IN THE SUPREME COURT OF FLORIDA

DAVID R. LEONARD,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

Case No. 93,332

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

BRIEF OF PETITIONER ON JURISDICTION

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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ATTORNEYS FOR PETITIONER

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PRELIMINARY STATEMENT

Petitioner, David R. Leonard, was the Appellant in the Second District Court of Appeal and the defendant in the trial court. Respondent, the State of Florida, was the Appellee in the Second District Court of Appeal. The appendix to this brief contains a copy of the decision rendered on June 10, 1998.

STATEMENT OF THE CASE AND FACTS

On November 6, 1995, an affidavit of Violation of Probation was filed alleging that the Appellant, DAVID R. LEONARD, violated his probation in case numbers 89-7782 and 89-9559. In case number 89-7782, the State Attorney for the Thirteenth Judicial Circuit in and for Hillsborough County filed an information on May 31, 1989 charging Leonard with one count of lewd and lascivious act on a child under the age of 16 years in violation of Section 800.04, Florida Statutes (1987). In case number 89-9559, the State Attorney filed an information charging Leonard with two counts of sexual battery on a child under the age of 12 years in violation of Section 794.011(2), Florida Statutes (1987). On September 8, 1989, Leonard pled guilty to the charges in both cases, and was sentenced in both cases according to a negotiated plea agreement. In case number 89-7782, Leonard was placed on 15 years of probation on the count of lewd and lascivious act upon a child. In case number 89-9559, Leonard was sentenced on two counts of sexual battery to 30 years of imprisonment that was to be suspended after 9 years followed by 21 years of probation. These sentences were to be served concurrently with each other and with the sentence imposed in case number 89-7782. On September 27, 1993, Leonard was released on probation.

The affidavit of Violation of Probation alleged that Leonard had violated condition (5) which required Leonard to live without violating the law, and special condition (19) which prohibited him from having contact with any child until he completed the Outpa-

tient Sex Offender Program. These allegations arose from events which allegedly took place on October 15, 1995. On August 30, 1996, Leonard pleaded no contest to violating condition (19) of probation. The trial court adjudicated Leonard guilty of violating his probation. In case number 89-7782, Leonard was sentenced to 30 years in prison. In case number 89-9559, Leonard was sentenced to 30 years in prison to run concurrently with the sentence in case number 89-7782. Leonard timely filed his notice of appeal on September 20, 1996.

In his appeal, Leonard argued that his sentence of 30 years in prison for the offense of committing a lewd and lascivious act, a second degree felony, was illegal. On June 10, 1998, the Second District Court of Appeal issued an opinion dismissing Leonard's direct appeal pursuant to Section 924.051(4), Florida Statutes (Supp. 1996) since there was no contemporaneous objection to the illegal sentence and no filing of a post-conviction relief motion under Florida Rule of Criminal Procedure 3.800. An amended notice to invoke the discretionary jurisdiction was filed on June 22,1998.

SUMMARY OF THE ARGUMENT

In holding that Section 924.051(4), Florida Statutes (Supp. 1996) bars appellate review of a sentence exceeding the statutory maximum without a contemporaneous objection, the Second District Court of Appeal is in conflict with another district which has held that § 924.051(4) does not prohibit review of such illegal sentences regardless of whether there is an objection. The Second District Court of Appeal's decision in this case that this issue was unpreserved for appeal was in conflict with the Fifth District Court of Appeal which has held that the imposition of an illegal sentence constitutes fundamental error.

ARGUMENT

ISSUE I

WHETHER THE DECISION IN LEONARD v. STATE, Case No. 96-4245 (Fla. 2d DCA June 10, 1998), CONFLICTS WITH THE FLORIDA SUPREME COURT AND DISTRICT COURT OF APPEAL OPINIONS AS TO WHETHER § 924.051(4) PROHIBITS REVIEW OF A SENTENCE EXCEEDING THE STATUTORY MAXIMUM ON DIRECT APPEAL WITHOUT A CONTEMPORANEOUS OBJECTION?

This Court has held that neither statute or any rule would take away the right to appeal conduct which would invalidate a defendant's plea. Robinson v. State, 373 So. 2d 898, 902 (Fla. 1979). Among those issues which may be properly appealed from a plea is the illegality of a sentence. Id. Subsequent decisions from this Court have sustained the defendant's right to appeal an illegal sentence imposed pursuant to a plea agreement. King v State, 681 So. 2d 1136 (Fla. 1996) (trial court can imposed a negotiated sentence not specifically authorized by statute, but it cannot imposed an illegal sentence); Larson v. State, 572 So. 2d 1368 (Fla. 1991) (Contemporaneous objection rule is inapplicable to probation conditions which are illegal); Williams v. State, 500 So. 2d 501 (Fla. 1986) (appellate review is always available where court has imposed an illegal sentence, even if the judgment and sentence resulted from a guilty plea). This Court defined an illegal sentence as "one that exceeds the maximum period set forth by law for a particular offense without regard to the guidelines." Davis v. State, 661 So. 2d 1193, 1196 (Fla. 1996).

In a recent decision, the Second District Court of Appeal has held that an unpreserved sentencing error involving an illegal sentence could only be reviewed on direct appeal because there was also a preserved error. Denson v. State, 23 Fla. L. Weekly D1216 (Fla. 2d DCA May 13, 1998). In Denson, the defendant pled guilty to two counts of delivery of cocaine and two counts of possession of cocaine. At the sentencing hearing, the defendant objected to the use of a prior conviction for conspiracy to deliver cocaine as a qualifying offense to support treatment as a habitual felony offender. However, the defendant failed to object to the habitual sentence for possession of cocaine. Id. Also, there was no objection to the written sentence which did not conform to the oral sentence. The Second District Court accepted jurisdiction to review the two unpreserved errors stating, "without a preserved error, these unpreserved sentencing errors would not give us jurisdiction over this appeal." Id. at 1217.

The holding in Denson and in the instant case is in conflict with an opinion from the Fifth District Court of Appeal which holds that § 924.051(4), Fla. Stat. (Supp. 1996) does not prohibit a defendant who enters a plea from appealing a sentence which exceeds the statutory maximum regardless of a contemporaneous objection. Ortiz v. State, 696 So. 2d 916 (Fla. 5th DCA 1997).

Since the decisions mentioned above hold that an illegal sentence may be corrected on direct appeal regardless of whether there is a contemporaneous objection, the Second District Court of

Appeal's decision in the instant case is in conflict with the decisions of this Court and other District Courts of Appeal.

CONCLUSION

Based on the foregoing arguments and authorities, Petitioner has demonstrated that conflict does exist with the instant decision and this Court as well as other District Courts of Appeal so as to invoke discretionary review.

APPENDIX

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

DAVID LEONARD,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 96-04245

Opinion filed June 10, 1998.

Appeal from the Circuit Court for Hillsborough County; Cynthia Holloway, Judge.

James Marion Moorman, Public Defender, and A. Victoria Wiggins, Assistant Public Defender, Bartow, for Appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Helene S. Parnes, Assistant Attorney General, Tampa, for Appellee.

PER CURIAM.

In this direct appeal, David Leonard challenges, as illegal, the thirty-year sentence he received when the probation he was serving on a second-degree felony was revoked. See §§ 775.082(3)(c), 800.04, Fla. Stat. (1987). No other issues are

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raised. Because Leonard pleaded guilty to the underlying offense and failed to bring this error to the trial court's attention first, pursuant to section 924.051(4), Florida Statutes (Supp. 1996), we are without jurisdiction to entertain this issue on direct appeal. Therefore, we dismiss this appeal without prejudice to Leonard to seek correction of this possible error by filing a motion pursuant to Florida Rule of Criminal Procedure 3.800(a).

Dismissed.

ALTENBERND, A.C.J., and FULMER and CASANUEVA, JJ., Concur.

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CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Helene S. Parnes, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on this 24th day of June, 1998.

Respectfully submitted,

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June 24, 1998

Honorable Sid J. White, Clerk
Supreme Court of Florida
Supreme Court Building
Tallahassee, Florida 32304

RE: David R. Leonard vs. State of Florida
Appeal No.

Dear Mr. White:

Enclosed for filing in the above-styled cause are the original and five (5) copies of the Brief of the Petitioner on Jurisdiction. This brief has been Leonard.bri as on the enclosed disk.

Sincerely,

Dallas Chestnut

DALLAS CHESTNUT
Secretary, Appellate Division

/dc

Enclosures: noted above

xc: Helene S. Parnes, Attorney General's Office