IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

WILBERT E. BOLYEA,

Respondent.

CASE NO. 70,720

DISCRETIONARY REVIEW OF THE DECISION OF
THE SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA

BRIEF OF PETITIONER ON THE MERITS

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PRELIMINARY STATEMENT

The STATE OF FLORIDA was the Appellee in the Second District Court of Appeal and will be referred to as Petitioner in this brief. WILBERT E. BOLYEA was the Appellant in the Second District Court of Appeal and will be referred to as Respondent in this brief. The record on appeal will be designated by the letter "R" followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

On April 15, 1982, the State Attorney for the Twentieth Judicial Circuit filed an information in Circuit Court in and for Collier County, Florida, charging Respondent with practicing dentistry without a license (R. 1, 3). On June 29, 1983, a jury found Respondent guilty as charged. Respondent was sentenced on November 21, 1983, to five years probation with the condition that he serve 364 days in the county jail (R. 4).

Respondent filed a motion for post-conviction relief in the trial court on September 6, 1984 (R. 5-11). On the same date, an order was filed denying the motion (R. 12).

Respondent appealed the denial to the Second District Court of Appeal (R. 13). On August 9, 1985, the Second District Court of Appeal reversed the trial court's denial of Respondent's motion for post-conviction relief and ordered the trial court to either summarily deny the motion and attach to its order portions of the record showing that Respondent was not entitled to relief or hold an evidentiary hearing on the motion (R. 15-16). Bolyea v. State, 473 So.2d 817 (Fla. 2d DCA 1985). A mandate was issued on August 30, 1985 (R. 14).

On September 24, 1985, Respondent filed a motion to set a hearing date (R. 17). A hearing was held on November 4, 1985, before the Honorable Ted Brousseau, Circuit Judge (R. 23-28). At the hearing Petitioner orally moved to strike the motion on the ground that Respondent was no longer in custody (R. 24). After argument by the parties, the trial court refused to set an evidentiary hearing because the court found Respondent was no longer in custody (R. 22).

Respondent appealed the trial court's order to the Second District Court of Appeal. The Second Distirct Court of Appeal again reversed the trial court and remanded the case for further proceedings consistent with its opinion (Appendix). The Second District Court of Appeal's decision was certified to be in conflict with the following cases:

> Bellcase v. State, 406 So.2d 116 (Fla. 5th DCA 1981), pet. for rev. denied, 417 So.2d 328 (Fla. 1982);
>
> Ferguson v. Stone, 415 So.2d 98 (Fla. 4th DCA 1982);
>
> Decker v. State, 476 So.2d 330 (Fla. 4th DCA 1985).

On June 9, 1987, pursuant to Fla.R.App.Proc. 9.030(a)(2)(iv), Petitioner filed its notice to invoke this Court's discretionary jurisdiction.

SUMMARY OF THE ARGUMENT

The purpose of rule 3.850 is to test the legality of a judgment and sentence. Section 948.01(3) of the Florida Statutes and Fla.R.Crim.P. 3.790 specifically provide that sentence not be imposed upon a probationer. This Court has also held that probation is not a sentence. Therefore, a probationer is not "a prisoner in custody under sentence," and thus, has no standing to file a rule 3.850 motion. Should this Court determine that probationers who are incarcerated are under sufficient restraint to satisfy the custody requirement of rule 3.850, the Court's holding should be limited to that circumstance. Probationers who are not incarcerated are neither "in custody" nor "under sentence," and thus, have no standing to seek 3.850 relief.

ARGUMENT

THE OPINION OF THE SECOND DISTRICT COURT OF APPEAL IN BOLYEA v. STATE, 12 F.L.W. 1355 (Fla. 2d DCA May 27, 1987) IS IN CONFLICT WITH THE DECISIONS OF THE FOURTH AND FIFTH DISTRICT COURTS OF APPEAL IN FERGUSON v. STONE, 415 So.2d 98 (Fla. 4th DCA 1982); DECKER v. STATE, 476 So.2d 330 (Fla. 4th DCA 1985); AND BELLCASE v. STATE, 406 So.2d 116 (Fla. 5th DCA 1981), pet. for rev. denied, 417 So.2d 328 (Fla. 1982).

In Bolyea v. State, 12 F.L.W. 1355 (Fla. 2d DCA May 27, 1987), the Second District Court of Appeal held "that a probationer, whether or not incarcerated as a condition of probation, is 'in custody' for purposes of rule 3.850 and may seek post-conviction relief pursuant to that rule." In its opinion, the Second District Court of Appeal certified that this holding was in conflict with the decisions of the Fourth and Fifth District Courts of Appeal in Ferguson v. Stone, 415 So.2d 98 (Fla. 4th DCA 1982); Decker v. State, 476 So.2d 330 (Fla. 4th DCA 1985); and Bellcase v. State, 406 So.2d 116 (Fla. 5th DCA 1981), pet. for rev. denied, 417 So.2d 328 (Fla. 1982). For the following reasons, this Court should follow the decisions of the Fourth and Fifth District Courts of Appeal in Ferguson, Decker, and Bellcase and reverse the Second District Court of Appeal's decision below.

Rule 3.850 of the Florida Rules of Criminal Procedure provides, in pertinent part:

> A prisoner in custody under sentence of a court established by the laws of Florida claiming the right to be released upon the ground that the judgment was entered or that the sentence was imposed in violation of the Constitution or Laws of the United

> States, or of the State of Florida, or that the court was without jurisdiction to enter such judgment or to impose such sentence or that the sentence was in excess of the maximum authorized by law, or that his plea was given involuntarily, or the judgment or sentence is otherwise subject to collateral attack, may move the court which entered the judgment or imposed the sentence to vacate, set aside or correct the judgment or sentence. (emphasis added).

It has long been recognized that persons not in custody are not entitled to relief under rule 3.850. Weir v. State, 319 So.2d 80 (Fla. 2d DCA 1975). This Court has held that a prisoner who files a rule 3.850 motion must actually be claiming a right to be released from custody. Johnson v. State, 184 So.2d 161 (Fla. 1966). This Court has also determined that probation is not a sentence. Villery v. Florida Parole and Probation Commission, 396 So.2d 1107 (Fla. 1980). Accordingly, the Fourth and Fifth District Courts of Appeal have held that a probationer does not have standing to file a rule 3.850 motion because he or she is not a "prisoner in custody under sentence." Ferguson v. Stone, 415 So.2d at 99, n.1; Decker v. State, supra; and Bellcase v. State, 406 So.2d at 117.

In Bellcase, the defendant was placed on probation for a period of five years. As a condition of his probation, the defendant was ordered to serve 11 months and 30 days in jail. After he was released from jail, the defendant filed a 3.850 motion. The Fifth District Court of Appeal held the defendant lacked standing to seek relief under Rule 3.850 because he was neither "in custody" nor "under sentence." Bellcase v. State, 406 So.2d at

117. Relying on Fla.R.Crim.P. 3.790 and this Court's decision in Villery, the court determined that incarceration as a condition of probation was not a sentence under Rule 3.850. Id. The Fourth District Court of Appeal agreed with this reasoning in Ferguson and Decker.

On the other hand, the First District Court of Appeal held in Rita v. State, 470 So.2d 80 (Fla. 1st DCA 1985), pet. for review denied, 480 So.2d 1296 (Fla. 1985), that an individual who was incarcerated awaiting a revocation of probation hearing had standing to file a rule 3.850 motion. In its opinion below, the Second District Court of Appeal not only agreed with the court in Rita, but expanded the holding in Rita to give all probationers standing to file a rule 3.850 motion, regardless of whether they are incarcerated as a condition of probation.

The question of when probation should be considered a sentence is unsettled. E.g., compare Villery v. Florida Parole and Probation Commission, supra, (incarceration as a condition of probation is not a sentence rendering the defendant eligible for parole consideration); Brown v. State, 463 So.2d 1230 (Fla. 1st DCA 1985) (imposition of a sentence of incarceration on a probation violator is not double jeopardy since the order placing the defendant on probation in first instance was not a sentence); Addison v. State, 452 So.2d 955 (Fla. 2d DCA 1984) (defendant who violated his probation after adoption of sentencing guidelines is entitled to elect to be sentenced under guidelines, because order

placing him on probation was not a sentence), with Van Tassel v. Coffman, 486 So.2d 528 (Fla. 1986) ("probation order which includes incarceration as a condition thereof becomes a sentence for the purpose of earning gain time"); Cervantes v. State, 422 So.2d 176 (Fla. 1984) (policy reason requiring separate sentence to be imposed on each separate adjudication of guilt applies equally to orders of probation); Peek v. State, 395 So.2d 492 (Fla. 1980), cert. denied, 451 U.S. 964, 101 S.Ct. 2036, 68 L.Ed.2d 342 (1981) (persons incarcerated as condition of probation or who have escaped from such incarceration at the time of commission of capital felony are persons "under sentence of imprisonment" for purpose of statute allowing such status to be considered an aggravating circumstance); State v. McGraw, 474 So.2d 289 (Fla. 3d DCA 1985), (invalid order of probation constitutes an "illegal sentence" under Section 924.07(5), Florida Statutes, and is, therefore, appealable by the State).

This Court stated recently that in making the determination it is appropriate to consider the policy to be served. Cervantes v. State, 442 So.2d at 177. The purpose of a rule 3.850 motion is to test the legality of a judgment and sentence. The legislature has specifically provided, however, that sentence not be imposed upon a defendant placed on probation. §948.01(3), Fla. Stat. (1985); Fla.R.Crim.P. 3.790. Accordingly, a probationer should not be permitted to file a rule 3.850 motion.

In the instant, case, Respondent was incarcerated as a condition of probation at the time he filed his rule 3.850 motion.

The court in Rita recognized a distinction between probationers who are incarcerated and those who are not. The Rita court considered probationers who were incarcerated to be "in custody" for purposes of rule 3.850. This Court may also decide to recognize such a distinction. Should this Court determine that probationers who are incarcerated as a condition of probation are sufficiently restrained to satisfy the custody requirement of rule 3.850, Petitioner would urge that the Court's holding be limited to that circumstance. Probationers who are not incarcerated are simply not "in custody" or "under sentence." Accordingly, the Second District Court of Appeal's expansive view of standing under rule 3.850 should not be adopted.

CONCLUSION

Based on the foregoing arguments and authorities, the decision of the Second District Court of Appeal should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Paul C. Helm, Assistant Public Defender, Hall of Justice Building, P. O. Box 1640, Bartow, Florida this 14 day of July, 1987.

Kim W. Munch

OF COUNSEL FOR PETITIONER