IN THE SUPREME COURT OF FLORIDA

ANDREW J. MORRIS,
Petitioner,
vs.
STATE OF FLORIDA,
Respondent.

Fifth District Court of Appeal No.: 95-1230

Supreme Court Case No.

PETITIONER'S BRIEF ON JURISDICTION

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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ATTORNEY FOR PETITIONER

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PETITIONER'S BRIEF ON JURISDICTION

STATEMENT OF THE CASE AND FACTS

Petitioner was charged by a two count information filed on October 25, 1994, charging Petitioner with committing the following offenses: Count I - unlawful possession of a controlled substance, to-wit: cocaine, in violation of Section 893.13(6)(a), Florida Statutes; Count II - resisting officer without violence to his person, in violation of Section 843.02 and 943.10, Florida Statutes. (R 1)

The case proceeded to trial on February 16, 1995 before the Honorable Charles J. Tinlin, acting Circuit Court Judge for the Seventh Judicial Circuit, in and for St. Johns County. (T 42-205) At the close of the State's case, defense counsel moved for a judgment of acquittal on Count I. (T 148) The trial court denied the motion. (T 149) Defense counsel failed to renew his motion for judgment of acquittal after Petitioner testified on his own behalf. After deliberations, the jury returned a verdict of guilty as charged in Count I and Count II. (T 198)

A sentencing hearing was held on May 3, 1995 before the Honorable Robert K. Mathis. (R 79-86) Petitioner's sentencing guidelines scoresheet total indicated that state prison time was not appropriate. (R 36-37) The trial court, however, imposed a departure sentence of five years incarceration in Count I because of Petitioner's extensive unscored juvenile record. (R 29, 37) In Count II, the trial court sentenced Petitioner to 364 days in the county jail to run concurrent to the sentence imposed in Count I. (R 30, 37, 84)

Petitioner appealed to the Fifth District Court of Appeal, arguing that the trial court erred in denying Petitioner's motion for judgment of acquittal made at the close of the State's case as to Count I and in sentencing Petitioner to a departure sentence which exceeded the term of incarceration if Petitioner's juvenile record had actually been scored. (R 46)

On March 21, 1997, the Fifth District Court of Appeal affirmed Petitioner's conviction but reversed for a new sentencing. The Fifth District Court of Appeal in affirming Petitioner's conviction held that Petitioner's claim that the trial court erred in denying his motion for judgment of acquittal was not preserved because Petitioner did not renew the motion at the close of all the evidence.

Notice to Invoke this Honorable Court's Discretionary Jurisdiction was filed in the Fifth District Court of Appeal on April 21, 1997.

SUMMARY OF THE ARGUMENT

Petitioner respectfully requests that this Honorable Court accept jurisdiction, because the opinion of District Court of Appeal, Fifth District, in the instant case expressly and directly conflicts with this Court's decision in State v. Pennington, 534 So.2d 393 (Fla. 1988) and with the decisions of other District Courts of Appeal.

ISSUE

THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL IN THIS CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISIONS OF THE OTHER DISTRICT COURT'S OF APPEAL AND WITH THIS COURT'S DECISION IN STATE V. PENNINGTON, 534 So. 2d 393 (Fla. 1988).

This Honorable Court should accept jurisdiction in the instant case, because the decision expressly and directly conflicts with this Court's decision in State v. Pennington, 534 So.2d 393 (Fla. 1988) and with the decisions of the other District Courts of Appeal. This Court has jurisdiction to review this matter pursuant to Rule 9.030(a)(2)(A)(6), Florida Rules of Appellate Procedure.

In the instant case, the Fifth District Court of Appeal held that Petitioner's argument that the trial court erred in denying his motion for judgment of acquittal was not preserved for appeal. Although, Petitioner properly made a motion for judgment of acquittal at the close of the State's case, he did not renew his motion for judgment of acquittal at the conclusion of all the evidence. In holding that the denial of Petitioner's motion for judgment of acquittal was not preserved for appeal, the Fifth District Court of Appeal relied on this Court's decision in State v. Pennington, 534 So. 2d 393, (Fla. 1988) and Rule 3.380(b), Florida Rules of Criminal Procedure.

In Pennington, however, this Court rejected the State's argument to adopt the federal "waiver doctrine". Under the "waiver doctrine," if a defendant presents evidence following a denial of his motion for judgment of acquittal, this operates as a waiver of his objection to the denial of his motion. Further, if the defendant fails to renew his motion for judgment of

acquittal at the end of all the evidence, the "waiver doctrine" operates to foreclose the issue of sufficiency of the evidence on appeal. This Court stated that:

> The Florida Rule expressly states that a defendant's motion for judgment of acquittal at the close of the state's case is not waived by the defendant's subsequent introduction of evidence if properly preserved by a motion at the close of all the evidence. Further, the committee notes reflect that "a minority felt that the language should be changed so that a defendant would waive an erroneous denial of his motion for judgment of acquittal by introducing evidence. Florida Rule Criminal Procedure 3.660 Committee Notes (1967). It is clear that our rule is written to prevent application of the federal waiver rule. (Emphasis added) Id. at 395-396.

Furthermore, the Fifth District Court of Appeal reached a contrary result in Williams v. State, 511 So.2d 740 (Fla. 5th DCA 1987). In Williams, the defendant moved for a judgment of acquittal at the close of the State's case, but failed to renew the motion at the conclusion of all of the evidence or to file a motion for new trial. The Fifth District Court of Appeal held that the issue of the denial of defendant's motion for judgment of acquittal was preserved for appeal. The appellate court, however, was limited in their scope of review to only the evidence presented during the State's case in chief. See also, McGeorge v. State, 386 So.2d 29 (Fla. 5th DCA 1990)

The Fourth District Court of Appeal in TMM v. State, 567 So.2d 805 (Fla. 4th DCA 1990), held that the failure of the defendant to renew his motion for judgment of acquittal at the close of the all the evidence does not prevent the court from reviewing the denial of the motion after the State's case. The Third and First District Courts of Appeal have reached the same conclusion. See, e.g., Everett v. State, 339 So.2d 704 (Fla. 3rd DCA 1976); Vazquez v. State, 350 So.2d 1094 (Fla. 3rd DCA 1977); Castillo v. State, 308 So.2d 619 (Fla. 3rd

DCA 1975); Wiggins v. State, 101 So. 2d 833 (Fla. 1st DCA 1958).

Because the decision of the District Court of Appeal in this case, expressly and directly conflicts with a decision of this Court and with the decisions of the other District Courts of Appeal on the same point of law, this Honorable Court has jurisdiction to review this cause.

CONCLUSION

For the reasons expressed herein, Petitioner respectfully requests that this Honorable Court exercise its discretionary jurisdiction and review the decision of the Fifth District Court of Appeal herein.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

M.A. LUCAS
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 0658286
112 Orange Ave., Ste. A
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ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to: The Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Blvd., 5th Floor, Daytona Beach, FL 32118 via his basket at the Fifth District Court of Appeal and mailed to: Andrew J. Morris, #979867, Lancaster Correctional Institution, P. O. Drawer 158, Trenton, FL 32693-0158, this 29th day of April, 1997.

M.A. LUCAS
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF FLORIDA

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APPENDIX

Morris v. State, 22 Fla. L. Weekly D 738 (Fla. 5th DCA March 21, 1997)

(PER CURIAM.) Convicted of the offense of battery on a law enforcement officer, the appellant Julia Macri complains that the trial court failed to instruct the jury on the necessarily lesser included offense of simple battery as requested by defense counsel. The appellant correctly argues that the trial court had no alternative but to give the instruction and the state, in effect, concedes that it was a per se reversible error. *State v. Wimberly*, 498 So. 2d 929 (Fla. 1986); *Nelson v. State*, 665 So. 2d 382 (Fla. 4th DCA 1996); *Crapps v. State*, 566 So. 2d 62 (Fla. 5th DCA 1990).

Accordingly, we vacate the judgement of conviction and remand for a new trial on the charge of battery on a law enforcement officer.

JUDGMENT VACATED; REMANDED. (PETERSON, C.J., SHARP, W., and GOSHORN, JJ., concur.)

* * *

Criminal law—Denial of motion for judgment of acquittal not preserved for appellate review where defendant made motion at the close of state's case, but failed to renew motion at close of all evidence—Sentencing—Guidelines—Error to impose departure sentence based on nonscoreable juvenile record where record on appeal does not reflect that trial court considered the limitation that the departure may be no greater than the sentence that the juvenile would have received had the juvenile record been scored—Error to set public defender's lien without proper notice

ANDREW J. MORRIS, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 95-1230. Opinion filed March 21, 1997. Appeal from the Circuit Court for St. Johns County, Robert K. Mathis, Judge. Counsel: James B. Gibson, Public Defender, and M. A. Lucas, Assistant Public Defender, Daytona Beach, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Michael D. Crotty, Assistant Attorney General, Daytona Beach, for Appellee.

(HARRIS, J.) Andrew J. Morris was convicted of the unlawful possession of a controlled substance and resisting arrest without violence. Although his scoresheet reflected a sentence of any non-state incarceration, the judge departed and sentenced Morris to five years incarceration based on his unscored juvenile record. Morris appeals his conviction and his sentence. We affirm the conviction but reverse for a new sentencing.

Morris' claim that the court erred in not granting his motion for judgment of acquittal was not preserved for appeal. Although he properly made the motion at the conclusion of the State's case, he did not renew the motion at the conclusion of his case. Rule 3.380(b), Florida Rules of Criminal Procedure provides:

> A motion for judgment of acquittal is not waived by subsequent introduction of evidence on behalf of the defendant, but after introduction of evidence by the defendant, the motion for judgment of acquittal must be renewed at the close of all the evidence. Such motion must fully set forth the grounds upon which it is based.

In *State v. Pennington*, 534 So. 2d 393 (Fla. 1988), the supreme court noted that the above cited rule expressly states that a defendant's motion for judgment of acquittal at the close of the State's case is not waived by the defendant's subsequent introduction of evidence *if properly preserved by a motion at the close of all the evidence*. Therefore, both the rule and *Pennington* (at least by implication) require that a motion for judgment of acquittal must be repeated at the close of all the evidence in order to preserve the denial of such motion for review on appeal.

We agree with Morris, however, that the trial court erred in sentencing both by not having or providing us with sufficient information and also by setting a Public Defender's lien without proper notice. Although the nonscoreable juvenile record may be considered as a reason for departure, such departure may be no greater than the sentence which the juvenile would have received had the juvenile record been scored. *See Puffinberger v. State*, 583 So. 2d 897 (Fla. 1991). This record does not reflect that the trial court considered what that limitation might be.

We, therefore, affirm the conviction but reverse and remand for a new sentencing in conformity with *Pennington* and for a new determination of the Public Defender's lien after proper notice.

AFFIRMED in part; REVERSED in part and REMANDED. (COBB and SHARP, W., JJ., concur.)

* * *

Torts—Nuisance—Trespass—Real property—Injunctions—Error to grant summary judgment in favor of city based on sovereign immunity in action which alleged that developer of adjacent subdivision, the roads of which were dedicated to the city for public use, and the plans for which were reviewed by city, raised elevation of land so that surface waters accumulated on plaintiff's property, and further alleged that manner in which city was using its property constituted an unlawful diversion of surface water onto private property, representing a continuing trespass and nuisance—Once government takes control of property or decides to build, it has same common law duty as private person to properly maintain and operate property—Trial court incorrectly concluded that action was only a "taking" case—Cause of action can exist against city for injunctive relief or abating a private nuisance, and related damages—Fact that city did not build roads not determinative

MADAY'S WHOLESALE GREENHOUSES, INC. and HENRY G. MADAY, Appellants, v. INDIGO GROUP, INC. and CITY OF PORT ORANGE, Appellees. 5th District. Case No. 96-2458. Opinion filed March 21, 1997. Appeal from the Circuit Court for Volusia County, Richard B. Orfinger, Judge. Counsel: C. David Coffey of Coffey, Tillman & Kalishman, Gainesville, for Appellants. Bruce R. Bogan of Eubanks, Hilyard, Rumbley, Meier and Lengauer, P.A., Orlando, for Appellee City of Port Orange. No Appearance for Appellee, Indigo Group, Inc.

(COBB, J.) The sole issue on this appeal is whether the lower court properly entered summary judgment in favor of the City of Port Orange.

Maday's Wholesale Greenhouses, Inc. (Maday), as plaintiff below, alleged that Indigo Group, Inc. (Indigo), developer of the Woodlake Subdivision (Woodlake), raised the elevation of its land adjacent to Maday's property, thereby altering the natural contours of the land so that surface waters that previously flowed across Woodlake now accumulated on Maday's property. Maday requested damages and injunctive relief. The City of Port Orange is now the "dedicated" owner of the roads in Woodlake.

In response to the complaint, Port Orange argued in its affirmative defenses that it was protected by sovereign immunity and that its action in issuing permits to Indigo was a planning level discretionary decision. It also maintained that it did not design or construct the subdivision, nor did it design or construct the drainage systems or roads. According to Port Orange, its only involvement was to review plans for compliance with local and state regulations and to issue permits. Once the subdivision roads were complete, Port Orange accepted their dedication for public use, but made no material alterations to the roads which would change the elevations or drainage.

Maday filed a memorandum in opposition to Port Orange's subsequent motion for summary judgment arguing that the City did not enjoy sovereign immunity from liability for unreasonable use of the property it now owned, *i.e.*, the subdivision roads. Maday cited *Trianon Park Condominium Ass'n, Inc. v. City of Hialeah*, 468 So. 2d 912 (Fla. 1985) for the proposition that when a government takes control of property or an improvement, it has the same common law duty as a private person to properly maintain and operate the property. Maday also cited *Westland Skating Center, Inc. v. Gus Machado Buick, Inc.*, 542 So. 2d 959 (Fla. 1989) to demonstrate that Florida law imposes a duty on adjacent landowners to refrain from interfering with the natural flow of surface water as would cause harm to any adjoining land. In addition, Maday submitted an affidavit from one A. J. "Jay" Brown, a professional engineer, who claimed the "primary reason for the flooding on plaintiff's property results directly from the replacement of fill on the entire Woodlake Subdivision property."

Subsequently, the trial court entered an order granting Port Orange's motion for summary judgment and entered final judgment. The court concluded that a governmental entity enjoys sovereign immunity in circumstances "where the purported failure to maintain is in actuality only the failure to make (or in some cases, the making of) a capital improvement or expenditure."

Based on this, the court indicated that Maday's complaint