D.A. 4-8-93 087

FILED
SID J. WHITE
NOV 23 1992
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

ALAN LEONARD BOGUSH, :

Petitioner, :

vs. : Case No. 79,878

STATE OF FLORIDA, :

Respondent. :

_____ :

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

REPLY BRIEF OF PETITIONER ON THE MERITS

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED BY SENTENCING PETITIONER TO COMMUNITY CONTROL AS A HABITUAL FELONY OFFENDER.

Respondent argues that since Petitioner failed to challenge the original sentence he waived his right to do so. When Petitioner was placed on community control there was nothing to appeal because if there is such a status as habitual felony community control it is no different than community control. The issue was not ripe for appeal at the time Petitioner was placed on community control.

Petitioner contends that the habitual felony offender statute does not provide the authority to impose community control. Thus the imposition of community control as a habitual felony offender is an illegal sentence. The sentencing error in this case was fundamental and therefor preserved for review. Steinhorst v. State, 412 So.2d 332 (Fla. 1982). That portion of the sentence which was not illegal, community control, could stand. Upon revocation of community control the guidelines must apply.

Respondent contends the transcript of the original sentence was not a part of the record, and Petitioner therefor waived any objection to being habitualized. Petitioner agrees, to the extent there was no objection at the original sentencing, the procedure there can not be attacked which is why the record was not supplemented to include that transcript. Petitioner will now move to

supplement the record because, if an illegality appears on the face of the record the error is not waived. An illegal sentence may be attacked at any time. Bouie v. State, 360 So. 2d 1142, 1143 (Fla. 2d DCA 1978). Petitioner attacked the lack of habitual findings at the revocation of community control not at the initial sentencing.

The state alleges that Petitioner received an original lenient sentence and they were disadvantaged because they were not allowed to appeal, citing to State v. Davis, 559 So.2d 1279 (Fla. 2d DCA 1990). However under State v. Kendrick, 596 So.2d 1153 (Fla. 5th DCA 1991) under the same factual situation the state was allowed to appeal because it was determined that habitualized probation is an illegal sentence.

Neither the state nor the Petitioner would have wanted to appeal the original sentence because a trial was avoided on a habitual offender case. Petitioner was enticed into a plea by an exceedingly lenient sentence only to be severely punished upon revocation. The state should not be allowed to set a trap for the habitual felony offender and have him give up his right to a jury trial and subsequently be given a maximum habitual offender sanction. If probation or community control is imposed, the habitual offender sanction is not needed for the protection of the public. Thus the habitual offender portion of a probation or community control sentence is a nullity and should be declared void.

ISSUE II

WHETHER THE COURT ERRED BY IMPOSING HABITUAL FELONY OFFENDER SANCTIONS WHICH EXCEEDED THE MAXIMUM STATUTORY PRISON TIME PETITIONER WAS INFORMED HE COULD RECEIVE.

Respondent argues that Petitioner can not raise this issue because a motion to withdraw the plea was not filed. Perhaps that should have been done, but is not necessary for this issue to be addressed because Petitioner is not asking to withdraw his plea. Petitioner is asking that the sentence be corrected to conform with the statutory maximum penalty he was informed he could receive.

The state cites to an out of state case for the proposition that Petitioner did not have to be informed of the maximum possible penalty under habitual sentencing because it is a collateral consequence of the plea. In Brown v. State, 585 So.2d 350, 352 (Fla. 4th DCA 1991) a Florida Court has held that increased penalties under the habitual offender statute are a direct consequence of the plea. In Brown, a motion to withdraw plea was filed before imposition of sentence but not after the sentence was imposed. Brown appealed the sentence that was imposed, and he was allowed to withdraw his plea because he was not informed of the maximum possible sentence he could receive. Id. at 354.

In Watson v. State, 17 FLW D2251 (Fla. 4th DCA October 9, 1992) the court reversed a summary denial of the motion to withdraw a plea because Watson was not informed of the maximum habitual offender penalty he could receive. It is clear form the record that Petitioner was twice informed that the maximum penalty he could

receive was fifteen years imprisonment. The court should be bound by this representation and should impose a sentence not in excess of fifteen years. In the alternative Petitioner should be allowed to withdraw his plea.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Erica M. Raffel, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 20 day of November, 1992.

Respectfully submitted,

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