IN THE SUPREME COURT OF FLORIDA

SALIM KAMAU LATIF,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

S.Ct. Case No.: 93,385

DCA No. 96-2992

AMENDED BRIEF OF RESPONDENT ON JURISDICTION

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CASES:

STATEMENT OF THE CASE AND FACTS.

Petitioner's sentence was affirmed on appeal based on the precedent of Maddox v. State, 23 Fla. L. Weekly D720 (Fla. 5th DCA March 13, 1998).

SUMMARY OF ARGUMENT

Since the decision of the Fifth District Court of Appeal relies on a case currently pending in this Court, this Court has jurisdiction to accept the appeal. Respondent requests the instant case be consolidated with Maddox v. State, Case Number 92,805.

ARGUMENT

THIS COURT HAS THE DISCRETION TO ACCEPT JURISDICTION IN THE INSTANT CASE.

In Jollie v. State, 405 So. 2d 418 (Fla. 1981), this Court held that when a district court issues a decision where the controlling precedent is presently pending in this Court, there is "prima facie express conflict (which) allows this court to exercise its jurisdiction." Id. at 420. The decision of the Fifth District Court of Appeal in the instant case relied on Maddox v. State, 23 Fla. L. Weekly D720 (Fla. 5th DCA March 13, 1998), which is currently pending review before this Court. This Court therefore has discretion to entertain the review sought by Petitioner.

Respondent respectfully requests this Court consolidate the instant case with Maddox v. State, Case Number 92,805.

CONCLUSION

Based on the arguments and authorities presented herein, the State respectfully requests this honorable Court accept jurisdiction in this case pursuant to the holding in Jollie and consolidate the instant appeal with Maddox v. State, Case Number 92,805.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Brief of Respondent on Jurisdiction has been furnished by delivery via the basket of the Public Defender at the Fifth District Court of Appeal to M.A. Lucas, Assistant Public Defender, this 3rd day of August 1998.

Wesley Heidt
Counsel for Respondent

IN THE SUPREME COURT OF FLORIDA

SALIM KAMAU LATIF,

Petitioner,

v. S.Ct. Case No.: 93,385

STATE OF FLORIDA, DCA No. 96-2992

Respondent.

_____/

APPENDIX

deprivation of "jurisdiction").

PETITION GRANTED. (COBB, HARRIS, and PETERSON, JJ., concur.)

* * *

Criminal law—Appeals—Sentencing—Guidelines—Scoresheet— Challenge to scoresheet calculations cannot be raised on direct appeal where scoring issue was abandoned before trial court had opportunity to rule on it

SALIM KAMAU LATIIF. Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 96-2992. Opinion filed May 29, 1998. Appeal from the Circuit Court for Volusia County, William C. Johnson, Jr.. Judge. Counsel: James B. Gibson, Public Defender, and M. A. Lucas, Assistant Public Defender, Daytona Beach, for Appellant. Robert A. Butterworth. Attorney Genera!, Tallahassee, and David H. Foxman, Assistant Attorney General, Daytona Beach, for Appelltc.

(ANTOON, J.) Salim Kamau Latiif (defendant) appeals his sentences which were imposed by the trial court after he pled guilty to the charges of possession of cocaine with intent to sell and possession of drug paraphernalia, [1] The defendant argues the trial court erred in calculating his prior record score in completing his sentencing guideline scoresheet. We affirm because this issue was not preserved for appellate review.

At the sentencing hearing, defense counsel advised the trial court that the defendant claimed that his prior record, which included convictions for battery on a law enforcement officer and criminal mischief, was erroneously scored on the guideline scoresheet. However, after bringing the matter to the court's attention, defense counsel abandoned his objection stating that "[i]f either of those offenses . . . were deleted, the points, I think, would only be 2.6 points. I don't know if it would have any significant effect on the ultimate sentence."

Subsections 924.051(3) and (4), Florida Statutes (Supp. 1996), and amended Florida Rule of Criminal Procedure 3.800(b) provide that a defendant who pleads guilty without expressly reserving his or her right to appeal the sentence either by raising the issue at the sentencing hearing, or by filing a motion to *correct sentence* within thirty days after the rendition of the sentence has failed to preserve the issue for purposes of appeal. See *Saldana v. State, 698 So.* 2d 338 (Fla. 5th DCA 1997). An issue is preserved for appellate review when "the issue has been presented to, and ruled on by the trial *court." Maddox v. State, 23* Fla. L. Weekly D720 (Fla. 5th DCA March 13, 1998). Here, although the defense counsel refuted the calculations contained in the defendant's guideline scoresheet, the scoring issue was abandoned before the trial court had an opportunity to rule upon it. As a result, this claim of error cannot be raised on direct appeal. See *also Rodriguez v. State, 650 So.* 2d 1111, 1112 (Fla. 2d DCA 1995), *rev. denied,* 699 So, 2d 1375 (Fla. 1997).

AFFIRMED. (DAUKSCH and HARRIS, JJ., concur.)

[1] §§ 893.13(1)(a)1; 893.147(1), Fla. Stat. (1995).

* * *

Real property-Counties-Operation and maintenance of drainage system-Appellate court unable to find anything in development plans and contracts or in the law which prohibits owner of development that has completed a drainage system and operated system successfully throughout sales program from turning system over to property owners through owners' non-profit corporation for continued operation and maintenance after developer has completed sales program

FLAGLER COUNTY, Appellant, v. PALM COAST COMMUNITY SERVICE CORP., Appellee. 5th District. Case No. 97-1659. Opinion filed May 29, 1998. Appeal from the Circuit Court for Flagler County, Kim C. Hammond, Judge. Counsel: C. Allen Watts of Cobb, Cole & Be!!, Daytona Beach, Special Counsel for Appellant, Flagler County, and Albert J. Hadeed, Bunnell. Flagler County Attorney. David A. Monaco and Michael S. Orfinger of Monaco, Smith, Hood. Perkins, Loucks & Stout, Daytona Beach, for Appellee.

(HARRIS, J.) Although we understand the County's concern about the possibility of having presented to it in the future a poorly-maintained and under-funded' drainage system, we nevertheless agree with the trial judge that there is nothing in the record which supports the county's position. We find nothing in the various development plans and contracts, or in the law, which prohibits the owner of a development that has completed a drainage system and has operated the system successfully throughout its sales program from turning over that system to the property owners through a property owners' non-profit corporation for continued operation and maintenance after the developer has completed its sales program. The property owners' corporation has willingly accepted the conveyance of all the necessary property and equipment and has undertaken the obligation of operation and maintenance of the system.

AFFIRMED. (THOMPSON, J., concurs. GRIFFIN, C.J., concurs in result only.)

* * *

Criminal law—Argument—No abuse of discretion in limiting comment as to possible prison time for defendant-In non-capital case, sentence is matter for judge, not jury

MICHAEL MCCOY, Appellant, v. STATE OF FLORIDA, Appellec. 5th District. Case No. 97-2059. Opinion filed May 29, 1998. Appeal from the Circuit Court for Orange County. Dorothy J. Russell, Judge. Counsel: James B. Gibson, Public Defender, and Thomas J. Lukashow, Assistant Public Defender, Daytona Beach, for Appellant. Robert A. Butterworth, Attorney General. Tallahassee, and Mary G. Jolley, Assistant Attorney Genera!, Daytona Beach, for Appellee.

(PER CURIAM.) Control of comments during closing argument is within discretion of the trial court and a court's ruling will not be disturbed absent a clear showing of abuse of discretion. *Crump* v. *State,* 622 So. 2d 963 (Fla. 1993). The court did not limit comment as to a witness' possible motive for testifying against the defendant, but only limited comment as to possible prison time for the defendant. In a non-capital case any possible sentence for a defendant is a matter for the judge, and not the jury. No abuse of discretion is demonstrated here.

AFFIRMED. (COBB, THOMPSON, JJ., and ORFINGER, M,, Senior Judge, concur.)

* * *

Unemployment compensation-Overpayments--Claimant who had been employed as substitute teacher before the end of the academic year not entitled to compensation benefits for period between two academic years where claimant maintained his status as substitute teacher and had reasonable assurance of returning as a substitute when new academic term started

PAUL PARZIK, Appellant, v. UNEMPLOYMENT APPEALS COMMISSION, Appellee. 5th District. Case No. 97-2710. Opinion filed May 29, 1998. Administrative Appeal from the Unemployment Appeals Commission. Counsel: Paul Panik. Windermere, Pro Se. John D. Maher, Tallahassee, for Appellee.

(ORFINGER, M., Senior Judge.) This appeal is from an order of the Florida Unemployment Appeals Commission requiring appellant to repay to the Division of Unemployment Compensation the sum of $431.00 which appellant received as benefits and to which it had been determined he was not entitled. The appeals referee found that appellant had been employed as a substitute teacher by Orange County School Board from August 1995; in March 1997 he became self-employed, but maintained his status as a substitute teacher as an option for further income while he attempted to build his business. The referee further found that benefits were paid for the weeks ending June 7, 1997, June 14, 1997 and June 2 1, 1997, although the school year ended June 2, 1997; the academic term started on August 5, 1997 and appellant had reasonable assurance of returning as a substitute.

Section 443.091(3)(a) and (c), Florida Statutes (1996) provides that no benefits shall be paid for any period of unemployment between two academic years or during an established Or customary vacation period or holiday recess where services were performed prior to such periods and there is a reasonable assurance such individual will perform any such service in the period