IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 71,102

THERION FRIERSON,

Respondent.

PETITIONER'S BRIEF ON THE MERITS

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AUTHORITIES CITED

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STATEMENT OF THE CASE AND FACTS

In 1985 the respondent was convicted of burglary of a structure and sentenced after an habitual offender finding, to ten years in prison, a departure from his recommended guidelines sentence of two and one-half to three and one-half years incarceration. In his direct appeal to the district court, Frierson did not challenge the sentnece imposed and on March 25, 1986, that court affirmed his conviction and sentence without opinion. Frierson v. State, 485 So.2d 835 (Fla. 5th DCA 1986). In his November 18, 1986, motion to correct sentence under Florida Rule of Criminal Procedure 3.800(a), the respondent belatedly challenged the trial court's 1985 departure from the recommended guidelines sentence claiming that the trial court's use of habitual offender classification as a basis for a guidelines departure was improper under this court's subsequent decision in Whitehead v. State, 498 So.2d 863 (Fla. 1986). The trial court judge denied the motion to correct sentence and Frierson appealed.

The Fifth District Court of Appeal reversed the lower court and remanded for a resentencing hearing at which the trial court was precluded from entering a departure sentence in excess of five years and from utilizing habitual offender status alone as a basis for departure. Frierson v. State, 511 So.2d 1016 (Fla. 5th DCA 1987) The rationale for the district court reversal was not argued or discussed by either of the parties whose briefs before the appellate court concentrated upon the retroactivity of Whitehead. Instead the district court, citing Justice Overton's

dissenting opinion in Whitehead, determined that he habitual offender statute was repealed by implication as of October 1, 1983, (the effective date of the guidelines) such that the maximum legal sentence which could have been imposed upon Frierson in 1985 was five, not ten years; thus, because rule 3.800(a) is available at any time to correct an illegal sentence reversal was required.

The petitioner's Motion for Rehearing and/or for Certification of Conflict or Question of Great Public Importance, challenged the district court's reliance upon mere dicta in the Whitehead opinion as the basis for its determination rather than addressing the actual issue of Whitehead's retroactivity in the habitual offender/departure rationale context as argued by the parties before the state trial court and in their appellate briefs. The state noted the uniformity in other district court opinions rejecting the Whitehead dicta to the effect that the habitual offender statute had been repealed by implication and likewise noted that at that time at least two other district courts of appeal had rejected claims that Whitehead was retroactive. The district court denied rehearing and the state filed its Notice to Invoke Discretionary Jurisdiction and a Motion to Stay Mandate with the district court. This court then granted discretionary review based upon the asserted conflict.

SUMMARY OF ARGUMENT

The district court erred in utilizing "dicta" in Whitehead v. State, 498 So.2d 863 (Fla. 1986) as the basis for reversal of the trial court's rejection of Frierson's motion for post-conviction relief. This court in Winters v. State, 522 So.2d 816 (Fla. 1988) has now made it clear that the habitual offender statute was not repealed by implication through enactment of the guidelines. The district court determination that Frierson's sentence was "illegal" and could therefore be challenged by motion for post-conviction relief is accordingly without basis.

Furthermore, the district court's de facto retroactive application of Whitehead in granting the motion for post-conviction relief under the rationale of Witt v. State, 387 So.2d 922 (Fla.), cert. denied, 449 U.S. 1067, 101 S.Ct. 796, 66 L.Ed.2d 612 (1980) was improper. This retroactivity issue is presently pending before this court in at least two other cases and its resolution will necessarily impact upon this case such that the cases should travel together.

ARGUMENT

THE DISTRICT COURT ERRED IN APPLYING THE "DICTA" OF WHITEHEAD V. STATE, 498 SO.2D 863 (FLA. 1986) AS THE BASIS FOR DETERMINING FRIERSON'S SENTENCE "ILLEGAL" AND FOR REVERSAL OF THE TRIAL COURT'S DENIAL OF THE RESPONDENT'S MOTION FOR POST-CONVICTION RELIEF; THE DISTRICT COURT'S RETROACTIVE APPLICATION OF WHITEHEAD SO AS TO REVERSE A DEPARTURE SENTENCE BASED UPON HABITUAL OFFENDER CLASSIFICATION WAS IMPROPER.

Frierson was given a departure sentence based upon habitual offender classification prior to this court's decision in Whitehead v. State, 498 So.2d 863 (Fla. 1986). He challenged his sentence as "illegal" in a motion for post-conviction relief under Florida Rule of Criminal Procedure 3.800(a) and the district court reversed the trial court's denial of that motion holding that, under their perception of the rationale of Whitehead, the habitual offender statute (section 775.084) was "repealed by implication" with the enactment of the sentencing guidelines. Frierson v. State, 511 So.2d 1016, 1017 (Fla. 5th DCA 1987). The Frierson court held that the sentence was therefore "illegal" and could be challenged "at any time" by post-conviction motion because the repeal "by enactment of the guidelines" of the habitual offender statute necessarily rendered invalid any sentence in excess of the statutory maximum of five years. Id. This court has since made clear that the habitual offender statute was not repealed by implication with the enactment of the guidelines. Winters v. State, 522 So.2d 817 (Fla. 1988) Accordingly, the entire rationale for the district

court's decision has been invalidated, i.e., since the habitual offender statute was not repealed and could in fact serve as the basis for imposing a ten year sentence upon Frierson in 1985 the perceived "illegality" justifying post-conviction relief does not exist such that the decision should be reversed.

The district court's decision to rely upon the "repeal by implication" rationale as basis for reversal made it unnecessary to specifically address the challenge to the retroactive application of Whitehead raised by the state as the basis for upholding the trial court's rejection of Frierson's motion for post-conviction relief. Although the district court did make passing reference to the conflict which has arisen as to the retroactive application of Whitehead in footnote 2 of its opinion it did not specifically decide that issue such that this court could, should it see fit, remand for reconsideration since the stated basis for the district court opinion has now been rejected in Winters. However, since the question of Whitehead's retroactivity does clearly exist in this case and is in fact pending before this court in other cases[1] the issue should likewise be resolved in this cause.

The state urges this court to adopt the reasoning and holding of the Second District Court of Appeal that under Witt v. State, 387 So.2d 922 (Fla.), cert. denied, 449 U.S. 1067, 101 S.Ct. 796, 66 L.Ed.2d 612 (1980), the ultimate invalidation by

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[1] McCuiston v. State, 507 So.2d 1185 (Fla. 2d DCA 1987); Hall v. State, 511 So.2d 1038 (Fla. 1st DCA 1987)

this court of habitual offender status as a reason for departure (where that basis was previously recognized as valid in every lower appellate court) does not constitute a fundamental change of law warranting post-conviction relief for those individuals whose sentences have become final. Gilmore v. State, 13 F.L.W. 1393 (Fla. 2d DCA June 8, 1988); Rowe v. State, 523 So.2d 620 (Fla. 2d DCA 1988); Cusic v. State, 512 So.2d 309 (Fla. 2d DCA 1987); McCuiston v. State, 507 So.2d 1185 (Fla. 2d DCA 1987). See also, Kiser v. State, 505 So.2d 9 (Fla. 1st DCA 1987); Ardley v. State, 491 So.2d 1259 (Fla. 1st DCA 1986). Although the First District Court of Appeal has since retreated from Kiser and Ardley in Hall v. State, 511 So.2d 1038 (Fla. 1st DCA 1987) relying upon this court's decision in Bass v. State, 12 F.L.W. 289 (Fla. June 11, 1987), the petitioner notes that Bass is still pending on rehearing and that the district court in Hall had obvious difficulty with reconciling Bass and Witt and chose to follow the Bass decision only because it considered itself bound by "the controlling precedent on the issue". The petitioner urges this court to resolve this case and the retroactivity issue by reaffirming the well-reasoned standard of Witt and the rationale of Rowe and Kiser. Changes in guidelines law do not merit retroactive application. Indeed, the potential flood of litigation through post-conviction filings and the obvious lack of finality in sentencing militate against application of retroactivity to each decision which changes the application of the guidelines sentencing procedures or removes a previously accepted rationale departure. The frequency of guidelines law

changes under our relatively new procedure is evident, and the changes themselves are certainly of non-constitutional dimension, such that this court should, like the Witt tribunal, reject the use of post-conviction proceedings in the context of an alleged change in guidelines decisional law. 387 So.2d at 928-929. The "limited role for post-conviction relief proceedings" restated by the Witt court and the clear lack of any change of constitutional magnitude arising from changes in guidelines sentencing interpretations necessarily mandates a non-retroactive application of such changes to assure finality in state criminal procedures and to avoid the inundation of state trial and appellate courts with resentencing claims based upon each new edition of appellate advance sheets.

CONCLUSION

Based on the arguments and authorities presented the petitioner respectfully requests this court to vacate the district court decision reversing the trial court's denial of Frierson's motion for post-conviction relief.

Respectfully submitted,

ROBERT A. BUTTERWORTH
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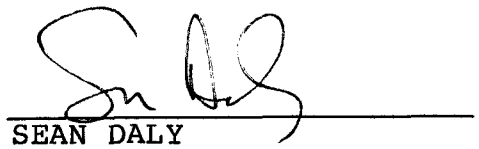

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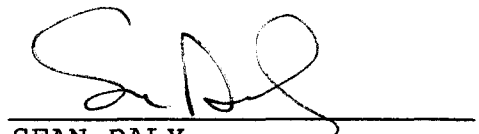
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Petitioner's Brief on the Merits has been furnished by mail, to Therion Frierson, pro se, at 1634 Ravenal Avenue, Richmond Heights, Orlando, FL 32811, this 1st day of July, 1988



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