O/a 10-27-86

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IN THE SUPREME COURT OF FLORIDA

CHARLES EDWARD BASS,

Petitioner,

v. CASE NO. 68,230

STATE OF FLORIDA,

Respondent.

PETITIONER'S REPLY BRIEF ON THE MERITS

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	:	

PETITIONER'S REPLY BRIEF ON THE MERITS

I PRELIMINARY STATEMENT

Respondent's brief will be referred to as "RB". Other references will be designated as set forth initially.

II STATEMENT OF THE CASE AND FACTS

Respondent correctly points out that petitioner's present Rule 3.850 motion is the third he has filed.

December 22, 1980, petitioner filed a motion to vacate judgment and sentence in which he alleged, inter alia, that the three year minimum mandatory sentences imposed in Counts I and III (Burglary and Aggravated Battery) were improper since Counts I and III were lesser included offenses of Count II (armed robbery).

Petitioner's second 3.850 motion was filed December 3, 1981, and was denied on procedural grounds since "A. The motion alleges no sworn facts, all purported facts being designated as 'argument'; B. The motion is insufficient on its face as a matter of law." The present 3.850 motion, in which the Palmer[1/] issue was first raised, was filed July 24, 1984 (R-7).

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

III 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.

Petitioner asseverates that he is entitled to challenge the legality of his sentence via a post-conviction motion or any other legally recognized procedure. For that reason, the decision in Bass v. State, 478 So.2d 461 (Fla. 1st DCA 1985), should be reversed.

Respondent claims that the present claim is barred by Rule 3.850, Florida Rules of Criminal Procedure (1985), which provides in pertinent part:

> A second or successive motion may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the movant or his attorney to assert those grounds in a prior motion constituted an abuse of the procedure governed by these rules.

This contention is without merit. Firstly, the amended rule did not become effective until January 1, 1985, subsequent to the filing of petitioner's motion. Even though procedural in nature, the amended rule cannot be retroactively

applied to petitioner to foreclose his claim.[2] See, NAACP v. Alabama ex rel. Flowers, 377 U.S. 288, 301 (1964), and Breest v. Perrin, 655 F.2d 1, 2-3 (1st Cir. 1981) (can't foreclose federal issue on basis of either new rule applied without notice or old rule applied in surprisingly harsh or unexpectedly different manner). See also, United States ex rel. Barksdale v. Blackburn, 610 F.2d 253 (5th Cir. 1980) (amendment to Rule 9 of rules governing 28 U.S.C. Section 2254 concerning dismissal due to delayed petition does not apply to petitions filed prior to its effective date); Jackson v. Estelle, 570 F.2d 546 (5th Cir. 1978) (same); State v. Turner, 11 F.L.W. 1739 (Fla. 5th DCA August 7, 1986) (Amendment to Rule 3.172, Florida Rules of Criminal Procedure not retroactively applicable; "These later adopted rules have prospective effect only and do not serve to make the original plea taking errneous.") Secondly, even the amended rule provides that illegal sentences may be raised at any

2 The statement in Christopher v. State, 489 So.2d 22 (Fla. 1986), that the amendment "may be applied retroactively" is only dicta. There, Christopher's claim was barred under the successive motion provision of the former rule. Id. at 24, 25. For that reason, it was totally unnecessary to consider the retroactivity of the amended rule. Moreover, in Christopher, unlike the present case, Christopher's 3.850 motion was filed after the effective date of the amended version of Rule 3.850.

time.[3] Finally, the trial judge made no finding (nor could it) that the present motion constituted an abusive motion.

Respondent's argument that petitioner's claim cannot be raised because no objection to his illegal sentence was made at trial (RB-4-5) is likewise without merit. In State v. Whitfield, 487 So.2d 1045 (Fla. 1986), this court reaffirmed that sentencing errors which produce an illegal sentence do not require a contemporaneous objection to be preserved for appeal. And, the fact that the issue was not raised on direct appeal does not bar the claim since as noted in Styles v. State, 465 So.2d 1369, 1372 (Fla. 2d DCA 1985):

> A motion to correct an illegal sentence pursuant to either rule 3.800 or 3.850 is not improper because of the normal rule that an issue that could have been raised by direct appeal but was not cannot be addressed by such a motion for post-conviction relief.

Since a fundamental sentencing error can be raised at any time, and since a Palmer violation constitutes such

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3 Petitioner's motion could as well be treated as a Rule 3.800(a) motion. That rule provides that "a court may at any time correct an illegal sentence imposed by it." In De Santis v. State, 400 So.2d 525 (Fla. 5th DCA 1981), it was recognized that the court should treat a pro se motion as one filed under the proper rule for the relief sought. The court stated: "The fact that appellant, proceeding without a lawyer, says he is entitled to relief under Florida Rules of Criminal Procedure 3.800 (rather than 3.850), does not give the court authority to deny a request to correct an illegal sentence both because Rule 3.800(a) gives the trial court the authority to at any time correct an illegal sentence and because the court can on its own decide the proper rule to use to correct the sentence." Id. at 526.

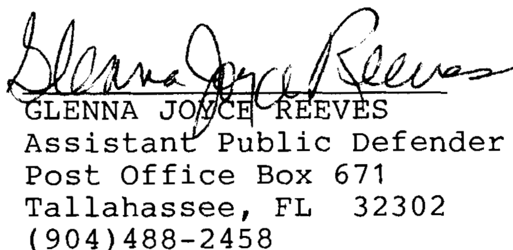
a fundamental error, the decision of the First District herein should be reversed.

IV 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,

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT



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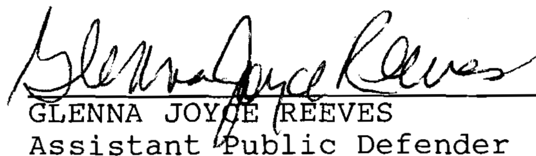
CERTIFICATE OF SERVICE

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 3 day of October, 1986.



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