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SID J. WHITE
MAY 27 1997
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Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

EDWIN H. BEATY,

Petitioner/Appellant,

v.

Case No. 09,356
2 DCA Case No. 96-03252

STATE OF FLORIDA,

Respondent/Appellee.

DISCRETIONARY REVIEW OF DECISION OF
DISTRICT COURT OF APPEAL, SECOND DISTRICT
STATE OF FLORIDA

RESPONDENT'S BRIEF ON THE MERITS

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TABLE OF CONTENTS

PAGE NO.

TABLE OF CITATIONS

OTHER AUTHORITIES

PRELIMINARY STATEMENT

The instant appeal originated from the trial court's summary denial of a time-barred Rule 3.850 motion for post-conviction relief. Petitioner, Edwin Beaty, contends that direct review proceedings were not "final" until the Clerk of the Florida Supreme Court responded to Beaty's pro se letter, which was filed with this Court on July 19, 1993. However, petitioner did not submit a copy of his pro se letter or the clerk's correspondence of September 10, 1993, to either the trial court or to the Second District Court of Appeal. Accordingly, these letters are not properly part of the instant record. Rule 9.200(a), Florida Rules of Appellate Procedure.

Petitioner has now included copies of these two letters as an Appendix to his initial brief. Because this Court may take judicial notice of its prior court records, S90.202*(6)*, Florida Statutes, Respondent does not object to this Court's consideration of this correspondence.

STATEMENT OF THE CASE AND FACTS

Petitioner, Edwin Beaty, a/k/a Beatty, was represented by the Office of the Public Defender on direct appeal in Beatty v. State, 2d DCA Case No. 90-02433. On June 2, 1993, petitioner's direct appeal was affirmed, per curiam, by the Second District Court. Beatty v. State, 621 So. 2d 437 (Fla. 2d DCA 1993). Forty-seven days later, on July 19, 1993, petitioner's pro se letter was filed with this Court. In his pro se letter, petitioner asked this Court to accept his case for review. On September 10, 1993, the Clerk of the Florida Supreme Court wrote to the petitioner, stating

> I regret to advise you that the Florida Supreme Court is unable to grant review of a per curiam affirmed decision of a district court of appeal.
>
> The Court's discretionary jurisdiction is invoked only when the district court issues an express written opinion (with the exception of a finding of constitutional or statutory invalidity by the district court). Please see the enclosed copy of Jenkins v. State, 385 So. 2d 1356.
>
> /s/ Sid J. White
> Clerk

(Pet. App., Ex. B, C)

On July 27, 1995, petitioner filed a Rule 3.850 motion for post-conviction relief in the trial court. The trial court summarily denied post-conviction relief, finding, *inter alia*, that

the petitioner's motion was untimely because his judgment and sentence "became final" upon the issuance of the mandate from the Second District Court on June 22, **1993**, more than two years before the filing his post-conviction motion. The trial court also found that the petitioner failed to sufficiently allege any exception to the two-year requirement under Rule 3.850(b) **(1).**

On post-conviction appeal, the Second District Court agreed that the trial court correctly measured the two-year period from the issuance of the district court's mandate, and not from the Florida Supreme Court's alleged denial of review. Beaty v. State, **684 So.** 2d 206 (Fla. 2d DCA **1996).** As Judge Altenbernd explained,

> . . . We hold that a judgment and sentence become final for purposes of rule 3.850 when our mandate issues in a direct appeal in which the judgment and sentence are affirmed without a written opinion. Mr. Beaty was convicted of first-degree murder and received a life sentence. He appealed that judgment and sentence to this court in August 1990. On June **2, 1993,** this court affirmed. Our mandate issued on June 22, **1993.** Instead of filing a motion for postconviction relief at that time, Mr. Beaty alleges that he filed "for review by certiorari" in the Florida Supreme Court. That court allegedly denied review on September 10, 1993. (FN1)[1]

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[1](FN1) This court has no record establishing that Mr. Beaty filed a notice to invoke the discretionary jurisdiction of the supreme court pursuant to Florida Rule of Appellate Procedure 9.120. Because he alleges under oath that he sought certiorari review directly in the supreme court, we assume that he made such an attempt. Our analysis would not change if he had filed in this court a notice to invoke the supreme court's jurisdiction in a futile effort to seek review of our unwritten opinion.

Mr. Beaty served his motion for postconviction relief on July 25, 1995. The trial court denied the motion on the ground that it was untimely. We conclude that the trial court correctly measured the two-year period from the issuance of our mandate, and not from the supreme court's alleged denial of review.

In Nava v. *State*, 659 So. 2d 1314 (Fla. 4th DCA 1995), the Fourth District held that a prisoner could file a motion pursuant to rule 3.850 "within two years of the termination, by denial of a petition for writ of certiorari in the supreme court, of Appellant's plenary appeal." We have been unable to locate a written opinion by the Fourth District in Mr. Nava's direct appeal. Thus, we presume that the Fourth District affirmed the direct appeal without a written opinion. In reaching its decision, the Fourth District relied upon the following statement from Huff v. *State*, 569 So.2d 1247, 1250 (Fla.1990): "If a writ of certiorari is filed in the United States Supreme Court, the two-year period does not begin to run until the writ is finally determined." The facts in Huff, however, reveal that it was a capital case. The United States Supreme Court had jurisdiction to review the written opinion in that death penalty case.

We are not convinced that the rule in Huff should apply in this case. Although Mr. Beaty could file papers in the Florida Supreme Court, the constitution gives that court no appeal jurisdiction or discretionary jurisdiction to review this court's per curiam affirmance of Mr. Beaty's judgment and sentence because it was rendered without a written opinion. See Art. V, § 3(b), Fla. Const.; Fla. R.App. P. 9.030(a); Jenkins v. *State*, 385 So.2d 1356 (Fla.1980). No pleadings he may have filed in the Florida Supreme Court divested the trial court of its jurisdiction to review a motion pursuant to rule 3.850. We see no reason to pretend that his judgment and sentence did not become final because of his frivolous pleadings in the supreme court. Assuming that *Nava* involved an affirmance without written opinion, its holding encourages prisoners to file inappropriate and futile pleadings in the Florida Supreme Court. (FN2)

We distinguish cases in which prisoners have timely sought supreme court review of district court decisions affirming a judgment and sentence by a written opinion. See *State* v. *Meneses*, 392 So.2d 905 (Fla.1981); *Brown v. State*, 617 So.2d 1105 (Fla. 1st DCA 1993). See also Ward v. *Dugger*, 508 So.2d 778 (Fla. 1st DCA

1987). When a district court issues a written opinion, there is a possibility that the supreme court will take jurisdiction over the case. The fact that the two-year time limitation for the filing of a rule 3.850 motion runs from the supreme court's denial of review in cases in which it has the constitutional power of review is no reason to extend the time in cases in which it has no jurisdiction to review the judgment and sentence. The argument in Justice England's dissent in Meneses, which convinced two other justices in a case involving a written opinion, appears to be more persuasive in a case of per curiam affirmance without a written opinion. 392 So.2d at 907 (England, J., dissenting).

Affirmed.

Beaty v. State, 684 So.2d at 207-208.

On March 26, 1997, this Court accepted jurisdiction to review Beaty v. State, 684 So. 2d 206 (Fla. 2d DCA 1996).

SUMMARY OF THE ARGUMENT

In a direct appeal in which the criminal defendant's judgment and sentence are affirmed without a written opinion, the judgment and sentence become final, for purposes of two-year period in which to file a motion for postconviction relief, on the date the district court issues its mandate.

ARGUMENT

A CRIMINAL DEFENDANT'S JUDGMENT *AND* SENTENCE "BECOME FINAL" FOR PURPOSES OF RULE 3.850 WHEN THE MANDATE ISSUES IN A DIRECT APPEAL IN WHICH THE JUDGMENT AND SENTENCE ARE AFFIRMED WITHOUT A WRITTEN OPINION.

Disposition of the instant case requires the resolution of when a criminal defendant's judgment and sentence "become final." Rule 3.850, Florida Rules of Criminal Procedure sets forth the following time limits and exceptions:

> (b) Time Limitations, A motion to vacate a sentence that exceeds the limits provided by law may be filed at any time. **No other motion shall be filed or considered pursuant to this rule if filed more than 2 years after the judgment and sentence become final in a noncapital case or** more than 1 year after the judgment and sentence become final in a capital case in which a death sentence has been imposed unless it alleges that
>
> (1) the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence, or
>
> **(2)** the fundamental constitutional right asserted was not established within the period provided for herein and has been held to apply retroactively.

For purposes of the two-year time limitation for requesting post-conviction relief, a criminal defendant's judgment and sentence "become final" when direct review has concluded. Kennedy v. State, 637 So. 2d 987 (Fla. 1st DCA 1994). If no direct appeal is filed, the two year limit does not begin to run until expiration

of thirty day period within which defendant could file an appeal from a judgment and sentence. Gust v. State, 535 So. 2d 642 (Fla. 1st DCA 1988); Ramos v. State, 638 So. 2d 169 (Fla. 3d DCA 1995).

Sub judice, in affirming the trial court's summary denial of post-conviction relief, the district court held that "a judgment and sentence become final for purposes of rule 3.850 when our mandate issues in a direct appeal in which the judgment and sentence are affirmed without a written opinion." Beaty v. State, 684 So. 2d 206 (Fla. 2d DCA 1996). For the following reasons, the well-reasoned decision of the district court in Beaty should be approved.

On direct appeal, petitioner, Edwin Beaty, was represented by the Office of the Public Defender for the Tenth Judicial Circuit. See §27.51(4)(b), Florida Statutes (1991). A criminal defendant is not simultaneously entitled to be represented by counsel and to also represent himself. Consequently, because Beaty was represented by counsel, he had no right to file any additional pro se briefs or appellate papers on direct appeal. Powell v. State, 206 So. 2d 47 (Fla. 4th DCA 1968). *Any* pro se briefs or pleadings filed during the direct appeal were a nullity. As the court in Powell explained,

> . . . Absent some compelling reason reflected in

> an application for permission and absent this court's consent for an appellant to represent himself and to be also represented by counsel, we believe that a party on appeal represented by counsel has no right, in propria persona, to file additional briefs and appellate papers. To permit this would clearly interfere with the time schedules and the filing and service of papers. Such practice would frustrate and confuse the appellate process and administration of justice.
>
> 206 So. 2d at 48.

Beaty's direct appeal was affirmed per curiam, without a written opinion, on June 2, 1993, and the district court's mandate issued on June 22, 1993. The two-year time period commenced at that time because a defendant's judgment and sentence become final, for purposes of filing a motion for post-conviction relief, upon issuance of the mandate. Cook v. State, 596 So. 2d 483 (Fla. 1st DCA 1992); Rule 9.340, Florida Rules of Appellate Procedure. Thereafter, the trial court was without authority to alter or evade the mandate. 8924.35, Florida Statutes (1995).

The Florida Constitution does not give this court either appeal or discretionary jurisdiction to review a district court's per curiam affirmance without a written opinion. Article V, 53(b)(3), Florida Constitution; Jenkins v. State, 385 So.2d 1356 (Fla. 1980). Therefore, petitioner's pro se letter was, at most, a time-barred attempt to obtain a second appeal in a case where this court was without jurisdiction. However, even if a written

opinion had been issued and petitioner arguably might have been eligible to seek discretionary review pursuant to Rule 9.030(a)(2)(A), Florida Rules of Appellate Procedure, it was still a necessary jurisdictional prerequisite for petitioner to file a notice to invoke discretionary jurisdiction within thirty days of rendition of the district court's decision. Rule 9.120(c), Florida Rules of Appellate Procedure. Thus, even if discretionary review had been arguably available to this criminal defendant, the failure to file this notice within thirty days of June 2, 1993 constitutes an independent procedural bar.

Forty-two days after Beaty's direct appeal was affirmed, he filed a pro se letter with this court complaining about the district court's disposition of his appeal and asking this court to grant him further review. Thus, petitioner's purported attempt to seek "discretionary review" not only was unauthorized, but it clearly was time-barred for failure to comply with the requirements of Rule 9.120(c). It is irrelevant whether petitioner now claims that he made an untimely attempt to secure unauthorized "discretionary review" or attempted to invoke this court's original "all writs" jurisdiction under Rule 9.030(a)(3), Florida Rules of Appellate Procedure. Beaty's pro se letter did nothing to toll the procedural time requirements for filing a Rule 3.850 motion.

Not surprisingly, Beaty raises the same hue and cry of many post-conviction writ writers -- that the procedural requirements of Florida law should not be applied to him because he is "untrained in law." Pro se litigants are not exempt from, and are expected to comply with, the procedural requirements of the Florida Rules of Appellate Procedure. Compo v. State, **617 So. 2d 362** (Fla. 2d DCA 1993). A litigant's pro se status and alleged ignorance of available post-conviction remedies will not excuse a procedural default. Harmon V. Barton, **894 F.2d 1268, 1274-5** (11th Cir. 1990).

In affirming the trial court's denial of post-conviction relief because Beaty's motion was not filed within two years of the court's mandate on direct appeal and Beaty did not allege any basis to extend the two-year period contained in Rule 3.850(b), Florida Rules of Criminal Procedure, the Second District Court conducted a careful analysis of the existing Florida precedent. For example, in Huff v. State, **569 So. 2d 1247** (Fla. 1990), the criminal defendant's post-conviction motion was timely filed where his motion was filed two years from the date the United States Supreme Court issued its mandate affirming Huff's convictions and sentences. According to **Huff,** if a petition for writ of certiorari is filed with United States Supreme Court, the time period for filing post-conviction motions in a capital case does not begin to

run until the writ is finally determined. Id. In Nava v. State, 659 So. 2d 1314 (Fla. 4th DCA 1995), the Fourth District relied upon Huff v. State, 569 So.2d 1247, 1250 (Fla.1990). However, as the Second District Court explained below, Huff was a capital case and the United States Supreme Court had jurisdiction to review the written opinion in that death penalty case.

In the instant case, the Second District also recognized that no pleadings Beaty may have filed in the Florida Supreme Court divested the trial court of its jurisdiction to review a motion pursuant to rule 3.850. Accordingly, there was no reason to "pretend that his judgment and sentence did not become final because of his frivolous pro se pleadings" in the Florida Supreme Court. Even assuming that Nava involved an affirmance without a written opinion, the Second District Court echoed a sound policy reason to reject Nava -- its holding encourages prisoners to file inappropriate and futile pleadings in the Florida Supreme Court.

Finally, as the Second District aptly illustrated, the cases in which prisoners timely sought supreme court review of district court decisions affirming a judgment and sentence by a written opinion are readily distinguishable from the instant case. Beaty, 684 So. 2d at 207, citing State v. Meneses, 392 So.2d 905 (Fla.1981);Brown v. State, 617 So.2d 1105 (Fla. 1st DCA 1993). See

also Ward v. Dugger, 508 So.2d 778 (Fla. 1st DCA 1987). The fact that the two-year time limit "runs from the supreme court's denial of review in cases in which it has the constitutional power of review is no reason to extend the time in cases in which it has no jurisdiction to review the judgment and sentence." Beaty, 684 So. 2d at 208.

Lastly, Beaty alleges that the State impeded the timely filing of his post-conviction motion. In the court's order denying post-conviction relief, the trial judge specifically found that "after being informed by the State in February 1994, that payment in advance for the copies [of public records] was required, it was not until over a year later that Defendant's representative finally responded that she wished to view the documents, and therefore at least one year of delay in retrieving such documents was due to the lack of diligence on Defendant's part, not due to any misconduct by the State." (Order dated July 18, 1996). Beaty's allegations against the department of corrections were not raised in his brief on appeal in the Second District Court, and, therefore, are waived.

Based upon the foregoing arguments and authorities, the decision of the Second District Court in Beaty should be approved.

CONCLUSION

Based upon the foregoing reasons, arguments, and citations of authority, Respondent submits that this Honorable Court should approve the decision of the district court in Beatv v. State, 684 So. 2d 206 (Fla. 2d DCA 1996).

Respectfully submitted,

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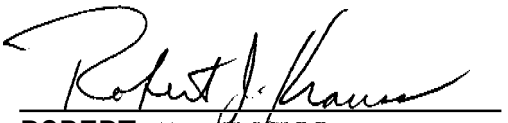
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Respondent on the Merits has been furnished by regular U.S. mail to inmate Edwin Beaty, 350297, M.B. #359, Charlotte Correctional Institution, 33123 Oil Well Road, Punta Gorda, Florida 33955, on this 22nd day of May, 1997.

Katherine Blanco

COUNSEL FOR RESPONDENT