

IN THE SUPREME COURT OF FLORIDA

027
App. Mad.

WADE E. CARTER
Petitioner/Appellant,

V.
STATE OF FLORIDA
Respondent/Appellee

CASE NO: 92,501
5th DCA-NO: 97-2235

FILED

SID J. WHITE

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CLERK, SUPREME COURT

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Chief Deputy Clerk

DISCRETIONARY REVIEW OF A DECISION OF
THE FIFTH DISTRICT COURT OF APPEAL

PETITIONER'S INITIAL BRIEF ON THE MERITS

WADE E. CARTER #068325
MARION CORRECTIONAL INSTITUTION
P.O. BOX 158 / BOX 307
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PRO. SE.

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STATEMENT OF THE CASE AND FACTS

In 1986, petitioner was tried, convicted and received a departure sentence and was adjudicated an habitual offender for 2nd degree murder with a deadly weapon, 40 years. Attempted 2nd degree murder with a deadly weapon, 30 years, and battery, 1 year. All to run concurrently with the 40 years in court one. A timely appeal affirmed the judgement and sentences in Carter v. State, 510 So.2d 930 (Fl. 5th), rev. den., 519 So.2d 986 (Fl. 1987).

Post conviction proceeding entail a Fl. R. Crim. P. 3.800 (a), motion, denied and affirmed in Carter v. State, 551 So.2d 475 (Fl. 5th 1989); Fl. R. Crim. P. 3.850 motion, denied and affirmed in Carter v. State, 559 So.2d 1151 (Fl. 5th 1990); and a habeas corpus petition, denied, Carter v. State, case no 90-608 (Fl. 5th 6-4-1990).

On May 19, 1997, petitioner filed a motion to correct an illegal, which was denied. An appeal to the 5th district court of appeals followed and denied in Carter v. State, 22 FLW (D) 23 (Fl. 5th 12-19-1997), an opinion was published affirming the trial court denial. Petitioner then filed an All Writ with this court which was treated as a Notice To Invoke Discretionary Jurisdiction of this court, dated March 4th, 1998. This court has accepted jurisdiction in an order dated Sept. 9, 1998.

SUMMARY OF ARGUMENT

A sentence is illegal under State v. Callaway, 658 So.2d 983 (Fl. 1995) and Davis v. State, 661 So.2d 1143 (Fl. 1995) when it is a habitual sentence to a life felony contrary to Lamont v. State, 610 So.2d 435 (Fl. 1992) even though it is within the 40 year statutory maximum of § 775.082 (3)(a)(2), its enhanced punishment is not statutorily authorized by § 775.084, Fl. Stat. The 5th district denial of petitioner's claim is in direct conflict with this court's decisions and other district courts on this same issue.

ARGUMENT

This court has expressly stated in Lamont v. State, 610 So.2d 435, at 438 (Fl. 1992) that: "Both the plain language and the history of the relevant statutes leads us to hold that one convicted of a life felony is not subject to enhanced punishment as an habitual offender under section 775.084." Since section 775.084 authorized no extended term of imprisonment for life felonies, such sentence is illegal irrespective of its length for a defendant convicted of a life felony is not subject to enhanced punishment as an habitual felony offender.

Every district and this court acknowledge enhancement of life felonies under the habitual felony offender exceed the penalties statutorily authorized. E.g. Washington v. State, 653 So.2d 362, 367 (Fl. 1994) (a life felony is not subject to enhanced punishment as a habitual offender); Partridge v. State, 680 So.2d 543, 544 (Fl. 1st 1996) (same); Blotz v. State, 640 So.2d 1240, 1241 (Fl. 2nd 1994) (same); Thomas v. State, 638 So.2d 627 (Fl. 3rd 1994) (same); Core v. State, 639 So.2d 185, 186 (Fl. 4th 1994) (same); Johnson v. State, 664 So.2d 36, 37 (Fl. 5th 1995).

The issue carries this wealth of authority to an all time low in Carter v. State, 23 FLW (D) at 23, 24:

... The only remaining issue is whether, on this count only, he was not subject to habitualization. The

Supreme Court of Florida has held that an illegal sentence which can be corrected by rule 3.800(a) is a sentence which exceeds the maximum allowed by law. See King v. State, 681 So.2d 1136 (Fl. 1996); Davis v. State, 661 So. 2d 1193 (Fl. 1995); State v. Callaway, 658 So.2d 983 (Fl. 1995).

Appellant's forty year sentence is legal because it does not exceed the statutory maximum term for a life felony. Section 775.082(3)(a)(2), Fl. Stat. As defendant was sentenced to forty years, albeit as an habitual felony offender, it appears that under the supreme court's definition of an illegal sentence, the state is correct [P] Under the present case law, however, improper habitualization is not remediable under rule 3.800(a) as long as the sentence imposed is within the statutory maximum for the offense.

This decision directly conflicts with this court's decisions in Lamont, Callaway and Davis as well as other districts on the same question of law. See e.g. Williams v. State, 650 So.2d 1054, 1055-56 (Fl. 1st 1995) (such a [thirty year habitual offender] sentence is illegal); Blotz v. State, 640 So.2d 1240, 1241 (Fl. 2nd 1994) (sentenced as a habitual offender to 40 years imprisonment *** cannot be imposed on life felonies);

Thomas v. State, 638 So. 2d 627 (Fl. 3rd 1994) (Exceeds the statutory maximum); Gardner v. State, 685 So. 2d 1025, 1026 (Fl. 3rd 1997) (motion to correct unlawful sentence); Beaudon v. State, 658 So. 2d 663, 664 (Fl. 3rd 1994) (rule 3,800 relief). Callaway and Davis based its reasoning in defining an illegal sentence on Judge v. State, 596 So. 2d 73 (Fl. 2nd 1991), rev. den., 613 So. 2d 5 (Fl. 1992). In Nathan v. State, 689 So. 2d 1150 at 1151 (Fl. 2nd 1997), the court was faced with an identical scenario as petitioner's and reached the issue based upon, to wit:

A motion to correct an illegal sentence can be raised at any time. Fl. R. Crim. P. 3,800(a).

Furthermore, a habitual offender sentence is illegal for purposes of a motion to correct an illegal sentence if the terms or conditions of the sentence exceed those authorized by the habitual offender statute. Judge v. State, ...

This court just this year addressed this issue in Hopping v. State, 708 So.2d 263 (Fl. 1998), "An illegal sentence is one that exceeds the maximum period set forth by law for a particular offense without regard to the guidelines. A rule 3.800 motion can be filed at any time, even decades after a sentence has been imposed, and as such, its subject matter is limited to those sentencing issues that can be resolved as a matter of law without an evidentiary determination."

Petitioner's issue is based entirely upon the record, the state does not argue that petitioner's sentence is not illegal. Based on the case law presented herein, petitioner prays this court grants relief.

CONCLUSION

Petitioner has been serving a forty year habitual offender sentence and has been precluded from receiving early release credits, i.e. administrative or provisional credits because of the habitual offender status. Based on the record, and the case law presented, petitioner respectfully requests this court to grant relief.

this 17 day of september, 1998.

Respectfully Submitted,
Wade E. Carter

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DECLARATION/CERTIFICATE OF SERVICE

Having read the forgoing statements of this petition, I swear under penalties all to be true and correct based upon personal knowledge and hereby certify that a true and correct copy has been furnished by U.S. mail to:

Roberta J. Tylke

Asst. Atty. Gen.

444 Seabreeze Blvd. 5th floor

Daytona Beach, Fl. 32118

this 17 day of September, 1998.

Wade E. Carter

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