O/a 10-27-86

IN THE SUPREME COURT OF FLORIDA

CHARLES EDWARD BASS,

Petitioner,

v. CASE NO. 68,230

STATE OF FLORIDA,

Respondent.
_____/

RESPONDENT'S BRIEF ON THE MERITS

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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 Record on Appeal in the original appeal to the First District Court of Appeal consists of one volume which will be referred to as "R" followed by the appropriate page number in parentheses.

The Record below also contains Petitioner's original motion for post conviction relief filed by trial counsel, a second 3.850 motion filed by Petitioner as a pro se movant, and the third Rule 3.850 motion which forms the basis of this appeal.

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's Statement of the Case and Facts with the following supplements.

On December 18, 1980 William Slaughter II trial counsel for petitioner filed a Rule 3.850 motion alleging among other grounds that the three (3) year minimum mandatory sentences imposed in Counts I (armed burglarly) and Count III (aggravated battery) were illegal because those offenses are lesser included offenses of Count II (armed robbery). (R 14-16) Circuit Judge J. Arthur Lawrence, Jr. denied the motion on January 7, 1981. (R 22).

Petitioner's successive pro se motions are his second and third motions.

SUMMARY OF ARGUMENT

An issue which could have and should have been raised on direct appeal and was not, may not be raised for the first time in a motion for post conviction relief.

Fla.R.Crim.P. 3.850 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.

Consecutive three (3) year minimum mandatory prison term is an issue which if properly preserved could have and should have been raised at trial on an direct appeal.

The prohibition against consecutive three (3) year minimum mandatory sentences arising out of a single episode is a change in the law based on a matter of statutory construction not on constitutional grounds.

The only exception to the above rules is where the unpreserved claim is constitutional in nature and involves a development of fundamental significance.

ARGUMENT

THE DISTRICT COURT BELOW DID NOT ERR IN AFFIRMING THE TRIAL COURT'S ORDER DENYING PETITIONER'S THIRD SUCCESSIVE MOTION FOR POST CONVICTION RELIEF WHICH RAISED A CLAIM WHICH COULD HAVE AND SHOULD HAVE BEEN RAISED AT TRIAL OR ON DIRECT APPEAL.

Petitioner argues that his belated "Palmer"[1] claim is cognizable on a third successive Rule 3.850 because sentencing errors are fundamental and can be raised at any time. Petitioner relies on the wrongly decided case of Cisnero v. State, 458 So.2d 377 (Fla.2d DCA 1984) and its progeny which misconstrued this Courts clear interpretation of Rule 3.850 in Witt v. State, 387 So.2d 922 (Fla.1980) and was written without benefit of the amendment to Rule 3.850 effective January 7, 1985. See The Florida Bar; Re Amendment to Rules of Criminal Procedure (Rule 3.850), 460 So.2d 907 (Fla.1984) which incorporates prior case law stating:

> This rules 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.

Id. at 908.

Petitioner and his trial counsel had challenged the imposition of the consecutive minimum mandatory sentences on other grounds via prior motions for post conviction relief and

[1] Palmer v. State, 438 So.2d 1 (Fla.1983).

direct appeal. The basis for the attack was an alleged double jeopardy violation for sentencing on lesser included offenses. Therefore as Petitioner was present at sentencing he cannot claim ignorance of the pertinent facts as a basis for his failure to assert the claim. In fact, petitioner stood before the trial and appellate courts in the same shoes as the defendant in Palmer except Palmer entered a timely objection before the trial court, preserved the matter and unsuccessfully raised the claim before the Fourth District Court of Appeal only to eventfully prevail before this Court in a sharply divided (4-3) court.

Petitioner has not challenged the effectiveness of his trial counsel for his failure to object and it is clear he may not. In State v. Stacey, 482 So.2d 1350 (Fla.1985) the change in the law issued prior to Stacey's trial, thus trial counsel and the District Court of Appeal had a decision of this Court on the same point of law holding the retention of jurisdiction was uunconstitutional. Stacey at 1351. Thus Stacey involved a change in the law emanating from this Court which was constitutional in nature thus satisfying the test of Witt v. State, supra.

In Witt this Court held that a change in the law will not be applied retroactively under Rule 3.850.

> unless the change: (a) emanates from this Court or the United States Supreme

> Court, (b) is constitutional in nature, and (c) constitutes a development of fundamental significance.

Id. at 931.

Hence the claim is Stacey was constitutional and apparently a development of fundamental significance given this Court's decision, while here the claim is not constitutionally based and given the conjunctive nature of the Witt three pronged test, barred from consideration via Rule 3.850.

Moreover, amended Rule 3.850 would also bar relief merely because this is a third successive petition. The amendments to Rule 3.850 apply to Petitioner's motion even though it was filed prior to Janaury 1, 1985 given the fact that the 1985 amendment to rule 3.850 is procedural in nature and therefore may be applied retroactively. Christopher v. State, 489 So.2d 22 (Fla.1986).

In Christopher this Court in an unanimous opinion refused to reach claims filed by a Death Row inmate because they were either claims which could have been raised on direct appeal or because amended Rule 3.850 allows the trial judge to dismiss a successive motion for post conviction relief that raises a new ground that was not previously decided on the merits. The new standard for abuse of procedure allows the trial court to summarily deny a successive motion unless the movant alleges that the asserted grounds were not known and could not have been known to the

movant at the time the initial motion was filed and the movant must show justification for the failure to raise the asserted issues in the first motion. Witt v. State, 465 So.2d 510, 512 (Fla.1985); Christopher, supra at 24.

Petitioner's initial motion filed December 18, 1980 or eight days after imposition of sentence clearly reveals his knowledge of the consecutive three (3) minimum mandatory sentences. In fact, paragraph f of the Statement of Judicial Acts to be reviewed filed in the original direct appeal states:

> The Trial Court's imposition upon the Appellant of three (3) "stacked" or consecutive three-year minimum mandatory sentences for the offenses of armed robbery, burglarly, and aggravated battery when (1) the Appellant was not armed at the time of the commission of the burglarly and when (2) the offense of aggravated battery was a lesser included offense of, and was part of the same transaction as the armed robbery for which the Appellant also received a three (3) minimum mandatory sentence. (R 27-28).

Respondent takes exception to the First District's opinion on rehearing where the Court disagreed with the trial court's reasoning. Bass v. Stae, 478 So.2d 461 (Fla.1st DCA 1985). This Court's holding in Christopher supports the trial court's reasoning that the motion was a successive motion because Petitioner could plead no facts to justify withholding the claim from the prior two motions. In any event, a trial judge who is right for any reason should be affirmed on appeal. See Savage v. State,

156 So.2d 566 (Fla.1st DCA 1963) where an order dismising a petition for post conviction relief was affirmed per Judge John Wigginton stating:

> If a trial judge's order, judgment or decree is sustainable under any theory revealed by the record on appeal notwithstanding that it may have been bottomed on an erroneous theory, an erroneous reason, or an erroneous ground, the order judgment or decree will be affirmed.

Id. at 568.

In Aikens v. State, 488 So.2d 543 (Fla.1st DCA 1986) the First District not unsurprisingly misinterpreted the amended rule and further muddied the waters of the Rule 3.850 case law. In Aikens the Court held the unavailability of Palmer at the time of the initial Rule 3.850 motion allowed the movant to raise the claim in a successive motion because it was a new ground. The unavailability of Palmer is not a justifiable reason under the amended rule 3.850 because Aikens was aware of his consecutive minimum mandatory sentences. Otherwise all changes in the law are available on rule 3.850 motions because defendents and their lawyers are not clairvoyant. This Court voted 4-3 to deny the State's petition for writ of certiorari in Aikens. The instant case is the proper vehicle to set the record straight less the errors of Cisnero, Aikens, and Dowdell v. State, 11 F.L.W. 1639 (Fla.1st DCA 1986) now will vitiate the finality goals of Witt v. State, 387 So.2d 922 (Fla.1980) and the amendments to rule

3.850. Justice Barkett's lament in her dissenting opinion in State v. Zeigler 488 So.2d 820, 823 (Fla.1986) that we should not "subscribe to a method which breaks one rule to save another" has sage application here. This Court cannot ignore the irony of sending a capital defendants to their death because of abuse of process while generously allowing the District Courts to subvert all finality of judgment and sentences through misapplication of rule 3.850 to essentially allow a new appeal to non capital defendants raising belated Palmer claims such as petitioner who cannot even show prejudice because he would serve nine years in any event. While Petitioner may not like the result he must subscribe to a method which allows him the same relief-no more, no less than we provide capital inmates.

CONCLUSION

This Court should end the confusion among the District Courts and affirm the finality of judgments and sentences. This claim could have and should have been raised at trial and on direct appeal, but was not, so no relief is authorized under the law of Florida.

Respesctfully submitted

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail Glenna Joyce Reeves, Assistant Public Defender, Post Office Box 671, Tallahassee, Florida 32302 this 22nd day of September, 1986.

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