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047

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

KISON EVANS,

Respondent.

S. CT. CASE NO. 88, 145

RESPONDENT'S BRIEF ON THE MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

SEAN K. AHMED
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COUNSEL FOR RESPONDENT

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	)	
vs.	)	S. CT, CASE NO. 88, 145
	)	
KISON EVANS,	)	
	)	
Respondent.	)	

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's statement of the case and facts as represented in Petitioner's brief.

SUMMARY OF ARGUMENT

Point One: Respondent properly raised the issue in a rule 3.850 motion of whether he properly received adult sanctions as a sentence, where said sentence was an unlawful sentence requiring a re-examination of whether the procedure employed to impose punishment comported with statutory law and due process.

Point Two: The amendment to §39.057(d) does not apply to the instant case because the Respondent was sentenced prior to said amendment coming into effect.

ARGUMENT

POINT I

WHETHER RESPONDENT PROPERLY RECEIVED ADULT SANCTIONS WAS PROPERLY RAISED IN A 3.850 MOTION,

In Brown v. State, 633 So. 2d 112 (Fla. 2d DCA 1994), the court stated, "Sentences that are factually erroneous, i.e., "unlawful" for purposes of rule 3.850, tend to require a review of evidence that was not in the record at the time of sentencing. We permit postconviction review of these factual matters because there can be no practical determination on the basis of the record provided for direct appeal." See also Nowlin v. State, 639 So. 2d 1050 (Fla. 1st DCA 1994).

Rule 3.800(a) is intended to provide relief for a narrow category of cases in which the sentence imposes a penalty that is simply not authorized by law. It is concerned primarily with whether the terms and conditions of the punishment for a particular offense are permissible as a matter of law. It is not a vehicle designed to re-examine whether the procedure employed to impose the punishment comported with statutory law and due process. Unlike a motion pursuant to rule 3.850, the motion can be filed without an oath because it is designed to test issues that should not involve significant questions of fact or require a lengthy evidentiary hearing. Judge v. State, 596 So. 2d 73, 76-77, (Fla. 2d DCA 1991) review denied, 613 So. 2d 5 (Fla. 1992).

The court in Judge stated that an "unlawful' sentence" is one which is correctable only after an evidentiary hearing under rule 3.850. See also Fountain v. State, 660 So. 2d 376 (Fla. 4th DCA 1995).

In State v. Callaway, 658 So. 2d 983 (Fla. 1995), this court held that rule 3.800 is limited to sentencing issues which can be resolved without an evidentiary hearing.

In Martell v. State, 21 Fla. L. Weekly D1477 (Fla. 3d DCA June 26, 1996), the court found that a rule 3.850 motion is the appropriate vehicle to re-examine whether the procedure employed to impose a sentence comported with statutory law and due process.

Petitioner argues that the sentence in the case at bar involving the imposition of adult sanctions on a juvenile in the absence of specific findings regarding the criteria set forth in §39.059(7)(c), could only be raised on direct appeal and that this issue does not create an illegal sentence. Petitioner cites Judge, supra, in furtherance of his argument. Yet, a close examination reveals that the court in Judge was addressing a rule 3.800(a) motion in deciding whether an illegal sentence existed and did not address the question if an unlawful sentence existed which could be raised in a 3.850 motion.

The Respondent's use of a 3.850 motion to challenge his sentence was correct, Various courts have found that the use of a 3.850 motion is a permissible vehicle in which to attack the imposition of adult sanctions where the requisite statutory findings were absent. See Ramos v. State, 660 So. 2d 817 (Fla. 5th DCA 1995); Smith v. State, 641 So. 2d 188 (Fla. 2d DCA 1994); Wood v. State, 655 So. 2d 1155 (Fla. 5th DCA 1995); Davis v. State, 661 So. 2d 1261 (Fla. 4th DCA 1995).

ARGUMENT

POINT II

THE AMENDMENT TO §39.059(7)(d) DOES NOT APPLY WHERE DEFENDANT WAS SENTENCED BEFORE THE AMENDMENT CAME INTO EFFECT.

Petitioner argues in his brief that the Fifth District Court of Appeal erred because it did not apply the amendment to §39.059(7)(d) retroactively and, therefore, erred in reversing and remanding the trial court's denial of the Respondent's motion for post-conviction relief.

Petitioner's analysis misses one critical point, the Respondent committed the offense and was sentenced before the amendment to §39.059(7)(d) came into effect on October 1, 1994. All of the case law cited by the Petitioner involved cases where the defendant had committed the offense prior to the amendment taking place, but was sentenced- the amendment went into effect. The courts in these case applied the amendment to §39.059(7)(d) retroactively because the amendment had come into effect prior to sentencing. See Jutz v. State, 664 So. 2d 1060 (Fla. 4th DCA 1995) (Juvenile's sentencing occurred after effective date of amendment, and thus amended statute applied retroactively to juvenile at his sentencing hearing); Grayson v. State, 671 So. 2d 855 (Fla. 4th DCA 1996) (Court held that the amended statute should be applied retroactively to defendants who committed their offense prior to 1994 but were sentenced after the effective date of the amendment); Thomas v. State, 662 So. 2d 1334 (Fla. 1st DCA 1995); Shortridge v. State, 21 Fla. L. Weekly D1249 (Fla. 2d DCA May 22, 1996) (Although defendant committed his offenses before the amendment, he was sentenced after the October 1, 1994 effective date of the amendment, thus making the amendment applicable to defendant).

The Fifth District Court of Appeal's analysis and ruling in the instant case was consistent with the case law cited by Petitioner and with other case law. See Shaw v. State, 645 So. 2d 68 (Fla. 4th 1994) (Amendments to statute regarding the sentencing of a juvenile offender as an adult are inapplicable to sentences in appeal "pipeline" rendered prior to amendment's effective date of October 1, 1994); Hangen v. State, 651 So. 2d 706 (Fla. 5th DCA 1995).

CONCLUSION

BASED UPON the foregoing cases, authorities and policies, the undersigned counsel requests this Honorable Court to affirm the decision of the Fifth District Court of Appeal.

Respectfully submitted,

JAMES B. GIBSON
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been hand delivered to the Honorable Robert Butterworth, Attorney General, 444 Seabreeze Blvd., Fifth Floor, Daytona Beach, FL 32114, in his basket, at the Fifth District Court of Appeal, and mailed to: Mr. Kison Evans, Inmate #203963, Marion Correctional Institute, P. O. Box 158, Lowell, FL 32663-0158, this 4th day of November, 1996.

SEAN K. AHMED
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,	)	
	)	
Petitioner,	)	
	)	
vs.	)	S. CT. CASE NO. 88, 145
	)	
KISON EVANS,	)	
	)	
Respondent.	)	

APPENDIX

95-3303

other

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT
JANUARY TERM 1996

AW

NOTFINALUNTILTHETIMEEXPIRES TO FILE REHEARING MOTION, AND, IF FILED, DISPOSED OF.

KISON EVANS,

Appellant,

v.

CASE NO. 95-3303

STATE OF FLORIDA,

Appellee.

Opinion filed March 15, 1996

3.850 Appeal from the Circuit Court for Lake County, Jerry T. Lockett, Judge.

Kison Evans, Lowell, Pro se.

Robert A. Butterworth, Attorney General, Tallahassee, and Michael D. Crotty, Assistant Attorney General, Daytona Beach, for Appellee.

HARRIS, J.

Evans appeals the summary denial of his motion for post conviction relief filed pursuant to Rule 3,850, Florida Rules of Criminal Procedure. We find that one of the grounds for post-conviction relief is legally sufficient.

Evans, who was a minor at the time he committed his criminal offense, was sentenced as an adult. At the time he was sentenced, a juvenile could only receive adult sanctions if specific findings mandated by statute were reduced to writing. See section 39.059(7)(d), Fla. Stat. (1993). Evans alleged that the court failed to enter written findings

as to the suitability of adult sanctions before imposing sentence. Our court previously held that this allegation is legally sufficient and precludes summary denial of a Rule 3.850 motion, See *Ramos v. State, 660 So.* 2d 817 (Fla. 5th DCA 1995); *Wood v. State*, 655 So. 2d 1155 (Fla. 5th DCA 1995). See also *Davis v. State*, 661 So. 2d 1261 (Fla. 4th DCA 1995). If there is a complete absence of written findings, there is no authority for sentencing a juvenile as an adult and the resulting sentence is illegal.

The state correctly notes that the legislature recently amended section 39.059(7), Florida Statutes (1994), and a court is no longer required to set forth specific findings or enumerate statutory criteria as a basis for its decision to impose adult sanctions on a juvenile. See Ch. 94-209, section 51, Laws of Fla. However, this amendment did not take effect until October 1, 1994, long after Evans committed his offense as a juvenile and was sentenced as an adult.[1] This amendment+ then, would not apply to Evans. *Cf. Hangen v.* State, 651 So. 2d 706 (Fla. 5th DCA 1995); *Shaw v.* State, 645 So. 2d 68 (Fla. 4th DCA 1994).

An illegal Sentence may be raised at any time. As the trial judge did not conclusively refute this claim of illegal sentence, the order denying post conviction relief is reversed, and the case remanded for the court to conduct a hearing or attach documents showing that written findings were entered or that Evans knowingly waived his statutory right to written findings, If the proper Sentencing procedure was not followed, the court on resentencing could reimpose adult sanctions after making the necessary written findings,

[1]Evans was placed on probation in 1991 and was sentenced to incarceration following a revocation of probation in 1992.

See Troutman v. State, 630 So. 2d 528 (Fla. 1993); *Hannah v. State*, 644 So. 2d 141 (Fla. 2d DCA 1994).

REVERSED AND REMANDED,

SHARP, W., and ANTOON, JJ., concur.