IN THE SUPREME COURT OF FLORIDA

EDGAR EUGENE STEPHENSON,

Petitioner,

vs. CASE NO. 84,208

STATE OF FLORIDA,

Respondent.

_____/

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

BRIEF OF RESPONDENT ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER AUTHORITIES:

SUMMARY OF THE ARGUMENT

As to Issue I: The late filing of a notice of appeal does not establish ineffectiveness of counsel in this case because it was neither alleged nor proved that Petitioner made a timely request for an appeal. Thus, the proper remedy, as mandated by this Court in State v. District Court of Appeal, First District, 569 So. 2d 439 (Fla. 1990), is to seek a belated appeal in a Rule 3.850 motion for post conviction relief in the trial court.

As to Issue II: Notwithstanding the absence of copies of the prior convictions and presentence investigative report (PSI) in the record on appeal, there is ample evidence in the record to support the trial court's finding that Appellant qualifies as a habitual violent felony offender. Thus, no fundamental error occurred.

As to Issue III: The trial court's finding that Appellant was under supervision of the Department of Corrections within five years of the commission of the instant crimes is supported by information which was set out in the PSI and to which Appellant expressly conceded. Appellant did not challenge the truth of this allegation at trial or in this appeal. Therefore, the habitual offender enhanced sentence must be upheld.

ARGUMENT

ISSUE I

AFTER STATE V. DISTRICT COURT OF APPEAL, FIRST DISTRICT, 569 SO. 2D 439 (FLA. 1990), DOES A DISTRICT COURT OF APPEAL HAVE THE AUTHORITY TO GRANT A BELATED APPEAL IN A CRIMINAL CASE WHEN THE RECORD ON DIRECT APPEAL INDISPUTABLY REFLECTS THAT TRIAL COUNSEL THROUGH NEGLECT, INADVERTENCE OR ERROR FILED AN UNTIMELY NOTICE OF APPEAL AND THUS RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL AS A MATTER OF LAW?

The State submits the above certified question should be answered in the negative. In State v. District Court of Appeal of Florida, First District, 569 So. 2d 439 (Fla. 1990), this Court clearly mandated that petitions for belated appeal because of ineffective assistance of trial counsel should be filed in the trial court by a motion for post conviction relief under rule 3.850 rather than in the appellate court by a petition for writ of habeas corpus. Id. at 442. It is axiomatic that a defendant has a right to a direct appeal; however, unlike trial proceedings, the defendant himself is solely responsible for intitiating the appellate process. Baggett v. Wainwright, 229 So. 2d 239, 241 (Fla. 1969). Whether a defendant's alleged desire to pursue an appeal is thwarted by the filing of an untimely notice of appeal or by the absence of such a notice, the factual determination must be made at the trial court level whether the defendant actually invoked his right to appeal by making a timely request to his attorney.

A prima facie case of ineffective assistance of counsel has never been established in this case because Petitioner has never

alleged that he "made a timely request for an appeal, which his counsel failed to honor." Gilliam v. State, 611 So. 2d 90, 91 (Fla. 2d DCA 1992)(emphasis added), citing Smith v. State, 592 So. 2d 1208 (Fla. 2d DCA 1992). See also, Short v. State, 596 So. 2d 502, 502-503 (Fla. 1st DCA 1992); Dortch v. State, 588 So. 2d 342, 343 (Fla. 4th DCA 1991); Viqueira v. Roth, 591 So. 2d 1147, 1147-1148 (Fla. 3d DCA 1992); Turner v. State, 588 So. 2d 1042, 1045 (Fla. 5th DCA 1991).

Once a defendant has satisfied the initial threshold burden by alleging in a Rule 3.850 motion that he made a timely request for an appeal which for some reason was not perfected by counsel, an "evidentiary hearing may be necessary to determine whether appellant had timely told trial counsel he wished to appeal, and had not subsequently changed his instructions . . ." Gunn v. State, 612 So. 2d 643, 644 (Fla. 4th DCA 1993). See also State v. Meyer, 430 So. 2d 440, 443, n. 3 (Fla. 1983)("Where the effectiveness of counsel is in dispute, a hearing would be required to determine the issue.").

Assuming arguendo that the filing of a notice of appeal, as in this case, is conclusive evidence that Petitioner did in fact ask his attorney to initiate an appeal, there is no indication in the record that Petitioner's request was timely. Respondent acknowledges that in the majority of cases the untimeliness of the notice of appeal may be the result of counsel's neglect, inadvertence, or error, rather than any delay on the defendant's part. Nevertheless, an automatic finding of ineffective assistance of counsel based solely on the untimely notice, with

no sworn factual assertion by the defendant and without allowing counsel the opportunity to explain or respond, is unsound policy. Nor should the appellate court direct the circuit court to grant a belated appeal without an evidentiary hearing unless the "record contains sufficient evidence that the appellant timely, but unsuccessfully, requested the attorney who was substituted as his counsel after sentencing to file a notice of appeal." Taylor v. State, 613 So. 2d 943, 944 (Fla. 2d DCA 1993).

The district court correctly noted that it is not free to ignore this Court's binding precedent in First District, nor is the lower court "at liberty to cast aside this well-settled rule because it may work a hardship in this particular case." Stephenson v. State, No. 93-00405 (Fla. 2d DCA July 20, 1994)[19 Fla. L. Weekly D1574], citing Gentile Bros. Co. v. Florida Indus. Comm'n, 151 Fla. 857, 10 So. 2d 568 (1942). It should be noted that this Court's decision in First District was based in part on the need to avoid the more cumbersome procedures engendered by the former use of a petition for writ of habeas corpus in the appellate court:

> Under the present procedure, the petitioner must first petition an appellate court, which has no record or other knowledge of the case, by alleging facts which, if proven, would show that counsel's failure to file a timely notice of appeal denied the petitioner's right to a direct appeal. While in some cases the state may agree with the petitioner's right to a belated appeal, in most instances the state is simply without knowledge concerning the allegations of fact. Therefore, if the petitioner alleges a prima facie case, the appellate

> court must then appoint a commissioner to take testimony and make findings and recommendations to the appellate court. The appellate court then reviews the report of the commissioner to determine if the petitioner was unconstitutionally denied the right to appeal. All of this could be more easily accomplished by filing a motion under rule 3.850 alleging ineffective assistance of trial counsel. . . . A trial judge does not interfere with the appellate court's jurisdiction by entering an order finding trial counsel to be ineffective and authorizing the filing of a belated appeal.

First District, 569 So. 2d at 442. Notwithstanding the district court's authority to entertain petitions for writ of habeas corpus, the procedure instituted by this Court in First District for resolving an ineffective assistance of counsel claim based on counsel's alleged failure to file a timely notice of appeal not only comports with the letter and spirit of Rule 3.850 but conserves judicial economy and affords fairness to all parties. Accordingly, this Court should answer the certified question in the negative.

ISSUE II

WHETHER THE RECORD SUPPORTS THE TRIAL COURT'S FINDING THAT PETITIONER HAS PRIOR FELONY CONVICTIONS?

The trial court's finding in this case that Petitioner had three previous felony convictions was based primarily upon the certified copies of the prior convictions submitted to the court by the State and admitted into evidence without objection as State's Exhibit No. 1. (R 42, 143). Although this exhibit was not included in the record on appeal for unknown reasons, Respondent submits the omission is not dispositive in light of Petitioner's express agreement with the existence and accuracy of the earlier convictions. (R 142). The same is true regarding the presentence investigation report (PSI). Petitioner contested three minor points of information in the PSI which were corrected by the trial court, and Petitioner had no further disagreement with the factual matters in the report. (R 140-141). Petitioner is not now complaining that the trial court's factual findings regarding his prior criminal history or other data included in the PSI are incorrect. The trial court reviewed all pertinent documents, including the PSI and prior convictions, and afforded Petitioner the opportunity to be heard and raise any objections. The trial court orally pronounced its findings on the record, without challenge by Petitioner. The record reveals that Petitioner meets the requirements for sentencing as a habitual violent felony offender. Thus, no error occurred.

ISSUE III

WHETHER THE TRIAL JUDGE COMMITTED FUNDAMENTAL ERROR BY APPLYING THE HABITUAL OFFENDER STATUTE?

Petitioner contends the trial court failed to comply with the requirements of section 775.084(1)(b)2, Florida Statutes (1991), by failing to determine when Petitioner had been released from supervision on parole and whether the release occurred within five years of the commission of the instant offenses. This assertion is incorrect, however. The record reveals that the trial court was well aware of its duty to find whether Petitioner had been released from supervision by the Department of Corrections within the prior five year period. (R 146-150). The Assistant State Attorney pointed out that the PSI indicates Petitioner was on parole on December 20, 1989, and offered to get a certified document from the D.O.C. to substantiate this fact. (R 150). There was no need for further proof, however, because Petitioner admitted that he was indeed under restraint at that time.[1] (R 150).

This case is distinguishable from Frazier v. State, 595 So. 2d 131 (Fla. 2d DCA 1992) and Johnson v. State, 597 So. 2d 353 (Fla. 1st DCA 1992), cited in Petitioner's brief. In Frazier, the record was inconclusive as to whether certified copies of the prior convictions were in evidence at the trial; the State moved them into evidence, but the court never ruled that they were

[1] Petitioner committed the instant offenses on July 19, 1992. (R 8-11).

admitted. 595 So. 2d at 132. In Johnson, the trial court merely stated that the defendant has a history of burglarizing other people's property and has been on probation and community control and has even done state time, without making any specific findings regarding the earlier crimes or determining the date of his release from supervision. 597 So. 2d at 355. In this case, the court made findings based on the certified copies of convictions concerning the nature and dates of the prior felonies and the date of release on parole. Petitioner acknowledged the truthfulness of these findings. A similar situation was considered by this Court in State v. Rucker, 613 So. 2d 460 (Fla. 1993). There, this Court held that the sentencing judge should have made the requisite habitual offender findings; however, the error was harmless:

> In the present case, the State introduced certified copies of Rucker's prior convictions, both of which occurred within the requisite period of time. Rucker conceded the validity of the convictions and the trial court expressly found that Rucker met the definition of habitual felony offender by a preponderance of the evidence. Because this evidence was unrebutted and Rucker does not now assert that his prior convictions were pardoned or set aside, any failure to make more specific findings was harmless. Were we to remand for resentencing, the result would be mere legal churning.

Id. at 462.

The State submits that any error in the proceedings in this case, like Rucker, is harmless and that to remand for resentencing would result in a waste of valuable judicial resources. Therefore the sentence should be affirmed.

CONCLUSION

WHEREFORE, based on the above reasons and authorities, the State respectfully requests this Honorable Court to answer the certified question in the negative, approve the decision of the Second District Court of Appeal in dismissing the appeal as untimely, and affirm the conviction and sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Randall O. Reder, Esquire, 1060 W. Busch Boulevard, Suite 103, Tampa, Florida 33612-7703, on this 28th day of September, 1994.

Michael Taylor
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