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IN THE FLORIDA SUPREME COURT

JOSEPH INNES :

PETITIONER :

v. : Case No. 79,902

STATE OF FLORIDA :

RESPONDENT :

_____ :

No appendix

ON DISCRETIONARY REVIEW FROM THE
SECOND DISTRICT COURT OF APPEAL

PETITIONER'S BRIEF ON THE MERITS

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IN THE SUPREME COURT OF FLORIDA

JOSEPH INNES,

Petitioner,

vs. **Case No: 79,902**

STATE OF FLORIDA,

Respondent.

_____/

STATEMENT OF THE CASE AND FACTS

Appellant, Petitioner, Joseph Innes, seeks to have reviewed a decision of the District Court of Appeal, Second District, dated and filed on May 6, 1992. The Petitioner was the original defendant in the trial court and the appellant before the District Court of Appeal. The Respondent, State of Florida, was the appellee before the District Court of Appeal. This was an appeal by Petitioner from his conviction and sentence entered by the Circuit Court In and For Pinellas County.

The State Attorney for Pinellas County, Florida, direct filed an information charging Petitioner, Joseph Innes, with burglary of a dwelling and grand theft, [Case No. 91-7561] failure to appear, [Case No. 91-5368] burglary of a dwelling, [Case No. 91-6380] fraudulent use of a credit card, [Case No. 91-2626] and dealing in stolen property and grand theft [Case No. 91-523] (R92,58,81,39,1) Subsequently, Petitioner entered a plea of nolo contendere on the understanding he would receive no more than four years incarceration followed by two year's probation

and he would pay restitution, the amount to be determined later. (R36-38;53-57;76-80;87-91;111-116) On July 30, 1991, Petitioner was adjudicated guilty and sentenced as previously agreed upon. (R19-31) At the time of sentencing, Petitioner was a juvenile. (R5) Although the court was aware that Petitioner was a juvenile and attempted to comply with Florida Statute 39.057, (R152-153) the court failed to comply with all the requirements. On August 16, 1991, Petitioner timely filed a notice of appeal. (R117)

The District Court of Appeal, Second District, affirmed Petitioner's convictions and sentence in a written opinion citing Davis v. State, 528 So.2d 521 (Fla. 2d DCA 1988), but also recognizing conflict with the Fifth District in Lang v. State, 566 So.2d 1344 (Fla. 5th DCA 1990). Petitioner sought the discretionary review of this court on the jurisdictional grounds that the instant opinion was expressly and directly in conflict with the decisions of other district courts of appeal. This court accepted jurisdiction in its order of September 28, 1992.

SUMMARY OF THE ARGUMENT

Subsequent to its decision in the instant case, the Second District in an en banc opinion in Crosskey v. State, 17 FLW D1672 (Fla. 2d DCA July 10, 1992) specifically receded from its earlier opinion in Davis v. State, therefore, by implication its decision in Petitioner's case is erroneous. The applicable case law all points toward the conclusion that a prior plea agreement by the defendant does not necessarily constitute a waiver of his right to be sentenced in accordance with the requirements of Florida Statute 39.059. The adherence to these requirements is necessary because of the unlimited discretion on the part of State Attorneys to prosecute juveniles as adults. Furthermore, the reasons given orally by the trial court to justify imposition of an adult sentence are totally insufficient.

QUESTION PRESENTED

WHETHER THE TRIAL COURT MUST FOLLOW THE REQUIREMENTS OF 39.059[1] IN ALL CASES INVOLVING JUVENILE DEFENDANTS UNLESS THERE IS AN EXPRESS WAIVER BY THE JUVENILE DEFENDANT?

In the instant case the District Court affirmed petitioner's conviction and sentence citing one of its earlier opinions, Davis v. State, 528 So.2d 521 (Fla. 2d DCA 1988). Since reaching its decision in May of 1992, the Second District in Crosskey v. State, 17 FLW D1672 (Fla. 2d DCA July 10, 1992), an en banc opinion,[2] receded from its earlier decision in Davis, supra. The court held that it is incumbent upon the trial court to follow the procedures in 39.059 and furthermore a plea in exchange for a certain sentence did not necessarily waive the statutory requirements. By receding from Davis, supra., the court has removed the basis for its decision in Petitioner's case, therefore, the decision therein is necessarily erroneous.

Other district courts have also held that absent a waiver by the juvenile, the trial court must strictly comply with the requirements of Chapter 39 and that it is fundamental error for the trial court to impose adult sanctions without the required findings, regardless of whether it was after trial or upon a plea. see Toussaint v. State, 592 So.2d 770 (Fla. 5th DCA 1991);

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[1] Formerly Florida Statute 39.111

[2] The court decided to hear Crosskey en banc in order to resolve intradistrict conflict between Davis and Rathbone v. State, 448 So.2d 85 (Fla.2d DCA 1984).

Keith v.State, 542 So.2d 440 (Fla. 5th DCA 1989); Taylor v. State, 534 So.2d 1181 (Fla. 4th DCA 1988); Lang v. State, 566 So.2d 1354 (Fla. 5th DCA 1990); Sullivan v. State, 587 So.2d 599 (Fla. 5th DCA 1991); Stanley v. State, 582 So.2d 140 (5th DCA 1991).

In State v. Rhoden, 448 So.2d 1013 (Fla. 1984), this court declared:

> "The legislature mandated that trial judges consider the statutory criteria in order to protect the rights which the legislature has given to juveniles. Trial courts cannot avoid that mandate absent an intelligent and knowing waiver of that right by a juvenile."

Florida has bestowed upon juvenile offenders the right to be treated differently from their adult counterparts. Part of this right entails the trial court's duty to consider specific statutory criteria and give specific reasons for imposing any adult sanction. Respondent's most logical argument would be that by pleading to a specific sentence, petitioner not only waived his right to consideration of the statutory criteria but also dispensed with the need for it. There is nothing in the record herein which suggests that petitioner waived or bargained away his rights under 39.059. To the contrary, both defense counsel and the state attorney informed the trial judge he was still required to give reasons on the record for imposing an adult sentence. There is certainly no evidence of any specific waiver on the part of petitioner. see McCray v. State, 588 So.2d 298 (Fla.2d DCA 1991).

The more difficult question is whether by agreeing to plead

in exchange for a specific sentence, petitioner dispensed with the need for the court to follow the requirements of Chapter 39. Perhaps the most pressing reason is the absolute discretion the state attorney has to direct file charges against a juvenile in adult court. Under section 39.047(4)(e)(5), the state attorney may direct file against any child over the age of sixteen whenever "in his judgment and discretion the public interest requires that adult sanctions be considered or imposed." This discretion has been held to be absolute. see State v. Cain, 381 So.2d 1361 (Fla. 1980). The requirements of 39.059, calling for a pre-dispositional report, consideration of certain statutory factors and enunciation of specific findings of fact and reasons for imposition of an adult sanction is necessary as a check against an abuse of prosecutorial discretion.

In addition, the reasons given by the trial court in the instant case were woefully insufficient. The reasons cited by the court were:

> "First of all, I'll find that the public is in need of protection from him. Secondly, that HRS has indicated that they feel the juvenile system can no longer handle him. Thirdly, there appears to be an increasing degree in his criminality. And while all of the crimes up to this point appear to be property as opposed to personal, based on the criterion on Florida Statute 39, I find that adult sanctions were appropriate." (R152-3)

Florida Statute 39.059 require that the court consider the following criteria:

> "1. The seriousness of the offense to the community and whether the protection of the community requires adult disposition.
>
> 2. Whether the offense was committed in an aggressive,

violent, premeditated, or willful manner.

3. Whether the offense was against persons or against property, greater weight being given to offenses against persons, especially if personal injury resulted.
4. The sophistication and maturity of the child.

5. The record and previous history of the child, including:

a. Previous contacts with the department, the Department of Corrections, other law enforcement agencies or community control;
b. Prior periods of probation or community control;
c.Prior adjudications that the child committed a delinquent act or violation of the law; and
d.Prior commitments to institutions.
6. The prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the child if he is assigned to services and facilities for delinquent children."

The court's findings herein, at best, only address three of the six criteria. Failure to address even one requires reversal and remand. see Hill v. State, 17 FLW D2067 (Fla. 1st DCA September 4, 1992) Moreover, the reasons given were deficient because the trial court did not set forth sufficient detail for its decision, but rather drew conclusions without setting forth any factual basis.

Furthermore, it was incumbent upon the trial court to determine the suitability or non-suitability of adult sanctions for petitioner before any other determination of disposition was made. Rathbone v. State, 448 So.2d 85 (Fla. 2d DCA 1984). In the instant case such determination was made after petitioner was already sentenced. By doing so, the trial court undermined the intent of the statute which was to make trial judges give careful and thoughtful consideration before imposing adult sanctions on

juveniles. By considering the statutory criteria after sentence was imposed, the trial court was in essence merely rationalizing a decision that had already been made.

CONCLUSION

The decision of the District Court of Appeal, Second District, that the petitioner, Joseph Innes, seeks to have reviewed is in direct and express conflict with the decisions of the District Courts of Appeal, for the Fourth and Fifth Districts, as well as, a subsequent en banc decision of the Second District itself. Because of the reasons and authorities set forth in this brief, it is submitted that the decision in the present case is erroneous and that the decisions of the District Courts of Appeal for the Fourth and Fifth Districts and the en banc decision of the Second District are correct and should be approved by this court as the controlling law of this state. Petitioner, Joseph Innes, therefore, asks this Court to enter its order quashing the decision sought to be reviewed, and approve the conflicting decisions cited as correct and granting such other relief as shall seem right and proper to the court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been sent to Stephen Baker, Assistant Attorney General, Westwood Center, 2002 North Lois, Tampa, Florida 33607, and to Joseph Innes, #122631, Lancaster Correctional, this 19th day of October, 1992.

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