045 w/app

4-17

FILED
SID J. WHITE
MAR 25 1992
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

LESTER JOYNER, :

Petitioner, :

vs. : Case No. 79,565

STATE OF FLORIDA, :

Respondent. :

_____ :

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

BRIEF OF PETITIONER ON JURISDICTION

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

JENNIFER Y. FOGLE
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NUMBER 628204

Public Defender's Office
Polk County Courthouse
P. O. Box 9000--Drawer PD
Bartow, FL 33830
(813) 534-4200

ATTORNEYS FOR PETITIONER

TOPICAL INDEX TO BRIEF

TABLE OF CITATIONS

PRELIMINARY STATEMENT

Petitioner, LESTER JOYNER, was the Appellant in the Second District Court of Appeal and the Defendant in the trial court. Respondent, the State of Florida, was the Appellee in the Second District Court of Appeal. The appendix to this brief contains a copy of the decision rendered by the Second District Court of Appeal on February 19, 1992.

STATEMENT OF THE CASE AND FACTS

On February 8, 1990, the State Attorney for the Thirteenth Judicial Circuit in and for Hillsborough County, Florida, charged the Petitioner, LESTER JOYNER, with possession of cocaine in violation of Fla. Stat. § 893.13 (1)(f). On February 13, 1990, the trial court accepted Mr. Joyner's plea of nolo contendere and noticed and sentenced him to two years on community control as a "subsequent felony offender," concurrent with community control imposed in 1988 and 1989 violation of probation cases.

On May 23, 1990, the court revoked Mr. Joyner's community control on the charge of possession of cocaine and sentenced him to ten years in prison as a "subsequent felony offender." On December 12, 1990, Mr. Joyner filed a pro se petition for writ of habeas corpus, seeking a belated appeal of the judgment and sentence imposed on the charge of possession of cocaine. The Second District Court of Appeal granted Mr. Joyner's pro se motion on January 16, 1990.

On appeal Mr. Joyner asserted that his sentence of "habitualized community control" followed by a ten-year prison sentence upon revocation of community control constituted an illegal application of Fla. Stat. § 775.084 and Chapter 948, requiring his sentence to be vacated. On February 19, 1992, the appellate court affirmed Petitioner's judgment and sentence, holding that any error complained of was waived because there was no objection to the community control sentence when it was imposed and Mr. Joyner did not timely appeal that initial sentence. The holding conflicts

with decisions rendered by this Court and other District Courts of Appeal.

SUMMARY OF THE ARGUMENT

Mr. Joyner argues that the Second District Court of Appeal's decision holding that the contemporaneous objection rule is applicable to a sentence of "habitualized community control" and waives right to attack the sentence, expressly and directly conflicts with holdings of this Court and other District Courts of Appeal. If the contemporaneous objection rule is inapplicable, a theory which the Second District Court of Appeal has rejected, then resentencing is required.

ARGUMENT

WHETHER THE DECISION IN JOYNER v. STATE, CASE NO. 91-00419 (Fla. 2d DCA February 19, 1992), IS IN CONFLICT WITH DECISIONS OF THIS COURT AND OTHER DISTRICT COURTS OF APPEAL AS TO WHETHER THE FAILURE TO OBJECT TO AN ILLEGAL SENTENCE CONSTITUTES A WAIVER OF THE RIGHT TO LATER ATTACK THE SENTENCE?

A defendant need not make a contemporaneous objection to later challenge an illegal sentence. Larson v. State, 572 So.2d 1368, 1370 (Fla. 1991) (contemporaneous objection not needed to challenge illegal condition of probation); State v. Whitfield, 487 So.2d 1045, 1047 (Fla. 1986) (contemporaneous objection rule not required to preserve review of trial court's failure to make mandatorily written, clear and convincing reasons for upward departure from sentence); State v. Rhoden, 448 So.2d 1013, 1016 (Fla. 1984) (where juvenile statute provides for findings of fact, in order to make effective right of sentence review, contemporaneous objection rule not applicable). See also, the habitual offender statute, section 775.084, Florida Statutes (1989), providing for specific evidentiary findings and the right of appellate review.

An illegal sentence may be successfully challenged at any time. Fla. R. Crim. P. 3.800 (a). A defendant may not confer upon a trial court the authority to impose an illegal sentence merely by agreeing to the illegal sentence in plea negotiations and failing to object at sentencing. Clark v. State, 579 So.2d 109, 110-111

(Fla. 1991); Fuller v. State, 578 So.2d 887, 889 (Fla. 1st DCA 1991).

Contrary to the foregoing principles, the Second District Court of Appeal in Lester Joyner v. State, Case No. 91-00419 (Fla. 2d DCA, February 19, 1992), relied on Wolfson v. State, 437 So.2d 174 (Fla. 2d DCA 1983), in holding that Petitioner's acceptance of his sentence without contemporaneous objection constituted a waiver of his right to later attack the sentence. This decision is in conflict with the cited decisions of this court and other district courts of appeal. If contemporaneous objection is not required, then Petitioner has suffered a more severe sanction and denial of right to review because he is within the jurisdiction of the Second District Court of Appeal. This Court should accept jurisdiction in order to settle the conflict.

CONCLUSION

In light of the foregoing reasons, argument, and authorities, Petitioner has demonstrated that conflict does exist with the instant decision and decisions of this Court so as to invoke discretionary review of this Honorable Court.

APPENDIX

22

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

LESTER JOYNER,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 91-00419

Opinion filed February 19, 1992.

Appeal from the Circuit Court for Hillsborough County; Harry Lee Coe, III, Judge.

James Marion Moorman, Public Defender, and Jennifer Y. Fogle, Assistant Public Defender, Bartow, for Appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Elaine L. Thompson, Assistant Attorney General, Tampa, for Appellee.

CASE, JAMES R., Associate Judge.

We affirm the defendant's conviction and sentence upon his violation of community control.

We need not and do not address the defendant's argument that he should not have been sentenced to community control after

A1

having been declared a habitual offender. The record on appeal does not indicate that the defendant objected to the community control sentence when it was imposed nor did he timely appeal that sentence thereafter. His acceptance of community control constituted a waiver of the right to attack that community control at revocation. See Thompson v. State, No. 90-02876 (Fla. 2d DCA Jan. 3, 1992); Wolfson v. State, 437 So. 2d 174 (Fla. 2d DCA 1983).

DANAHY, A.C.J., and THREADGILL, J., Concur.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Elaine L. Thompson, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 23rd day of March, 1992.

Respectfully submitted,

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT
(813) 534-4200

JENNIFER Y. FOGLE
Assistant Public Defender
Florida Bar Number 628204
P. O. Box 9000 - Drawer PD
Bartow, FL 33830

JYF/tll