

IN THE SUPREME COURT OF FLORIDA

FILED

SID J. WHITE

NOV 30 1998

CLERK, SUPREME COURT
By BAW
Chief Deputy Clerk

Case No.

94,469

TOMMY THOMAS, :
 :
 Petitioner, :
 :
 vs. :
 :
 STATE OF FLORIDA, :
 :
 Respondent. :
 :
 _____ :

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

BRIEF OF PETITIONER ON JURISDICTION

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

ROBERT D. ROSEN
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FLORIDA BAR NUMBER 0826065

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ATTORNEYS FOR PETITIONER

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STATEMENT OF TYPE USED

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

STATEMENT OF THE CASE AND FACTS

On January 9, 1995, the Petitioner, Tommy Thomas, pled guilty in lower case no. 94-9417 to sexual battery with slight force, a violation of section 794.011(3), Florida Statutes (1993), and was placed on three years probation. On November 14, 1996, the lower court found Mr. Thomas to have violated Condition (S) of his probation, failing to enroll and remain continuously enrolled in the Psychological Group. The court found him not guilty of violating the other conditions of his probation. However, the order of revocation lists Thomas in violation of conditions (2), (5), (J), (K), (N), (W), and (X) as well. The court revoked Thomas' probation and sentenced him to 60 months in prison to run concurrent with another 60 month habitual offender sentence. In his appeal, Mr. Thomas argued that the written order of revocation must conform to the court's oral pronouncement.

On November 6, 1998, the Second District Court of Appeal affirmed the lower court's revocation order, holding that "[b]ecause Thomas failed to seek correction of the scrivener's error in the trial court and because the error is not fundamental, he is precluded from raising this issue on appeal." See Thomas v. State, 23 Fla. L. Weekly D2483 (Fla. 2d DCA November 6, 1998). Mr. Thomas filed a notice of discretionary jurisdiction in the Second District Court of Appeal on November 24, 1998.

SUMMARY OF THE ARGUMENT

The Second District's holding in Thomas v. State, 23 Fla. L. Weekly D2483 (Fla. 2d DCA November 8, 1998), conflicts with the Fourth District's decision in Harriel v. State, 710 So. 2d 102 (Fla. 4th DCA 1998). Harriel states that the claim of an illegal sentence may be raised at any time.

ARGUMENT

ISSUE

THE INSTANT DECISION IS IN EXPRESS
AND DIRECT CONFLICT WITH OTHER DIS-
TRICT COURTS OF APPEAL.

The Second District's ruling expressly and directly conflicts with the Fourth District's decision in Harriel v. State, 710 So. 2d 1102 (Fla. 4th DCA 1998). The Fourth District held in Harriel that any issue involving an illegal sentence may be raised at any time. The Petitioner acknowledges the contrary opinions of other District Court decisions. See West v. State, 23 Fla. L. Weekly D2198 (Fla. 1st DCA September 23, 1998); Maddox v. State, 708 So. 2d 617 (Fla. 5th DCA 1998). Maddox is currently on appeal before this court in Maddox v. State, Case No. 92,805. Because of the conflict in the case law, this Court has discretionary jurisdiction over the case. The Petitioner asks this Court to decide the issue in his favor.

CONCLUSION

In light of the foregoing reasons, arguments, and authorities, the Petitioner has demonstrated that conflict does exist with the instant decision so as to invoke the discretionary jurisdiction of this Honorable Court.

APPENDIX

PAGE NO.

1. Opinion issued by Second District Court
of Appeal dated November 6, 1998.

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NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

TOMMY THOMAS,)
)
 Appellant,)
)
 v.)
)
 STATE OF FLORIDA,)
)
 Appellee.)
 _____)

CASE NO. 96-05281

Opinion filed November 6, 1998.

Appeal from the Circuit Court for
Hillsborough County; Diana M. Allen,
Judge.

James Marion Moorman, Public Defender,
and Robert D. Rosen, Assistant Public
Defender, Bartow, for Appellant.

Robert A. Butterworth, Attorney General,
Tallahassee, and William I. Munsey, Jr.,
Assistant Attorney General, Tampa,
for Appellee.

NOV - 8 1998
Public Defender's Office

PER CURIAM.

Tommy Thomas appeals the trial court's revocation of his probation and also seeks correction of a scrivener's error in the revocation order. The evidence presented at the revocation hearing supports the trial court's determination that Thomas wilfully violated his probation and, therefore, we affirm the revocation order. Because

AI

Thomas failed to seek correction of the scrivener's error in the trial court and because the error is not fundamental, he is precluded from raising this issue on appeal. See § 924.051, Fla. Stat. (Supp. 1996).

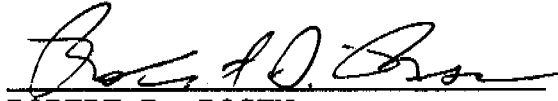
Affirmed.

BLUE, A.C.J., and FULMER and CASANUEVA, JJ., Concur.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to William I. Munsey, Jr., Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on this 25th day of November, 1998.

Respectfully submitted,



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NOV 30 1998

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

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PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

HOLLY M. STUTZ
EXECUTIVE DIRECTOR

PLEASE REPLY TO
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November ²⁵ 24, 1998

Honorable Sid J. White, Clerk
Supreme Court of Florida
Supreme Court Building
Tallahassee, Florida 32304

RE: Tommy Thomas vs. State of Florida
Appeal No.

Dear Mr. White:

Enclosed for filing in the above-styled cause are the original and five (5) copies of the Brief of the Petitioner on Jurisdiction. This brief has been saved as on the enclosed disk.

Sincerely,

TAMI L. LOCKE
Secretary, Appellate Division

/tll

Enclosures: noted above

xc: William I. Munsey, Jr., Attorney General's Office