

FILED

SID J. WHITE

SEP 1 1998

IN THE SUPREME COURT OF FLORIDA

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

DARRYLE T. COOK,)
)
 Petitioner/Appellant,)
)
 versus)
)
 STATE OF FLORIDA,)
)
 Respondent/Appellee.)
 _____)

S.C.T. CASE NO. 93,781

DCA CASE NO. 97-2923

**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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COUNSEL FOR PETITIONER/
APPELLANT

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TABLE OF CITATIONS

CASES CITED:

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Chojnowski v. State

22 Fla. Law Weekly D2660 (Fla. 2d DCA
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698 So. 2d 883 (Fla. 4th DCA 1997)

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Maddox v. State

S.Ct. Case number 92,805

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Pryor v. State

22 Fla. Law Weekly D2500 (Fla. 3d DCA
October 29, 1997)

4

Pryor v. State

704 So. 2d 217 (Fla. 3d DCA 1998)

4

Sanders v. State

698 So. 2d 377 (Fla. 4th DCA 1997)

4

State v. Hewitt

702 So. 2d 633 (Fla. 1st DCA 1997)

4

OTHER AUTHORITIES CITED:

Rule 3.800(b), Florida Rules of Criminal Procedure

2,4

STATEMENT OF THE CASE AND FACTS

As regards Count I, where the jury found appellant guilty of the lesser included offense of robbery, with a special finding that Mr. Cook did not possess a firearm nor did he wear a mask the sentence was 160.8 months in the Department of Corrections with credit for 351 days time served. On Count II, attempted robbery, the sentence is 60 months with 351 days credit. The sentence on Count III, attempted robbery, was 60 months with 351 days credit. On Count V, robbery with a firearm, the sentence is 160.8 months with 351 days credit, with a three year minimum mandatory. On Count VI, robbery with a firearm, the sentence is 160.8 months with 351 days credit, with a three-year minimum mandatory - consecutive to the three-year minimum mandatory of Count V. On Count VII, possession of a firearm, the sentence is 160.8 months with 351 days credit. On Count VIII and IX, the sentence on each is 351 days with credit for 351 days time served. Mr. Cook was adjudicated guilty for each and every offense for which he was found guilty. All the sentences were to run concurrently, except for the three-year minimum mandatories on Counts V and VI, which were to run consecutively. (Sentencing Transcript, pages 24-27)

Petitioner appealed to the Fifth District Court of Appeal, arguing the trial court erred when imposing consecutive minimum mandatories. The Fifth District Court issued a per curiam

decision, which consisted of a citation to Maddox v. State, 23 Fla. Law Weekly D720 (Fla. 5th DCA March 13, 1998). Maddox was a decision holding that the 5th District Court of Appeal would no longer recognize fundamental error in the sentencing context nor would the Court address illegal sentences on direct appeal, unless the issue had been preserved for review either by objection in the trial court or by means of a 3.800(b) motion for post-conviction relief. 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. Law 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).

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). 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).

Maddox is currently before this Court pending a decision on

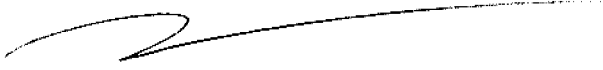
jurisdiction, Florida Supreme Court Case #92,805. The Fifth District Court did acknowledge conflict with any other District Court in its decision in this case. The Court, however, relied entirely on a decision that is in conflict with every other District Court. This Court has discretionary jurisdiction 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




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COUNSEL FOR PETITIONER/
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 Darryle T. Cook, Inmate No. X-06747, East Unit, Apalachee Correctional Institution, Post Office Box 699, Sneads, Florida 32460-0699, on this 31st day of August, 1998.



LYLE HITCHENS
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF FLORIDA

DARRYLE T. COOK,)
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 Petitioner/Appellant,)
)
 vs.)
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 STATE OF FLORIDA,)
)
 Respondent/Appellee.)
 _____)

S.CT. CASE NO.93,781

DCA CASE NO. 97-2923

A P P E N D I X

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

JULY TERM 1998

98-43
Lyle

DARRYLE T. COOK,

Appellant,

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

v.

Case No. 97-2923

STATE OF FLORIDA,

Appellee.

RECEIVED

Opinion Filed August 7, 1998.

AUG 06 1998

Appeal from the Circuit Court
for Orange County,
A. Thomas Mihok, Judge.

PUBLIC DEFENDER'S OFFICE
7th 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 Robin A. Compton, Assistant Attorney General,
Daytona Beach, for Appellee.

UPON MOTION FOR REHEARING

PER CURIAM.

We previously dismissed this appeal by order relying on *Maddox v. State*, 23 Fla. Law Weekly D720 (Fla. 5th DCA 1998). The appellant asks that we withdraw that order and issue an opinion so that his appeal may be considered by the Supreme Court of Florida in conjunction with, or in light of *Maddox*, currently before that court for review.

We grant his request, withdraw the previous order and formally dismiss his appeal on the authority of this court's opinion in *Maddox*.

APPEAL DISMISSED.

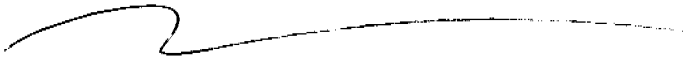
GRIFFIN, C.J., DAUKSCH and PETERSON, JJ., concur.

IN THE SUPREME COURT OF FLORIDA

DARRYLE T. COOK,)	
)	
Petitioner/Appellant,)	
)	
versus)	S.CT. CASE NO. 93,781
)	
STATE OF FLORIDA,)	DCA CASE NO. 97-2923
)	
Respondent/Appellee.)	
_____)	

CERTIFICATE OF FONT

I HEREBY CERTIFY that the size and style of type used in this jurisdictional brief is 12 point Courier New, a font that is not proportionally spaced.



LYLE HITCHENS
Counsel for Petitioner/
Appellant



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FILED JAMES R. WULCHAK
Chief, Appellate Division
SID J. WHITE CHRISTOPHER S. QUARLES
Chief, Capital Appeals
SEP 1 1998 MARLEAH K. HILBRANT
Administrative Assistant

August 31, 1998

CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

Honorable Sid J. White
Clerk, Supreme Court of Florida
500 South Duval Street
Tallahassee, Florida 32399-1927

Re: Darryle T. Cook v. State, Our file No. 98-719, DCA Case No. 97-2923, S.Ct. Case No. 93,781

Dear Mr. White:

Enclosed please find the original and five copies of the jurisdictional brief of the Petitioner. Attached as an appendix is a copy of the Fifth District Court of Appeal opinion dated August 7, 1998.

If you have any suggestions or questions, please do not hesitate to let me know.

Sincerely yours,

LYLE HITCHENS
Assistant Public Defender

LH/lbh

Enclosures