

**ORIGINAL**

**FILED**

IN THE SUPREME COURT OF FLORIDA

SIB J. WHITE

**OCT 29 1998**

CLERK, SUPREME COURT

By \_\_\_\_\_  
Chief Deputy Clerk

JOSEPH HODGE, )  
 )  
 Petitioner, )  
 )  
 vs. )  
 )  
 STATE OF FLORIDA, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

Case No. 94,180

PETITIONER'S BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

Petitioner was the appellant in the district court of appeal and was the defendant in the trial court. He will be referred to as petitioner and by name in this brief.

Attached to this brief on jurisdiction is an Appendix containing conformed copies of those portions of the record in this case deemed pertinent to this Court's jurisdiction.

STATEMENT OF THE CASE AND FACTS

Petitioner, Joseph Hodge (Hodge), filed an appeal timely invoking the jurisdiction of the Florida District Court of Appeal, Fourth District, to review a judgment of conviction and sentence for conviction of the crime of aggravated battery (A-1).

The district court of appeal, on direct appeal, issued a citation per curiam affirmed decision (A-2). The district court refused to consider and rule on the issue of the legality of a portion of the judgment and sentence by reliance upon its decision, in Hyden v. State, 715 So. 2d 960 (Fla. 1998) (23 Fla. L. Weekly D1342 (Fla. 4th DCA June 3, 1998)). That decision is now pending review in this Court based upon a certification of conflict, in Hyden v. State, Fla. Supreme Court Case No. 93,966.

Jurisdiction of this Court is invoked pursuant to Article V, section 3(b)(4), Fla. Constitution, based upon the certification of conflict of decisions in the cited case which is pending review in this Court. Jollie v. State, 405 So. 2d 418 (Fla. 1981).

The sentencing court had imposed on Hodge a fee in the amount of \$1089.00 on Hodge for services of the public defender. The judgment was pronounced summarily without advising him of his right to contest either the amount of the fee or his ability to pay it (A-4). Moreover, counsel representing Hodge assisted the court in

determining the amount without any assertion that Hodge had been afforded counsel regarding his right to contest the amount or to be represented by counsel concerning the determination or imposition of costs. The legality of the judgement and lien was the subject of the direct appeal that the district court refused to consider.

Hodge filed a timely notice to invoke the jurisdiction of this Court to review the decision of the district court of appeal.

ARGUMENT

POINT I

WHETHER THE COURT SHOULD EXERCISE ITS JURISDICTION TO REVIEW THE ISSUE OF WHEN A DISTRICT COURT OF APPEAL MAY REFUSE TO CONSIDER AN UNLAWFUL FEE IMPOSED AS PART OF THE PENALTY IN A CRIMINAL CASE AS THE TYPE OF ILLEGAL SENTENCING ORDER THAT CONSTITUTES FUNDAMENTAL ERROR?

(a) Jurisdiction to review this case.

The issue concerns when a district court of appeal must review a sentence of judgment based upon illegality when the defendant has failed to move to correct or vacate the order in the sentencing court. This Court should decide the issue whether imposition of a judgment, lien and issuance of an order for execution of an assessment of fees or costs can constitute fundamental error. The imposition occurred without a hearing should be reviewed as an illegal judgement or sentence when the court fails to give advice of the right to contest the amount of the fee or to assert inability to pay.

In this case, no objection was made on behalf of Hodge at the sentencing to the imposition of the fee, however counsel representing Hodge affirmatively assisted the court in determining the amount to impose (A-4).



The Court has jurisdiction based upon the decision in Jollie v. State, supra, in which the Court held that reliance by a district court upon a cited case, which is itself either pending review or which has been previously reversed, constitutes a prima facie conflict to permit the Court to exercise its jurisdiction. The Court further stated in Jollie that if review is requested, the parties may seek consolidation with the referenced case in this Court.

(b) Reasons for granting review of the issue in this case.

The Court should exercise its jurisdiction to consider this issue because the conflict concerns substantial rights to defendants in criminal cases. The right not to have unlawful punishments imposed, should be effectuated with routine and readily available procedures within the judicial system. This Court has previously held that it "will not approve a judgment which is patently erroneous." Lewis v. State, 154 Fla. 825; 19 So. 2d 199 (1944).

While all unlawful sentencing matters do not constitute "illegal sentences," i.e. sentences that exceed the maximum punishments permitted by the law, the imposition of a penalty which is patently erroneous should be corrected at the earliest opportunity. The requirement of an objection has been considered

important to prevent a party from "rolling the dice" in an effort to have two opportunities to prevail. Hargrove v. CSX Transp., Inc., 631 So. 2d 345, 346 (Fla. 2d DCA 1994); Low Investment Co. v. Clemente, 685 So. 2d 84 (Fla. 2d DCA 1996). No such advantage is to be gained by a lawyer's (or party's) failure to object to a judgement or punishment that is unlawful or illegal. Furthermore, the remedial action to be taken does not change, and the opportunity to remedy the error remains the same unlike matters occurring during trial where a timely objection serves to further the administration of justice by preventing unfair advantage to be taken by delay. See, e.g. Nissan Motor Corp. in U.S.A. v. Padilla, 545 So. 2d 274 (Fla. 3d DCA 1989); City of Orlando v. Birmingham, 539 So. 2d 1133 (Fla. 1989); County of Volusia v. Niles, 445 So. 2d 1043, 1047 (Fla. 5th DCA 1984); Hargrove v. CSX Transportation Inc., 631 So. 2d 345 (Fla. 2d DCA 1994).

In a criminal case, an error that is apparent on the record regarding the imposition of penalty should not be ignored on direct appeal. The first court with jurisdiction over the matter should consider issues of unlawful penalties or judgments in the interests of both judicial economy and in the interests of the equal administration of justice. Defendants in criminal cases, after direct appeal, have no constitutional right to the assistance of

counsel. Defendants serving terms of imprisonment are hardly prepared to ascertain the legality of a sentence counsel for both the defense and prosecution, as well as sentencing court, failed to recognize. Further, such defendants are not in a fair position to litigate complex sentencing issues. To require them to do so would burden the administration of justice by requiring trial courts to schedule new actions and to revisit matters after a record has been prepared on which the matter could have been readily resolved earlier. The Court should determine whether the interests of justice require a court to directly determine the validity as part of its exercise of jurisdiction or to relinquish to the sentencing court to focus upon the potentially unlawful punishment or judgment in a criminal case.

The separation of powers within our state constitution prevents encroachment by another branch of government into this Court's power to implement procedures necessary to accomplish the fair and efficient administration of justice. Johnson v. State, 336 So. 2d 93 (Fla. 1976); State v. Garcia, 229 So. 2d 236 (Fla. 1969). The courts have exclusive power to provide procedures to promptly and effectively administer equal justice by correcting patently improper or invalid orders entered as part of the disposition in criminal cases.

The Court should grant review in this case because the procedures adopted and applied under the rules of procedure have a great effect upon the fair and equal application of the law as well as there being a substantial effect whether a burdensome relitigation of issues results from requiring issues of unlawful sentences to be re-raised in a new trial court pleading.

The First District recently in Locke v. State, Fla. 1st DCA Case No. 97-2431 (Slip Opinion issued October 21, 1998), en banc, considered whether the failure to give notice of imposition of a lien for public defender fees should continue to be considered a fundamental error. The court receded from its earlier holding in Neal v. State, 688 So. 2d 392, 396 (Fla. 1st DCA) rev. denied, 698 So. 2d 543 (Fla. 1997), and held that it is no longer an issue that can be reviewed on direct appeal without having been raised in a trial court. Unlike the present case, the defendant in Locke indicated at the time that he had no objection to the amount.

This Court has previously disapproved of procedures for the repetitive litigation of matters following a direct appeal, as such repetitive consideration of issues makes a mockery of the judicial process and thwarts interests of finality and judicial economy. See. e.g., Arky v. Bowmar 537 So. 2d 561 (Fla. 1988); Dober v. Worrell, 401 So.2d 1322 (Fla. 1981).

The requirement that a criminal defendant, who has been ordered as part of the sentencing process an assertedly unlawful fee, or one that has been unlawfully imposed, to refile a pleading in a sentencing court after an appeal record has been prepared and the error is readily observable, wastes judicial resources and burdens the equal justice. The issue should be disposed of by the reviewing court, if it is readily apparent, which can enter an order to direct that the error be corrected by the trial court or can relinquished jurisdiction to permit the trial court to consider and dispose of the issue. Requiring further litigation by filing a new motion or action in the trial court burdens the judicial system and also further restricts relief to those able to successfully litigate such matters and denies equal justice to those who are unable to further litigate such issues.

These issues should be considered by the Court on the merits after full briefing and argumentation of the law concerning what "fundamental" issues can be reviewed on direct appeal when no objection has been made in a trial court to an unlawful judgment, punishment or penalty in a criminal case.

CONCLUSION

WHEREFORE, the Court is respectfully requested to grant review and to set the matter for oral argument on the merits.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier to Barbra Amron Weisberg, Assistant Attorney General, 1655 Palm Beach Lakes Boulevard, Suite 300, West Palm Beach, Florida 3401-2299 this 28<sup>th</sup> day of October, 1998.



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Counsel for Petitioner

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APPENDIX TO

PETITIONER'S BRIEF ON JURISDICTION

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