

IN THE SUPREME COURT OF FLORIDA

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CASE NO. 72,864

BARRY PAUL GILMORE,)
Petitioner,)
v.)
STATE OF FLORIDA,)
Respondent.)

INITIAL BRIEF OF PETITIONER ON THE MERITS

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I. PRELIMINARY STATEMENT

Barry Paul Gilmore was the Defendant in the trial Court, Appellant before the District Court of Appeal, Second District, and will be referred to in this brief as "Petitioner," "Defendant," or by his proper name. Filed with this brief is an appendix containing a copy of the decision of the lower tribunal under review, as well as other matters pertinent to the issues presented. Reference to the appendix will be by use of the symbol "A" followed by the appropriate page number in parentheses.

STATEMENT OF THE CASE AND FACTS

In February 1986 the Petitioner, Barry Gilmore, was convicted of one count of burglary of a dwelling in violation of Fla. Stat. Sec. 810.02(3), and one count of grand theft in violation of Fla. Stat. Sec. 812.014 (A. 1-2). The Trial Judge sentenced the Petitioner to two concurrent terms in excess of that provided by the sentencing guidelines (A. 3-5). Specifically, the Petitioner was sentenced to concurrent terms of twenty-five years for burglary of a dwelling and ten years for grand theft. The only justification given by the Trial Court for departing from the sentencing guidelines range of seven to nine years was that Petitioner was a habitual offender (A. 3-5).

Subsequent to the Petitioner's sentencing, the Florida Supreme Court issued it's opinion in Whitehead v. State, 498 So.2d 863 (Fla. 1986) where the court held that departures from sentencing guidelines are illegal when the sole justification given by the Trial Court for the departure is that the Petitioner is a habitual offender. Since the Petitioner's habitual offender status was the sole justification given by

the Trial Judge for his guideline sentence departure in the subject case, the Petitioner filed, on February 9, 1987, a pro-se post-conviction motion pursuant to Florida Rules of Criminal Procedure 3.800 and cited Whitehead as the basis of his motion (A. 6-9). The Trial Court appointed the public defender to represent the Petitioner and after a hearing, on April 22, 1987, (A. 10-24) the Trial Court denied the Petitioner's motion (A. 29).

Petitioner timely took an appeal to the District Court of Appeal, Second District on April 29, 1987 (A. 25).

On appeal, the District Court held (A. 31-32) that the intervening Whitehead case could not be retroactively applied to Petitioner's sentence for the reasons the District Court expressed in McCuiston v. State, 507 So.2d 1185 (Fla. 2d DCA 1987) rev. pending, Case #70,706; Cusic v. State, 512 So.2d 309 (Fla. 2d DCA 1987) rev. pending, Case #71,268; and Rowe v. State, 523 So.2d 620 (Fla. 2d DCA 1988) rev. pending, Case #72,398, all of which cases are currently pending before the Florida Supreme Court. The District Court went on to certify this case in conflict with Hall v. State, 511 So.2d 1038 (Fla. 1st DCA 1987) rev.

pending, Case #71,078, also currently pending before the Florida Supreme Court.

Notice of invoking this Court's discretionary jurisdiction was timely filed on August 4, 1988. By Order dated August 9, 1988 this Court issued a briefing schedule requiring the initial brief on the merits be filed on or before September 6, 1988.

POINT ON APPEAL

WHETHER IT WAS ERROR TO DENY
PETITIONER'S POST CONVICTION MOTION
TO CORRECT SENTENCE WHICH DEPARTED
FROM THE SENTENCING GUIDELINES
SOLELY BECAUSE OF HIS STATUS AS A
HABITUAL OFFENDER WHERE SUCH
DEPARTURE IS INVALID UNDER A SUPREME
COURT DECISION RENDERED AFTER THE
ORIGINAL SENTENCE WAS IMPOSED.

SUMMARY OF ARGUMENT

The issue presented is whether the trial Court erred in denying the Petitioner's post conviction Motion to correct a sentence which departed from the sentencing guidelines solely because of his habitual offender status. The Florida Supreme Court in Whitehead v. State, 498 So.2d 863 (Fla. 1986) held that a convicted defendant cannot be sentenced to a term departing from the sentencing guidelines where the only justification given for the departure is that the defendant is a habitual offender.

Since the decision in Whitehead does not constitute a change in the law, but merely corrected mistakes in the implementation of the habitual offender statute, Fla. Stat. Sec. 775.084, the Petitioner is entitled to the benefit of Whitehead regardless of the fact that he was sentenced before Whitehead was decided.

Applying the rationale of the Florida Supreme Court's decision in Bass v. State, 12 F.L.W. 289 (Fla. June 11, 1987) (motion for rehearing pending) to the instant case leads to the conclusion that the Petitioner is entitled to the benefit of Whitehead v.

State, 498 So.2d 863 (Fla. 1987).

The fundamental nature of the error corrected in Whitehead v. State, 498 So.2d 863 (Fla. 1987) requires that the holding in Whitehead be retroactively applied to the Petitioner's sentencing.

The identical issue presented in this Petition is currently pending before the Florida Supreme Court in McCuiston v. State, 507 So.2d 1185 (Fla. 2d DCA 1987) rev. pending, Case No. 70,706; and Frierson v. State, 511 So.2d 1016 (Fla. 5th DCA 1987) rev. pending, Case No. 71,102; Hall v. State, 511 So.2d 1038 (Fla. 1st DCA 1987) rev. pending, Case No. 71,078; Cusic v. State, 512 So.2d 309 (Fla. 2d DCA 1987) rev. pending, Case No. 71,268; Rowe v. State, 523 So.2d 620 (Fla. 2d DCA 1988) rev. pending, Case No. 72,398.

ARGUMENT

WHETHER IT WAS ERROR TO DENY
PETITIONER'S POST CONVICTION
MOTION TO CORRECT SENTENCE
WHICH DEPARTED FROM THE
SENTENCING GUIDELINES SOLELY
BECAUSE OF HIS STATUS AS A
HABITUAL OFFENDER WHERE SUCH
DEPARTURE IS INVALID UNDER A
SUPREME COURT DECISION RENDERED
AFTER THE ORIGINAL SENTENCE WAS
IMPOSED.

THE FLORIDA COURTS CANNOT DEPART FROM THE
SENTENCING GUIDELINES, FLA. STAT. SEC.
921.001(4)(a), ON THE GROUNDS PETITIONER
IS A HABITUAL OFFENDER

The Florida Supreme Court in Whitehead v. State,
498 So.2d 863 (Fla. 1986) held that a convicted
defendant cannot be sentenced to a term departing from
the sentencing guidelines where the only justification
given for the departure is that the defendant is a
habitual offender.

The Court reasoned that since a defendant's
criminal record is scored into the presumptive
sentence of the guidelines, Fla. Stat. 921.001(4)(a),
and a defendant's dangerousness is equally
accommodated by the guidelines, the Court cannot
depart from the guidelines merely on the basis that

defendant is a habitual offender. Whitehead, at 865. Further, the Court said that the habitual offender status is not an adequate reason for departure from the guidelines because it would improperly allow sentences to be enhanced by factors already included in the presumptive guidelines sentence. Whitehead, 866.

THE TRIAL COURT AND SECOND DISTRICT COURT
OF APPEAL ERRED IN NOT APPLYING THE
HOLDING OF WHITEHEAD RETROACTIVELY TO
SENTENCES IMPOSED PRIOR TO THE RENDITION
OF WHITEHEAD

The Trial Court denied the Petitioner's post-conviction Motion on the grounds that Whitehead did not apply because it was decided after Petitioner's sentencing (A. 18-23).

However, Petitioner Gilmore is entitled to the relief provided in Whitehead regardless of the fact that he was sentenced prior to the Whitehead decision. The decision in Whitehead did not constitute a change in the law of sentencing, but merely corrected mistakes in the implementation of the habitual offender statute, Fla. Stat. Sec. 775.084(3), in light of the legislative enactment of the sentencing guidelines, Fla. Stat. Sec. 921.001(4)(a), Whitehead,

at 865-866.

THE FLORIDA SUPREME COURT HAS HELD THAT A
DEFENDANT IS ENTITLED TO THE BENEFIT OF A
SUBSEQUENT COURT DECISION EVEN IF THE
DECISION WAS ISSUED AFTER DEFENDANT'S
SENTENCING

The Florida Supreme Court in Bass v. State, 12 F.L.W. 289 (Fla. June 11, 1987) (motion for rehearing pending) held that the defendant Bass was entitled to the benefit of the Court's decision in Palmer v. State, 438 So.2d 1 (Fla. 1983) in spite of the fact that Palmer was decided subsequent to Bass' direct appeal. The Court in Bass reasoned that the decision in Palmer did not change the law, but merely corrected the scope of the trial Court's statutory duty to make parole computations. Bass, at 289.

The instant case cannot be meaningfully distinguished from Bass. In both cases the Court is confronted with sentencing errors not known to the lower courts until, in the case of Mr. Bass, the Florida Supreme Court decided Palmer, or until, in the case of Mr. Gilmore, the Florida Supreme Court decided Whitehead. Both decisions do not make any changes in the law, but simply correct mistakes in the

implementation of the habitual offender statute in light of the legislative enactment of the sentencing guidelines. Whitehead, at 865.

THE HOLDING IN WHITEHEAD v. STATE OPERATES TO CURE FUNDAMENTAL ERROR BECAUSE IT SERVES TO CORRECT SENTENCES WHICH EXCEED LEGAL LIMITS

The holding in Whitehead v. State, 498 So.2d 863 (Fla. 1986) operates to prevent the imposition of sentences that exceed legal limits. Whitehead, at 866. Whenever a defendant is subjected to a sentence greater than that provided by law, then fundamental error occurs. Lawson v. State, 400 So.2d 1053 (Fla. 2d DCA 1981), Cisnero v. State, 458 So.2d 377 (Fla. 2d DCA 1984), Vause v. State, 502 So.2d 511 (Fla. 5th DCA 1987). Thus, the application of Whitehead to the case at bar would operate to cure fundamental error, to-wit, the sentencing of Petitioner to a term greater than that provided by the legislatively enacted sentencing guidelines.

THE HOLDING IN WHITEHEAD v. STATE APPLIES RETROACTIVELY TO CORRECT THE FUNDAMENTAL ERROR IN DEFENDANT'S SENTENCING

In light of Whitehead v. State, Petitioner

Gilmore's sentence exceeds that provided by law, and the holding in Whitehead should retroactively apply to cure the fundamental error of the Petitioner's sentence. Palmer v. State, 438 So.2d 1 (Fla. 1983), Cisnero v. State, 458 So.2d 377 (Fla. 2d DCA, 1984). In Cisnero this court reasoned that retroactive application of Palmer was needed to cure the fundamental error in sentencing a defendant to consecutive minimum mandatory sentences for crimes arising out of a single episode. Cisnero, at 378.

The present case and Cisnero cannot be meaningfully distinguished. In both cases the sentences originally imposed were later declared illegal by the Florida Supreme Court. It is therefore, necessary that Whitehead be applied retroactively to cure the fundamental error in Petitioner Gilmore's case.

THE SECOND DISTRICT IS ALONE IN HOLDING
THAT WHITEHEAD IS NOT RETROACTIVE

The Petitioner recognizes that the Second District Court of Appeal has held contra to Petitioner's position in recent cases, McCuiston v. State, 507 So.2d 1185 (Fla. 2d DCA 1987); Cusic v. State, 512 So.2d 309 (Fla. 2d DCA 1987) and Rowe v.

State, 523 So.2d 620 (Fla. 2d DCA 1988). It should however be noted that the First District Court of Appeal decisions, Kiser v. State, 455 So.2d 1071 (Fla. 1st DCA 1984) and Ardley v. State, 491 So.2d 1259 (Fla. 1st DCA 1986), relied upon by the Second District Court of Appeal in McCuiston and Cusic were distinguished by the First District Court of Appeal in Hall v. State, 511 So.2d 1038, 1044 (Fla. 1st DCA 1987) rev. pending, Case #71,078. Furthermore, in Hall the Court held that in light of Bass v. State, 12 F.L.W. 289 (Fla. June 11, 1987) (motion for rehearing pending) the decision in Whitehead v. State is to be retroactively applied to those sentences imposed before Whitehead was decided.

Additionally the Second District Court of Appeal now finds itself alone among the Districts in not holding Whitehead retroactive; the Third and Fifth District Court of Appeals have joined the First District in holding Whitehead retroactive. Early v. State, 516 So.2d 24 (Fla. 3d DCA 1987); and Frierson v. State, 511 So.2d 1016 (Fla. 5th DCA 1987) rev. pending, Case #71,102, respectively.

PETITIONER'S FAILURE TO RAISE THE LEGALITY
OF HIS SENTENCE AS AN ISSUE AT HIS
SENTENCING DOES NOT PRECLUDE HIM FROM
DOING SO IN POST-SENTENCE PROCEEDINGS

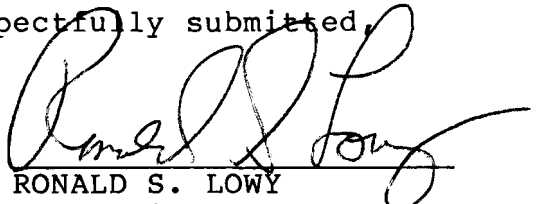
The fact that the courts and the bar did not know what interpretation the Florida Supreme Court would give to the application of the Habitual Offender Statute, in light of the sentencing guidelines, does not render Mr. Gilmore's sentence legal, but does excuse his failure to raise the matter at his sentencing. Bass v. State, 12 F.L.W. 289 (Fla. June 11, 1987) (motion for rehearing pending). Furthermore, because Mr. Gilmore's motion sought to correct a sentence which exceeds the legal limits provided by law, the motion could be filed at any time. Fla.R.Crim.P. 3.800.

CONCLUSION

For the reasons stated herein the Petitioner requests that this Court vacate his sentence, and that his case be remanded to the trial Court for resentencing within the range provided by sentencing guidelines, Fla. Stat. Sec. 921.001(4)(a), and removal of the Petitioner's habitual offender status from the Trial Court's Judgment.

Respectfully submitted,

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