IN THE SUPREME COURT OF FLORIDA

CHARLES EDWARD BASS,

Petitioner,

v.

CASE NO.: 68,230

STATE OF FLORIDA,

Respondent.
_____/

RESPONDENT'S BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

Charles Edward Bass was the appellant below and will be referred to herein as Petitioner. The State of Florida was the appellee below and will be referred to herein as Respondent.

The opinion below, Bass v. State, 478 So.2d 461 (Fla. 1st DCA 1985), is attached as the appendix.

STATEMENT OF THE CASE AND FACTS

Petitioner was charged by information on four counts of armed burglary, armed robbery, aggravated battery and theft on May 17, 1979. On December 10, 1980 Petitioner was convicted on all counts and sentenced to three years in prison on Count I, sixty years in prison on Count II, fifteen years in prison on Count III and five years on Count IV. The trial court imposed

three consecutive minimum mandatory three-year sentences on Counts I, II and III; without objection before the trial court.

Petitioner filed a Notice of Appeal and was represented on appeal by the Office of the Public Defender for the Second Judicial Circuit. The judgment and sentenced were affirmed per curiam without opinion. Bass v. State, 421 So.2d 69 (Fla. 1st DCA 1982). Petitioner also filed a Rule 3.850 Motion for Post-Conviction Relief on December 3, 1980. The trial court denied the motion and that order was affirmed per curiam without opinion. Bass v. State, 412 So.2d 473 (Fla. 1st DCA 1982).

Petitioner filed a second successive Rule 3.850 motion challenging for the first time the postition of three consecutive minimum mandatory sentences as being contrary to this Court's decision in Palmer v. State, 438 So.2d 1 (Fla. 1983). The trial court denied the motion as a "second or successive motion for similar relief" on December 13, 1984. Petitioner appealed the order and on October 8, 1985, the First District Court of Appeal, acting without a pleading from the Respondent, entered an opinion which reversed and remanded the trial court's order. Respondent filed a timely motion for rehearing and rehearing was granted on November 13, 1985. Petitioner filed his motion for rehearing which was denied January 3, 1986. The mandate issued January 22, 1986. Petitioner filed a timely notice to invoke the discretionary jurisdiction of this Court on January 23, 1986.

SUMMARY OF ARGUMENT

The opinion below does not conflict either expressly or directly with any decision of this Court or a district court of appeal.

This Court has long recognized that "matters which could have been raised on direct appeal may not be considered by a motion for post-conviction relief. This principal of the decisional law of this Court has recently been encoded into this Court's procedural rules governing post-conviction relief.

The imposition of consecutive minimum mandatory sentences is clearly an issue which could have and should have been raised on direct appeal.

ARGUMENT

ISSUE

THE DECISION OF THE DISTRICT COURT OF APPEAL DOES NOT DIRECTLY AND EXPRESSLY CONFLICT WITH MCRAE V. STATE, INFRA, AND STEVENS V. STATE, INFRA.

The opinion and decision entered by the First District Court of Appeal below does not directly and expressly conflict with the legal principals announced in McRae v. State, 437 So.2d 1388 (Fla. 1983). McCrae, supra, clearly stands for the principle that "matters which could have been raised on direct appeal may not be considered by a motion under Rule 3.850." See also Smith v. State, 453 So.2d 388 (Fla. 1984). The district court below really applied the principals announced by this Court in McRae and Smith to the instant case. This has long been the law regarding Rule 3.850 motions and the recently promulgated amendments to Rule 3.850 incorporate this principal. See Florida Bar Re: Amendment to Rules, 460 So.2d 907,908 (Fla. 1984) which states:

> 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.

The subject of Petitioner's appeal was whether a trial court may dismiss a second successive Rule 3.850 motion without a

hearing where the motion merely asserts a claim which could have and should have been raised on direct appeal if properly preserved in the trial court at the time the judgment and sentence were entered. Clearly, Petitioner was aware of the fact that he was being sentenced to three consecutive minimum mandatory terms at the time he was sentenced. Thus Petitioner could have and should have raised this issue on direct appeal as did the defendant in Palmer v. State, 438 So.2d 1 (Fla. 1983).

Petitioner's second Rule 3.850 motion as filed raised no claim cognizable in a 3.850 motion and should have been, instanter, rejected because the claim did not constitute an exception recognized by this Court in Witt v. State, 387 So.2d 922 (Fla. 1980).

This Court held long ago that the rule authorizing a motion for post-conviction relief, "Rule 3.850" is patterned after the federal standard authorizing a petition for writ of habeas corpus (28 U.S.C. § 2254,2255), in that the Florida courts should look to federal precedence in interpreting the rule. Roy v. Wainwright, 151 So.2d 825 (Fla. 1963); see also Dickens v. State, 165 So.2d 811 (Fla. 2d DCA 1964). The federal courts have routinely held that where a successive petition for writ of habeas corpus urges as a basis for relief matters which either were or could have been raised in an initial petition, the receiving court should perfunctorily deny relief. Cf. Sanders v. United States, 373 U.S. 1 (1963) and May v. Balkcom, 631 F.2d 48 (5th Cir. 1980).

This Court held that the trial court may dismiss this petition (Petitioner's second) as an abuse of the post-conviction process. In Smith, supra, that court held:

> Smith presents six points in his second post-conviction petition. The trial court dismissed the petition "on grounds that this successive 3.850 motion is abuse of the post-conviction process." We agree. All of the six points raised by Smith are issues which were or could have been raised on direct appeal and are thus foreclosed for consideration under post-conviction relief. McRae v. State, 437 So.2d 1388 (Fla. 1983).

Id. at 389.

Respondent submits that the order of the trial court in this case dismissing the second Rule 3.850 motion because it was a successive motion for the same or similar relief is tantamount to finding the motion to be an abuse of the post-conviction process. Otherwise, this Court's opinion might be read as authorizing successive 3.850 motions as a substitute for direct appeal. A new ground cannot be a ground which could have and should have been raised on direct appeal. See also Witt v. State, 465 So.2d 510 (Fla. 1985).

Petitioner alleges there is express and direct conflict with Stevens v. State, 478 So.2d 419 (Fla. 3d DCA 1985). Stevens, however, raised a much substantially different question than is the motion for post-conviction relief. The defendant Stevens should have filed a 3.800 motion to correct an illegal sentence. A Rule 3.800 motion may be filed at any time. In any event, the trial court in Stevens made no determination as to whether the

conviction was for an armed robbery or for an unarmed robbery. Here there was no factual question raised by Petitioner which would have necessitated an evidentiary hearing.

CONCLUSION

The opinion of the district court below does not expressly and directly conflict with the decision of this Court or with another district court of appeal. The district court merely applied this Court's principal that an issue which could have and should have been raised on a direct appeal may not be raised in a motion for post-conviction relief. The district court did not err in affirming the denial of the Petitioner's motion as a second successive petition for similar relief.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing was forwarded by U.S. Mail to Charles Edward Bass, Union Correctional Institution, Post Office Box 221, Raiford, Florida, 32083, on this 10th day of March, 1986.

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ASSISTANT ATTORNEY GENERAL

COUNSEL FOR RESPONDENT