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IN THE SUPREME COURT OF FLORIDA

DARREN KEITH DAVIS,

Petitioner,

VS. CASE NO. 84,155

STATE OF FLORIDA,

Respondent.
_____/

AMENDED
PETITIONER'S INITIAL BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

The parties will be referred to herein as they stand before this Court. Petitioner Darren Keith Davis was the appellee in the First District Court of Appeal and defendant in the trial court; the Respondent State of Florida was the appellant in the First District Court of Appeal and plaintiff in the trial court.

References to the transcript of the record on appeal will be designated "(TR___)" followed by the appropriate page number.

References to the appendix of this brief will be designated "(APP___)" followed by the appropriate page number.

Petitioner's Initial Brief was served on December 5, 1994 however, the appendix omitted the opinion and mandate of the First District Court of Appeal, which is now included in the appendix to the Amended Petitioner's Initial Brief on the Merits.

STATEMENT OF THE CASE AND FACTS

On July 7, 1993, the trial court granted petitioner's Motion for Post-Conviction Relief based on the failure of the original sentencing court to issue contemporaneous written reasons for departing (APP 1).

On appeal, the First District Court of Appeal held that the trial court erred in vacating the departure sentence. State v. Davis, 19 Fla. L. Weekly D1519 (1st DCA July 12, 1994). The history of this case was set out in the opinion of the First District Court of Appeal:

> "On April 6, 1989, Davis was sentenced to three concurrent life terms and one concurrent 30 year term. Eight days later, he filed a notice of appeal, and on May 6, 1989, during the pendency of the appeal, the trial court filed its written reasons for guideline departure. In his direct appeal, Davis raised errors allegedly transpiring during trial, but never raised the issue regarding the trial court's failure to reduce its departure reasons to writing at the time of sentencing. Before his appeal was terminated, the Florida Supreme Court decided Ree v. State, but limited its application to cases arising prospectively. Subsequent to the decision in Ree, the First District affirmed Davis's appeal, and mandate was issued on July 12, 1991. Davis v. State, 582 So. 2d 695 (Fla. 1st DCA 1991).
>
> Thereafter, the Florida Supreme Court issued several opinions relating to the types of cases that were affected by the prospective application of Ree. One in particular, Smith v. State, 598 So. 2d 1063 (Fla. 1992), commented that Ree applied to all cases not yet final when mandate issued after rehearing in Ree.[1] [[1] The date of mandate in Ree was July 19, 1990.] As Davis's appeal had remained undecided at such time, Davis, on March 24, 1993, filed a motion

> to vacate and set aside sentence, pursuant to Florida Rules of Criminal Procedure 3.800 and/or 3.850, alleging the court's failure to reduce its departure reasons to writing during sentencing."

It should also be noted that no objection was made at sentencing. The First District Court of Appeal agreed with the state's argument that the trial court erroneously vacated the departure sentence based on Ree, stating:

> "On the same day the supreme court decided Smith v. State, which, as stated, held Ree applicable to all cases not final when mandate issued in Ree, it also decided Blair v. State, 598 So. 2d 1068 (Fla. 1992). In Blair, the court explained that Ree's prospectivity requirement applied 'to all cases not final where the issue was raised.' Id. at 1069 (emphasis added). Although Davis's case on appeal was not final at the time the mandate was issued in Ree, his appeal raised no point regarding the trial court's failure to enter contemporaneous written reasons for departure.[2] [[2] The failure to raise the Ree issue on appeal distinguishes this case from Brown v. State, 634 So. 2d 735 (Fla. 1st DCA 1994), upon which Davis relies.] Therefore, as Ree could not be retroactively applied to Davis's case, we conclude that the lower court erred in vacating the departure sentence on such ground."

Notice to invoke the discretionary jurisdiction of this Court was filed on August 5, 1994 and by order dated November 9, 1994, this Court accepted jurisdiction and ordered petitioner's brief on the merits to be served on or before December 5, 1994.

SUMMARY OF ARGUMENT

ISSUE I

THE TRIAL COURT DID NOT ERR IN VACATING PETITIONER'S ORIGINAL SENTENCE WITH THE INTENT TO RESENTENCE HIM WITHIN THE GUIDELINES.

The trial court was correct in vacating petitioner's original sentence, imposed April 6, 1989, as the written reasons for departure were not rendered until May 6, 1989, after the notice of appeal had been filed. No objection was made in the trial court and the issue was not raised on appeal as it was not reversible error at that time. During the pendency of petitioner's appeal, Ree v. State, 565 So. 2d 1329 (Fla. 1990) was decided however it was to apply prospectively only and there was no reason to believe it would apply to petitioner's sentencing otherwise, the First District Court of Appeal from its review of the record should have considered the matter.

Petitioner's appeal was final on July 12, 1991, and approximately one year later this Court announced in Smith v. State, 598 So. 2d 1063 (Fla. 1992), that Ree would apply to all cases not yet final when mandate was issued, which was on July 19, 1990, and on that date petitioner's appeal was not yet final. There is no language in Smith requiring that the issue had to have been raised on appeal in order to benefit from its application. If there had been such language, it would have been contrary to the firmly entrenched

rule of law that an illegal sentence may be cured at any time by any means.

ARGUMENT ON ISSUE I

THE TRIAL COURT DID NOT ERR IN VACATING PETITIONER'S ORIGINAL SENTENCE WITH THE INTENT TO RESENTENCE HIM WITHIN THE GUIDELINES.

We begin our analysis with the observation that although no objection was made in the trial court when the trial judge failed to reduce his reasons for departure to writing, none was required because it was not until Ree v. State, 565 So. 2d 1329 (Fla. 1990) that it became reversible error, however it was to be applied prospectively only. The opinion in Ree was dated July 19, 1990 and there was no guidance as to what prospectively meant. Petitioner had been sentenced on April 6, 1989.

Black's Law Dictionary defines "prospective law" as "one applicable only to cases which shall arise after its enactment." (Black's Law Dictionary, 5th Edition). Accordingly, there was no reason to believe from this Court's announcement in Ree, supra, that Ree would apply to petitioner's original sentencing on April 6, 1989. If that were so, then the First District Court of Appeal should have done what this Court did in Grossman v. State, 525 So. 2d 833 (Fla. 1988), cert. denied, 109 S.Ct. 1354 (1989), when, after the briefs and arguments had been presented, this Court, due to a change in the law during the pendency of the appeal[1], ordered supplemental briefs to be filed regarding the new matter.

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[1] Booth v. Maryland, 107 S.Ct. 2529 (1987)

It was not until April 2, 1992, when this Court decided Smith v. State, 598 So. 2d 1063 (Fla. 1992), that the prospective application of Ree was defined as applying to all cases not final at the time Ree decision was announced. By the time of Smith, petitioner's appeal had been final for over a year. Davis v. State, 582 So. 2d 695 (Fla. 1st DCA 1991) (opinion was dated June 26, 1991).

Decided at the same time as Smith v. State, supra, was Blair v. State, 598 So. 2d 1068 (Fla. 1992), and for the first time there is language that Ree would not be applied unless the case was not final when mandate was issued and where the issue had been raised. (Blair, at 1069). The added requirement that the issue had to have been raised is not found in Smith, supra. In Smith, this Court spoke not just of the issue raised herein but of any changing rule of law and nowhere does it say that the issue had to have been raised on appeal. In fact, that would seem to be contrary to the language of this court:

> "We are persuaded that the principles of fairness and equal treatment Griffith, which are embodied in the due process and equal protection provisions of article I, sections 9 and 16 of the Florida Constitution, (FN 4) compel us to adopt a similar evenhanded approach to the retrospective application of the decisions of this court with respect to all nonfinal cases. Any rule of law that substantially affects the life, liberty, or property of criminal defendants must be applied in a fair and evenhanded manner. Art. I, Secs. 9, 16, Fla. Const. '(T)he integrity of judicial review requires that we apply [rule changes] to all similar cases pending on direct review.' Griffith, 479 U.S. at 323, 107 S.Ct. at 1713. Moreover, 'selective application of new rules violates the principle of treating similarly

> situated defendants the same,' because selective application causes 'actual inequity' when the Court 'chooses which of many similarly situated defendants should be the chance beneficiary' of a new rule. Id. (quoting Johnson, 475 U.S. at 556 n. 16, 102 S.Ct. at 2590 n. 16). Thus, we hold that any decision of this court announcing a new rule of law, or merely applying an established rule of law to a new or different factual situation, must be given retrospective application by the courts of this state in every case pending on direct review or not yet final. Art. I, Secs. 9, 16, Fla. Const. (FN 5) To benefit from the change in law, the defendant must have timely objected at trial if an objection was required to preserve the issue for appellate review." (Pg. 1066; cites omitted)

In the case approved by and relied upon by this court in Smith, supra, Griffith v. Kentucky, 107 S.Ct. 708 (1987), the issue was whether the ruling of the United States Supreme Court in Batson v. Kentucky, 106 S.Ct 1712 (1986) should be applied to "... litigation pending on direct state or federal review or not yet final ..." and to this the Supreme Court answered in the "affirmative" (at p. 709). This Court adopted the language of the United States Supreme Court with the exception of "or federal review" and neither Smith, supra, nor Griffith, supra, require that the issue had to have been raised on appeal.

The First District Court of Appeal's finding below that the failure to raise the Ree issue on appeal distinguished petitioner's case from Brown v. State, 634 So. 2d 735 (Fla. 1st DCA 1994), flies in the face of the language earlier quoted:

> "[T]he integrity of judicial review requires that we apply [rule changes] to all similar cases pending on direct review....Moreover, 'selective application of new rules violates the

> principle of treating similarly situated defendants the same,' because selective application causes 'actual inequity when the court 'chooses which of many similarly situated defendants should be the chance beneficiary' of a new rule." Smith, supra, at p. 1066; cites omitted

In order to benefit from this change in the law, this Court only required that "...the defendant must have timely objected at trial if an objection was required to preserve the issue for appellate review." (Smith v. State, supra, Id.). But no objection was necessary then because it was not error and, in fact, no objection is yet required as this Court has held "...that departure errors apparent on the face of the record do not require a contemporaneous objection in order to be preserved for review." Taylor v. State, 601 So. 2d 540, 541 (Fla. 1992; cites omitted).

In State v. Whitfield, 47 So. 2d 1045 (Fla. 1986), this Court, upon certification from the First District Court of Appeal, held that State v. Rhoden, 448 So. 2d 1013 (Fla. 1984) and its progeny, cases in which objections were not required to preserve sentencing error for appellate review because they resulted in illegal sentences for failure of the trial courts to make the statutorily mandated findings, mandated a reversal. This Court went on to note:

> "In the case at hand, the impact of the error was that the trial court departed from the sentencing guidelines in Rule 3.701 without making the mandatorily written, clear and convincing reasons for departure. Thus, Rhoden, Walker and Snow are controlling and the district court was correct in considering the sentencing error on appeal even though there had been no

contemporaneous objection at trial." (Whitfield, supra, 1047; cites omitted).

Fla.R.Crim.P. 3.800(a) allows the court "at any time" to correct of an illegal sentence imposed by it and there is no requirement that it had been raised in the trial court or on appeal. In fact, use of this rule should be confined to "...circumstances in which the error must be corrected as a matter of law..." Judge v. State, 596 So. 2d 73, 79, Fn 1 (Fla. 2nd DCA 1992) (En Banc), rev. denied, 613 So. 2d 5 (Fla. 1992).

Even if the error could have been raised on appeal and was not, that would not be grounds to deny relief:

> "Where, as here, the sentencing error can cause or require a defendant to be incarcerated or restrained for a greater length of time than provided by law in the absence of the sentencing error, that sentencing error is fundamental and endures and petitioner is entitled to relief in any and every legal manner possible, viz: on direct appeal although not first presented to the trial court, by post-conviction relief under Rule 3.850 or by extraordinary remedy. As to such a fundamental sentencing error he is entitled to relief under an alternative remedy notwithstanding that he could have, but did not, raise the error on appeal." Reynolds v. State, 429 So. 1333 (Fla. 5th DCA 1983)

Citing Reynolds, supra, the Fourth District Court of Appeal held that the absence of written reasons for a trial court's departure from the guidelines resulted in the defendant being confined longer than lawfully permitted and could be corrected "...in any and every legal manner possible." Braddy v. State, 520 So. 2d 660 (Fla. 4th DCA 1988), rev. denied, 528 So. 2d 1183 (Fla. 1988).

In summary, petitioner is entitled to benefit from the rule of law announced in Ree and its progeny because: 1) the confusion stemming from the Ree announcement of "prospectivity" prevented petitioner from raising the Ree issue while his appeal was pending or; 2) Smith's definition of prospectivity as used in Ree qualifies petitioner for the benefit of Ree, or; 3) the requirement announced in Ree embodies a major change of law which may be raised for the first time in a post-conviction motion. [Nelms v. State, 596 So. 2d 441 (Fla. 1992)], or; 4) because an illegal sentence may be remedied at any time through any means.

CONCLUSION

Petitioner respectfully requests this Court to reverse the decision of the First District Court of Appeal below and to reinstate the decision of the trial court vacating petitioner's original sentence.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Robert Butterworth, Attorney General, The Capitol, Tallahassee, FL 32399-1050 by regular U.S. Mail on this the 6th day of December, 1994.

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