IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

CASE NO: 84,443
5th DCA No.: 93-2898

MICHAEL PENNINGTON,

Respondent.

_____/

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

PETITIONER'S BRIEF ON JURISDICTION

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TABLE OF CONTENTS

PAGES:

TABLE OF AUTHORITIES.....ii

STATEMENT OF THE CASE AND FACTS.....1

SUMMARY OF THE ARGUMENT.....2

ARGUMENT

THE DECISION IN THIS CASE IS IN EXPRESS AND DIRECT CONFLICT WITH A DECISION FROM THIS COURT.....3

CONCLUSION.....5

CERTIFICATE OF SERVICE.....5

TABLE OF AUTHORITIES

CASES: PAGES:

Ashley v. State,
614 So. 2d 486 (Fla. 1993).....4

Jollie v. State,
405 So. 2d 418 (Fla. 1981).....3

Massey v. State,
609 So. 2d 598 (Fla. 1992).....2-4

Pennington v. State,
19 Fla. L. Weekly D1754 (Fla. 5th DCA August 19, 1994)...1

Thompson v. State,
19 Fla. L. Weekly D1221 (Fla. 5th DCA June 3, 1994)....1-4

OTHER AUTHORITIES

§812.014(1)(2)(c), Fla. Stat. (1991).....1
§415.111(5), Fla. Stat. (1991).....1

STATEMENT OF THE CASE AND FACTS

Respondent pled guilty to grand theft and attempted abuse of the aged by exploitation in violation of §§812.014(1) and (2)(c) and 415.111(5), Florida Statutes (1991), and signed a plea form that stated he "could" be sentenced as an habitual offender. Respondent was sentenced as an habitual offender and the Fifth District Court of Appeal reversed and remanded relying on Thompson, infra. Pennington v. State, 19 Fla. L. Weekly D1754 (Fla. 5th DCA August 19, 1994). Upon remand, the Fifth directed that Respondent be given the option to withdraw his guilty plea should the court intend to depart from the sentencing guidelines. Id. The State then filed a Notice To Invoke Discretionary Jurisdiction of this Court based on express and direct conflict with a decision of this Court.

SUMMARY OF THE ARGUMENT

The opinion issued in the instant case by the Fifth District Court of Appeal cites Thompson, infra, as controlling authority which is currently pending jurisdiction in this Court. This constitutes prima facie express conflict, if accepted, thereby allowing this Court to exercise its jurisdiction.

As additional grounds for jurisdiction, the decision by the Fifth District Court of Appeal in this case is in express and direct conflict with this Court's decision in Massey, infra. Due to this conflict, this Court should exercise its discretionary jurisdiction.

ARGUMENT

THE DECISION IN THIS CASE IS IN EXPRESS AND DIRECT CONFLICT WITH A DECISION FROM THIS COURT.

A district court of appeal per curiam opinion which cites as controlling authority a decision that is either pending review in or has been reversed by the Supreme Court continues to constitute prima facie express conflict and allows the Supreme Court to exercise its jurisdiction. Jollie v. State, 405 So. 2d 418 (Fla. 1981). The opinion issued in the instant case by the Fifth District Court of Appeal cites Thompson v. State, 19 Fla. L. Weekly D1221 (Fla. 5th DCA June 3, 1994), as controlling authority. (Appendix A) Thompson is currently pending jurisdiction in this Court, Florida Supreme Court Case Number 83,951, therefore, if accepted, this Court must exercise its jurisdiction in the instant case.

As additional grounds for jurisdiction, Petitioner asserts that the decision in the instant case is in express and direct conflict with this Court's decision in Massey v. State, 609 So. 2d 598 (Fla. 1992). In Massey, this Court held that the State's failure to strictly comply with the statute requiring that notice of the state's intention to have the defendant sentenced as an habitual offender be served upon the defendant, may be reviewed under the harmless error analysis. In that case, the State's error in failing to serve actual notice to the defendant was harmless where the defendant and his attorney had actual notice of the State's intention.

In the instant case, the Fifth District Court of Appeal reversed Respondent's sentence relying on Thompson, supra. The instant decision is in express and direct conflict with Massey, supra, because the Fifth District failed to apply a harmless error analysis. As in Massey, the Respondent had **actual** notice of the possible consideration of habitual offender sanctions.

At the time of entering his plea, Respondent signed a plea agreement which provided for the maximum sentence should he be determined by the Judge to be an habitual offender as well as the consequences of such a sentence. Respondent affirmatively indicated at his plea hearing that he read the agreement, had an adequate opportunity to ask questions of his attorney about the agreement, and that he understood the agreement. Because Respondent had actual notice of the possibility of a habitual offender sentence before he entered his plea, the protections afforded by Ashley v. State, 614 So. 2d 486 (Fla. 1993), were provided to him, and any error in failing to provide formal written notice of habitualization was harmless. The Fifth District erred in failing to apply a harmless error analysis as outlined in Massey, infra.

The Fifth District's decision in the instant case is in express and direct conflict with this Court's decision in Massey, infra. This honorable court should exercise its jurisdiction in this case and resolve the conflict between the two cases.

CONCLUSION

Based on the arguments and authorities presented herein, Petitioner respectfully requests this honorable court exercise its jurisdiction in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Jurisdictional Brief has been furnished by delivery to Brynn Newton, Assistant Public Defender, 112-A Orange Avenue, Daytona Beach, FL, 32114, this 23rd day of September, 1994.

Robin Compton Jones
Assistant Attorney General

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

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CASE NO.

5th DCA Case No. 93-2898

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APPENDIX

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terest award to the extent that it fails to award Baker interest from April 1, 1985, the date FP, Inc., terminated Baker from the project. *See Argonaut Ins. Co. v. May Plumbing, Co.*, 474 So. 2d [redacted] (Fla. 1985); *Ferrell v. Ashmore*, 507 So. 2d 691 (Fla. 1st [redacted] 1991); *United Aluma Glass v. Bratton Corp.*, 8 F.3d 756 (11th Cir. 1993).

Affirmed in part; reversed in part; and cause remanded for entry of a judgment in accordance with this decision.

* * *

STONG v. STONG. 3rd District. #93-1483. August 17, 1994. Appeal from the Circuit Court for Dade County. Affirmed. *See and compare Marcoux v. Marcoux*, 464 So. 2d 542 (Fla. 1985); *Grant v. Corbitt*, 95 So. 2d 25 (Fla. 1957); *Solomon v. Gordon*, 4 So. 2d 710 (1941); *Walsh v. Walsh*, 388 So. 2d 240 (Fla. 2d DCA 1980); *Tillman v. Tillman*, 222 So. 2d 218 (Fla. 1st DCA 1969); *Bullard v. Bullard*, 195 So. 2d 876 (Fla. 2nd DCA 1967), *Schwartz v. Schwartz*, 143 So. 2d 901 (Fla. 2d DCA 1962).

CROWLEY CARIBBEAN TRANSPORT, INC. v. XELA CORPORATION. 3rd District. #93-2420. August 17, 1994. Appeal from the Circuit Court for Dade County. Affirmed. *Lance v. Wade*, 457 So. 2d 1008 (Fla. 1984); *Foreman v. E.F. Hutton & Co.*, 568 So. 2d 531 (Fla. 3d DCA 1990); *Horacio O. Ferrera No. Am. Div., Inc. v. Moroso Performance Products, Inc.*, 553 So. 2d 336 (Fla. 4th DCA 1989).

DAVIS v. STATE. 3rd District. #94-345. August 17, 1994. Appeal from the Circuit Court for Dade County. Affirmed. *See State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986); *Nordelo v. State*, 603 So. 2d 36 (Fla. 3d DCA 1993).

STATE v. DAVIDSON. 3rd District. #94-280. August 17, 1994. Appeal from the Circuit Court for Dade County. Affirmed. *Collier v. Boney*, 525 So. 2d 971 (Fla. 1st DCA 1988); *State v. Twelves*, 463 So. 2d 493 (Fla. 2d DCA 1985).

NORRIS v. STATE. 3rd District. #93-2624. August 17, 1994. Appeal from the Circuit Court for Dade County. Affirmed. *Crump v. State*, 622 So. 2d 963 (Fla. 1993).

* * *

Criminal law—Sentencing—Guidelines

MICHAEL PENNINGTON, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 93-2898. Opinion filed August 19, 1994. Appeal from the Circuit Court for Volusia County, John W. Watson, III, Judge. Counsel: J[redacted]B. Gibson, Public Defender, and Nancy Ryan, Assistant Public Defend[redacted]tona Beach, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Kellie A. Nielan, Assistant Attorney General, Daytona Beach, for Appellee.

(PER CURIAM.) The sentence in this case is violative of the dictates of *Thompson v. State*, 19 Fla. L. Weekly D1221 (Fla. 5th DCA June 3, 1994) and must be vacated. Upon remand appellant must be given the option to withdraw his guilty plea should the court intend to depart from the sentencing guidelines. Finally, it is apparent the court's written community control order is different from the judge's oral pronouncements.

SENTENCE VACATED; REMANDED. (HARRIS, C.J., DAUKSCH and COBB, JJ., concur.)

* * *

Appeals—Attorney's fees—Order granting motion for attorney's fees and reserving jurisdiction to determine amount is non-final, non-appealable order—Appeal of order dismissed for lack of jurisdiction

TRANS ATLANTIC DISTRIBUTORS, L.P., Appellant, v. WHILAND AND COMPANY, S.A., etc., et al., Appellees. 5th District. Case No. 94-291. Opinion filed August 19, 1994. Non-Final Appeal from the Circuit Court for Orange County, Lawrence R. Kirkwood, Judge. Counsel: James S. Grodin and John R. Hamilton of Foley & Lardner, Orlando, for Appellant. Hal K. Litchford and Kristyn D. Elliott of Litchford, Christopher & Ruta, Orlando, for Appellees.

(PER CURIAM.) Trans Atlantic Distributors appeals the trial court's order granting appellees' motion for attorney's fees and reserving jurisdiction to determine the amount of fees. This is a non-final, non-appealable order and, therefore, this appeal must be dismissed for lack of jurisdiction. *See Winkelman v. Toll*, 632 S[redacted]d 130 (Fla. 4th DCA 1994); *Malone v. Costin*, 410 So. 2d 5[redacted]Fla. 1st DCA 1982).

DISMISSED. (DAUKSCH, GRIFFIN and DIAMANTIS, JJ., concur.)

* * *

Criminal law—Judgment—Correction

BEAU LUTHER BRIGHT, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 93-2332. Opinion filed August 19, 1994. Appeal from the Circuit Court for Marion County, Thomas D. Sawaya, Judge. Counsel: James B. Gibson, Public Defender and Susan A. Fagan, Assistant Public Defender, Daytona Beach, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Ann M. Childs, Assistant Attorney General, Daytona Beach, for Appellee.

(PER CURIAM.) Beau Luther Bright entered a plea of no contest to six felonies. We affirm the convictions and sentences imposed following his plea. In doing so, we correct a scrivener's error on the judgment to reflect that his plea was to a violation of section 810.02(2) Florida Statutes, and that a violation of that section is a first degree felony punishable by life imprisonment.

AFFIRMED as corrected. (SHARP, W., GOSHORN and THOMPSON, JJ., concur.)

* * *

Negotiable instruments—Notes—Mortgage foreclosure—Affirmative defenses—Fraudulent inducement—Plaintiff's status as holder in due course

EARLIE A. ROACH, FRANCE N. ROACH, et al., Appellants, v. FEDERAL NATIONAL MORTGAGE CORPORATION, Appellee. 5th District. Case Nos. 93-728, 93-1026, 93-1057, 93-1058, 93-1059, 93-1060, 93-1061, 93-1062. Opinion filed August 19, 1994. Appeal from the Circuit Court for Brevard County, Frank R. Pound, Jr., Judge. Counsel: Steven M. Greenberg of the Law Offices of Stephen L. Raskin, South Miami, for Appellants. John W. Little, III, Troy D. Ferguson and J. Russell Campbell of Steel, Hector & Davis, West Palm Beach, for Appellee.

(DAUKSCH, J.) Consistent with this court's recent decision in *James v. Nationsbank Trust Co. Nat. Ass'n*, 19 F.L.W. D1482 (Fla. 5th DCA July 8, 1994), we remand this cause to the trial court for further proceedings with regard only to the issue of whether appellants were fraudulently induced to sign the notes and mortgages which are the subject of each of their foreclosures and, if so, whether appellee ever attained the status of a holder in due course.

AFFIRMED in part; REVERSED in part; REMANDED. (HARRIS, C.J. and GRIFFIN, J., concur.)

* * *

Criminal law—Probation—Condition requiring payment to county First Step program reversed where condition was not orally pronounced and trial court failed to reference statutory authority

STEPHEN MARCO MORRIS, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 93-1694. Opinion filed August 19, 1994. Appeal from the Circuit Court for Volusia County, Uriel Blount, Jr., Senior Judge. Counsel: James B. Gibson, Public Defender, and Nancy Ryan, Assistant Public Defender, Daytona Beach, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Anthony J. Golden, Assistant Attorney General, Daytona Beach, for Appellee.

(DIAMANTIS, J.) We affirm Stephen Marco Morris's convictions and sentences for two counts of dealing in stolen property; however, we reverse the imposition of a special condition of Morris's probation which required him to pay $60 to First Step of Volusia County because this condition was not orally pronounced at sentencing, *see Shaddix v. State*, 599 So. 2d 269 (Fla. 1st DCA 1992), and because the trial court failed to reference the statutory authority for the imposition of such costs. *See Gedeon v. State*, 636 So. 2d 178 (Fla. 5th DCA 1994); *Thomas v. State*, 633 So. 2d 1122 (Fla. 5th DCA 1994), *rev. denied*, No. 83,501 (Fla. June 13, 1994). This reversal is without prejudice to the state to seek reimposition of such costs after Morris has been given adequate notice and opportunity to be heard on the matter. *See Williams v. State*, 580 So. 2d 326 (Fla. 5th DCA 1991). If the trial court does reimpose such costs on remand, the trial court shall reference the statutory authority for the imposition of such costs.

AFFIRMED in part; REVERSED in part; REMANDED. (HARRIS, C.J., and PETERSON, J., concur.)

* * *