

IN THE SUPREME COURT OF FLORIDA

MARY SUE DUKE,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

FILED

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John S. Allen
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CASE NO.

72,912

INITIAL BRIEF OF PETITIONER

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IN THE SUPREME COURT OF FLORIDA

MARY SUE DUKE, :
 :
 Petitioner, :
 :
 v. : CASE NO.
 :
 STATE OF FLORIDA, :
 :
 Respondent. :
 :
 _____ :

INITIAL BRIEF OF PETITIONER

I. PRELIMINARY STATEMENT

Mary Sue Duke was the defendant in the trial court, appellant before the District Court Of Appeal, First District, and will be referred to in this brief as "petitioner," "defendant," or by her proper name. Reference to the volume of the record on appeal labelled "Volume I" containing transcripts of the hearing held on the state's notice of intent to rely upon out of court statements and jury selection will be by use of the symbol "A" followed by the appropriate page number in parentheses. Reference to the volume of the record labelled "Volume II" containing transcripts of the jury trial will be by use of the symbol "B" followed by the appropriate page number in parentheses. Reference to the volume of the record labelled "Volume III" containing transcripts of the defendant's motion for a new trial and sentencing will be by use of the symbol "C" followed by the appropriate page number in parentheses. Reference to the volume of the record containing the pleadings and

orders filed in the cause will be by use of the symbol "R" followed by the appropriate page number in parentheses.

Filed with this brief is an appendix containing a copy of the opinion issued in petitioner's case by the District Court of Appeal, First District, which will be referred to by the symbol "App" followed by the appropriate page number in parentheses.

II. STATEMENT OF THE CASE AND FACTS

Count II of an indictment alleged that petitioner aided and abetted a sexual battery actually committed by her codefendant, Steven Duke, on or between March 30, 1986, and May 27, 1986, contrary to Sections 777.011 and 794.011(2), Florida Statutes (1985)(R-3-4). Petitioner was born December 15, 1970 (B-18), and thus was fifteen years old during the period of time alleged in the indictment. She was convicted as charged (B-166) and, on December 16, 1986, she was adjudged guilty and sentenced to seven years in prison, with 195 days credit (R-51-57).

Petitioner timely took an appeal to the District Court Of Appeal, First District (R-71), and her judgment and sentence was affirmed by opinion entered August 4, 1988 (App. 1-4). That opinion summarized the arguments made by petitioner and by the state, and gave the basis for the district court's affirmance in the following manner:

[M]ary Sue Duke, appeals her sentence of seven years for aiding and abetting the commission of the sexual battery, a life felony, claiming that the trial court erred in failing to follow the requirements of section 39.111, Florida Statutes (1985). We affirm her conviction and sentence, but certify the question to the supreme court as a matter of great public importance.

Mary asserts that the trial court failed to consider a predisposition report and the statutory criteria for determining the suitability of adult sanctions, and failed to analyze in writing the decision to impose adult sanctions, as required by section 39.111(6) when "a child has been transferred for criminal prosecution." She argues that a juvenile charged by indictment is considered "transferred", citing Goodson v. State,

So.2d 1335 (Fla. 1st DCA 1980), approved, State v. Goodson, 403 So.2d 1337 (Fla. 1981), and State v. Upshaw, 469 So.2d 922 (Fla. 3d DCA 1985).

The State contends that under section 39.02(5)(c)1, Florida Statutes (1985) a child charged by indictment with a crime punishable by death or life imprisonment "shall be tried and handled in every respect as if he were an adult" on all crimes charged in the indictment based on the same act. The State argues that an indictment for an offense punishable by death or life imprisonment does not constitute a "transfer" under chapter 39, citing Myers v. State, 442 So.2d 272 (Fla. 1st DCA 1983), pet. for rev. den., 450 So.2d 487 (Fla. 1984), and that the trial court did not abuse its discretion by treating Mary Duke as an adult without the written findings required by section 39.111(6).

Reading the provisions of chapter 39 in pari materia, we find that an indictment for an offense punishable by death or life imprisonment does not constitute a "transfer" within the meaning of section 39.02(6), Florida Statutes (1985), which would require compliance with the provisions of section 39.111(6). However, because of the possible confusion engendered by Goodson, we certify this issue to the Florida Supreme Court as a matter of great public importance.

(App. 2-3).

As noted, the district court certified that the issue involved is a matter of great public importance, thereby conferring jurisdiction in this Court pursuant to Article V, Section 3(b)(4), Constitution of the State Of Florida.

Notice of invoking this Court's jurisdiction is being timely filed simultaneously with this initial brief.

III. SUMMARY OF ARGUMENT

Since the actual argument is within the page limitations for a summary of argument, to avoid needless repetition a formal summary of argument will be omitted here.

IV. ARGUMENT

THE TRIAL COURT ERRED BY IMPOSING ADULT SANCTIONS UPON PETITIONER WITHOUT FIRST FOLLOWING THE REQUIREMENTS OF SECTION 39.111, FLORIDA STATUTES (1985).

Since petitioner was fifteen years old at the time the offense for which she was convicted was committed, she was subject to the jurisdiction of the juvenile court. Section 39.01(7) and 39.02(1), Florida Statutes (1985). Although a juvenile, the prosecutor caused petitioner to be tried as adult by obtaining a grand jury indictment against her (R-3-4). Section 39.111, Florida Statutes (1985), sets forth the procedure to be followed when disposing of cases where a juvenile is tried as an adult. A predispositional report must be considered by the court. Section 39.011(6)(a), Florida Statutes (1985). The suitability or unsuitability of adult sanctions must be determined by reference to specified statutory criteria. Section 39.011(6)(c), Florida Statutes (1985). The decision to impose adult sanctions must be in writing replete with findings of fact and analysis of the criteria. Section 39.011(6)(d), Florida Statutes (1985). None of these requirements were satisfied in the instant case.

Pursuant to Section 39.011(6), Florida Statutes (1985), the procedure outlined in the preceding paragraph applies where "...a child has been transferred for criminal prosecution and the child has been found to have committed a violation of Florida law...." A juvenile who has been tried as an adult because charged by an indictment is considered "transferred" to

the criminal division of the circuit court. Goodson v. State, 392 So.2d 1335 (Fla. 1st DCA 1980), approved, State v. Goodson, 403 So.2d 1337 (Fla. 1981) See also State v. Upshaw, 469 So.2d 922 (Fla. 3d DCA 1985). It follows that petitioner is entitled to, but thus far has been denied, the benefits of the statute.

In the district court the state took the position that, based upon Myers v. State, 442 So.2d 272 (Fla. 1st DCA 1983), petitioner was not "transferred" to the adult division of the circuit court because she was charged by indictment. The state also argued below that Chapter 39, Florida Statutes (1985) gives the trial court discretion whether to sentence petitioner as an adult, or whether to even make the written findings set forth in Section 39.111(6), Florida Statutes (1985). Petitioner submits these arguments are devoid of legal merit.

In Myers, the district court reached the decision it did because the statute in question did not explicitly mention the word "indictment":

Judge v. State, 408 So.2d 831, 832 (Fla. 4th DCA 1982), held that such an indictment is a transfer within the meaning of section 39.02(5)(d). Judge, however, is no longer controlling, inasmuch as the Florida Legislature, by chapter 81-269, section 1, Laws of Florida, amended section 39.02(5)(d) by eliminating the word "indictment" from the statute. We therefor adopt the result of Postell v. State, 383 So.2d 1159 (Fla. 3d DCA 1980) and find that there was no transfer as contemplated by the statute.

442 So.2d at 272.

This reasoning, however, was explicitly rejected in this Court's subsequently rendered decision in State v. Goodson, supra:

[T]he state argues Goodson could not have been "transferred" to the criminal division of the circuit court as required by section 958.04(1)(a), since he was brought before the criminal division pursuant to an indictment and was never subject to the circuit court's jurisdiction. To accept this argument would create the anomalous situation in which a person between the ages of eighteen and twenty-one who is indicted may be classified as a youthful offender, whereas a person under eighteen who is indicted may not be. [citation omitted] We do not believe the legislature intended such a result.

403 So.2d at 1339.

Since Goodson, with the exception of the decision below, courts have uniformly treated indictments as "transfers" from the juvenile to the adult divisions of circuit court, even though the term "indictment" was eliminated from the statute. See State v. Upshaw, supra. As was true in Goodson, to adopt the state's position would result in the anomalous situation in which a juvenile who is tried in adult court by virtue of a method other than indictment has the chance of receiving juvenile treatment, whereas an indicted person would not. Myers is simply no longer good law in light of Goodson.

While as a general proposition it is true that a trial court has discretion whether or not to impose adult sanctions, petitioner contends this discretion cannot be intelligently utilized if the trial court did not consider the statutory

criteria. In other words, the trial court has no discretion as to whether to follow the proper procedure.

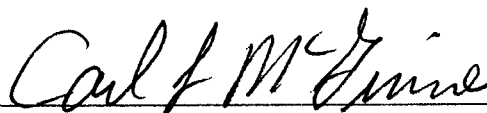
For these reasons petitioner requests this Court to quash the decision of the district court, vacate petitioner's seven year sentence, and remand the cause to the trial court with directions to dispose of the case pursuant to the procedure set forth in Section 39.111(6), Florida Statutes (1985), at a hearing during which petitioner is present. Pickerill v. State, 493 So.2d 1096 (Fla. 4th DCA 1986).

V. CONCLUSION

For the reasons set forth herein petitioner requests this Court to quash the decision of the district court below, vacate petitioner's sentence, and remand the cause to the trial court with directions to follow Chapter 39, Florida Statutes (1985).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Initial Brief of Petitioner has been furnished by hand delivery to Mr. Gary Printy, Assistant Attorney General, The Capitol, Tallahassee, Florida, this 11th day of August, 1988.



CARL S. MCGINNES