d 1369 (3.850 is not improper because of the normal rule that an issue that could have been raised by direct appeal but was not). The same conflict exist between this case and Reynolds v. State, 429 so.2d 1331,1333(sentencing error is fundamental and endures and petitioner is entitled to relief in any and every legal manner possible, viz : on direct appeal although not first presented to the trial court, by post-conviction relief under Rule 3.850); Sanders v. State, 386 so.2d 256,257("A sentence not authorized

by law is always subject to collateral attack."); Skinner v. State, 366 so.2d 486, 487 (same); and Stephens v. State, 478 so.2d 419,420 (" . . . fundamental error, such as the imposition of an unlawful sentence, may be raised for the first time in a Rule 3.850 motion notwithstanding the fact that it could have been raised on direct appeal.").

In Petitioner's case the First District Court applied the contemporaneous bar in conflict with the cases cited for conflict jurisdiction. The cases cited for conflict are not distinguishable from the instant case because each case embraces fundamental error from the sentencing process. The First District Court application of the bar to fundamental error produced a different result in this case which involves substantially the same controlling facts as the cases cited for conflict jurisdiction - - fundamental error.

Although stability, uniformity and predictability of the appellate process is the primary function for this Court's conflict jurisdiction, another excellent reason for accepting jurisdiction of this case is stated however, in Rhoden, Supra :

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

Id., at 1016

Wherefore, Petitioner submit that the conflicts mentioned above are not only direct and express, but are shocking to the fundamental principles of law requiring this Court to grant jurisdiction to also resolve the conflict in the law as applied in this cause.

CONCLUSION

Based on the cited authorities Petitioner urge that an apparent conflict in decisions involving legal principles on the District Court and Supreme Court level have been shown, therefore, it is prayed that this Court liberally construe this jurisdictional brief, grant review and Order the parties to submit briefs on the merits.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true and correct copy of the foregoing Brief On Jurisdiction has been furnished by U. S. Mail (postage prepaid) to :

Gary L. Printy, Esquire
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This 13 day of February, 1986.

Charles Edward Bass

PETITIONER