

ORIGINAL

IN THE SUPREME COURT OF FLORIDA

FILED

SID J. WHITE

JUL 9 1998

CLERK, SUPREME COURT
By *[Signature]*
Chief Deputy Clerk

SHAWN DAVID SPENCER,)
)
 Petitioner/Appellant,)
)
 versus)
)
 STATE OF FLORIDA,)
)
 Respondent/Appellee.)
 _____)

S.C.T. CASE NO. 93,430

DCA CASE NO. 97-2064

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

JURISDICTIONAL BRIEF OF PETITIONER

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

LYLE HITCHENS
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sentencing error preserved for appeal. The Fifth District Court issued a per curiam decision, which included a citation to Maddox v. State, 23 Fla. Law 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 two citations in its decision in this case, Maddox v. State, 23 Fla.Law Weekly D720 (Fla. 5th DCA March 13, 1998), and further included the reference "but see"Harriel v. State, 23 Fla Law Weekly D967 (Fla. 4th DCA April 15, 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).

ARGUMENT

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.Law Weekly D720 (Fla. 5th DCA March 13, 1998), and further included the reference "but see" Harriel v. State, 23 Fla Law Weekly D967 (Fla. 4th DCA April 15, 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.Law Weekly D2660 (Fla. 2d DCA November 19 1997), Pryor v. State, 22 Fla.Law Weekly D2500 (Fla. 3d DCA October 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).

In Harriel v. State, 23 Fla.Law Weekly D967 (Fla. 4th DCA April 15, 1997), the Court certified conflict with Maddox insofar as illegal sentences are concerned. Specifically, the Court said that a sentence in excess of the statutory maximum is an illegal sentence (as opposed to unlawful) which constitutes fundamental error correctable on direct appeal without objection.

Maddox is currently before this Court pending a decision on jurisdiction, Florida Supreme Court Case No. 92,805. The Fifth District Court did not use the "key-words" to recognize conflict with any other District Court in its decision in this case, however they did use the reference "but see" Harriel v. State, 23 Fla Law Weekly D967 (Fla. 4th DCA April 15, 1998.)

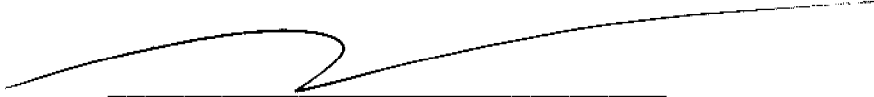
This Court has discretionary jurisdiction pursuant to Jollie v. State, 405 So.2d 418 (Fla. 1981).

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



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APPELLANT

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 David Spencer, Inmate No. X-04618, #A-1122L, Mayo Correctional Institution, Post Office Box 1805, Mayo, Florida 32066-1805, on this 7th day of July, 1998.



LYLE HITCHENS
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF FLORIDA

SHAWN DAVID SPENCER,)
)
 Petitioner/Appellant,)
)
 vs.) S.CT. CASE NO. _____
)
 STATE OF FLORIDA,) DCA CASE NO. 97-2064
)
 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

SHAWN D. SPENCER,
Appellant,

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

v.

CASE NO. 97-2064 ✓

97-843
cycle

STATE OF FLORIDA,
Appellee.

RECEIVED

JUN 12 1998

Opinion filed June 12, 1998 ✓

Appeal from the Circuit Court
for Osceola County,
Anthony H. Johnson, Senior Judge.

PUBLIC DEFENDER'S OFFICE
5th CIR. APP. DIV.

James B. Gibson, Public Defender,
and Lyle Hitchens, Assistant Public
Defender, Daytona Beach, for Appellant.

Robert A. Butterworth, Attorney
General, Tallahassee, and Jennifer
Meek, Assistant Attorney General,
Daytona Beach, for Appellee.

PER CURIAM.

AFFIRMED on the authority of Maddox v. State, 23 Fla. L. Weekly D720 (Fla. 5th
DCA March 13, 1998), but see Harriel v. State, 23 Fla. L. Weekly D967 (Fla. 4th DCA April
15, 1998).

DAUKSCH, HARRIS and PETERSON, JJ., concur.