Supreme Court of Florida

MONDAY, APRIL 17, 1989

STATE OF FLORIDA

Petitioner,

vs. Case No. 73,828

ERIC JENSEN

Respondent.

* * * * * * * * * * *

Petitioner's Motion To Adopt Brief in State v. Glenn, Case No. 73,496 is granted. The adopted brief has been filed in the above styled case.

A TRUE COPY

TEST:

Sid J. White
Clerk Supreme Court

bdm
c: David R. Gemmer, Esquire
Eric Jensen

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,
Petitioner,

v.

ROOSEVELT GLENN,
Respondent

Case. No. 73,496

ON APPEAL FROM THE SECOND DISTRICT COURT OF AFFEAL
STATE OF FLORIDA
CERTIFIED CONFLICT

BRIEF OF THE PETITIONER

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STATEMENT OF THE CASE AND FACTS

A jury convicted Roosevelt Glenn of multiple counts of drug-related offenses arising from a single episode. R3. His direct appeal was affirmed per curiam. R12. Mr. Glenn filed multiple pleadings seeking post-conviction relief. R13-28, R33-64, R67-71, R74-76, R77-81, R90-93 (form 3.850 motion at R77-81 filed after hearing on motion for post-conviction relief and denied as abuse of process, R82-83). The various claims were sorted out at a hearing held March 18, 1988, where respondent was represented by counsel. R82 (summary of proceeding in order denying 3.850 motion). The state conceded at the 3.850 hearing that the drugs involved in the trafficking and delivery charges were the same.

On the issue before this court, the trial judge denied relief. Respondent Glenn filed an appeal. The Second District reversed in the instant issue, and certified conflict.

SUMMARY OF THE ARGUMENT

Harris, the case certified to be in conflict with the instant case, clearly held that relief under Carawan may not be given retroactively. While Harris did not specifically mention Carawan, it relied on Hall, a case which expressly declared Carawan dictated relief on direct appeal. Harris merely held that Hall/Carawan relief was unavailable in a collateral proceeding.

This Court denied review of Harris shortly after it issued its opinion on rehearing in Bass. Bass reiterated the traditional analysis for determining retroactive application of judicial decisions. McCuiston further solidified reliance on the traditional analysis of Witt. With retroactivity obviously a focus of the Court's consciousness at the time Harris was denied review, it would appear that this Court deems Harris to be proper law.

Undertaking the traditional Witt analysis, Carawan is neither a "jurisprudential upheaval" nor of sufficient import to require retroactive application under the three-pronged analysis of Stovall.

Finally, a fundamental reason for denying relief exists. As argued by the state in Gordon, currently pending before this Court, the recent amendment to section 775.021(4) severely limits the rule of lenity. The amendment essentially voids Carawan ab initio. No relief would be appropriate in the instant case, even if the issue had been preserved and was before this Court on direct appeal.

ARGUMENT

DOUBLE JEOPARDY CLAIMS BASED ON CARAWAN HAT NOT BE RAISED IN MOTIONS FOR POST-CONVICTION RELIEF.

The instant case is before this court on certified conflict with Harris v. State, 520 So.2d 639 (Fla. 1st DCA), rev. denied, No. 71,999 (Fla. Oct. 12, 1988). In Harris, the court certified the following question:

> UKDER THE REASONING OF BASS V. STATE, 12 F.L.W. 289 (FLA. JUNE 11, 1987), IS APPELLANT ENTITLED TO POST-CONVICTION RELIEF Oh THE BASIS THAT HIS CONVICTION, ALTHOUGH VALID UNDER EXTANT LAW AS ANNOUNCED BY THE SUPREME COURT AT THE TIME OF CONVICTION AND APPEAL, WOULD BE INVALID UNDER A SUBSEQUENTLY ISSUED SUPREME COURT DECISIOK ENUNCIATING A DIFFERENT CONSTRUCTION OF THE STATUTE, THEREBY CHANGING THE EXTANT LAW?

520 So.2d at 640. Subsequent to the certification of the question in Harris, this Court withdrew its original decision in Bass and issued a new opinion. Bass v. State, 530 So.2d 282 (Fla. 1988). Bass was released September 1, 1988. Review was denied on Harris six weeks later, October 12, 1988.

The issue in Harris was whether the defendant could challenge his convictions for both armed robbery and possession of a firearm in a post-conviction motion. Bass addressed post-conviction relief for stacking of minimum mandatory sentences. Both Bass and Harris involved changes in the law subsequent tc the finality of direct appeal. The Bass opinion on rehearing reaffirmed the principle that "retroactive application should be decided upon traditional principles pertaining to changes ir decisional law." McCuiston v. State, 13 F.L.W. 672, 673 (Fla.

Nov. 17, 1988). Thus, in Bass, this Court held that "we have now concluded as a matter of policy that the principle of Palmer [holding stacking of minimum mandatory sentences for a single criminal episode improper] should be applied retroactively." 530 So.2d at 283.

On the other hand, in McCuiston this Court held that White-Bead v. State, 498 So.2d 863 (Fla. 1986) (habitual offender status not a valid reason for departure), was not retroactive. Bass barely addressed the tenets of retroactivity, resolving the issues therein with the "matter of policy" determination. McCuiston offers a more detailed doctrinal grounding for retroactivity analysis. The McCuiston opinion reasserts the primacy 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). Witt holds that a decision should be applied retroactively only when the change in law amounts to "jurisprudential upheaval" or when it meets the three-fold test of Stovall v. Denno, 388 U.S. 293 (1967).

Bass and McCuiston addressed issues other than application of Carawan v. State, 515 So.2d 161 (Fla. 1987). Harris, on the other hand, is a true post-Carawan decision raising the issue of retroactive application of Carawan, although the connection is indirect. Dual convictions for armed robbery and possession of a firearm were permissible under Gibson v. State, 452 So.2d 553 (Fla. 1984), when Harris's appeal became final. Harris v. State, 489 So.2d 838 (Fla. 1st DCA 1986). Gibson was overruled in Hall v. State, 517 So.2d 678 (Fla. 1988). Hall expressly relied on Carawan when it held:

> We find in accordance with our recent decision in Carawan . . . that the (certified] question [regarding dual weapons convictions] must be answered ion the negative, and our decision in State v. Gibson . . . is overruled.

517 So.2d at 678. Thus, Harris, the case which is certified to be in conflict with the instant case, has held that a double jeopardy issue arising from Carawan shall not be applied retroactively. The Harris court certified a question to this Court because of the unsettled nature of the law resulting from the initial opinion in Pass. The timing of the denial of review in Harris suggests that once the doctrinal error in Bass was corrected by the opinion on rehearing, this Court felt the question of retroactive application of the double jeopardy rule of Hall/Carawan was resolved. In other words, in the opinion on rehearing in Bass, this Court held that the rule against stacking minimum mandatory sentences should be applied retroactively, and, in denying review of Harris, that double jeopardy relief under Carawan should not be available retroactively through a motion under Florida Rule of Criminal Procedure 3.850.

If as Harris held, post-conviction relief for the change in law in Hall should be denied, then the change in law in the instant case should likewise not be applied retroactively. In the instant opinion below, the second district noted that Carawan had been applied to the drug statutes in such cases as Campbell v. State, 517 So.2d 690 (Fla. 2d DCA 1987). Glenn, slip op. at 4 n.2. Thus, Carawan relief is available on drug charges on direct appeal. The instant case holds that such relief should also be

available on a 3.850 motion. Thus, the instant case is in direct conflict with Harris.

This Court allowed Harris to stand after traditional retroactivity analysis was adhered to in the opinion on rehearing in Bass. It is difficult to see how this Court would now permit relief tc be granted to the respondent in this case after denying relief to the petitioner in Harris.

Addressing the criteria for determining retroactivity as set out in Witt and reiterated in Bass and McCuiston, relief in the instant circumstances should not be applied retroactively. The state cannot envision a valid interpretation of Carawan which would hold it to be of such fundamental import as to amount to "jurisprudential upheaval." Carawan is merely evolutionary in nature, receding from the excursions this Court had made in earlier decisions in application of section 775.021(4), Florida Statutes.

Witt held that retroactive application would be viable only if the change in law:

> (a) emanates from this Court or the United States Supreme Court, (b) is constitutional in nature, and (c) constitutes a development of fundamental significance. Host law changes of "fundamental significance" will fa13 within the two broad categories described earlier (i.e. "jurisprudential upheaval" or passing the Stovall test].

387 So.2d at 931. While Carawan emanated from this Court, it is neither constitutional in nature nor of fundamental significance. The language of Carawan is grounded in a statutory construction analysis, balancing the dictate of section 775.021(4) with the lenity provision. Statutory construction, while it may have some

constitutional trappings, as does any matter brought before a court, is not fundamentally a constitutional issue.

Likewise, as urged supra, Carawan does not constitute a "jurisprudential upheaval." Nor does it pass the three-pronged criteria of Stovall. In determining whether to apply a change in the law retroactively, the court should consider:

> (a) the purpose to be served by the new rule; (b) the extent of reliance on the old rule; and (c) the effect on the administration of justice of a retroactive application of the new rule.

Witt, 387 So.2d at 926. The purpose of Carawan was to balance potentially conflicting rules of construction, so that the courts may determine legislative intent regarding similar crimes. The old rule of law was heavily relied upon, as the law of multiple offenses went through various transformations during most of this decade.

Finally, the finality of decisions in many cases would be brought into doubt, forcing the courts to resentence. In many cases, such as the instant case, the resentencing will have little or no effect on the defendant's sentence. In this case, for instance, the sentence on the delivery charge was made concurrent to the other sentences, and so would not affect respondent's actual sentence. The only effect the removal of the conviction might have would be to remove one conviction from a person's record for purposes of future scoresheet preparation. However, tens of thousands of criminal defendant8 who have already served their sentences could be eligible for collateral relief. The problem of determining whether the old convictions

were had for trafficking and delivery of the identical portion of contraband would be impossible in many cases.

Finally, the state would urge that relief is inappropriate in the instant case for a more fundamental reason. In another case currently pending before this Court, State v. Gordon, No. 72,850, the state urges that the recent amendment to section 775.021(4), alters the rationale of Carawan. The state urges in Gordon that the amendment makes clear the legislature never intended the rule of lenity to be applied as it was in Carawan. Thus, the amendment doesn't merely "repeal" Carawan, it renders Carawan void ab initio. The state adopts the argument and reasoning in Gordon and urges that no relief is due any defendant, mooting the question of whether such relief may be given retroactively.

CONCLUSION

It would be unrealistic and unduly burdensome to make Carawan, or at least the particular rule of law in this case, retroactive. Old fact issues might never be resolvable. Further, no relief is appropriate in any event, retroactively vel non.

This Court should quash the decision below and remand for entry of a mandate affirming the denial of relief in the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Roosevelt Glenn, DOC #006690, Marion Correctional Institute, Post Office Box 158-334, Lowell, Florida 32663, this 7th day of February 1989.

OF COUNSEL FOR PETITIONER