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OCT 23 1996

CLERK, SUPREME COURT

By _____ Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

CASE NO: 88,145

KISON EVANS,

Respondent

PETITIONER'S BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF ATJTHORITIES

CASES:

OTHER AUTHORITIES:

STATEMENT OF THE CASE AND FACTS

Respondent, hereinafter known as Evans, pled nolo contendere to one count of armed robbery, in violation of §812.13(2) (a), a first degree felony punishable by life. Evans was originally placed on probation. Thereafter, he was apprehended while trying to purchase cocaine. On October 28, 1992, after finding he violated his probation, the trial court sentenced him to seventeen years in the Department of Corrections followed by life probation. This sentence was amended to seventeen years followed by five years probation.

Evans submitted a Motion for Post Conviction Relief to the Circuit Court of the Fifth Judicial Circuit in and for Lake County on July 9, 1995. This motion alleged that the trial court improperly sentenced him as an adult. Specifically, Evans claimed that the trial court sentenced him as an adult without making specific written findings as required by §39.059(7)(d). On August 9, 1995, the Circuit Court issued an order denying the motion, nunc pro tunc to August 7, 1995. On August 21, 1995, he filed a motion for rehearing. On September 7, 1995, this motion was also denied. This was received by Evans on October 18, 1995. On October 24, 1995, he submitted his Notice of Appeal.

The Fifth District Court of Appeal ordered a response to this

Notice on January 16, 1996. The State responded that the question of whether the trial court properly sentenced Evans as an adult should have been raised on direct appeal. Further, the State argued that §39.059(7)(c)[1] had been amended, and, although it was amended after Evans committed the crime, the new law could be applied retroactively because the change was procedural in nature. Subsequent to the State's response, the district court found the original sentence illegal. Although it did note that §39.059(7)(d) had been amended, it stated that since the amendment did not take effect until October 1, 1994, it would not apply to Evans because he had already committed the offense. On April 1, 1996, the State filed a Motion for Rehearing, which was denied April 22, 1996. The instant appeal followed.

[1] §39.059(7)(c) was cited as §39.059(7)(d) before it was amended.

SUMMARY OF THE ARGUMENT

POINT I: Whether the trial court properly imposed adult sanctions on a juvenile in the absence of specific findings regarding the criteria set forth in §39.059(7)(c), Florida Statutes, is a question which must be raised on direct appeal. The trial court's sentence could have and should have been raised on direct appeal. Evans raised this in a motion for post-conviction relief. Because he did not raise this issue on direct appeal, his motion was not one that was cognizable for appellate review.

POINT II: The trial court properly imposed adult sanctions on Evans. The trial court was not required to make specific, individualized findings. The statute requiring those findings was amended so that specific findings are not required. Because the law is procedural in nature, the amendment is retroactively applicable to Evans. The trial court's determination that Evans was suitable to be sentenced as an adult is in conformity with both the current and amended forms of Section 39.059(7)(c), Florida Statutes, and its decision should have been upheld.

ARGUMENT

POINT I

WHETHER EVANS PROPERLY RECEIVED ADULT SANCTIONS IS AN ISSUE THAT IS PROPERLY RESOLVED ON DIRECT APPEAL RATHER THAN A COLLATERAL PROCEEDING.

The first question presented to this court is whether the imposition of adult sanctions on juveniles in the absence of specific findings regarding the criteria set forth in §39.059(7)(c), Florida Statutes, must be raised on direct appeal. Like the issue as to whether the amendment to §39.059(7)(c) was a procedural change in the statute, the opinion of the Fifth District Court of Appeal on that issue in the instant case is in direct conflict with opinion of several other districts.

In the instant case, Evans raised in a post-conviction proceeding the issue of whether he was properly sentenced. The Fifth District Court of Appeal found the fact that the trial court, in sentencing Evans to adult sanctions without conforming to the the requirements of §39.059(7)(c), imposed an illegal sentence.

Courts have long grappled with the question of when issues are properly raised in a collateral proceeding. The Second District Court of Appeal, in attempting to define when a collateral proceeding is appropriate, observed that it would be difficult, if

not impossible, to clearly state the distinctions between sentencing errors which may be corrected on direct appeal; "illegal sentences" that must be corrected at any time under Rule 3.800(a), and sentences imposed "in violation of the law" subject to correction in Rule 3.850. See, Judge v. State, 596 So. 2d 73, 76 (Fla. 2d DCA 1991).

However, in more recent opinions, this Court has attempted to clarify what issues are cognizable in collateral proceedings. In State v. Callaway, 658 So. 2d 983, 988 (Fla. 1995), this Court defined the three types of sentencing errors: (1) an erroneous sentence which is correctable on direct appeal, (2) an unlawful sentence which is correctable only after an evidentiary hearing under rule 3.850, and (3) an illegal sentence which may be corrected at any time under Florida Rule of Criminal Procedure 3.800. Further, it defined an illegal sentence. An illegal sentence is simply a sentence which exceeds the statutory maximum. Davis v. State, 661 So. 2d 1193 (Fla. 1995). Finally, it was determined that it is not proper to address in a 3.850 proceeding an issue that was or could have been presented by direct appeal. McCrae v. State, 437 So. 2d 1388 (Fla. 1983).

Several districts have addressed the question of whether the imposition of adult sanctions on juveniles in the absence of

specific findings regarding the criteria set forth in §39.059(7)(c), Florida Statutes, may be raised by a collateral appeal. The First District had an opportunity to review this question in Springer v. State, 660 So. 2d 310 (Fla. 1st DCA 1995). In Springer, the Court held that a challenge to the sentence of a juvenile without findings pursuant to §39.059(7)(c) may not be raised for the first time in a collateral proceeding. It certified this question as one of great public importance to the Supreme Court. However, that proceeding was dismissed without opinion. See, Springer v. State, 670 So. 2d 940 (Fla. 1996).

This question was also raised in the Third District in McCloud-v. State, 653 So. 2d 453 (Fla. 3d DCA 1995), rev. denied, 613 So.2d 5 (Fla.1992). In McCloud, the defendant, a juvenile, pled no contest to two felonies. He was adjudicated guilty, spent a short period in the county jail and then received three years adult probation. Soon after, he was charged with a violation of probation and eventually had his probation revoked. Defendant argued that because there was no discussion of the findings required by §39.059(7), he should be resentenced in accordance with the statute. The court found that since this claim was one that should have been raised, if at all, during the appeal when he was originally on probation, the defendant was not entitled to relief.

Finally, in Judge, supra, the Second District specifically held that a sentence imposing adult sanctions on a juvenile in the absence of specific findings regarding the criteria set forth in §39.059(7)(c), Florida Statutes, must be raised on direct appeal, and that this issue does not create an illegal sentence.

The issue of whether the trial court properly imposed adult sanctions when sentencing Evans as an adult is clearly an issue that should have been raised on direct appeal. Given that the Fifth District's opinion in the instant case conflicts with the First, Second, and Third Districts as to whether the imposition of adult sanctions on juveniles in the absence of specific findings regarding the criteria set forth in §39.059(7)(c), Florida Statutes, may be raised by a collateral appeal, this issue should be resolved by the court. This court should find that this issue is one which should have been addressed on direct appeal.

POINT II

THE AMENDMENT TO §39.059(7)(d) WAS A PROCEDURAL CHANGE IN THE LAW AND SHOULD BE APPLIED RETROACTIVELY.

The second question presented to this Court is whether the amendment to §39.059(7)(d), Florida Statutes (1993), was procedural in nature, allowing retroactive application, or whether it was a substantive change in the law affecting only juveniles who committed crimes after the statute was amended[2].

It has long been held, and widely recognized, that substantive changes in the law must be applied prospectively, while procedural changes may be applied retroactively. See, Thompson v. Missouri, 171 U.S. 380, 18 S. Ct. 922, 43 L. Ed. 204 (1898); Dobbert v. Florida, 432 U.S. 282, 97 S. Ct. 2290 (1977); State v. Jackson, 478 So. 2d 1054 (Fla. 1985).

This Court has defined the difference between a substantive change in the law and a procedural change. In Smith v. State, 537 So. 2d 982 (Fla. 1989) this Court stated:

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[2] The State acknowledges the en banc ruling in Clarkston v. State, 21 Fla. L. Weekly 1873 (Fla. 5th DCA August 16, 1996) in which the Fifth District Court of Appeal receded from its original position on this issue. However, the court did not explicitly recede from its opinion in this case. The State maintains that this is an important question of law in which a final resolution on the merits is necessary.

> As related to criminal law and procedure, substantive law is that which declares what **acts are crimes** and prescribes punishment therefor, while procedural **law** is that which provides or regulates the steps by which one who violates a criminal statute is punished.

Further, although as a general rule of statutory authority, **a law** is presumed to act prospectively, procedural statutes may be applied retroactively because no one has a vested interest in a given mode of procedure. State v. Kelley, 588 So. 2d 595 (Fla. 1st DCA 1991), citing Walker & Laberge, Inc. V. Halligan, 344 so. 2d 239 (Fla. 1977).

Prior to being amended, §39.059(7) mandated that any decision to impose adult sanctions by the court had to be in writing and in conformity with a list of enumerated criteria. Specific findings of fact and the reasons for the decision to impose adult sanctions were also required. Subsequent to the statute being amended, the trial court no longer had to make specific, individualized findings as to whether to impose adult sanctions. The amended version of §39.059(7)(c) reads **as** follows[3]:

> Any decision to impose adult sanctions must be in writing, but is presumed appropriate, and the court is not required to set forth specific findings or enumerate the criteria in this subsection as any basis for its decision

[3] Section 39.059(7)(c), Florida Statutes, 1994 supplement.

to impose adult sanctions.

Section 39.059(7)(c) does not declare which acts are crimes, or prescribe any punishment. It merely restates the procedure for sentencing a juvenile as an adult. Thus, the amendment should have been found to be procedural in nature and retroactively applicable.

The Fifth District observed that the legislature amended §39.059(7)(d), but noted that because the amendment did not take effect until after Evans committed the offense, it did not apply to him. It cited in support of this idea Hansen v. State, 651 So. 2d 706 (Fla. 5th DCA 1995) and Shaw v. State, 645 So. 2d 68 (Fla. 4th DCA 1994). The Fourth District, as well as the Second and First Districts have addressed the question of whether the trial court may apply the amended version of §39.059(7) retroactively, and have held that the amendment §39.059(7) was a procedural change.

In Lutz v. State, 664 So.2d 1060 (Fla. 4th DCA 1995), the defendant was convicted of burglary of a structure and third degree theft. The court held that despite the fact that the offense was committed before the amendment's effective date, the amended statute should have been applied retroactively to appellant's sentencing hearing. See, also, Grayson v. State, 671 So. 2d 855 (Fla. 4th DCA 1996). Similarly, in Thomas v. State, 662 So. 2d 1334 (Fla. 1st DCA 1995), the court noted that it considered

§39.059(c) to be a procedural amendment and that it is properly applied retroactively. Finally, in Shortridge v. State, 21 Fla. L. Weekly D 1249 (Fla. 2d DCA May 22, 1996), the defendant was convicted of first degree felony murder as well as robbery with a firearm. The trial court, in sentencing defendant as an adult, simply concluded that juvenile sanctions no longer apply. The Court held that despite the fact that defendant committed his offenses before the amendment, the trial court's cursory conclusion was sufficient and he was properly sentenced as an adult.

The amendment to §39.059(d) is procedural in nature and is properly applied retroactively. Additionally, this is an issue which could have and should have been raised on direct appeal and is not properly raised in a 3.850 motion. Based on the above stated reasons, the decision of the Fifth District Court of Appeal should be reversed and a final resolution of each of these issues should be enacted.

Conclusion

Based upon the foregoing argument and authority, Petitioner respectfully requests this honorable court to quash the decision of the Fifth District Court of Appeal and affirm the trial court's original order denying relief.

Respectfully submitted

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing merits brief has been furnished by delivery to Assistant Public Defender James R. Wulchak, counsel for Respondent, this 21st day of October, 1996.

Michael D. Crotty
Assistant Attorney General