IN THE SUPREME COURT OF FLORIDA

CHARLES W. LEE,

Petitioner,

v. CASE NO. 86,531

STATE OF FLORIDA,

Respondent.

_____/

ON DISCRETIONARY REVIEW FROM
THE FIRST DISTRICT COURT OF APPEAL

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

This is an answer brief to a petition for discretionary review pursuant to article V, section 3(b)(4) of the Florida Constitution based upon the certified question by the First District Court of Appeal. Petitioner, Frank Wilson, Jr., defendant at trial and appellant on appeal, is referred to herein as "petitioner." Respondent, the State of Florida, is referred to herein as "the State."

STATEMENT OF THE CASE AND FACTS

The State accepts petitioner's statement of the case and facts, subject to the addition of the following:

1. The First District Court of Appeal concluded that petitioner's claim that the trial court failed to consider him for youthful offender sentencing was not cognizable in a postconviction motion. See Opinion[1] at 1-2.

2. This Court, in an order dated October 3, 1995, postponed its decision on jurisdiction, but the Court did order the parties to file briefs on the merits.

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[1] Lee v. State, Case No. 94-3499 (Fla. 1st DCA August 31, 1995).

SUMMARY OF THE ARGUMENT

Petitioner argues that this Court should answer the certified question in the affirmative because the trial court's failure to consider him for youthful offender sentencing makes his sentence illegal. Petitioner's argument fails because his sentence is not illegal. His sentence is within the statutory maximum, and therefore, the sentence is not illegal. See Davis, infra; Callaway, infra. This Court should answer the certified question in the negative.

ARGUMENT

ISSUE

WHETHER THE TRIAL COURT'S FAILURE TO CONSIDER A DEFENDANT FOR CLASSIFICATION AS A YOUTHFUL OFFENDER IS COGNIZABLE UNDER RULE 3.800(A), FLORIDA RULES OF CRIMINAL PROCEDURE. (CERTIFIED QUESTION)

This case is before the Court based upon a certified question from the First District Court of Appeal. Petitioner claims that his sentence is illegal because the trial court failed to consider and sentence him as a youthful offender. Accordingly, petitioner seeks to have this Court answer the certified question in the affirmative.

This Court should answer the certified question in the negative because the failure to consider a defendant for youthful offender treatment is not cognizable in a Rule 3.800(a) motion. See Davis v. State, 20 Fla. L. Weekly S362 (Fla. July 20, 1995); Callaway v. State, 20 Fla. L. Weekly S358 (Fla. July 20, 1995). Davis and Callaway define an "illegal sentence" as solely one which exceeds the statutory maximum authorized for the conviction at issue.

The district court below assumed arguendo that the trial court failed to consider sentencing petitioner as a youthful offender to a maximum sentence of six years imprisonment when it sentenced him to a sentence of 120 years in prison. The district court recognized that this assumed issue would have been cognizable on direct appeal: "Lee would have been entitled to be

considered for sentencing as a youthful offender, and lack of such consideration could have been remedied on direct appeal." Opinion at 1-2 (emphasis added). Thus, because the claim if properly preserved was cognizable on direct appeal, it was not cognizable under either Rule 3.800 or 3.850 unless petitioner could show as a matter of law that a sentence of 120 years imprisonment for the commission of second degree murder, a first degree felony punishable by life, is illegal under all factual circumstances. This is obviously not so, as a reading of the plain words of sections 782.04(2) and 775.082(3)(b) show.

Both Davis and Callaway make it unmistakably clear that sentences which are merely erroneous are not thereby rendered illegal. See Davis, 20 Fla. L. Weekly at S363 ("[A] departure sentence that is beyond the guidelines may be an erroneous sentence when written reasons are not properly filed, but it is not an illegal sentence when it is still within the maximum allowed by law."). An illegal sentence is one which, on the face of the sentencing judgment, exceeds the maximum or minimum sentence authorized by statute for the criminal conviction on which the sentence is imposed. See id. ("Only if the sentence exceeds the maximum allowed by law would the sentence be illegal.").

In Davis, this Court held that the total absence of written departure reasons did not cause a sentence to be illegal, and thus, the claim was not cognizable under either Rule 3.800 or 3.850. In Callaway, this Court held that the simple question of

whether two crimes occurred in a single criminal episode required fact-finding, and thus, the issue of whether consecutive habitual sentences were improperly imposed could not be raised in a Rule 3.800 motion because Rule 3.800 "is limited to those sentencing issues that can be resolved as a matter of law without an evidentiary determination." Callaway, 20 Fla. L. Weekly at S360. Hence, petitioner cannot obtain relief because the failure of a trial court to consider petitioner for youthful offender treatment is not cognizable in a Rule 3.800(a) motion.

The First District's opinion in this case shows that petitioner was sentenced to 120 years for violating section 782.04(2), Florida Statutes. See Opinion at 2, 4. Sections 775.082(3)(b) and 782.04(2), Florida Statutes (1979), authorized the sentence that petitioner received. Consequently, as a matter of law, the sentence of 120 years is legal, and petitioner cannot challenge the sentence in either a Rule 3.800 or 3.850 motion.

Additionally, the State points out that petitioner seeks discretionary review from this Court pursuant to article V, section 3(b)(4) of the Florida Constitution. This Court, in an order dated October 3, 1995, postponed its decision on jurisdiction, but the Court did order the parties to file briefs on the merits. The Court should decline to accept jurisdiction in this case. See, e.g., Abramson v. Florida Psychological Ass'n., 634 So. 2d 610, 612 (Fla. 1994).

In Abramson, this Court held that "[u]pon reflection, we decline to answer the certified question because we do not

believe that a general rule can be formulated which would be applicable under all circumstances." 634 So. 2d at 612. Conversely, in this case, the Court should decline jurisdiction because it has clearly, emphatically, and recently defined an illegal sentence in Davis and Callaway. These two cases make it unmistakably clear that there is only one sentence which is illegal: one that either exceeds the statutory maximum or falls below a statutory minimum. In short, if a sentence is authorized by statute for the conviction(s), it is legal. There is no ambiguity in these holdings and no need to answer this certified question.

It is also desirable to decline discretionary jurisdiction in the interest of orderly administration of justice and out of respect for the constitutional role of the district courts as courts of final impression. The district court below was required to follow the case law of the Court and could not knowingly create conflict. See Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973). It correctly relied on Davis and Callaway for the definition of an illegal sentence. If it erred in doing so, this Court has the conflict of decisions authority to discretionarily review any decision of a district court which "misapplies the law by relying on a decision which involves a situation materially at variance with the one under review. [Cites omitted]." Gibson v. Avis Rent-A-Car System, Inc., 386 So. 2d 520, 521 (Fla. 1980). Thus, the certification of a question was entirely unnecessary. The promiscuously unnecessary certification of questions to this Court denigrates the constitutional role of the district courts

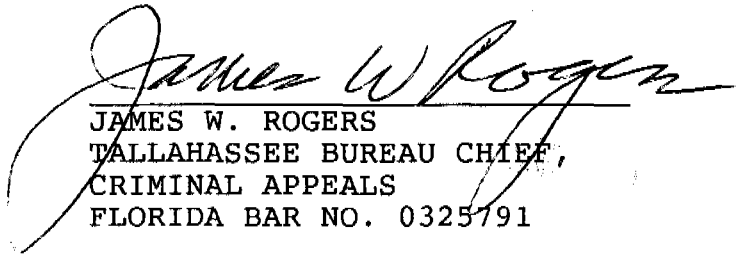
as courts of last impression and suggests to the appellate bar and public that district courts lack the confidence to make decisions on their own authority and responsibility and are mere way stations on the road to this Court.

CONCLUSION

Based on the foregoing reasons, the State urges this Court to decline jurisdiction in this case, or, if it does accept jurisdiction, to answer the certified question in the negative.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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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. Mail to Charles W. Lee, DC # 074483, Columbia Correctional Institution, Post Office Box 376, Route # 7, Lake City, Florida 32055, this 20 day of November, 1995.

Thomas Falkinburg
Assistant Attorney General

IN THE SUPREME COURT OF FLORIDA

CHARLES W. LEE,

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STATE OF FLORIDA,

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_____/

APPENDIX

Lee v. State, Case No. 94-3499 (Fla. 1st DCA August 31, 1995).

CHARLES W. LEE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

CASE NO. 94-3499

Opinion filed August 31, 1995.

An appeal from the Circuit Court for Duval County. David C. Wiggins, Judge.

Appellant pro se.

Robert A. Butterworth, Attorney General; Thomas Falkinburg, Assistant Attorney General, Tallahassee, for Appellee.

PER CURIAM.

Charles W. Lee appeals an order of the circuit court denying his motion to correct an illegal sentence pursuant to Florida Rule of Criminal Procedure 3.800(a). On appeal, Lee raises three grounds for relief, only one of which merits discussion: Lee alleges that the trial court was required, at the time of his sentencing, to classify him as a youthful offender, pursuant to section 958.04, Florida Statutes (1979).

At the time of Lee's offense, there was no requirement that the trial court sentence him as a youthful offender, although, if he met the requirements of section 958.04(1), Florida Statutes (Supp. 1980), Lee would have been entitled to be considered for sentencing as a youthful offender, and a lack of such

consideration could have been remedied on direct appeal. We conclude, in light of our supreme court's recent decision in Davis v. State, 20 Fla. L. Weekly S362 (Fla. July 20, 1995), that whether Lee should have been considered for sentencing as a youthful offender is not cognizable on a Rule 3.800 motion or otherwise collaterally. See also State v. Callaway, 20 Fla. L. Weekly S358 (Fla. July 20, 1995). But the matter is not entirely free from doubt, and we certify the question as a matter of great public importance.

On August 4, 1981, after pleading guilty to second degree murder, Lee was sentenced to 120 years in prison, well in excess of the maximum allowed if sentence had been pronounced under section 958.04, the youthful offender statute. In his motion, Lee alleges that, because the offense occurred on November 18, 1980, when he was seventeen years old, section 958.04 mandated that he be classified as a youthful offender. The motion relies specifically on section 958.04(2), Florida Statutes (1979).

As of October 1, 1980, however, the statute, which lists several criteria, was amended to require only that they "shall be considered in determining whether to classify as a youthful offender a person who meets the requirements of subsection (1)[.]" § 958.04(2), Fla. Stat. (Supp. 1980). The version of the statute which applied in Lee's case only mandates "consideration of the criteria contained in section 958.04(2), Florida Statutes (1981) . . . when a person meets the

requirements of section 958.04(1)." McNeil, 438 So. 2d 178, 179 n.1 (Fla. 1st DCA 1983).[1] The statute[2] does not dictate that the defendant be sentenced as a youthful offender in every case in which it applies.

In the order denying Lee's motion to correct an illegal sentence, the circuit judge (who was not the sentencing judge) concluded that Lee was ineligible for classification as a youthful offender because he was convicted of a life felony.

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[1] McNeil makes it clear that the statute in effect at the time of the offense should govern.

[2] The 1981 version of section 958.04, Florida Statutes, is identical to the version in force at the time of appellant's offense.

The 1979 version provided:

> (2) A person shall be classified a youthful offender if such person meets the criteria of subsection (1) and such person:
> (a) Has not previously been found guilty of a felony, whether or not the adjudication of guilt has been withheld; or
> (b) Has not been adjudicated delinquent for an act which would be a capital, life, or first degree felony if committed by an adult.

(Emphasis supplied.) But the statute was amended effective October 1, 1980. Ch. 80-321, §§ 1, 2, at 1388-89, Laws of Fla.

Under the amended statute, adjudication for an act constituting a first degree felony was no longer disqualifying, and classification ceased to be mandatory.

Section 39.02(5)(c), Florida Statutes, was amended effective October 1, 1981 to read:

> 3. If the child is found to have committed the offense punishable by death or by life imprisonment, the child shall be sentenced as an adult. . . .

This more recent language, which was deleted effective October 1, 1994, by Ch. 94-209, § 19, at 1253, Laws of Florida, is not applicable to Lee because his offense, conviction and sentence all occurred before the effective date.

> In his motion, the defendant contends he met the criteria for classification as a youthful offender and should have been sentenced as such. However, section 958.04, Florida Statutes (1981), provides that ". . . no person who has been found guilty of a capital or life felony may be classified as a youthful offender under this act." § 958.04(1)(c), Fla. Stat. (1981). As the defendant was convicted of a life felony, he was not subject to classification as a youthful offender. Accordingly, the defendant's first ground for relief is without merit.

The statutory language set out in the trial court's order was in effect at the time of the offense. We agree with the trial court's conclusion that, if Lee was convicted of a life felony, he was not eligible even to be considered for classification as a youthful offender. § 958.04(1)(c), Fla. Stat. (Supp. 1980).

But it is not clear why the judgment designates his crime a life felony, or that this designation is correct. The plea agreement states that the negotiated sentence is for "Murder II." The judgment bears an "offense statute number" of 782.04(2). Section 782.04(2), Florida Statutes (Supp. 1980), proscribes murder in the second degree, a "felony of the first degree, punishable by imprisonment for a term of years not exceeding life or as provided in s. 775.082, s. 775.083, or s. 775.084." "[A]uthorization of imprisonment for 'a term of years not exceeding life' under § 782.04(2) does not reasonably support classification of the offense as a life felony for Chapter 958 purposes . . . ." McNeil, 438 So. 2d at 179, quoting Williams v.

State, 405 So. 2d 436, 438 (Fla. 1st DCA 1981). The record does not show conclusively that Lee was convicted of a life felony.[3]

Our supreme court has recently held that within the meaning of Rule 3.800(a), a sentence is "illegal" only if "it exceeds the maximum period set forth by law for a particular offense" and that the failure to file contemporaneous written reasons for a departure sentence does not render the sentence illegal. Davis, 20 Fla. L. Weekly at S363, S364. In light of Davis, we affirm Lee's sentence.

We recognize, however, that there are differences between the failure to file contemporaneous written reasons for a departure sentence and the failure to consider a defendant for classification as a youthful offender based on the apparently erroneous assumption that the defendant committed a life felony and thus is not eligible for such consideration. We therefore certify the following question to the Florida Supreme Court as one of great public importance:

> WHETHER THE TRIAL COURT'S FAILURE TO CONSIDER A DEFENDANT FOR CLASSIFICATION AS A YOUTHFUL OFFENDER IS COGNIZABLE UNDER RULE 3.800(A), FLORIDA RULES OF CRIMINAL PROCEDURE.

ERVIN, MINER, and BENTON, JJ., CONCUR.

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[3] There is nothing in the record to indicate that Lee used a firearm in the commission of the crime, see § 775.087(1)(a), Fla. Stat. (1980 or 1979), or that this first degree felony should be reclassified as a life felony on any other basis.