

IN THE SUPREME COURT OF FLORIDA

CHARLES EDWARD BASS,  
Petitioner,

v.

STATE OF FLORIDA,  
Respondent.

C  
FILED  
BY  
CASE NO. 68,230 *pl*

PETITIONER'S BRIEF ON THE MERITS

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## II STATEMENT OF THE CASE AND FACTS

Following a jury trial in Hamilton County, Case No. 79-46, petitioner was found guilty and was sentenced as follows:

Count I, armed burglary - 30 years in prison with a mandatory three year minimum.

Count II, armed robbery - 60 years in prison with a mandatory three year minimum.

Count III, aggravated battery - 15 years in prison with a mandatory three year minimum.

Counts I, II and III were to be served consecutively, and Count IV was to be served concurrently (R 1-2, 3-6).

On direct appeal, petitioner's judgments and sentences were per curiam affirmed. Bass v. State, 412 So.2d 473 (Fla. 1st DCA 1982) Docket Number ZZ-313. December 3, 1981, petitioner filed a motion for post-conviction relief raising as grounds ineffective assistance of counsel, denial of a sanity hearing, double jeopardy, unfair trial and lack of jurisdiction. The trial court denied the motion without evidentiary hearing and the decision was affirmed per curiam. Bass v. State, 421 So.2d 69 (Fla. 1st DCA 1982).

July 24, 1984, petitioner filed his second motion for post-conviction relief. Therein, he alleged that he was erroneously sentenced to three consecutive mandatory minimum terms where the three offenses were committed during a single criminal episode (R 7-13). The trial court, without eviden-

tiary hearing, denied the motion on the basis that it was a successive motion for the same or similar relief (R 17).

The District Court initially reversed stating:

Under Rule 3.850, Fla.R.Crim.P., a court is not required to entertain a second or a successive motion which states substantially the same grounds as a previous motion attacking the same conviction or sentence. That restriction, however, applies only where the grounds of the first motion were adjudicated on their merits and not where the previous motion was summarily denied or dismissed for legal insufficiency. McRae v. State, 437 So.2d 1388 (Fla. 1983). 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.

Bass v. State, 10 F.L.W. 2303 (Fla. 1st DCA October 8, 1985). In response to the state's motion for rehearing, this opinion was vacated and the court affirmed the denial of petitioner's motion. While disagreeing with the trial judge's stated basis for denial (i.e., that it was a successive motion for the same or similar relief), the District Court nonetheless affirmed stating:

Matters which could have been raised on direct appeal may not be considered by motion under Rule 3.850. E.g. Smith v. State, 453 So.2d 388 (Fla. 1984); McRae v. State, 437 So.2d 1388 (Fla. 1983). Furthermore, Rule 3.850 has recently been amended effective January 1, 1985, to state:

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 Florida Bar: ReAmendment to Rules of Criminal Procedure (Rule 3.850), 460 So.2d 907 (Fla. 1984).

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 v. State, 478 So.2d 461 (Fla. 1st DCA 1985).

In his Motion for Rehearing, which the court treated as timely, petitioner asserted conflict with the decisions in Styles v. State, 465 So.2d 1369 (Fla. 2d DCA 1985); Walker v. State, 462 So.2d 452 (Fla. 1985); and State v. Stacey, 482 So.2d 1350 (Fla. 1986). Following denial of petitioner's motion, petitioner timely filed a Notice to Invoke Discretionary Jurisdiction. By order of July 7, 1986, this Court accepted jurisdiction and appointed the Public Defender's Office for the Second Judicial Circuit to represent petitioner. This brief on the merits follows.

### III SUMMARY OF ARGUMENT

Petitioner asserts that his Rule 3.850 motion, which alleged that consecutive mandatory minimum sentences were improperly imposed, should be considered by the District Court on its merits. This sentencing error is a fundamental one cognizable on a Rule 3.850 motion, even if the issue were one which could have been raised on direct appeal.



#### IV ARGUMENT

##### ISSUE PRESENTED

THE DECISION IN BASS v. STATE, 478 So.2d 461 (Fla. 1st DCA 1985) SHOULD BE REVERSED SINCE A FUNDAMENTAL SENTENCING ERROR IS COGNIZABLE ON A MOTION FOR POST-CONVICTION RELIEF.

In Bass v. State, 478 So.2d 461 (Fla. 1st DCA 1985), the District Court held that petitioner could not challenge by a motion for post-conviction relief the legality of his sentences under Palmer v. State, 438 So.2d 1 (Fla. 1983) since this issue "could have been raised on direct appeal" and is not therefore cognizable under Rule 3.850. This holding should be reversed since the settled law in this state is that a fundamental sentencing error can be raised at any time, and that a Palmer violation constitutes such a fundamental error.

In Reynolds v. State, 429 So.2d 1331 (Fla. 5th DCA 1983), the trial court's summary denial of defendant's post-conviction motion which alleged improper imposition of the mandatory minimum three year sentence was reversed. The denial was based in part on the ground that the issue could have been raised on appeal. In rejecting this reasoning, the court noted:

Where, as here, the sentencing error can cause or require a defendant to be incarcerated or restrained for a greater length of time than provided by law in the absence of the sentencing error, that 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, or by extraordinary remedy. As to such a fundamental sentencing error he is entitled to relief under an alternative remedy notwithstanding that he could have, but did not, raise the error on appeal.

[Emphasis supplied]. Id. at 1333. See also, Hamm v. State, 380 So.2d 1101 (Fla. 2d DCA 1980); Gonzalez v. State, 392 So.2d 334 (Fla. 3d DCA 1981); Polk v. State, 418 So.2d 388 (Fla. 1st DCA 1982); Styles v. State, 465 So.2d 1369 (Fla. 2d DCA 1985); Stephens v. State, 478 So.2d 419 (Fla. 3d DCA 1985). The court further recognized that "an erroneous application of the three year mandatory minimum sentence would constitute a fundamental sentencing error." Reynolds v. State, supra at 1333. Accord, Lawson v. State, 400 So.2d 1053 (Fla. 2d DCA 1981); Whitehead v. State, 446 So.2d 194 (Fla. 4th DCA 1984). See also, Suffield v. State, 456 So.2d 1196 (Fla. 4th DCA 1984) and Pettis v. State, 448 So.2d 565 (Fla. 4th DCA 1984), both specifically recognizing that the imposition of consecutive mandatory minimum sentences in violation of Palmer is fundamental error.

The foregoing cases demonstrate that the decision of the First District herein should be reversed. A Palmer violation constitutes fundamental error. Therefore, petitioner should be entitled to seek relief by a post-conviction motion even though he did not raise the error on appeal.

It should be noted that petitioner's direct appeal predated this Court's Palmer decision. This does not bar petitioner relief, however, since Palmer has consistently been

retroactively applied. Cisnero v. State, 458 So.2d 377 (Fla. 2d DCA 1984); Moore v. State, 464 So.2d 1296 (Fla. 1st DCA 1985); Daniels v. Smith, 478 So.2d 110 (Fla. 2d DCA 1985); Sanders v. State, 482 So.2d 504 (Fla. 2d DCA 1986); Robinson v. State, 484 So.2d 60 (Fla. 2d DCA 1986); Dowdell v. State, 11 F.L.W. 1639 (Fla. 1st DCA July 29, 1986). As stated in Cisnero v. State, supra at 377-378:

In Palmer v. State, 438 So.2d 1 (Fla. 1983), the supreme court construed section 775.087(2), Florida Statutes (1981), to preclude the "stacking" of consecutive mandatory three-year minimum sentences for crimes committed at the same time and place. The case was one of first impression, and the court did not indicate whether its holding was limited to prospective application. Therefore, the issue before us is whether the principle of Palmer should be applied retroactively to appellant's sentences.

The supreme court in Witt v. State, 387 So.2d 922 (Fla. 1980, stated:

Without attempting to survey this relatively unsatisfactory body of law, we note that the essential considerations in determining whether a new rule of law should be applied retroactively are essential considerations in determining whether a new rule of law should be applied retroactively are essentially three: (a) the purpose to be served by the new rule; (b) the extent of reliance on the old rule; and (c) the effect on the administration of justice of a retroactive application of the new rule.

387 So.2d at 926.

This court faced an issue of retroactivity in Hamm v. State, 380 So.2d 1101 (Fla. 2d DCA 1980), in which the defendant had

filed a motion for postconviction relief from a long term prison sentence imposed as a condition of probation. Appellate decisions rendered after the expiration of his appeal time had held that such sentences were illegal. Though not couched in terms of retroactive application, we concluded that the error was of such fundamental dimension as to warrant relief under Florida Rule of Criminal Procedure 3.850. This ruling was consistent with the proposition that sentencing errors are more likely to be considered fundamental. See State v. Rhoden, 448 So.2d 1013 (Fla. 1984).

In Whitehead v. State, 446 So.2d 194 (Fla. 4th DCA 1984), the court held that because of its inherent potential of causing a defendant to be incarcerated for a greater length of time than provided by law, the improper imposition of a mandatory minimum sentence constituted fundamental error. Accord Pettis v. State, 448 So.2d 565 (Fla. 4th DCA 1984); Reynolds v. State, 429 So.2d 1331 (Fla. 5th DCA 1983); Lawson v. State, 400 So.2d 1053 (Fla. 2d DCA 1981). Our sister court in Davis v. State, 453 So.2d 196 (Fla. 3d DCA 1984), 9 F.L.W. 1644, recently accorded the defendant relief on a motion filed pursuant to Florida Rule of Criminal Procedure 3.850 by setting aside the multiple consecutive three-year minimum mandatory sentences for convictions of separate offenses occurring in the same incident. Thus, we conclude that appellant is entitled to the benefit of Palmer.

Thus, since Palmer represents a change of law retroactively applicable, petitioner's claim is properly raised by his Rule 3.850 motion, and the District Court's decision to the contrary should be reversed.

Likewise, the fact that petitioner did not raise his Palmer challenge in his initial Rule 3.850 motion is no bar. Since petitioner's initial Rule 3.850 motion predated the

Palmer decision, there was a justifiable reason for petitioner not raising this claim. See, Aikens v. State, 488 So.2d 543, 544 (Fla. 1st DCA 1986) (On Motion for Rehearing) where the court noted:

The Palmer issue was not raised in the first 3.850 motion filed by Aikens. There was a justifiable reason for Aikens not raising the Palmer issue at the time of his first 3.850 motion because Palmer had not been decided by our Supreme Court when the first motion was filed. Rule 3.850 and Adams support the ruling of this court that the second Rule 3.850 motion should not have been dismissed by the trial court and that the motion for post-conviction relief should have been granted.

Based upon the foregoing, petitioner has demonstrated that his Palmer claim should have been considered by the trial court. Petitioner requests therefor that the decision of the First District precluding this claim be reversed and the cause remanded for consideration of the merits of the Palmer claim.

CONCLUSION

For the reasons stated, petitioner prays that the decision in Bass v. State, 478 So.2d 461 (Fla. 1st DCA 1985) be reversed and the cause remanded to the District Court for consideration of the merits of his claim.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand to Assistant Attorney General Gary L. Printy, The Capitol, Tallahassee, Florida, 32302, this 2<sup>nd</sup> day of September, 1986.



GLENNA JOYCE REEVES  
Assistant Public Defender