

IN THE SUPREME COURT OF FLORIDA

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JAN 14 1998

CLERK SUPREME COURT
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Chief Deputy Clerk

CASE NO. 91,370

GREGORY DIXON,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW FROM
THE DISTRICT COURT OF APPEAL OF FLORIDA,
THIRD DISTRICT

BRIEF OF RESPONDENT ON THE MERITS

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INTRODUCTION

Petitioner, **GREGORY E. DIXON**, was the Petitioner in the trial court and the Appellant in the Third District Court of Appeal. The Respondent, **THE STATE OF FLORIDA**, was the respondent in the trial court and the Appellee in the Third District Court of Appeal. The parties shall be referred to as they stood in the trial court.

STATEMENT OF THE CASE AND FACTS

The defendant was given consecutive habitual offender sentences in 1991 and his conviction was affirmed in 1992. Dixon v. State, 605 So. 2d 179 (Fla. 3d DCA 1992). After the decision in Hale v. State, 630 So. 2d 521 (Fla. 1993), cert. denied, 513 U.S. 909, 115 S. Ct. 278, 130 L.Ed.2d 195 (1994), the defendant filed a motion for post conviction relief pursuant to Rule 3.850, contending that he was entitled to have his consecutive habitual offender sentences modified to be concurrent. The Rule 3.850 motion was denied and the denial was affirmed by the Third District Court of Appeal. Dixon v. State, 652 So. 2d 827 (Fla. 3d DCA 1995).

On July 20, 1995, this Court announced State v. Callaway, 658 So. 2d 983 (Fla. 1995), which held that this Court's decision in Hale, would be applied retroactively. 658 So. 2d at 987.

The defendant filed his post-Callaway Rule 3.850 motion on August 11, 1996. The trial court denied the motion and the defendant appealed to the Third District Court of Appeal. The Third District found that the defendant's post-Callaway motion was filed untimely because it was filed more than two years from the Hale decision. The Third District specifically noted that this Court in Callaway made clear that there would be a two-year window following this Court's decision in Hale...for criminal defendants to challenge the imposition of consecutive habitual felony offender sentences for multiple offenses arising out of a

single criminal episode. Dixon v. State, 684 So. 2d 345 (Fla. 3d DCA 1996) citing State v. Callaway, 658 So. 2d at 987.

By corrected order issued on February 28, 1997, recognizing that the court's opinion had not reached the defendant in time for him to file a timely motion for a rehearing, the Third District recalled its mandate and appointed the public defendant to represent the defendant for purposes of the motion for rehearing. The Third District ordered the Public Defender to file a memorandum on the defendant's behalf.

On August 6, 1997, the Third District Court of Appeal issued an opinion on the motion for rehearing. Dixon v. State, 697 So. 2d 966 (Fla. 3d DCA 1997). The Third District amplified its' earlier opinion and certified a question to this Court. The Third District in its' opinion, noted that the defendant was in the position of having raised the Hale issue both too early and too late. The Third District stated that the defendant's initial Rule 3.850 motion raised the Hale issue, but did so at a time when Hale had not been held to be retroactive. The motion was denied without opinion. The Third District stated that the most reasonable explanation for that was the assumption that Hale would not be deemed to be retroactive. 697 So. 2d at 967.

The Third District noted that this Court in Callaway in fact, subsequently held that Hale would be applied retroactively. The Third District stated that since the two-year time interval was established to run from the date of the Hale decision, rather than Callaway, this left a six and one-half-month interval after

Callaway for the filing of Rule 3.850 motions. 697 So. 2d at 967. The Third District correctly found that the defendant's August 1996 motion was therefore filed untimely.

The Third District maintained that since Callaway was clear, the Court would adhere to the Court's previous ruling denying defendant's Rule 3.850 motion. 697 So. 2d at 967. The Third District certified the following question of great public importance:

WHETHER APPELLANT'S RULE 3.850 MOTION SEEKING RETROACTIVE BENEFIT OF HALE V. STATE, 630 So.2d 521 (Fla. 1993), SHOULD BE DEEMED TIMELY FILED WHERE:
(1) APPELLANT SOUGHT HALE RELIEF PRIOR TO THE ANNOUNCEMENT OF CALLAWAY, AND RELIEF WAS DENIED; AND
(2) APPELLANT FILED ANOTHER MOTION FOR POST-CONVICTION RELIEF, BASED ON HALE, WITHIN TWO YEARS AFTER CALLAWAY WAS ANNOUNCED?

Accordingly, the Petitioner filed a notice to invoke the discretionary review jurisdiction on this Court. On September 15, 1997, this Court entered an order postponing decision on jurisdiction and ordering the Petitioner to file a brief on the merits. The Petitioner has filed his brief, and the Respondent's brief on the merits now follows:

QUESTION PRESENTED

WHETHER APPELLANT'S RULE 3.850 MOTION SEEKING RETROACTIVE BENEFIT OF HALE V. STATE, 630 So.2d 521, (Fla. 1993), SHOULD BE DEEMED TIMELY FILED WHERE: (1) APPELLANT SOUGHT HALE RELIEF PRIOR TO THE ANNOUNCEMENT OF CALLAWAY, AND RELIEF WAS DENIED; AND (2) APPELLANT FILED ANOTHER MOTION FOR POSTCONVICTION RELIEF, BASED ON HALE WITHIN TWO YEARS AFTER CALLAWAY WAS ANNOUNCED?

SUMMARY OF THE ARGUMENT

This Court in State v. Callaway, 658 So. 2d 983 (Fla. 1995), held that the decision in Hale v. State, 630 So. 2d 521 (Fla. 1993), cert. den., 513 U.S. 909, 115 S. Ct. 278, 130 L.Ed. 2d 195 (1994) would be applied retroactively. A two-year window following Hale was provided for a criminal defendant to challenge the imposition of consecutive habitual felony offender sentences for multiple offenses arising out of a single criminal episode. This Court noted in a footnote in Callaway, that the two-year window was derived from the two-year time limit for filing motions under Rule 3.850. State v. Callaway, 658 So. 2d at 988. Counting the time from the denial of rehearing in Hale on February 9, 1994, the two-year period ran until February 9, 1996. The defendant filed his post-Callaway Rule 3.850 motion on August 11, 1996. The motion was, therefore, properly found to be untimely by the Third District Court of Appeal, since the motion was filed more than two years from the date of the Hale decision. His earlier post conviction motion raising a Hale issue is of no consequence since the motion was filed at a time when Hale had not been held to be retroactive.

The certified question should be answered in the negative. The petitioner was provided a window for filing his post-Callaway motion for post conviction relief. The petitioner, nevertheless, filed his motion untimely. The petitioner's Rule 3.850 motion, should therefore, not be deemed timely filed.

ARGUMENT

THE PETITIONER'S RULE 3.850 MOTION SEEKING
RETROACTIVE BENEFIT OF HALE V. STATE, 630
So.2d 521 (Fla. 1993), SHOULD NOT BE DEEMED
TIMELY FILED. (Restated)¹

This Court's decision in State v. Callaway, 658 So. 2d 983, 987 (Fla. 1995), held that the decision in Hale v. State, 630 So. 2d 521 (Fla. 1993), cert. denied, 513 U.S. 909, 115 S. Ct. 278, 130 L.Ed.2d 195 (1994), would be applied retroactively. The Third District properly found that this Court in Callaway provided that relief must be sought under Rule 3.850, and that the two-year period for seeking such relief would run from the decision in Hale. 658 So. 2d at 987-988. The other District Court of Appeal's decisions have also uniformly held that the two-year limit runs from the date of the Hale decision and not the decision in Callaway. See, Dublin v. State, 681 So. 2d 865 (Fla. 5th DCA 1996) and cases cited therein; Parrish v. State, 665 So. 2d 1114 (Fla. 4th DCA 1996); Sikes v. State, 683 So. 2d 599 (Fla. 2d DCA 1996), Rosier v. State, 655 So. 2d 160 (Fla. 1st DCA), rev. den., 663 So. 2d 632 (Fla. 1995).

Counting the time from the denial of rehearing in Hale on February 9, 1994, the two-year period ran until February 9, 1996.

¹ The State has restated the defendant's argument, in order to follow the language in the certified question posed by the Third District Court of Appeal.

See Dixon v. State, 697 So. 2d at 966, and Lock v. State, 668 So. 2d 1081, 1081 n. 1 (Fla. 2d DCA 1996).

The defendant filed his post-Callaway Rule 3.850 motion on August 11, 1996. The motion was therefore untimely because it was filed more than two years from the Hale decision--although it was within two years after the date of Callaway. Again, as noted above, this Court made clear that the two years for filing a post conviction relief would be two years from the date of the decision in Hale, not Callaway.

The petitioner argues that the two year limit should run from the date of Callaway and not Hale. This argument has no merit since the change of law came about in the Hale decision and not in Callaway. This Court in Callaway dealt with the question of whether the change of law set forth in Hale should be applied retroactively pursuant to the test set forth in Witt v. State, 387 So. 2d 922 (Fla.) cert. den., 449 U.S. 1067, 101 S. Ct. 796, 66 L. Ed. 2d 612 (1980). As noted above, there is no disagreement among the District Courts of Appeal, each has uniformly held that the two-year limit runs from the date of the Hale decision and not the date of the decision in Callaway.

The defendant had a six and one-half-month interval after Callaway, for the filing of his Rule 3.850 motion. His August 1996 motion, therefore, came too late. The State would respectfully submit that it makes no difference that the defendant filed an earlier post conviction motion raising a Hale

issue. He filed the motion at a time when Hale had not been held to be retroactive.

The defendant argues that at the time the trial court denied his first motion for post conviction relief, the Second District Court of Appeal had held in Callaway v. State, 642 So. 2d 636 (Fla. 2d DCA 1994) that the issue of whether a convicted felon was sentenced as a habitual offender for offenses committed during a single criminal episode may be raised under Rule 3.850. The case further held, that a two-year window exists after Hale in which to address this issue. The Third District, however, was clearly aware of this fact when it affirmed the trial court's order denying the defendant's first motion for post conviction relief. Dixon v. State, 652 So. 2d 827 (Fla. 3d DCA 1995). The Third District, therefore, well within the Court's discretion, chose not to follow the Second District's decision in Callaway v. State. As this Court noted in Pardo v. State, 596 So. 2d 665, 667 (Fla. 1992), a sister district's opinion is merely persuasive. The Third District in fact, stated in the opinion denying the petitioner's motion for rehearing, that the 3.850 motion was denied without opinion, and the most reasonable explanation for that denial was the assumption that Hale would not be retroactive.

The petitioner was provided a window period to properly bring his Motion for Post Conviction relief. This Court in Callaway stated perfectly clearly that a two-year window following Hale would be provided for a criminal defendant to

challenge the imposition of consecutive habitual felony offender sentences for multiple offenses arising out of a single criminal episode. This Court noted in footnote three of the opinion that "the two-year window was derived from the two-year time limit for filing motions under Rule 3.850." 658 So. 2d at 988. If this Court deems the petitioner's rule 3.850 motion timely filed, this Court would be giving the petitioner an extra six months² to file his motion for post conviction relief. Other defendants, not meeting any exceptions to the two-year limitation, are not provided this opportunity, and neither should the petitioner in this case. This Court in Johnson v. State, 536 So. 2d 1009 (Fla. 1988), stated as follows:

The credibility of the criminal justice system depends upon both fairness and finality. The time limitation of rule 3.850 accommodates both interests.

536 So. 2d at 1011.

The State would respectfully submit that this Court answer the certified question in the negative. As the United States Supreme Court stated in Teague v. Lane, 489 U.S. 288, 309, 109 S. Ct. 1060, 1075, 103 L.Ed. 2d 334 (1989), "without finality, the criminal law is deprived of much of its deterrent effect.... [I]f a criminal judgment is ever to be final, the notion of legality must at some point include the assignment of final competence to

² Counting the time from the denial of rehearing in Hale on February 9, 1994, the two-year period ran until February 9, 1996. The defendant filed his post-Callaway Rule 3.850 motion on August 11, 1996.

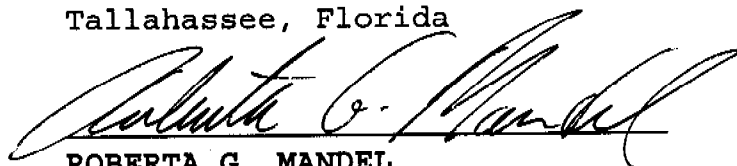
determine legality," citing to Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441, 450-451 (1963) (emphasis omitted). See also Mackey v. United States, 401 U.S. 667, 691, 91 S.Ct. 1160, 1179, 28 L.Ed.2d 404 (1971) (Harlan, J., concurring in judgments in part and dissenting in part) ("No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing that a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation"). The petitioner in the instant case was given a window period in which to file his motion for post conviction relief, and he failed to use it. The petitioner's Rule 3.850 motion should not be deemed timely filed.

CONCLUSION

Based upon the preceding authorities and arguments, the Respondent respectfully requests that this Court enter an opinion answering the certified question in the negative. The Petitioner's Rule 3.850 motion seeking retroactive benefit of Hale v. State, 630 So. 2d 521 (Fla. 1993) should not be deemed timely filed.

Respectfully submitted,

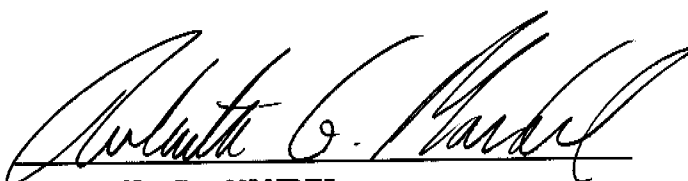
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF RESPONDENT ON THE MERITS was furnished by mail to BRUCE A. ROSENTHAL, Assistant Public Defender, Public Defender's Office, Eleventh Judicial Circuit of Florida, 1320 Northwest 14th Street, Miami, Florida 33125 Florida, on this 10th day of January 1998.

A handwritten signature in cursive script, reading "Roberta G. Mandel", written over a horizontal line.

ROBERTA G. MANDEL
Assistant Attorney General