Allowed brief for Gilmore v. ft. #72,864

IN THE SUPREME COURT OF FLORIDA

GREG EDWARD CUSIC,
Petitioner,

vs. Case No.: 71,268

STATE OF FLORIDA,
Respondent. /

ON DISCRETIONARY REVIEW FROM THE
DISTRICT COURT OF APPEAL
SECOND DISTRICT, FLORIDA

INITIAL BRIEF OF PETITIONER

Greg Edward Cusic #226410
Apalachee Correctional Inst.
Post Office Box 699W N-45
Sneads, Florida 32460

PETITIONER IN PROPER PERSON

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PRELIMINARY STATEMENT

Petitioner, Greg Edward Cusic, the defendant, will hereinafter be reffered to as the "petitioner" or by his proper name. Respondent, the State of Florida, the prosecuting authority below, will be reffered to as the "State".

SUMMARY OF ARGUEMENT

The petitioner asserts the issue posed by this review, however, concerns the significance of a change in d ecisional fundamental lawon the application of the Habitual Offender Statute §. 775.084(3) Fla. Stat.(1983). This Court answered the question of determining the continued viability of the habitual offender statute in light of the subsequently enacted sentencing guidelines, in the case of Whitehead v. State, 498 So.2d 863 (FLA. 1986). The Court also ruled in the recent case of Hall v. State, 12 FLW 1901 (Fla. 1st DCA August 5, 1987).

That it would be inherently unjust to allow such because

the imposition of an illegal sentence even if the court was unaware of its illegality without providing a mechanism to attack that sentence.

STATEMENT OF THE CASE AND FACTS

The petitioner was convicted and sentenced in 1985. Cusic's conviction and sentence were affirmed by the Second DCA, see Cusic v. State, 490 So.2d 950 (Fla. 2d DCA 1986).

On July 6, 1987, the petitioner filed a Motion to Correct an Illegal Sentence alleging that the Court erred by going outside the recommended sentence the petitioner was sentenced to a eight year sentence, solely based on the fact that the petitioner is an habitual offender.(see App. A).

On July 24, 1987, the State filed it's response to the motion arguing that the petitioner was barred from relief under this motion because because the law of the case precludes the litigation of "all issues upon appeal could have been taken, but which were not appealed".(see App. B).

An Order Denying Motion to Correct an Illegal Sentence was filed by the Court on July 27, 1987.(see App. C).

The petitioner filed a Notice of Appeal on August 10, 1987.(see App. D). On September 11, 1987, the Second District Court of Appeal, filed an opinion and affirmed the denial of Cusic's motion on the authority of McCuiston v. State, 507 So.2d 1185 (Fla. 2d.DCA 1987).(see App. E).

On October 5, 1987, the petitioner filed a Notice to Invoke Discretionary Jurisdiction of this Court due to the ackowledged conflict with the case of Hall v. State, 12 FLW 1901 (Fla. 1st DCA August 5, 1987).(see App. F). On October 12, 1987 and November 13, 1987, all brief were filed by both parties acknowledging the conflict. On January 26, 1987, this Court accepted jurisdiction on the case.(see. App. G).

ARGUMENT

ISSUE PRESENTED

IS THE PETITIONER PERMITTED TO ATTACK COLLATERALLY THE LEGALITY OF HIS GUIDE-LINE SENTENCE BY RULE 3.850/3.800(a) ON THE BASIS THAT THE SOLE REASON FOR DEPARTURE, HIS STATUS AS A HABITUAL OFFENDER, ALTHOUGH VALID UNDER A LOWER COURT DECISION AT THE TIME IMPOSED, IS INVALID UNDER A SUBSEQUENTLY ISSUED SUPREME COURT DECISION ENUNCIATING A DIFFERENT CONSTRUCTION OF THE SENTENCING STATUES AND SENTENCING GUIDELINES RULE?

In this proceeding this Court must balance the interests of [fairness] and uniformity for the petitioner against the interests of decisional finality, in the context of alleged subsequent favorable changes of law. This court must also decide whether a Motion to Correct an Illegal sentence pursuant to Rule 3.800(a) can be used also as a mechanism to attack a illegal sentence. As where in Hall v. State, supra the First DCA ruled that a illegal sentence could be attacked by Rule 3.850, simply because courts were unaware of its illegality at the time of imposition of the sentence, see 12 FLW at 1902 .

A

The Second District Court of Appeals' affirmed the denial of Cusic's motion pursuant to Rule 3.800(a) on the authority of McCuiston v. State, 507 So.2d 1185 (Fla. 2d DCA 1987) see App. E. And the mandate was issued on September 29, 1987, see App. E-3. In the case of McCuiston, he had appealed the summary denial of his motion for post-conviction relief pursuant to Rule 3.850. The District Court had answered the squarely present issue of whether or not Whitehead v. State, supra, is to applied "retroactively". In other words, is the rule of Whitehead a change of law sufficient to support a challenge to a conviction and sentence that was valid when made?

Only the Florida and United States Supreme Courts can adopt a change in law sufficient to support such a change or challenge.— Witt v. State, 465 So.2d 510,512 (FLA. 1985), citing Witt v. State, 387 So.2d 922 (FLA. 1980)(Witt I).

The court went futher and cited Kiser v. State, 505 So.2d 9 (Fla. 1st DCA 1987). the court reasoned:

> In Witt v. State, 387 So.2d 922 (FLA. 1980), the Florida Supreme Court held that only fundamental and constitutional law changes which cast serious doubt on the veracity or integrity of the orignal trial proceedings will be grounds for allowing post-conviction relief. 387 So.2d at 929.

The disapproval of a previously valid reason for departure from the sentencing guidelines is not such a change.

Ardley v. State, 491 So.2d 1259 (Fla. 1st DCA 1986).

And thus, this, opinion authorized the affirmed judgment of the petitioner. But in doing so the Second DCA also acknowledged a conflict in its decision with a case that was decided a little more than two months after McCuiston which was Hall v. State, 12 FLW 1901 (Fla. 1st DCA August 5, 1987).

B

In the case of Hall he appealed the trial court's denial of his motion for post-conviction relief pursuant to Rule 3.850 FLA. R. CRIM. P. . And the First DCA approved Hall's habitual-offender status as valid reason for departure, citing Shull v. State, 481 So.2d 1294 (Fla. 1st DCA 1986) but reversed and remanded for resentencing because the reason for departure had not been reduced to writing, citing Cutbert v. State, 459 So.2d 1098,1100 n.3 (Fla 1st DCA 1984). At resentencing on July 21, 1986, the trial court reimposed the same 20 years and stated in writing that the sole reason for departure was his habitual offender status. On October 30, 1986, Hall file a motion for post-conviction relief. He alleged that his 20 year sentence was grossly in excess of the guidelines for the reason of being an habitual offender, on that same date, this court released its decision in Whitehead v. State, supra; finding that a defendant to be a habitual offender was not a legally sufficient reason for departure from the sentencing

guidelines' recommended sentence. Obviously Hall's motion could not refer to the decision, but it was clearly applicable law at the time the trial court denied the motion on November 18, 1986. The question the First DCA in Hall had answered this Court must answer in this instant case; to wit, "is whether the petitioner's motion pursuant to Rule 3.800(a) should be granted on the basis of the decision of Whitehead, which overturned the entire legal foundation of Cusic's departure sentence.

I

The decision of Witt I, supra(also Stovall v. Denno, 388 U.S. 293 (1967); and Linkletter v. Walker, 85 S.Ct. 1731). However, were handed down before this court's decision in Bass v. State, 12 FLW 289 (FLA. June 11. 1987). As Justice Ehrich observed in his dissent, the majority opinion in Bass appears to turn the Witt decision on its head, at least in respect to the construction of statutes governing the lenght of sentencing that may be imposed under statutory law.

And once again the Witt decision has been turned on its head from the decision on Whitehead governing the appicablity of using the finding that the defendant is a habitual offender to exceed the recommended guideline sentence.

Bass involved the stacking of minimum mandatory three year terms. After Bass's sentence became final. The supreme court held that such stacking is illegal in Palmer v. State, 438 So.2d 1 (FLA. 1983). This Court also held that Bass could challenge his sentence by way of a rule 3.850 motion

even though Palmer was released after Bass's sentence became final. This court reasoned that it need not decide whether Palmer should retroactively apply to invalidate Bass's sentence because the Palmer decision did not change the substantive law of sentencing but merely interpeted preexisting statutory law and[corrected mistakes in its implementation]. 12 FLW at 289, this court then continued:

> It would be inherently unjust to allow the imposition of an illegal sentence without providing a mechanism to attack that sentence, simply because courts were unaware of its illegality at the time of imposition of the sentence.

The First District Court, had experience some difficulty discerning the precise effect of the holding in Bass on the issue before that court. The decision nevertheless appears to be based exclusively on the legal principle that the court construction of a statute (i.e., s. 775.084(3)) gives it meaning from the inception of the statute(unless otherwise specified in the decision) [to] the complete exclusion of the legal doctrines of law of the cases and the correlative concept of finality of decision.

II

The petitioner at first wondered why, then, does Bass seem to accord different treatment and effect to change in sentencing laws than does Witt?

Perhaps, therefore, the material distinction between

Bass and Witt originates in the fact that Palmer overrruled a lower court's construction of a statute bearing on the permissible lenght of sentence that could be imposed.

Because the First DCA could not find no other basis for distinguishing these cases, and believed Bass-not-Witt to be controlling precedent on the issue before them.

The petitioner also remind the court that the "decisions of the district court of appeal represent the law of Florida unless and until they are overruled by this Court".— Stanfill v. State, 384 So.2d 141,143 (FLA. 1980)

The decision of the First District Court of Appeal in Whitehead expressly construed §. 921.001 Fla. Stat.(1983) and the implementing provision of the sentencing guideline rules approved by the legislature to mean that §. 784.084 Fla. Stat. (1983)— does not provide an exemption from the limitation imposed by the recommended guideline sentence on the basis of the criteria of the habitual offender statute was impermissible because it conflicted with the provisions of the sentencing guideline rules as previously construed in Hendrix v. State, 475 So.2d 1218 (FLA. 1985). Therefore, the fact that this instant case takes a contrary view of of the applicablity of the statute at issue in Whitehead than did the district courts clearly evidences that he did change the law in Florida on this issue. Taken to its logical conclusion, therefore, its understandable and conclusive that being under the status of a

"Habitual Offender" can NOT be used as a sole reason to depart from the recommended guideline sentence.

CONCLUSION

But this court must decide to other issue in this case to overrule the Second DCA ruling in this case, those issues are present in the cases of State v. Hall, Fla. S.Ct. #70,078 and McCuiston v. State, Fla. S.Ct. #70,706 and are pending review in this case. The petitioner case lies totally on the outcome of the abovementioned cases, and this court should apply those rulings accordingly.

Also, this Court must decide whether this petitioner was correct in filing a Motion to Correct An Illegal Sentence, pursuant to Rule 3.800(a) eventhough in the case of Hall the First DCA ruled that he could proceed by way of Rule 3.850.

The Court has to consider if both Post-Conviction Relief motion are applicable to the ruling. And after this court has made such consideration and it is infavor of the petitioner this case should be reversed and remanded back to the trial court to have the petitioner resentenced according to the recommended guideline sentence and in concurrence with Shull v. Dugger, 12 FLW 585(FLA November 27, 1987).

Respectfully Submitted

Greg E. Cusic

Greg E. Cusic #226410
A.C.I N-45
P.O. Box 699W
Sneads, Florida 32460

CERTIFICATE OF SERVICE

I HEREBY certify that I have furnished a true and correct copy of the aforegoing to; Ms. Katherine V. Blanco, Assistant Attorney General, Park Trammel Building, 1313 Tampa Street, Suite 804, Tampa, Florida 33602; Honorable Sid J. White, Supreme Court Building, Tallahassee, Florida 32399-1925, by U.S. Mail this 19th day of February, 1988.

Greg Cusic

Greg Edward Cusic, in pro per.