IN THE SUPREME COURT OF FLORIDA

DARREN KEITH DAVIS,

Petitioner,

VS. CASE NO. 84,155

STATE OF FLORIDA,

Respondent.
_____/

PETITIONER'S REPLY 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.

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.

References to the Petitioner's Initial Brief will be designated "(PIB___)" followed by the appropriate page number.

References to the Respondent's Answer Brief will be designated "(RAB___)" followed by the appropriate page number.

SUMMARY OF REPLY ARGUMENT

The operative facts are:

1. Petitioner's case was on direct appeal when the Ree rule was announced by this Court on July 19, 1990.

2. When it was announced, it was to apply prospectively only.

3. Since petitioner was sentenced on April 6, 1989, it was not to apply to his case.

4. Mandate was issued in petitioner's appeal on July 12, 1991.

5. On April 2, 1992, this court held in Smith v. State that the Ree rule would apply to any case on direct appeal when the Ree rule was announced.

6. Petitioner's case was on direct appeal when the Ree rule was announced.

7. The only means available to correct this inequity was post-conviction proceedings.

Accordingly, the true issue is:

May a defendant use post-conviction proceedings to benefit from a change in the law, announced by this court during the pendency of his direct appeal but which, when first announced, did not apply to his case but later, after conclusion of his direct appeal, was held by this court to apply to his case?

REPLY 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.

If Smith v. State, 598 So. 2d 1063 (Fla. 1992), had been decided on the heels of Ree v. State, 565 So. 2d 1329 (Fla. 1990), modified, State v. Lyles, 576 So. 2d 706 (Fla. 1991) and during the pendency of petitioner's direct appeal - would he have benefitted from the Ree rule? Of course.

The scenario presented by the state overlooks - and does not address - the critical fact that petitioner's appeal was not final when Ree was decided and had prospectively been defined then as it was two years later, he would have received the benefit at that time. The "nunc pro tunc" definition of prospectively results in the "nunc pro tunc" application to petitioner's case. However, at the time that Ree was decided, it was to be applied prospectively only so petitioner could not have succeed had he raised it at that time.

For example, in Fenleon v. State, 594 So. 2d 292 (Fla. 1992), this Court directed that henceforth trial judges would not give the jury instruction on flight. In Taylor v. State, 630 So. 2d 1038 (Fla. 1994), the defendant argued that he should received the benefit of the Fenleon decision however this Court held as follows:

> "This Court intended that the holding in Fenleon be applied prospectively only, and, since Taylor was tried before our decision in Fenleon was issued, the trial court did not err given the circumstances of this case." Taylor, at p. 1042.

Accordingly, through no fault of his own, petitioner did not and could not take advantage of the Ree rule as he had been sentenced prior to the date the rule was promulgated. Therefore, there was no legal reason to raise it in his direct appeal.

Respondent erroneously refers to the Ree rule as dicta however the promulgation of the rule was essential to this Court's determination of one of the two bases for jurisdiction, i.e., to answer a question of great public importance. In attempting to redefine Ree and its application, this Court is requested by respondent to overrule Rhoden v. State, 448 So. 2d 1013 (Fla. 1984) - as well as Smith v. State, supra, - to limit Fla.R.Crim.P. 3.800, to revise Fla.R.App.P. 9.140(g) and to overlook Griffith v. Kentucky, 107 S.Ct. 708 (1987).

Respondent's claim that had petitioner raised the Ree issue he would have lost based on the decisions in Ree, supra, Lyles, supra, and State v. Williams, 576 So. 2d 281 (Fla. 1991), is true only to the extent that these were pre-Smith cases, that is, before the definition of prospective was defined as applying to cases in the pipeline. The true reason that Lyles and Williams cannot now benefit from the Ree rule is because in Lyles this Court modified Ree so as to allow a trial judge the leeway to reduce his reasons for departure to writing immediately after the sentencing hearing. In both Lyles and Williams, the trial judges signed the written reasons for departure the same day of the sentencing but did not file them until the following business day in Lyles, and two business days later in Williams.

In the instant case, the reasons for departure were reduced to writing, signed and filed approximately one month after the sentencing date and after the notice of appeal was filed. The modification in Lyles is what bars Lyles and Williams from seeking post-conviction relief after Smith was decided. That modification would not have prevented petitioner from seeking post-conviction relief. Furthermore, this Court expressly receded from Lyles and Williams "...to the extent that they declined to apply Ree retrospectively to nonfinal cases." Smith, (p. 1066). Petitioner's case was nonfinal at that time.

Respondent's answer brief is based on what respondent wants the law to be, not what it is. Respondent inappropriately string cites Reed v. State, 640 So. 1094 (Fla. 1994) and Muhammad v. State, 603 So. 2d 488 (Fla. 1992), for the proposition that because petitioner did not challenge his sentence, he waived "...the procedural issue of whether a written departure order should have been entered contemporaneously with the oral pronouncement of his sentence." (RAB, p. 6). Neither Reed nor Muhammad involved illegal sentences that did not require an objection to be preserved for appellate review.

It is true that the decisional law in effect at the time of an appeal applies however it was not until this Court decided Smith v. State, 598 So. 2d 1063 (Fla. 1992), that the word "prospective" was defined to mean it would apply to all cases "...not yet final when mandate issued after rehearing in Ree." Smith, (at p. 1066). In effect, this Court, in order to maintain fairness and even-

handedness, applied the definition of prospectively "nunc pro tunc". Accordingly, this Court reconsidered and changed the law of the case by its decision in Smith v. State, supra, as it may do when necessary to prevent "manifest injustice". Strazzulla v. Hendrick, 177 So. 2d 1, 4 (Fla. 1965); Preston v. State, 444 So. 2d 939, 942 (Fla. 1984); Young v. State, 503 So. 2d 1360, 1361 (Fla. 1st DCA 1987).

> "We are persuaded that the principles of fairness and equal treatment underlying Griffith, which are embodied in the due process and equal protection provisions of article I, sections 9 and 16 of the Florida Constitution, compel us to adopt a similar evenhanded approach to the retrospective application of the decisions of this Court with respect to all non-final 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, §§ 9, 16, Fla. Const. '[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)

It is thus abundantly clear that petitioner would have suffered manifest injustice had the law of the case not been reconsidered and changed.

Respondent's insistence on a prospective application of Ree is simply denial of this court's decision in Smith and the State's argument failed then and should fail now.

Respondent correctly points out that in Blair v. State, 598 So. 2d 1068 (Fla. 1992), Justice Shaw opined that Smith v. State,

supra, required the Ree issue to have been raised in order to benefit from its application. However, there is no language in Smith that requires that nor is there any language in Griffith v. Kentucky, 107 S.Ct. 708 (1987), the case relied upon by this Court in Smith, to that effect either (PIB, p. 9 and 10).

Respondent then writes that notwithstanding the major "flaws" of the Smith decision, "...even Smith does not hold or even suggest that the Ree Rule should be retroactively applied in collateral proceedings to final judgments and sentences in which the issue is not raised on direct appeal." (RAB, p. 8,9). Smith suggests just that. That is, that it would apply to "...every case pending on direct review or not yet final." Otherwise, why add the clause "not yet final." Smith, (p. 1066; emp. sup.) But even if this Court decided that the Ree rule should not be applied retroactively in collateral proceedings to final judgments, there would still be an exception for petitioner's case because his case was not final when Ree was decided. The added requirement imposed by the state, that the issue had to have been raised on direct appeal, is meaningless because had it been raised in this particular case, it would not have succeeded at that time. It would seem that Respondent is now contending that if the issue had been raised on direct appeal it would have been reviewable in a collateral proceeding but because it was not raised it is not reviewable. Petitioner has answered that argument in his Initial Brief (PIB, p. 9, 10).

Respondent then takes a new tact and claims that Ree was merely a procedural rule change (RAB, p. 10), which is nothing more than a continued refusal to accept Smith:

> "Any rule of law that substantially affects the life, liberty, or property of criminal defendants must be applied in a fair and evenhanded manner. Article I, § 9, 16, Fla. Const." (Smith, p. 1066)

This court has previously explained the difference between substantive and procedural law.

> "Procedural law is sometimes referred to as 'Adjective law' or 'law remedy' or 'remedial law' and has been described as the legal machinery by which substantive law is made effective. Substantive law has been defined as that part of the law which creates, defines, and regulates rights, or that part of the law which courts are established to administer."[1]

Continuing, this court quoted from a California case[2],

> "As used in jurisprudence, the term 'right' denotes the capacity of asserting a legal enforceable claim. Legal rights have been classified as substantive and remedial. Substantive rights are those existing for their own sake and constituting the normal legal order of society, i.e., the rights of life, liberty, property and reputation. Remedial rights arise for the purpose of protecting or enforcing substantive rights." (Id, emp. sup.)

Finally, this court stated,

> "As related to criminal law and procedure, substantive law is that which declares what acts are crimes and prescribes the punishment there for, while procedural law is that which provides or regulates the steps by which one who violates the criminal statute is punished. (Id.)

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[1] State v. Garcia, 229 So. 2d 236 (Fla. 1969).

[2] Estate of Gogadashvele, 16 Cal. Rptr. 77 (1961).

Respondent claims Witt v. State, 387 So. 2d 922 (Fla. 1980), cert. den., 101 S.Ct. 796 (1980), is the "seminal Florida decision" on applying decisional law to collateral proceedings, however, it has been distinguished several times. In James v. State, 615 So 2d. 658 (Fla. 1993), during the pendency of the appeal the United States Supreme Court declared a jury instruction inadequate and because objections are required to preserve jury instruction issues and one was made in the trial court, this court held that the prisoner was entitled to be resentenced using the proper jury instruction. This claim was brought under Fla.R.Crim.P. 3.850.

Furthermore, Witt involved R. 3.850 rather than R. 3.800, which allows the correction of an illegal sentence at any time. This court there conceded that even under this rule relief should be granted in order to ensure "fairness and uniformity in individual adjudications." (Witt, p. 925) This is exactly what this court sought to do by its decision in Smith, supra, where it held that

> "'. . . 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." (at p. 1066)

In Witt, this court went on to comment:

> ". . . society recognizes that a sweeping change of law can so drastically alter the substantive or procedural underpinning of a final conviction and sentence that the machinery of post-conviction relief is necessary to avoid individual instances of obvious injustice. Considerations of fairness and uniformity make it very 'difficult to justify depriving a person of his liberty or his life, under process no longer considered acceptable and no longer

> applied to indistinguishable cases.'" (at p. 925).

Nevertheless, the true issue in Witt was when to apply a new rule of law retroactively and that issue has already been decided by this court in Smith, supra. In fact, the language from Witt would appear to support Petitioner's position:

> "Thus, society recognizes that a sweeping change of law can so drastically alter the substantive or procedural underpinnings of a final conviction and sentence that the machinery of post-conviction relief is necessary to avoid individual instances of obvious injustice. Consideration of fairness and uniformity make it very 'difficult to justify depriving a person of his liberty or his life, under process no longer considered acceptable and no longer applied to indistinguishable cases.'" Witt, (at p. 925; cites omitted).

Even if Witt would stand as a bar, in general, to the success of a collateral proceeding attack on a change in the law, an exception would have to be made in this case because of the unique circumstances, i.e., the delayed definition of prospectively.

Respondent's reference to State v. Whitfield, 47 So. 2d 1045 (Fla. 1986), overlooks this court's comment that the sentencing error, raised on direct appeal, could also have been considered in a 3.800 motion. See also: Smith v. State, 630 So. 2d 641 (Fla. 5th DCA 1994) (illegal sentence can be corrected at any time). If the failure, in this case, to reduce to writing reasons for departure renders the sentence unlawful, then it may be corrected at any time.

There is language in Prieto v. State,, 627 So. 2d 20 (Fla. 2nd DCA 1993), that even though a contemporaneous objection may not be necessary for appellate review of the failure of a trial court to

reduce his reasons for departure to writing, such an issue must be raised on direct appeal rather than through a motion for post-conviction relief. Prieto relied upon Rowe v. State, 496 So. 2d 857 (Fla. 2nd DCA 1986) for this proposition. The language in Rowe that "decisions affecting change in application of the sentencing guidelines are not retroactively cognizable in post-conviction proceedings" would seem at odds with the language of this Court in Smith v. State, supra. Again, there was no legal reason to raise it for it would have failed on direct appeal.

The Rowe decision relied upon Ardley v. State, 491 So. 2d 1259 (Fla. 1st DCA 1986), wherein it was held that the changes in sentencing guideline law as a result of Hendricks v. State, 475 So. 2d 1218 (Fla. 1985) and Allbritton v. State, 476 So. 2d 158 (Fla. 1985) would not be cognizable in post-conviction proceedings. Of course, the difference is that in the instant case petitioner's appeal was in the pipeline at the time Ree was announced and Smith v. State made it applicable to his case. The only method of raising it when it became applicable to his case was through post-conviction proceedings. Petitioner is not suggesting that the Ree rule applies to any case that was not in the pipeline when it was announced. See: Marshall v. State, 600 So. 2d 474 (Fla. 3rd DCA 1992). Accordingly, the above cases are not inconsistent with petitioner's position as he would not have been required to use post-conviction proceedings if prospectively had been defined in Ree, supra, as it was in Smith, supra, two years later.

The remainder of respondent's brief is dedicated to the condemnation of Fla.R.Crim.P. 3.800. The correct use of that rule is not before this Court at this time.

CONCLUSION

Petitioner respectfully submits that because his sentence was an illegal sentence, it may be corrected at any time through any proceedings; in the alternative, because his case was "not yet final" when the Ree rule was announced, he is entitled to the benefit of that rule.

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 16th day of January, 1995.

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