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Supreme Court of Florida

FILED

BO J. WHITE

JUN 26 1996

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

JUSTIN SUMMERS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 87,817

District Court of Appeal,
3rd District - No. 95-2165

* * * * *

APPEAL FROM THE THIRD DISTRICT COURT OF APPEAL

MIAMI, DADE COUNTY, FLORIDA

PETITIONER'S REPLY BRIEF ON THE MERITS

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The Assistant to the Petitioner in this matter, Lossie Merritt, did not receive a copy of the Respondent's Brief On The Merits. There fore, this reply is submitted without the guiding hand of Legal Consultants organized for this matter by MOTHER'S UNITED FOR JUSTICE, MIAMI, FLORIDA.

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TABLE OF CITATIONS

CASES

1. McCloud v. State, 335 So. 2d 257 (Fla.1976)
2. Milliken v. State, App., 398 So.2d 508 (1981).
3. State v. Cain, 381 So. 2d 1361 (Fla. 1980)
4. State v. G.D.M., 394 So. 2d 1017 (Fla. 1981)
5. Woodard v. Wainwright, 556 F 2d 781 (5th Cir.), reh'g den., 560 F 2d 1023 (5th Cir. 1977)

LAWS

1. Article 1, Section 15, Of The Florida Constitution
2. Fla. Stat.:
 - 39.022(5)(c)1.
 - 39.052(a)(1)4.a.
 - 39.052(a)(1)4.b.
 - 39.052(a)(1)4.c.
 - 39.047(4)(e)5

The Petitioner adheres to his original Point on Appeal.

Point On Appeal

I.

The petitioner, a juvenile, was denied his constitutional right to a Grand Jury indictment and due process when the State Direct Filed him into adult court by an information charging offenses punishable by death or life imprisonment. (Article 1, Section 15, of The Florida Constitution; F.S.Ch 39.022 (5)(c)1, and 39.052(a)(1)4.a.).

The affirmance of conviction by the Third District Court Of Appeal raise a very serious Constitutional question:

" Does F.S.Ch 39.047(4)(e)5, (1993), and the judgment in State v. Cain, 381 So.2d 1361 (Fla.1980), invalidate the Provisions of The State Constitution, Article 1, Section 15, and provisions of Florida State Statutes, 39.022(5)(c)1,(1993), ; 39.052(a)(1)4.a.)(1993), and 39.0587(1)(d)1.(1995)?"

II.

A CERTIFIED QUESTION:

"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?"

STATEMENT OF THE CASE AND OF THE FACTS

The Petitioner, Justin Summers, adheres to and adopts by reference in this Reply Brief the Statement of the Facts and Case articulated in his Brief On The Merits in this cause. The parties will be referred to in this brief as they were in the Brief On the Merits, by their respective positions. Justin Summers is "Petitioner" and the Respondent, State Of Florida as "State":

After the petitioner complained that a certain police officer "confiscated" money legally his, he suffered multiple arrests. On April 29, 1994, the Petitioner was transferred to adult court under the provision of F.S.Ch 39.047(4)(e)5, the Direct File mechanism, by an information. The Charges included upto three violations of the law punishable by death or life imprisonment. The transfer by an information is a clear error of the law as articulated by statute in F.S.Ch 39.022(5)(c)1,(1993) and of legislative intent embodied in the entire Chapter dealing with the treatment of juvenile offenders during, 1993/1994, F.S.Ch39.

MEMORANDUM OF LAW

Article I, §15, of the Florida Constitution requires a grand jury presentment or indictment before trial for a capital offense. Until an indictment, a child charged with a violation of law punishable by death or life imprisonment is subject to the provisions of F.S. Chapter 39. If an indictment is returned, all felonies and misdemeanors related to the charge will be tried together as if the child were an adult. F.S. 39.022(5)(c)1.

F.S. 39.022

- (5) (c)1. A child of any age charged with a violation of Florida law punishable by death or by life imprisonment is subject to the jurisdiction of the court as set forth in s. 39.049(7) unless and until an indictment on such charge is returned by the grand jury. When such indictment is returned, the petition for delinquency, if any, shall be dismissed and the child shall be tried and handled in every respect as if he were an adult:

The attorney hired by the Petitioner in this matter did not defend against the unlawful transfer, conviction nor sentence. On December 12, 1994, Judge Snyder presided and handed down the judgment and convicted without a trial in the Eleventh Judicial Circuit of Dade County, Florida. Within ten days an attorney was retained to file for a new trial and to set aside the conviction and sentence on the grounds that there was no waiver hearing in one case and no indictment for case number 94-14276. The transfer was not done within the law. On January 11, 1995, the trial court was given the opportunity to correct the errors of law made during the proceedings against the Petitioner:(1) denial of the right to due process (2) the Court lacked jurisdiction to convict and sentence (3) Ineffective assistance of counsel and other errors enumerated in the Petitioner's Brief on The Merits in this matter. The Court justified the improper actions with a State ordered polygraph of the Petitioner. Even-though the diagnostic interpretation and the physical limitations of the petitioner illuminated his innocence, Trial Court denied the appeal on the opinion of the polygrapher alone. The appeal to that order was made in the Third District Court Of Appeal Of Florida, July 14, 1995. On March 27, 1996, the Third District Court Of Appeal Affirmed with a Certified Question in the omission of statutory criteria in sentencing. On April 17,1996, there was a rehearing for the two overlooked claims of denial of due process and grand jury indictment ; and the lower tribunal lacked jurisdiction to impose sentence and conviction. The Third District Court overlooked the essential requirement for indictment of violations of the law punishable by death or life imprisonment. The improper transfer was affirmed with reference to F.S.Ch 39.047(4)(e)5.

MEMORANDUM OF LAW

F.S.Ch 39.047(4)(e)5, (1994)

(e) The state attorney shall in all cases have the right to take action, regardless of the action or lack of action of the intake counselor or case manager, and shall determine the action which is in the best interest of the public and the child. The state attorney may:

1. File a petition for dependency;
2. File a petition pursuant to part IV;
3. File a petition for delinquency;
4. File a petition for delinquency with a motion to

transfer and certify the child pursuant to ss. 39.022(5) and 39.052(2) for prosecution as an adult;

5. With respect to any child who at the time of commission of the alleged offense was 16 or 17 years of age, file an information when in his judgment and discretion the public interest requires that adult sanctions be considered or imposed. However, the state attorney shall not file an information on a child charged with a misdemeanor, unless the child has had at least two previous adjudications or adjudications withheld for delinquent acts, one of which involved an offense classified under Florida law as a felony;

6. Refer the case to a grand jury;

ARGUMENT

Petitioner adheres to his argument as articulated in his Brief On The Merits. The essence of that argument is restated here for convenience:

The record shows that the Petitioner has been denied a Constitutional right and a provision of state statute. (F.S.Ch 39.022(5)(c)1,(1993), and Article 1, Section 15 of The Florida Constitution). The application of F.S.Ch 39.047(4)(e)5, Direct File, in this case is contrary to a fixed law and Legislative intent embodied in F.S.Ch 39.001(e)1 and 2,;39.022 . This is not a cry for preferential treatment as a juvenile detailed by State v. Cain, 381 So.2d 1361,1367(Fla.1980). This is a prayer for fair and lawful treatment, due process and the benefit of all provisions of the laws. We are a people goverened by laws embodied in the U.S. and State Constitutions. These laws define the fundamental principles of our great democracy. The Courts must help to maintain the integrity of democracy in this country by compliance with the law. The Petitioner has been charged with and convicted of offences punishable by death or life imprisonment by an information. This is unlawful. The Petitioner is entitled to Grand Jury indictment as stated in the judgment of Milliken v. State, App.,398 So.2d 508 (1981). Grand Jury indictment is not discretionary.

MEMORANDUM OF LAW

Defect, in that defendant was charged by information when he should have been charged by indictment, affected jurisdiction of circuit court to proceed to trial and thus reversal of adjudication and sentence was required though defendant failed to move to dismiss information either before or during trial. Milliken v. State, App., 398 So.2d 508 (1981).

David Lee HAYES, Appellant,

v.

STATE of Florida, Appellee.

No. 82-1094.

District Court of Appeal of Florida,
Second District.

Jan. 21, 1983.

Defendant appealed from denial of the Circuit Court for Lee County, R. Wallace Pack, J., of motion to dismiss information charging him with escape from a juvenile detention center, a third-degree felony. The District Court of Appeal, Hobson, J., held that amendment to statute eliminating ability of child charged with felony to have his case transferred for adjudicatory proceedings as a child was constitutional.

Affirmed.

1. Infants ⇐ 68.1

Juvenile does not have inherent or constitutional right to treatment as juvenile delinquent instead of as criminal offender. West's F.S.A. Const. Art. 1, § 15(b).

2. Infants ⇐ 68.1

Juvenile has right to treatment as juvenile delinquent only to extent provided by legislature. West's F.S.A. Const. Art. 1, § 15(b).

3. Infants ⇐ 68.2

Amendment to statute eliminating ability of child charged with felony to have his case transferred for adjudicatory proceedings as a child was constitutional. West's F.S.A. § 39.04(2)(e)4; West's F.S.A. Const. Art. 1, § 15(b).

Jerry Hill, Public Defender, and W.C. McLain, Asst. Public Defender, Bartow, for appellant.

Jim Smith, Atty. Gen., Tallahassee, and William I. Munsey, Asst. Atty. Gen., Tampa, for appellee.

HOBSON, Judge.

David Lee Hayes appeals the denial of a motion to dismiss an information. We affirm.

The state filed an information charging appellant with escape from a juvenile detention center, a third-degree felony. Appellant filed a motion to dismiss the information, attacking the constitutionality of section 39.04(2)(e)4, Florida Statutes (1981). The trial court denied the motion. Appellant subsequently pled no contest but reserved his right to appeal the denial of his motion. The court thereupon adjudicated him guilty and sentenced him.

Our state supreme court held section 39.04(2)(e)4, Florida Statutes (Supp.1978), constitutional in *State v. Cain*, 381 So.2d 1361 (Fla.1980). The 1978 statute which the court dealt with in *Cain* allowed a child charged with a misdemeanor or a felony to have the case transferred for adjudicatory proceedings as a child if he had not previously committed two delinquent acts. Appellant contends that *Cain* is not controlling here since section 39.04(2)(e)4, as amended by section 6, chapter 81-218, Laws of Florida, no longer permits a child charged with a felony to have the case transferred to the juvenile court even though he has not previously committed two delinquent acts.

Section 39.04(2)(e)4, Florida Statutes (1981) provides in relevant part:

(e) The state attorney shall in all cases have the right to take action, regardless of the action or lack of action of the intake officer, and shall determine the action which is in the best interest of the public and the child. The state attorney may:

4. With respect to any child who at the time of commission of the alleged offense was 16 or 17 years of age, file an information when in his judgment and discretion the public interest requires that adult sanctions be considered or imposed. Upon motion of a child charged

with a misdemeanor, the case shall be transferred for adjudicatory proceedings as a child pursuant to s. 39.09(1) if it is shown by the child that he had not previously been found to have committed two delinquent acts, one of which involved an offense classified under Florida law as a felony;

.... (Emphasis added)

[1-3] A juvenile does not have an inherent or constitutional right to treatment as a juvenile delinquent instead of as a criminal offender. *Cain*. A juvenile has the right to treatment as a juvenile delinquent only to the extent provided by our legislature. *Id.*; Art. I, § 15(b), Fla. Const. We believe that the legislature acted reasonably in amending section 39.04(2)(e)4 by eliminating the ability of a child charged with a felony to have his case transferred for adjudicatory proceedings as a child.

Accordingly, we affirm the trial court's denial of appellant's motion to dismiss the information.

AFFIRMED.

OTT, C.J., and SCHEB, J., concur.

CONCLUSION

The Petitioner is entitled to relief from unlawful detention.

The conviction, sentence and judgment in this case should be reversed.

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Certificate Of Service

I certify that a copy of the foregoing has been furnished, by mail, this 28 day of June 1996, to Robert A. Butterworth, Attorney General, The Capitol, Tallahassee, Florida, 32399-1050.

Justin Summers
Justin Summers

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