IN THE SUPREME COURT OF FLORIDA

GEORGE W. PARKS, JR.,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 94,286

ON DISCRETIONARY REVIEW FROM THE FIFTH DISTRICT COURT OF APPEAL

PETITIONER'S MERIT BRIEF

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

M. A. LUCAS
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STATEMENT OF CASE AND FACTS

This appeal involves three lower court cases. In case number 94-86, a two-count information was filed on February 21, 1994 charging Petitioner with committing the following offenses: Count I, possession of a firearm by a convicted felon, a second degree felony, in violation of Section 790.23, Florida Statutes; Count II, grand theft, a third degree felony, in violation of Sections 812.014(1) and 812.014(2)(c)1, Florida Statutes. (R 5-6)

A plea and sentencing hearing were held on May 3, 1994, before the Honorable John P. Thurman, Circuit Court Judge of the Fifth Judicial Circuit, in and for Citrus County, Florida. (R 24-32) Pursuant to a plea agreement with the State, Petitioner entered a plea of no contest as charged in both counts. (R 14-15, 25-29) Petitioner's total sentence points equaled 30.8. (R 17) The trial court

adjudicated Petitioner guilty on both counts. Petitioner was sentenced to four years probation and as a special condition of probation, Petitioner was to serve six months in the county jail. (R 30)

In case number 95-465, a four-count information was filed on August 4, 1995, charging Petitioner with committing the following offenses: Count I and Count III, charged Petitioner with the sale of cocaine, a second degree felony, in violation of Sections 893.03(2)(a)(4) and 893.13(1)(a)(1); Count II and Count IV charged Petitioner with possession of cocaine, a third degree felony, in violation of Section 893.03(2)(a)4 and 893.13(6)(a), Florida Statutes. (R 35-36)

In case number 95-497, an information was filed on August 18, 1995 charging Petitioner with committing the offense of possession of cocaine with intent to sell, a second degree felony, in violation of Sections 893.03(2)(a)4 and 893.13(1)(a)1, Florida Statutes. (R 52)

On October 2, 1995, a plea and sentencing hearing on Petitioner's three cases were held before Judge Thurman. (R 107-116) Petitioner admitted to violating his probation. Petitioner entered a plea of no contest as charged in the two 1995 cases pursuant to a plea agreement with the State. (R 108, 113) The trial court adjudicated Petitioner guilty of the new charges. In each case, Petitioner was placed on two years of concurrent probation and as a special condition to

serve six months in the county jail. (R 114) Petitioner's sentencing guidelines scoresheet total indicated a minimum state prison months of 17.7 and a maximum state prison months of 29.5. (R 91)

Subsequently, on May 2, 1997, Petitioner was charged with violating his probation in all three cases by committing a new substantive offense. (R 200-208)

A sentencing hearing was held on August 28, 1997, before Judge Blackstone. (R 250-278) The trial court found Petitioner violated his probation by committing the new law violation as evidenced by Petitioner's convictions in case number 96-507. (R 263) In case number 95-465, Petitioner was placed on probation for a period of 15 years to run consecutive to the 30 years of incarceration ordered in Case number 96-507. In case number 95-497, Petitioner was placed on probation for a period of 15 years to run consecutive to the probation imposed in case number 95-465 and to the incarceration imposed in 96-507. In case number 94-86, the trial court sentenced Petitioner to 15 years incarceration to run concurrent with all the other counts. (R 272) The written sentencing orders dated August 28, 1997 indicated that Petitioner was sentenced as follows: In case number 94-86, to 15 years probation to run concurrent with all other cases. (R 241); In case number 95-465, to 15 years probation to run concurrent to case number 96-507. (R 242); In case number 95-497, to 15 years probation to run

consecutive to case number 96-507. (R 243)

An amended order was filed on September 2, 1997, in case number 95-465 which amended the original order of August 28, 1997, to reflect 15 years probation to run consecutive to case number 96-507. (R 248) On September 5, 1997, the trial court entered an amended order in case number 94-86 which amended the original order on August 28, 1997, to reflect 15 years incarceration to run concurrent with all other cases. (R 249)

On September 5, 1997, defense counsel filed a "Motion to Clarify, Amend, or Correct Sentence." (R 279-280)

A hearing was held on September 11, 1997, on defense counsel's motion before Judge Blackstone. (R 336-352) The trial court indicated that Petitioner was to be placed on probation and was not to be incarcerated in case number 94-86. (R 347) The trial court amended Petitioner's sentences as follows: In case no. 94-86, the sentence was amended to reflect 12 years of probation to run concurrent with the probation ordered in case number 95-465; (R 282, 348) In case no. 95-465, the probation was amended from 15 years to 12 years. (R 283, 350); In case no. 95-497, the probation was amended from 15 years to 12 years. (R 284, 350)

Petitioner appealed the sentences imposed by the trial court to the Fifth District Court of Appeal. (R 297) On appeal to the Fifth District Court of Appeal, Petitioner argued that the trial court erred by imposing a general sentence, by not granting credit for time served and by sentencing Petitioner to periods of probation which exceed the statutory maximum. On September 4, 1998, the Fifth District issued its opinion affirming Petitioner's sentence. See Parks v. State, 23 Fla. L. Weekly D 2065 (Fla. 5th DCA September 4, 1998). (Appendix) In rejecting Petitioner's argument, the District Court held that although Petitioner raised admittedly serious errors, these errors were not preserved and cited Maddox v. State, 708 So. 2d 617 (Fla. 5th DCA 1998) which is currently pending for review with this Court in case number 92,805 (filed April 23, 1998).

The State filed a motion for clarification on September 10, 1998. The Fifth District Court of Appeal denied the motion on November 3, 1998. An amended notice to invoke this Court's discretionary jurisdiction was timely filed on November 4, 1998. This Court accepted jurisdiction on January 27, 1999.

SUMMARY OF ARGUMENT

The Fifth District Court of Appeal erred in affirming Petitioner's sentences, holding that the errors were not preserved for purposes of appeal. The Fifth District Court of Appeal cited as authority their recent decision in Maddox which is currently pending review before this Court. Petitioner maintains that this Court should not follow the decision of Maddox, especially, in a case such as this where the errors are clearly apparent on the face of the record and accordingly should be corrected. Petitioner was improperly sentenced to a general sentence and was sentenced to probationary terms that exceed the statutory maximum provided by law. Thus, Petitioner's sentences must be vacated and the cases remanded for resentencing.

ARGUMENT

THE FIFTH DISTRICT COURT OF APPEAL ERRED BY AFFIRMING PETITIONER'S SENTENCES AND HOLDING THAT THE "SERIOUS" SENTENCING ERRORS RAISED ON APPEAL WERE NOT PRESERVED.

In the instant case, Petitioner was sentenced for violating his probation as follows: In case number 94-86, the trial court sentenced Petitioner to 12 years probation to run concurrent to the probation ordered in case number 95-465. In case number 95-465, Petitioner was sentenced to 12 years probation to run consecutively to the incarceration ordered in case number 96-507. In case number 95-497, Petitioner was sentenced to 12 years probation to run consecutive to the probation ordered in case number 95-465. (R 241-243, 248-249, 283-284, 350)

Petitioner argued that the trial court erred by imposing a general sentence in case numbers 94-86 and 95-465, which include more than one count. See Carter v. State, 689 So. 2d 455 (Fla. 5th DCA 1997); Cruz v. State, 674 So. 2d 802 (Fla. 3rd DCA 1996); Inclima v. Sate, 570 So. 2d 1034 (Fla. 5th DCA 1990). The trial court further erred in sentencing Petitioner to 12 years probation in Count II in case number 94-86 and in Counts II and IV in case number 95-465 because those offenses are third degree felonies. Section 775.082(3)(d) provides that for a felony of third degree the maximum term of incarceration may not exceed five years. The trial court erred in sentencing Petitioner to a term of probation which

exceeds the statutory maximum. Additionally, upon a revocation of probation, the trial court must grant Petitioner credit for any time previously served on probation, so that total probationary term does not exceed the statutory maximum. See Waters v. State, 662 So. 2d 332 (Fla. 1995); State v. Roundtree, 644 So. 2d 1358 (Fla. 1994); State v. Summers, 642 So. 2d 7442 (Fla. 1994).

The Fifth District Court of Appeal held that although the sentencing errors were serious they could not render a decision because the issues were not properly preserved, citing to their decision in Maddox. Petitioner respectfully requests this Court not to follow the decision of the Fifth District Court of Appeal in Maddox v. State, 708 So.2d 617 (Fla. 5th DCA 1998), which is currently pending review with this Court. In Maddox, the Fifth District Court of Appeal held that no sentencing errors would be heard on appeal unless it was preserved by an objection down below. Petitioner maintains that to follow the Fifth District Court of Appeals decision will only result in an increase of the "legal churning." Therefore, Petitioner maintains that Court should follow the decision of the Third District Court of Appeal in Mizell v. State, 23 Fla. L. Weekly D 1978 (Fla. 3rd DCA August 26, 1998) The Third District Court acknowledged the Fifth District Court's opinion in Maddox, but found that not to be an impediment to granting relief:

> It is apparent that, even if arguendo Maddox is correct, the defense counsel's failure to present the point precludes

> reversal, that very holding requires the concomitant conclusion that Mizell received ineffective assistance of counsel in failing to preserve a right which would have otherwise inevitably resulted in a correction of sentence. Applying a limited, but controlling, exception to the rule that ineffectiveness claims may not be reached on direct appeal which applies when, as here, "the facts give rise to such a claim are apparent on the fact of the record," [citations omitted], we simply ordered the amendment of the sentence after remand.
>
> While this resolution of the case may not satisfy some of the more rabid of the judicial Thomists among us we think it is easily more consistent with our duty to avoid the legal churnings. See, State v. Rucker, 613 So.2d 460 (Fla. 1993), which would be required if we make the parties and lower courts do the long what we ourselves should do the short. Thus, we agree with Maddox, 707 So. 2d at 621, that the lack of preservation in the sentencing area necessarily involves ineffective assistance of counsel, but strongly disagree that anything is accomplished by not dealing with the matter at once.

Thus, the Third District has adopted a common sense approach to dealing with arguably unpreserved yet clearly improper sentencings. In the instant case, if this Court finds the errors were not preserved for purposes of appeal, then this Court should find that the failure to object or to file a motion to correct constitutes ineffective assistance of counsel on the face of the record and Petitioner's sentence should be vacated and the cause remanded for a new sentencing hearing.

CONCLUSION

Based on the foregoing reasons and authorities, Petitioner respectfully requests this Honorable Court to quash the decision of the Fifth District Court of Appeal below.

Respectfully submitted,

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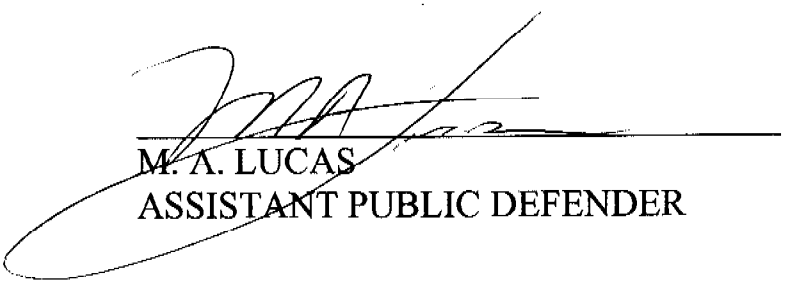
COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to: The Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Blvd., Fifth Floor, Daytona Beach, FL 32118 via his basket at the Fifth District Court of Appeal and mailed to: George W. Parks, Jr., Inmate #899284/F 1131S, Walton Correctional Institution, 691 World War II Veterans Lane, DeFuniak Springs, FL 32433, this 22nd day of February, 1999.



M. A. LUCAS
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF FLORIDA

GEORGE W. PARKS, JR.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO.
	)	
STATE OF FLORIDA,	)	
	)	
Respondent.	)	
	)	

APPENDIX

Parks v. State, 23 Fla. L. Weekly D 2065 (Fla. 5th DCA September 4, 1998)

JAMES B. GIBSON
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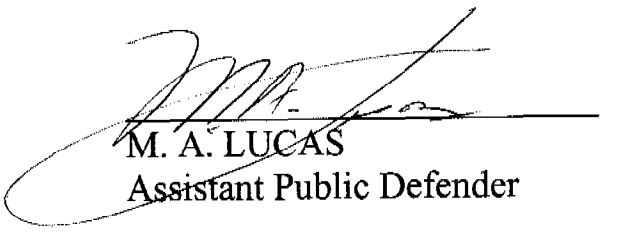
CERTIFICATE OF FONT

I HEREBY CERTIFY that the size and style of type used in the brief is 14 point proportionally spaced Times New Roman.



M. A. LUCAS
Assistant Public Defender

e party has a legal duty to perform because of its official *State ex rel. Buckwalter v. City of Lakeland*, 112 Fla. 200, 508 (1933). The act commanded by the writ must be rial and cannot be one that the party sought to be coerced has retion in performing. *See English v. McCrary*, 348 So. 2d la. 1977). Mandamus is proper to enforce a right which is and certainly established in the law, but not to litigate the ce of such a right. *See Florida League of Cities v. Smith*, 607 397 (Fla. 1992).

re a governmental agency provides that employee disputes resolved through a grievance process, the agency is bound comply with its own rules and policies. *Fredericks v. School of Monroe County*, 307 So. 2d 463 (Fla. 3d DCA 1975). The in this case provided in the County's personnel guideline that nce may be filed concerning "Any presumed violation of the el regulation and guidelines as adopted by the Board of Commissioners." The guideline further provides that "The sion of a grievance by an employee shall in no way adversely e employee or his employment with the County." If, as Soto in his mandamus complaint, he was denied a promotion e he had previously filed a grievance, Soto's employment be adversely affected due to his filing of a grievance, in n of the personnel guideline. Any presumed violation of the e is subject to the grievance process.

Board's contention that Soto was not disciplined or demoted t Soto has no right to file a grievance over the failure to a promotion is without merit. The personnel guideline does grievances to review of disciplinary proceedings against an ee.

o has stated a prima facie claim for mandamus relief. The is reversed and, in accordance with Florida Rule of Civil ure 1.630(d), the cause is remanded for issuance of an ive writ in mandamus.

VERSED AND REMANDED. (ANTOON, J., concurs. FIN, C.J., concurs specially, with opinion.)

FIN, C.J., concurring specially.) Given the county's tation of its own ordinance that it applies to presumed ns of personnel regulations and guidelines by the county *or* loyee, reversal is required.

* * *

al law—Sentencing—Probation revocation—Guidelines—o impose downward departure sentence without written —Trial court's belated effort to supply written reasons after was taken cannot cure defect because trial court had lost ion—Error to depart from guidelines on grounds pertain-lation of probation incident, not original crime for which t was being sentenced

OF FLORIDA, Appellant, v. ROBERT MARTIQUE WEST, Appellee. t. Case No. 97-2153. Opinion filed September 4, 1998. Appeal from the t for Hernando County, William G. Law, Jr., Judge. Counsel: Robert rworth, Attorney General, Tallahassee, and Mary G. Jolley, Assistant General, Daytona Beach, for Appellant. Richard A. Howard, Spring Hill, ee.

P, W., J.) The state appeals a downward departure sentence on West. While on probation, after having been convicted counts of robbery with a deadly weapon and one count of d robbery with a firearm, West was found to have violated ation and was sentenced to six months of community followed by five years probation. Although there may have ons for the downward departure sentence,[1] the trial court written reasons and articulated none at the sentencing [2]

ave no choice in this case but to reverse and remand for on of a guidelines sentence. *State v. Smallwood*, 664 So.2d 5th DCA 1995), *abrogated other grounds, State v. Gitto,* quired. § 921.0016(1)(c); Fla. R. Crim. P. 3.701(d)(11). We think the trial court's belated effort in this case to supply written reasons after an appeal was taken cannot cure the defect since the trial court had by that time lost jurisdiction.[4] In any event, the reasons given pertain to the violation of probation incident, not the original crime for which West was being sentenced. This is clearly erroneous. *Tossio v. State*, 634 So.2d 244, 245 (Fla. 5th DCA 1994).

REVERSED and REMANDED. (DAUKSCH and ANTOON, JJ., concur.)

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[1]The permitted range under the guidelines was 4½ to 9 years in prison and the recommended range was 5½ to 7 years in prison.

[2]After this case had been appealed by the state, the court *sua sponte* made written findings that (a) the court had become solely focused on a different sentencing decision and failed to follow a more deliberate and systemic approach to the issues at hand; (b) one could conclude from the record that West committed a misdemeanor trespass rather than a burglary; and (c) if the sentence was a downward departure, the court failed to set forth written findings within fifteen days as required by Florida Rule of Criminal Procedure 3.702. The court noted, however, that one could conclude that a mitigating factor found in section 921.0016(4)(j), unsophisticated manner and isolated incident, applied in this case.

[3]In limited circumstances, oral reasons may suffice. *See Reid v. State*, 673 So.2d 972 (Fla. 1st DCA 1996); *Wilcox v. State*, 664 So.2d 55 (Fla. 5th DCA 1995); Fla. R. Crim. P. 3.702(d)(18).

[4]*Domberg v. State*, 661 So.2d 285, 286-287 (Fla. 1995).

* * *

Criminal law—Sentencing—Issues not preserved for appeal—Conflict acknowledged

GEORGE W. PARKS, JR., Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 97-2618. Opinion filed September 4, 1998. Appeal from the Circuit Court for Citrus County, J. Michael Blackstone, Judge. Counsel: James B. Gibson, Public Defender, and M. A. Lucas, Assistant Public Defender, Daytona Beach, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Robin A. Compton, Assistant Attorney General, Daytona Beach, for Appellee.

(HARRIS, J.) Admittedly appellee has raised serious errors that may have occurred at his sentencing below. These errors, however, were not raised below and were not preserved for appeal. *See Maddox v. State*, 708 So. 2d 617 (Fla. 5th DCA 1998), *rev. granted*, No. 92,805 (Fla. July 7, 1998).

Although we affirm the sentence below, we acknowledge conflict with *Harriel v. State*, 710 So. 2d 102 (Fla. 4th DCA 1998) and *Denson v. State*, 711 So. 2d 1225 (Fla. 2d DCA 1998), currently pending before the supreme court.

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

* * *

MICHELLE DE LUNA GARCIA, Appellant, v. STATE OF FLORIDA, Appellee. 2nd District. Case No. 98-03005. Opinion filed September 4, 1998. Appeal pursuant to Fla. R. App. P. 9.140(i) from the Circuit Court for Hillsborough County; Barbara Fleischer, Judge.

(PER CURIAM.) We affirm the denial of Ms. Garcia's postconviction motion without prejudice to her right to file a timely motion for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.850, alleging ineffective assistance of counsel for failure to seek a dismissal of counts nineteen through twenty-one in connection with her pleas to the remaining counts. (PATTERSON, A.C.J., and ALTENBERND and NORTHCUTT, JJ., Concur.)

* * *

LARRY D. ELLIS, Appellant, v. HARRY K. SINGLETARY, Secretary, Florida Department of Corrections, Appellee. 1st District. Case No. 96-4945. Opinion filed September 4, 1998. An appeal from the Circuit Court for Leon County. F.E. Steinmeyer, III, Judge. Counsel: Appellant, pro se. Robert A. Butterworth, Attorney General; Louis Vargas, General Counsel, Florida Department of Corrections, Tallahassee, for Appellee.

(PER CURIAM.) Larry D. Ellis appeals the trial court's denial of