

IN THE SUPREME COURT OF FLORIDA

**FILED**

SID J. WHITE

MAY 18 1968

CLERK, SUPREME COURT

By \_\_\_\_\_ Deputy Clerk

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THOMAS ALVIN CONNELL, ]

Petitioner, ]

vs.. ]

JERRY WADE, ]

Respondent. ]

Case No. 71,777 Deputy Clerk

REPLY BRIEF OF PETITIONER  
THOMAS ALVIN CONNELL

THOMAS ALVIN CONNELL, 101802  
Petitioner, pro se

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PRELIMINARY STATEMENT

THOMAS ALVIN CONNELL will be referred to as the "Petitioner in this brief, JERRY WADE being named as the representative of the State of Florida, having lawful custody of Petitioner is named as the "Respondent". Reference will be made to the date and type of hearing as the Petitioner has not had benefit of the Record of Appeal only briefs and transcripts that have been at issue in prior proceedings before the District Court of Appeal. The pages referred to in the argument are contained in the briefs filed in Connell vs State, 502 So2d.1272 (Fla.2 DCA 1987) and are cited from that record.

STATEMENT OF THE CASE

The Petitioner was charged with one(1) count of sexual battery, violation of Florida Statute § 794.011(4) (1983) and lewd and lascivious assault, violation of Florida Statute § 800.04(1983) one(1) count. The events which formed the basis of the criminal allegations were alleged to have occurred between February 1,1983 and July 31,1983.

Petitioner had a jury trial and on February 2,1984 was found guilty on both counts. The trial judge prior to sentencing entered an order for a new trial because of a violation of the Rules of Discovery by the State, this was done on September 6,1984. The State appealed the order of the new trial, see State vs Connell, 478 So2d.1176(Fla.2 DCA 1985), the new trial order was reversed and the Petitioner was sentenced on February 13,1986.

The guideline scoresheet presented to the trial court to be used in the Sentencing of Petitioner was in error and this was pointed out to the trial judge who agreed to the error, the trial judge acknowledged that the correct guideline range was five(5) years but cited four(4) reasons for departure and enhanced the sentence imposed. Petitioner filed a Direct Appeal to the Second District Court of Florida see, Connell vs State, 502 So2d.1272(Fla.2 DCA 1987), the District Court reversed the enhanced sentence back to the trial court citing the reasons for departure as not being

clear and convincing. Petitioner was resentenced by the trial court on April 8, 1987 using the guideline in effect at the time of resentencing to two(2) terms of imprisonment of nine(9) years to be served concurrent. Petitioner made an objection to the enhanced sentence at the hearing, citing that the original scoresheet should be used, this argument was rejected by the trial judge citing that the guideline in effect at that time controlled. Petitioner filed an appeal to the Second District Court of Appeal of Florida, see Connell vs State, 517 So2d.77(Fla.2 DCA 1987). The Appellant Court ruled that State vs Jackson 478 So2d. 1054(Fla.1985) controlled.

Petitioner filed a Petition for Writ of Habeas Corpus to this Honorable Court and was granted review.

A matter of most grave error is contained in the Statement of the Case as filed by the State, that is the Petitioner has not had a second trial, this issue is addressed in the Argument of this Brief. There was but one (1) trial.

SUMMARY OF ARGUMENT

Petitioner was charged with crimes alleged to occurred prior to the effective date of the Sentencing Guidelines, Florida Statute 921.001(1983) but went to trial and was found guilty of alleged crimes after the Sentencing Guidelines went into effect. A provision was made in the Sentencing Guidelines that if elected, you could be sentenced under this Statute, specifically subsection (4)(a). Had not the State failed to conform with the Florida Rules of Criminal Procedure and Petitioner had not had to appeal an illegal sentence, Petitioner would have been sentenced at the same time the co-defendant was sentenced under the first guideline enacted, In re Rules of Criminal Procedure, 439 So2d.848(Fla.1983). Ruling by the Second District Court of Appeal in the issues presented by the Petitioner are in direct conflict with decisions of this Honorable Court and other courts.

ARGUMENT

WHETHER, THE TRIAL COURT ERRED BY USING THE GUIDELINE IN EFFECT AT THE TIME OF RESENTENCING RATHER THAN THE GUIDELINE SCORESHEET PREPARED FOR ORIGINAL TIME OF SENTENCING AND SHOULD PETITIONER BE PENALIZED FOR APPEALS ?

Petitioner directs this Honorable Court's attention to grave errors and untrue statements contained in the Respondent's Statement of the Case. Respondent claims that Petitioner has had a second trial and been found guilty a second time, these are not true statements and would mislead this court to believe that the Petitioner has misrepresented the facts of the case. Petitioner was granted a "NEW TRIAL" after a full inquiry (Post-Trial Richardson Inquiry) had been evaluated and decided. In the opinion of State vs Connell, 478 So2d.1176 (Fla.2 DCA 1985), it is clear that the Second District Court of Appeal reversed the trial court's order and reinstated the prior guilty verdicts against Petitioner. Mr. Welch was the Attorney of Record in Connell vs State, 502 So 2d.1272 (Fla.2 DCA 1987) and is full aware that there was not a subsequent trial, this is contained in the briefs used to argue the issues. This error is unexcusable and supports Petitioner's statement that a new trial at this point cannot be fair and impartial because of continuing disregard of Petitioner's rights violations by the State (Prosecution).



Respondent claims that no objection was made by the Petitioner but according to the brief filed in Connell vs State, 502 So2d.1272, the objections were made and can be found in the record at pp.R-541,602,605 as well as in the above appeal. The Trial Judge agreed that the correct guideline sentence was four and one half (4½) to five and one half (5½) years incarceration but then used four (4) reasons to depart from the guidelines that were held to be invalid in the above cited case (86-496,2 DCA). A guideline scoresheet was prepared for the Petitioner (see App.A-1) to be used at Petitioner's initial sentencing that was set for April 3, 1984, the day after the co-dendant's sentencing hearing. The trial court was made aware that the co-defendant confessed to PERJURY and the sentencing was continued until May 1, 1984. At this hearing the trial court was made aware that the STATE FAILED TO COMPLY WITH THE RULES OF DISCOVERY, this is not and cannot be attributed to any actions of the Petitioner, to the contrary, the delay in sentencing is because of the actions of the state. First, the state fails to comply with Discovery then appeals the order that results from their failure, first delay. Second, the trial court cites four reasons for departure, Petitioner defends a second issue not as a result of his actions, these delays are brought by the State, Petitioner is only exercising

his constitutional rights to be free from an illegally imposed sentence by the trial court.

This court has held in Troupe vs Rowe, 283 So2d.857 Fla.1973) that;

This Court held that once a defendant has been sentenced, double jeopardy attaches and a court may not thereafter on its own motion increase the severity of the sentence....(Emphasis added)

The trial court was without jurisdiction to impose a more severe sentence, once the trial court agreed that the correct sentence was the five(5) year range unless Petitioner is to be penalized for defending appeals. Accordingly this court opined that;

In matters of punishment, the Legislature's determination will be sustained against due process challenges unless the punishment itself is cruel and unusual. U.S.C.A. Const. Amends. 8 and 14, citing State vs Bailey, 360 So2d.772(Fla.1978)

Florida Statute 921.001(1983) has been upheld by the U.S. Supreme Court as being valid and there is no case law that refutes this statement, see Miller vs Florida, 107 S.Ct.2446(1987). Florida Statute 921.001(4) (a) (1983) is very clear that if the crimes occurred before the effective date of the enactment of the guidelines and were not capital or life felonies, the defendant could elect to be sentenced under the guidelines, Petitioner did affirmatively elect to be sentenced under the guidelines.

This was acknowledged in both Connell vs State, 502 So2d. 1272 (Fla.2 DCA 1987) and Connell vs State, 517 So2d.77 (Fla.2 DCA 1987). In Adams vs Wainwright, 512F.Supp.948 (Fla.ND 1981), ~~was~~ reasoned that once limitations were imposed, it would be a violation of DUE PROCESS to alter these limits, then applying Bailey, supra would further give support to the Petitioner's claim, the statute has not been ruled cruel and unusual.

Petitioner would again request this court to review the reason as to why it took two(2) years to sentence Petitioner and another year to correct the sentence imposed, these actions were initiated as a result not of the actions of Petitioner but of the State's actions. The relief sought by the Petitioner is clearly supported by the trial record and the Record of Appeal.

Respondent refers to the EX POST FACTO CLAUSE of the Constitution and his argument is that this should not apply. This statement is without merit as the Petitioner's case most certainly should be considered as violating the EX POST FACTO CLAUSE of the Constitution. **The** United States Supreme Court in a recent opinion stated;

Our test for determining whether a criminal law is EX POST FACTO derives from these principles. As we stated in Weaver, to fall within the EX POST FACTO prohibition, two critical elements must be present: first, the law "must be retrospective, that is, it

must apply to events occurring before its enactment"; and second "it must disadvantage the offender affected by it". citing Weaver vs Graham, 450 US.24,101 S.Ct.960, '67 L.Ed.2d.17(1981) as contained in Miller vs Florida, 107 S.Ct. 2446(1987) at page 2451

Petitioner invoked the right to be sentenced by Florida Statute § 921.001(1983), since this was a right granted to him by subsection (4)(a). This right was guaranteed by and defined by an act of the Legislation, Petitioner was only exercising this right. Petitioner was most certainly disadvantaged by the enactment of the revised guidelines. The co-defendant was sentenced by the first guidelines enacted. The only reason the Petitioner was not sentenced is because the trial court was made aware of multiple errors in his trial. The trial judge made inquiries as to protect the rights of the Petitioner, his right to a fair and impartial trial that he was clearly deprived of as the record reflects. Petitioner implores this Honorable Court to not limit their review to only the sentencing error but to address and settle all the issues raised by the Petitioner and apply the applicable case law of this Court and DISCHARGE the Petitioner, REVERSE the convictions and DISMISS the information due to the continuing violations of the Petitioner's Rights as guaranteed by the Constitutions of Florida and the United States.

CONCLUSION

Whereas, Petitioner has applied the applicable case law as defined by this Honorable Court and the United States Supreme Court to support the requested relief. Petitioner further requests this Court to consider all the issues that are before this court and resolve the issues in favor of the Petitioner as he has only presented true issues and supported the issues with case law. The Petitioner would request this Honorable Court to consider the most severe sanction to be imposed for the continuing violations by the State as exemplified even in this brief. The Petitioner's rights have been violated to such an extent that there could be no guarantee that a new trial would be free of prejudice.

Petitioner has supported the requested relief of his illegal sentence with case law that shows that he is entitled to immediate release.

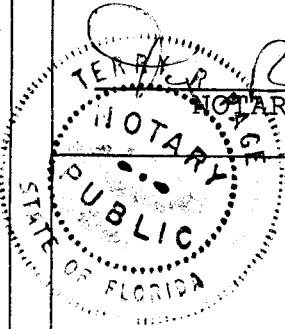
Respectfully Submitted,

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Petitioner, pro se

SWORN AND SUBSCRIBED TO BEFORE  
me the undersigned authority on  
this 13 day of May, 1988.

*Terry R. Page*  
\_\_\_\_\_  
NOTARY PUBLIC

NOTARY PUBLIC STATE OF FLORIDA  
MY COMMISSION EXP. DEC. 3, 1988  
BONDED THRU GENERAL INS. UND.



Terry R. Page 10-  
Notary Public  
State of Florida  
County of Hendry

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Reply Brief of Petitioner" has been furnished by U.S. Mail to GARY O. WELCH, Asst. Attorney General, Park Trammel Bldg., 1313 Tampa Street, Tampa, Florida 33602 on this 13 day of May, 1988.

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