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JUN 2 1998

IN THE SUPREME COURT OF FLORIDA

CLERK, SUPREME COURT

By Chief Deputy Clerk

SHAWN FITZGERALD,
Petitioner/Appellant,
vs
STATE OF FLORIDA,
Respondent/Appellee.

S.C.T. CASE NO. 92,097

DCA CASE NO. 97-1890

**ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL**

JURISDICTIONAL BRIEF OF PETITIONER

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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COUNSEL FOR PETITIONER

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STATEMENT OF THE CASE AND FACTS

Petitioner, Shawn Fitzgerald, was placed on thirty months probation on November 7, 1995 for grand theft (R88-96).

Following a violation of probation, Petitioner was placed on two years community control on June 20, 1996 (R123-129). On March 27, 1997, Petitioner was charged with violating his community control by quitting his job without permission, failing to call the community control office, being absent from his approved residence on three occasions and failing to remain gainfully employed (R154-156).

At a hearing in Brevard County Circuit Court on June 26, 1997, Petitioner was found to have violated community control by quitting his job and being away from home three times (R41-46). Petitioner's original guideline scoresheet totaled ten points (R81-83). Appellant was sentenced to 48 months imprisonment (R55-56, 178-180). The sentencing court said that Petitioner's recommended sentence was thirty to fifty months imprisonment (R52-53).

Petitioner appealed to the Fifth District Court of Appeal, arguing that his sentence was a guideline departure without reasons. The State argued that there was no sentencing error,

and also argued that the issue was not preserved for appeal pursuant to Fla. Stat. §924.051(3) (1995). The Fifth District Court issued a per curiam decision, which consisted of a citation to Maddox v. State, 23 Fla.L.Weekly D720 (Fla. 5th DCA March 13, 1998). Maddox was a decision holding that imposition of costs may not be raised on appeal when it was not raised pursuant to Fla.R.Crim.P. 3.800(b) at trial. Maddox was an interpretation of the Criminal Appeal Reform Act.

Petitioner now seeks discretionary review by this Court.

SUMMARY OF THE ARGUMENT

The Fifth District Court of Appeal included one citation in its decision in this case, Maddox v. State, 23 Fla.L.Weekly D720 (Fla. 5th DCA March 13, 1998). In Maddox the Fifth District acknowledged it was in conflict with every other District Court of Appeal. This Court has discretionary jurisdiction pursuant to Jollie v. State, 405 So.2d 418 (Fla. 1981).

POINT

THIS COURT SHOULD EXERCISE ITS
DISCRETIONARY JURISDICTION TO
REVIEW THE DECISION OF THE FIFTH
DISTRICT COURT OF APPEAL.

As mentioned, the decision in this case consisted of a citation to Maddox v. State, 23 Fla.L.Weekly D720 (Fla. 5th DCA March 13, 1998). The Court in Maddox decided that fundamental error did not exist in the context of sentencing, and that an illegal sentence would not be addressed on direct appeal unless the issue was raised by objection or 3.800(b) motion in the trial court. In its Maddox decision the Fifth District Court recognized that it was in conflict with the other Court's of Appeal on the issue of whether a sentencing error may be fundamental, citing Chojnowski v. State, 22 Fla.L.Weekly D2660 (Fla. 2d DCA Nov. 19 1997), Pryor v. State, 22 Fla.L.Weekly D2500 (Fla. 3d DCA Oct. 29, 1997), Johnson v. State, 701 So.2d 382 (Fla. 1st DCA 1997) and Collins v. State, 698 So.2d 883 (Fla. 4th DCA 1997). There is a corrected opinion in Pryor at Pryor v. State, 704 So.2d 217 (Fla. 3d DCA 1998). The Court also recognized conflict with other District Courts which have held that illegal sentences may be raised on appeal without preservation, citing State v. Hewitt, 702 So.2d 633 (Fla. 1st DCA

1997) and Sanders v. State, 698 So.2d 377 (Fla. 4th DCA 1997).

Maddox is currently before this Court pending a decision on jurisdiction, Florida Supreme Court Case #92,805. The Fifth District Court did not acknowledge conflict with any other District Court in its decision in this case. The Court, however, relied entirely on a decision that is in conflict with every other District Court. This Court has discretionary jurisdiction pursuant to Jollie v. State, 405 So.2d 418 (Fla. 1981).

CONCLUSION

BASED UPON the argument and authorities contained herein,
Petitioner respectfully requests that this Honorable Court accept
jurisdiction in this cause.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

Kenneth Witts

KENNETH WITTS
ASSISTANT PUBLIC DEFENDER
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112 Orange Avenue, Suite A
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COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the
foregoing has been served upon the Honorable Robert E.
Butterworth, Attorney General, 444 Seabreeze Boulevard, Fifth
Floor, Daytona Beach, Florida 32118, in his basket at the Fifth
District Court of Appeal, and mailed to Shawn Fitzgerald, Inmate
No. 999636, Hernando Correctional Institution, 16415 Springhill
Drive, Brooksville, Florida 34609, on this 1st day of June, 1998.

Kenneth Witts

KENNETH WITTS
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF FLORIDA

SHAWN FITZGERALD,)
)
 Petitioner/Appellant,)
)
 vs.) S.CT. CASE NO. _____
)
 STATE OF FLORIDA,) DCA CASE NO. 97-1890
)
 Respondent/Appellee.)
 _____)

A P P E N D I X

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

JANUARY TERM 1998 ✓

97-676
KW

NOT FINAL UNTIL THE TIME EXPIRES
TO FILE REHEARING MOTION, AND,
IF FILED, DISPOSED OF.

SHAWN FITZGERALD,

Appellant,

v.

CASE NO.: 97-1890 ✓

STATE OF FLORIDA,

Appellee.

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APR 24 1998

PUBLIC DEFENDER'S OFFICE
7th CIR. APP. DIV.

Opinion filed April 24, 1998 ✓

Appeal from the Circuit Court
for Brevard County,
Edward J. Richardson, Judge.

James B. Gibson, Public Defender, and
Kenneth Witts, Assistant Public Defender,
Daytona Beach, for Appellant.

Robert A. Butterworth, Attorney General,
Tallahassee, and Simone P. Firley, Assistant
Attorney General, Daytona Beach, for
Appellee.

PER CURIAM.

AFFIRMED. See Maddox v. State, 23 Fla. L. Weekly D720 (Fla. 5th DCA March 13,
1998).

COBB, THOMPSON and ANTOON, JJ., concur.