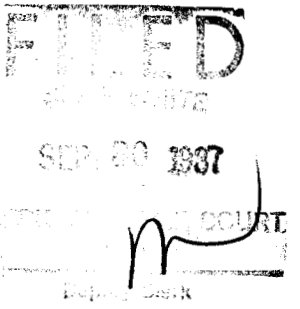
IN THE SUPREME COURT OF FLORIDA



STATE OF FLORIDA,

Petitioner,

V.

THERION FRIERSON,

Respondent,

/

CASE NO. 71, 102

RESPONDENT'S ANSWER BRIEF TO PETITIONER'S BRIEF ON JURISDICTION

THERION FRIERSON, PRO SE
Respondent
3876 Evans Road-Box 50
Polk City, Florida 33868

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AUTHORITIES CITED

STATEMENT OF THE CASE AND FACTS

I Therion Frierson, respondent to the above cited case, was arrested on Febuary 27,1985, for the allege offense of burglary to a structure. On March 20, 1985, I respondent, was charged by information with burglary to a structure. I pleaded not guilty and was found guilty by jury on June 26, 1985, The trial judge, reason for departing from the recommended guideline sentence of two and one half years to three and one half years, was that he found me to be a habitual offender, and sentenced me to ten years.

It appears that the petitioner has procedurally defaulted, when the petitioner submited their brief on jurisdiction on September 14, 1987, at that time, the fifth DCA still helded jurisdiction over the same case. It wasn't until September 16, 1987 that the fifth DCA granted the petitioner's motion to stay mandate, thus relinguishing it's jurisdiction. Moreover, I am sure the fifth DCA also procedurally errored when that court granted the petitioner's motion to stay mandate. See Fl. R. O. Cr. P. Rule 9.340 (a) (b) which requires the issuance of the mandate.

There are no conflicts between the 1st DCA and the 2nd DCA as stated in the petitioner's brief on jurisdiction. simply because the Whitehead v. State, deceision itself is retroactive, and here recently, the 1st DCA and 2nd DCA has receded from their holding in the past.

SUMMARY OF ARGUMENT

Its clair that the petitioner's brief on jurisdiction revolves strictly around the retroactive aspect of the Whitehead deceision, and whether or not, should it apply to my case.
Apparently the petitioner, haven't really research the Whitehead case, because if so, the petitioner, would have discovered that the Whitehead decision itself, is retroactive, being that the decision is based on a occurence dating back. The initial proceeding of the Whitehead, case was instituted in 1985, after the holding by this court in Hendrix v. State, 475 So. 2nd 1218 Fl. 1985. My contention throughout my Fl. R. O. Cr. P. Rule 3.800 (a) motion, were and still the same as Whitehead, contention.

ARGUMENT

During my direct appeal to the fifth district court of appeal, I was precluded by state law from challenging the illegal sentence of (10) ten years on the ground that the trial judge departed the recommended or from the recommended guideline sentence because (he) the judge determine I was a habitual offender. See Vicknair V. State, 483 So. 2d 896 Fla. 5th. DCA. and Howard V. State, 419 So. 2d 216 Fla. 5th. DCA. However, I did attempted on my own to inject this ground in my appeal, but as this court can see from appendix (a) I was prevented.

The rationale for the fifth district court reversal was answered and argued during the Whitehead, decision of 1986. I ask this court to take note that the appellant Whitehead, was also sentenced under the 1983, October 1, sentencing guideline. I farther explains. The case of Whitehead, was initiated in 1985, and this honorable court helded on October 30, 1986, that the habitual offender status was an invalid reason to depart from the recommended guideline sentence. See Whitehead V. State,467 So. 2d 779 Fl 1st. DCA 1986. This court must recognize that all other DCA court's are now adhering to the controlling decision of Whitehead, see Brooks V. State, F.L.W. 1484 Fl.1st. DCA June 16, 1987 , Williamson v. State, F.L.W. 1656 Fl.4th. DCA July 8, 1987, and Hall v. State, F.L.W. 1901 Fl. 1st. DCA August 5, 1987.

I am sure the holding by the 2d DCA in the McCuiston v.State, certainly conflicts with this court's interpertation of the retroactive aspect of the Whitehead, ruling, however, since this holding in the McCuiston, case by the 2d DCA, that court, has rejected the McCuiston, holding. See Zinnermon v. State, F.LW. 2063 2d DCA August 21, 1987.

The main issue by the petitioner, and in the petitioner's argument, is whether or not the Whitehead, decision should be applied retroactive. I think the reconsideration by the 1st. DCA answered that question when it reversed it own previous position in Kiser v. State 505 So. 2d 9 Fl. 1st. DCA 1987. And held that Whitehead, could be utilized in a retroactive collateral attack upon a sentence.
In regards to the petitioner's assertion contained in it's brief on jurisdiction page 5, I totally disagree, where it states that "the actual two-pronged holding in Whitehead,does nothing more than reject the operation of section 775. 084" However, I do agree with the fifth DCA opinion of July 2, 1987, where said opinion explains " departure may be availiable in this case" The opinion farther explained, "upon remand for resentencing the trial judge or court, may not enter a departure sentence in excess of five years" Thus yet allowing use of the named section. But I would like to point out to this court, the petitioner can not use said section for sanction, because none of the requirements were adhere to by the trial court.

Moreover, the petitioner has no other basis for an enhancment of sentence than the habitual offender statute, which were certainly decleared invalid by this court in the Whitehead, decision. See Whitehead v. State, 467 So. 2d 779. Going back in time, in Hendrix v. State, 475 So. 2d 1218 Fl. 1985. This court also helded that written and convincing reason shall reflect on one's scoresheet as reason for departure, which in my case the trial court choose to omit. See appendix (b) I think this court will agree, also see Clement v. State, F.L.W. 1547 Fl.4th.DCA July 3,1987. Also see Patterson v. State, F.L.W. 1796 Fl. 2DCA July 24, 1987. In refer. to the petitioner 's conclusion of argument on page 6, and 7 of the brief on jurisdiction, The petitioner's argument appears be nitted together by one weak and misinterperted opinion of the 2DCA in the McCuiston case, which more or less has been abandon see collection which is attach herein. In regards to page 7 of brief by petitioner the conclusion of said brief argument, I want to point out in refere nce to that appeal by petitioner. Where petitioner requests for an increase in the max. sentence under appropriate circumstances to allow an increased sentence under a departure for reason other than the habitual status, I say to this court, which I have once before proven, that there are no valid reason to support the petitioner's request or departure.

QUOTATIONS OF THE FLORIDA SUPREME COURT

(1)

" To permit departure base on the criteria of the habitual offender statute, however, would confllict with our holding in Hendrix v. State, 475 So. 2d 1218 Fl. 1985".

(2)

" If we permit application of the enhanced penalties available under the habitual offender statute to sentence without parole ', statutory habitual offenders would receive hasher sentences than those the legislature originally envisioned in the enacting habitual offender statute".

(3)

"Accordling, we can not agree with the district court when it finds that habitual offender status is adequate reason to depart from the recommended guideline sentence".

(4)

"Because the trial court used the habitual offender status as it reason for departing from the guideline in sentencing Whitehead, we must remand with directions to district court to return the matter to the trial court for resentencing in accordance with this opinion".

The above quotations of the Florida State Supreme Court seems to render the petitioner's attempt to invoke this court's discretionary jurisdiction pointless.

C O L L E C T I O N S

Brown v. State,

F. L. W. 1528 Fl. 1st. DCA June 23, 1987.

Wilson v. State,

F. L. W. 1716 Fl. 1st. DCA July 15, 1987.

Frierson v. State,

12 F. L. W. 1616 Fl. 5th. DCA July 2, 1987.

FORREST V. STATE,

F. L. W. 1968 Fl. 1st. Dca August 11, 1987.

Gibson v. State,

F. L. W. 1975 Fl. 1st. DCA August 12, 1987.

Barfield v. State,

F. L. W. 2093 Fl. 2DCA August 28, 1987.

Garland v. State,

F. L. W. 2097 Fl. 1st. DCA. September 1, 1987.

HOLLOMAN V. STATE,

F. L. W. 2113 Fl. 4DCA September 2, 1987.

C O N C L U S I O N

Therefore, based on the foregoings, I ask this court to reject the petitioner's move to invoke this court's discretionary jurisdiction, and consider the fact, that I respondent, have legal serve my legal sentence of three and one half years, thus warranting release from prison at forthwith. To detain me longer in prison would only serve to deprive me of the rights afforded me under the Florida Constitution as well as the fourteen amendment of the United States Constitution, which guarantees me due process and equal protection under the law.

I farther request that this court refuse to reconsider the petitioner's issue which has already been answered by this court in Vicknair v. State, 483 So. 2d 896 Fl. 5th. DCA. and order the mandate issued as justice requires. Or if this court must consider the petitioner's semi appeal after apparently procedurally defaulting, I request to be granted a supersedes appeal R. O. R bond, based on the merit contained in appendix (c)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. mail to Bob Butterworth, State Attorney, 125 N. Ridgewood Ave. Daytona Beach, Florida 32014 on the below date.

S/ Therion Frierson
Therion Frierson, Respondent
& pro se

SWORN TO BEFORE ME THIS 28 DAY OF
Sept 1987.

NOTARY PUBLIC STATE OF FLORIDA
MY COMMISSION EXP. AUG 24,1988
BONDED THRU GENERAL INS. UND.

MY COMMISSION EXPIRES _____

S/ Kathy M Finn
NOTARY