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IN THE SUPREME COURT OF FLORIDA

CASE NO. 87,817

CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

JUSTIN SUMMERS,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW FROM THE
DISTRICT COURT OF APPEAL, FLORIDA, THIRD DISTRICT

(CERTIFIED CONFLICT)

RESPONDENT'S BRIEF ON THE MERITS

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INTRODUCTION

The Petitioner, **JUSTIN SUMMERS**, was the defendant in the Circuit Court for the Eleventh Judicial Circuit in and for Dade County, Florida. The Respondent the **STATE OF FLORIDA**, was the prosecution in the lower court.

In this brief, the parties will be referred to as they appear before this Honorable Court except that Petitioner may also be referred to as the "defendant". An appendix is attached hereto. The symbol ("App.") followed by a letter will be used to refer to portions of the appendix.

STATEMENT OF THE CASE AND FACTS

On April 27, 1994, Justin Summers was charged by information in Case No. 94-14035 with burglary ("Count I" and grand theft "Count II"). (App. A).¹

On April 27, 1994 defendant, was charged by information in Case 94-14178 with carrying a concealed firearm ("Count I") and possession of a firearm by a minor ("Count II"). (App. B).

On April 29, 1994 defendant was charged by information in Case 94-14276 with kidnaping with a weapon ("Counts I-IV"), attempted first degree murder ("Counts V-VI"), armed robbery ("Count VII"), attempted armed robbery ("Count VIII") and burglary with an assault or battery therein while armed ("Count IX"). (App. C).

On April 29, 1994 the State filed an announcement of direct file and motion to transfer the defendant to jail. (App. D).

On December 12, 1994 defendant pled guilty to counts V, VII, VIII and IX in Case 94-14276, to Counts I and II in Case 94-14178 and to Counts I and II in Case 94-14035. (App. E.). Defendant was adjudicated guilty and sentenced in Case 94-14276 to seven and a half years in prison, to five years in prison in Case 94-14178 and to five years in Case 94-14035. (App. F).

¹
Since the Petitioner is proceeding pro se and there is no reference that he has filed copies of all pertinent pleadings with this Court, the Respondent has included the pertinent documentation in an appendix hereto. The State included these same exhibits in its' response to the defendant's Rule 3.850 motion which was filed in Third District Court of Appeal Case No. 95-02165.

On January 11, 1995, the court held a hearing on certain unsworn motions filed by the defendant pursuant to Florida Rules of Criminal Procedure 3.580, 3.600 and 3.610 and in which defendant claimed that his trial counsel was constitutionally ineffective because he failed to argue below that the defendant was less than sixteen years old at the time of the alleged commission of the various offenses and that therefore the cases should not have been direct filed in circuit court and that the trial court failed to properly determine the suitability of imposing adult sanctions by considering the statutory criteria enumerated in Florida Statutes §39.059(7). (App. G). Defense counsel established at the January 1995 hearing that at the time of the alleged commission of the offenses in Case 94-14178 i.e., December 3, 1993, defendant was fifteen years, eleven months and sixteen days old and the State, therefore, nolle prossed Case No. 94-14178. (App. G, H). The trial court dismissed the motions without prejudice to refile. (App. G). The trial court offered to sentence the defendant to fifteen years with a three year minimum mandatory and to vacate the sentence if the defendant passed a lie detector test administered by George Slattery. (App. G). The defendant failed the lie detector test but the record does not reveal whether any subsequent action was taken by the judge.

On April 28, 1994 defendant filed an unsworn or signed Rule 3.850 motion in which he claimed that his trial counsel was not effective because he failed to attempt to prevent the direct filing against the defendant who was not yet sixteen years old, that he was denied due process because the State direct filed in circuit court and that the trial court failed to properly determine the suitability of imposing adult sanctions

by considering the statutory criteria enumerated in Florida Statutes §39.059(7). (App. I).

On or after June 8, 1995 defendant filed a sworn Rule 3.850 motion in which he again claimed that he was denied due process because the State direct filed in circuit court, that his trial counsel was ineffective for failing to attempt to prevent this and that the trial court failed to properly determine the suitability of imposing adult sanctions by considering the statutory criteria enumerated in Florida Statutes §39.059(7). (App. J).

On June 14, 1995 the trial court denied defendant's motion without an evidentiary hearing. (App. K).

The defendant filed a Rule 3.850 motion in which he made three claims: (1) his trial counsel was not effective because he failed to attempt to prevent the direct filing against the defendant who was not yet sixteen years old, (2) that he was denied due process because the State direct filed in circuit court and (3) that the trial court failed to properly determine the suitability of imposing adult sanctions by considering the statutory criteria enumerated in Florida Statutes §39.059(7).

The Respondent filed a response to the order to show cause issued by the Third District Court of Appeal.

The Third District Court of Appeal issued a per curiam opinion on March 27, 1996. The court affirmed based upon the reasoning of Davis v. State, 661 So. 2d 1193 (Fla. 1995), State v. Callaway, 658 So. 2d 983 (Fla. 1995) and Springer v. State, 660 So. 2d 310 (Fla. 1st DCA 1995), cause dismissed, No. 87,088 (Fla. Dec.

29, 1995).

The court noted however, that as in Springer there may be differences between the failure to enter a contemporaneous reason for a departure sentence and the failure to enter written findings justifying adult sanctions for a juvenile offender under Section 39.059(7)(c), Florida Statutes (1991). The Third District Court of Appeal certified the same question that was certified in Springer.

IS THE FAILURE OF THE TRIAL COURT TO ENTER THE WRITTEN FINDINGS REQUIRED BY SECTION 39.059(7)(C), FLORIDA STATUTES (1991) AND TROUTMAN V. STATE, 630 So. 2d 528 (Fla. 1993) COGNIZABLE COLLATERALLY?

Summers v. State, 21 F.L.W. D761 (Fla. 3d DCA March 27, 1996).

SUMMARY OF THE ARGUMENT

The failure of the trial court to enter written findings required by Section 39.059(7)(C) Florida Statutes is not cognizable collaterally. A rule 3.850 motion cannot be used to review ordinary trial errors cognizable by means of a direct appeal.

ARGUMENT

THE FAILURE OF THE TRIAL COURT TO ENTER THE WRITTEN FINDINGS REQUIRED BY SECTION 39.059(7)(C), FLORIDA STATUTES (1991) AND TROUTMAN V. STATE, 630 So. 2d 528 (FLA. 1993) IS NOT COGNIZABLE COLLATERALLY.

The State would respectfully submit that this Honorable Court should answer the certified question herein in the negative. This same question was considered by this Court in Springer v. State. This Court dismissed the cause on December 29, 1995. See Springer v. State, 660 So. 2d 310 (Fla. 1st DCA 1995), cause dismissed, No. 87,088 (Fla. Dec. 29, 1995). This Court should also dismiss the instant cause.

The law is clear, a rule 3.850 motion cannot be used to review ordinary trial errors cognizable by means of a direct appeal. See Golden v. State, 509 So. 2d 1149, 1151 (Fla. 1st DCA 1987). This Court reached a similar result in Davis v. State, 661 So. 2d 1193, 1195 (Fla. 1995), where the defendant was precluded from asserting a Ree² sentencing error through a collateral attack under Rule 3.800 or 3.850.

Since the failure of the trial court to enter the written findings required by Section 39.059(7)(C), Florida Statutes (1991) and Troutman v. State, 630 So. 2d 528 (Fla. 1993) may be raised on direct appeal the issue is not cognizable collaterally.

The State, therefore, asks this Honorable Court to answer the certified question herein in the negative.

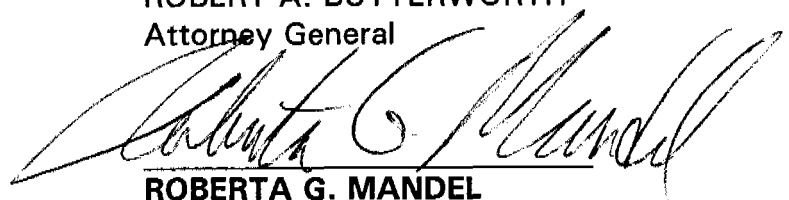
²
Ree v. State, 565 So. 2d 1329 (Fla. 1990).

CONCLUSION

Based upon the foregoing facts, authorities and arguments, the State would respectfully submit that this Court should respond to the certified question by declaring again that a Rule 3.850 motion cannot be used to review ordinary trial errors cognizable by means of a direct appeal.

Respectfully Submitted,


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing
RESPONDENT'S BRIEF ON THE MERITS was mailed to **JUSTIN SUMMERS, DC**
#194542, Hillsborough Correctional Institution, Riverview, Florida 33569-8402 and
LOSSIE MERRITT, Esq., 11361 S.W. 27th Street, Miami, Florida 33170 on this ^{6th} day
of June, 1996.



ROBERTA G. MANDEL
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mls/