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SID J. WHITE

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IN THE SUPREME COURT OF FLORIDA

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Chief Deputy Clerk

LEOTIS SMITH)
)
Petitioner,)
vs.)
)
STATE OF FLORIDA,)
)
Respondent.)
_____)

DCA CASE NO. 97-2647
SUPREME COURT CASE NO. 94,703

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

PETITIONER'S JURISDICTIONAL BRIEF

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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COUNSEL FOR APPELLANT

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STATEMENT OF THE CASE AND FACTS

After a jury trial, the Petitioner, LEOTIS SMITH, was convicted of second degree murder with a deadly weapon and was sentenced to life in prison as a habitual felony offender. During the sentencing proceeding the prior felony convictions relied upon by the state to establish that Petitioner qualified for sentencing as a habitual felony offender were insufficient to prove the required predicate. Two of these convictions were entered on the same day and the third conviction occurred after the date of the offense upon which the Appellant was being sentenced. There was no objection by the defense to the introduction of the judgements and sentences relied upon by the state. The trial court ruled that the Appellant met the criteria under section 775.084 and sentenced the Appellant as a habitual felony offender to life in prison. On appeal, Petitioner argued that the Appellant did not qualify as a habitual felony offender and that it was fundamental error for the trial court to sentence him as such. The Fifth District Court of Appeal issued a per curiam affirmance citing the case of Maddox v. State, 708 So.2d 617 (Fla. 5th DCA 1998), rev. granted, 718 So.2d 169 (Fla. 1998), as controlling authority for the affirmance. Smith v. State, 23 Fla.L.Weekly D2738 (Fla. 5th DCA December 11, 1998). Maddox

holds that the Criminal Appeal Reform Act as codified in §924.051, Florida Statutes (1996) has eliminated the concept of fundamental error at least as it had been previously applied to the sentencing context. Id. at 619.

The Petitioner, relying on Jollie v. State, 405 So.2d 418 (Fla. 1981) (conflict jurisdiction lies where the district court has issued a per curiam affirmance citing, as controlling authority, a case pending discretionary review before the Supreme Court), filed his Notice to Invoke the Discretionary Jurisdiction of the Court on January 8, 1999. This brief on jurisdiction follows.

SUMMARY OF ARGUMENT

The decision of the Fifth District Court of Appeal in the instant case expressly cited Maddox v. State, 708 So.2d 617 (Fla. 5th DCA 1998), rev. granted, 718 So.2d 169 (Fla. 1998) which is currently pending review before this Court. Pursuant to Jollie v. State, 405 So.2d 418 (Fla. 1981), this Court has the discretion to accept the instant case for review.

ARGUMENT

THE DISTRICT COURT OF APPEAL'S DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF THE SUPREME COURT OF FLORIDA OR OTHER DISTRICT COURTS OF APPEAL, AND RELIES DIRECTLY ON MADDOX V.STATE, 708 so.2d 617(Fla. 5th DCA 1998), rev.granted, 718 So.2d 169 (Fla. 1998) WHICH IS CURRENTLY PENDING BEFORE THIS COURT.

On appeal, Petitioner raised one issue alleging fundamental error in that the trial court sentenced the Petitioner to an illegal life sentence as an habitual felony offender where the Petitioner did not qualify as such. The opinion of the Fifth District Court of Appeal in the instant case cited as controlling authority the case of Maddox v. State, 708 So.2d 617 (Fla. 5th DCA 1998), rev. granted 718 So.2d 169 (Fla. 1998). In Maddox, in an *en banc* opinion, the Fifth District Court of Appeal held that The Criminal Appeal Reform Act abolished the concept of fundamental error in the sentencing context. Id. ; §924.051, Fla. Stat. (1996). Moreover, the Fifth District held in Maddox that even illegal sentences are not cognizable on direct appeal unless they are preserved for review with an objection within the meaning of section 924.051. Id.

Maddox v.State, *supra*, is currently pending review by this Court. The Petitioner in Maddox has argued that that decision

conflicts with State v. Hewitt, 702 So.2d 633 (Fla. 1st DCA 1977); Chojnowski v. State, 705 So.2d 915 (Fla. 2d DCA 1998); Pryor v. State, 704 So.2d 883 (Fla. 4th DCA 1998); and Callins v. State, 698 So.2d 883 (Fla. 4th DCA 1997). Additionally, Maddox also conflicts with Harriel v. State, 710 So.2d 102 (Fla. 4th DCA 1998) and Mizell v. State, 23 Fla.L.Weekly D1978 (Fla. 3rd DCA August 26, 1998).

This Honorable Court held in Jollie v. State, 405 So.2d 418 (Fla. 1981) that,

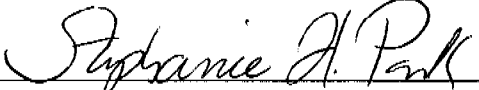
We thus conclude that a district court of appeal per curiam opinion which cites as controlling authority a decision that is either pending review in or has been reversed by the Court continues to constitute prima facie express conflict and allows this court to exercise its jurisdiction.

Id. at 420. Consequently, this Court has jurisdiction to review the decision by the Fifth District Court of Appeal in this cause due to the District Court's reliance as controlling authority on the decision of Maddox v. State, 708 So.2d 617 (Fla. 5th DCA 1998), rev. granted 718 So.2d 169 (Fla. 1998) (docket number 92805). Petitioner respectfully requests that this Honorable Court exercise its discretionary jurisdiction and grant review in this cause.

CONCLUSION

Based on arguments and authorities cited herein, Petitioner requests that this Honorable Court accept jurisdiction and grant review of the Fifth District Court of Appeal's decision in this cause.

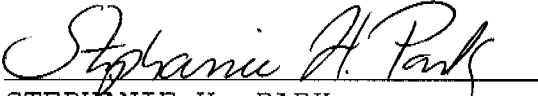
Respectfully submitted,
JAMES B. GIBSON
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SEVENTH JUDICIAL CIRCUIT


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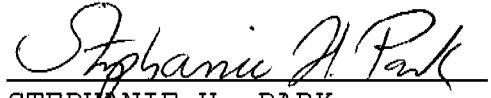
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon the Honorable Robert Butter worth, Attorney General, 444 Seabreeze Blvd., Fifth Floor, Daytona Beach, FL 32118, in his basket, at the Fifth District Court of Appeal, and mailed to Mr. Leotis L. Smith, DC# 380712, Hendry Correctional Institution 12551 Wainwright Drive, Immokalee, FL 34142, on this 11th day of January, 1999.


STEPHANIE H. PARK
ASSISTANT PUBLIC DEFENDER

STATEMENT CERTIFYING FONT

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


STEPHANIE H. PARK
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF FLORIDA

LEOTIS SMITH)
)
 Petitioner,)
vs.) DCA CASE NO. 97-2647
) SUPREME COURT CASE NO. _____
STATE OF FLORIDA,)
)
 Respondent.)
_____)

APPENDIX

Smith v. State,
23 Fla.L.Weekly D2738 (Fla. 5th DCA December 11, 1998)

Appendix A

General, Tallahassee, for Appellee.

(PER CURIAM.) We affirm that portion of the trial court's order dismissing, with prejudice, appellant's complaint brought against appellees in their individual capacities. Since appellant did not bring suit against appellees in their official capacities, we treat that portion of the trial court's order dismissing such complaint against appellees in their official capacities as a nullity. (MINER and LAWRENCE, JJ., and McDONALD, PARKER LEE, Senior Judge, CONCUR.)

* * *

JAMES CODY and DEBBIE CODY, Appellants, v. COLONIAL IMAGING PRODUCTS & SERVICES, etc., et al., Appellees. 5th District. Case No. 98-1392. Opinion filed December 11, 1998. Appeal from the Circuit Court for Orange County, Walter Komanski, Judge. Counsel: Richard E. Dunegan and David B. Falstad, of Gurney & Handley, P.A., Orlando, for Appellants. No Appearance for Appellees.

(THOMPSON, J.) The final judgment awarding attorney's fees is reversed. *See Cody v. Colonial Imaging Products & Services, Inc.*, 23 Fla. Law Weekly D2236 (Fla. 5th DCA Oct. 2, 1998).

REVERSED. (GRIFFIN, C.J., and DAUKSCH, J., concur.)

* * *

DONALD FRANK SWIHART, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 98-645. Opinion filed December 11, 1998. Appeal from the Circuit Court for Brevard County, Jere E. Lober, Judge. Counsel: James B. Gibson, Public Defender, and Rebecca M. Becker, Assistant Public Defender, Daytona Beach, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Anthony J. Golden, Assistant Attorney General, Daytona Beach, for Appellee.

**ON MOTION FOR REHEARING AND REQUEST FOR
CERTIFICATION OF CONFLICT**

[Original Opinion at 23 Fla. L. Weekly D2353q]

(COBB, J.) We grant appellants' motion for rehearing and certification, rescind our prior opinion, and issue the following opinion:

We affirm on the authority of *State v. Baxley*, 684 So. 2d 831 (Fla. 5th DCA 1996), *rev. denied*, 694 So. 2d 737 (Fla. 1997). *Accord State v. Hayes*, 23 Fla. L. Weekly D2184 (Fla. 4th DCA Sept. 23, 1998). *Contra State v. Holland*, 689 So. 2d 1268 (Fla. 1st DCA 1997), *State v. Perry*, 716 So. 2d 327 (Fla. 2d DCA 1998).

We certify conflict with *Holland* and *Perry*. (GOSHORN and THOMPSON, JJ., concur.)

* * *

K.F., a child, Appellant, v. STATE OF FLORIDA, Appellee. 4th District. Case No. 98-1254. Opinion filed December 9, 1998. Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Karen Martin, Judge; L.T. Case No. 98-0356. Counsel: Richard L. Jorandby, Public Defender, and Cherry Grant, Assistant Public Defender, West Palm Beach, for appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Myra J. Fried, Assistant Attorney General, West Palm Beach, for appellee.

(PER CURIAM.) Affirmed. The error in overruling Appellant's objection to the question posed here was not prejudicial. § 924.051(1),(3),(7), Fla. Stat. (1997). (STONE, C.J., POLEN and STEVENSON, JJ., concur.)

* * *

WONDELL CARTER, Appellant, v. STATE OF FLORIDA, Appellee. 4th District. Case No. 98-0077. Opinion filed December 9, 1998. Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Howard Berman, Judge; L.T. Case No. 97-5601 CF A02. Counsel: David Nunes of Law Office of David Nunes & Associates P.A., Fort Lauderdale, for appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Barbra Amron Weisberg, Assistant Attorney General, West Palm Beach, for appellee.

(PER CURIAM.) Affirmed without prejudice to seek relief pursuant to Florida Rule of Criminal Procedure 3.850. (STONE, C.J., POLEN and STEVENSON, JJ., concur.)

* * *

MARION ASHLEY, Appellant, vs. THE STATE OF FLORIDA, Appellee. 3rd District. Case No. 98-2819. L.T. Case No. 92-12874-C. Opinion filed December 9, 1998. An appeal under Fla. R. App. P. 9.140(i) from the Circuit Court for Dade County, Ellen L. Leesfield, Judge. Counsel: Marion Ashley, in proper person. Robert A. Butterworth, Attorney General, for appellee.

(Before SCHWARTZ, C.J., and NESBITT, and COPE, JJ.)

(PER CURIAM.) The order under review is affirmed without prejudice to refile the motion in the Circuit Court of the Thirteenth Judicial Circuit, in and for Hillsborough County.

Affirmed.

* * *

MANSHUM vs. CARNIVAL CRUISE LINES, INC. 3rd District. #98-822. December 9, 1998. Appeal from the Circuit Court for Dade County. Affirmed. *Froug v. Carnival Leisure Indus., Ltd.*, 627 So. 2d 538 (Fla. 3d DCA 1993); *Barquin v. Flores*, 459 So. 2d 436 (Fla. 3d DCA 1984).

CADE vs. STATE. 3rd District. #98-3018. December 9, 1998. Appeal under Fla. R. App. P. 9.140(i) from the Circuit Court for Dade County. Affirmed. *See Fla. R. Crim. P. 3.850(f)*.

* * *

NESSMITH v. ARNOLD. 1st District. #96-4110. December 11, 1998. Appeal from the Circuit Court for Columbia County. AFFIRMED. *See section 733.702(2), Florida Statutes (1995)*.

CRUMBIE v. LEON COUNTY SCHOOL BOARD. 1st District. #98-1056. December 11, 1998. Appeal from the Circuit Court for Leon County. Affirmed. *See Milano v. Moldmaster, Inc.*, 703 So. 2d 1093 (Fla. 4th DCA 1998).

RUDOLPH, JR. v. STATE. 1st District. #97-2732. December 11, 1998. Appeal from the Circuit Court for Escambia County. This appeal is dismissed. *See Robinson v. State*, 373 So. 2d 898 (Fla. 1979).

DARRELL v. STATE. 1st District. #97-3733. December 11, 1998. Appeal from the Circuit Court for Alachua County. This appeal is dismissed. *See Robinson v. State*, 373 So. 2d 898 (Fla. 1979).

CARLSON v. STATE. 1st District. #98-451. December 11, 1998. Appeal from the Circuit Court for Wakulla County. AFFIRMED. *See State v. Cunningham*, 712 So. 2d 1221 (Fla. 2d DCA 1998).

* * *

MONCRIEF v. STATE. 4th District. #98-1301. December 9, 1998. Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County. Affirmed on the authority of *Manka v. State*, No. 96-3318, 1998 WL 732949 (Fla. 4th DCA Oct. 21, 1998) [23 Fla. L. Weekly D2357].

* * *

McKENZIE v. STATE. 5th District. #98-1114. December 11, 1998. Appeal from the Circuit Court for Marion County. AFFIRMED. *See State v. Price*, 564 So. 2d 1239 (Fla. 5th DCA 1990).

McBRIDE v. COUNTY OF VOLUSIA. 5th District. #98-783. December 11, 1998. Appeal from the Circuit Court for Volusia County. AFFIRMED. *See In re Forfeiture of \$7,750 in United States Currency*, 546 So. 2d 1128, 1131 (Fla. 2d DCA 1989).

SPENCER v. STATE. 5th District. #98-563. December 11, 1998. Appeal from the Circuit Court for Orange County. AFFIRMED. *See Archer v. State*, 613 So. 2d 446 (Fla. 1993), *cert. denied*, 117 S. Ct. 197 (1996); *Pope v. State*, 646 So. 2d 827 (Fla. 5th DCA 1994).

B. K. v. STATE. 5th District. #98-558. December 11, 1998. Appeal from the Circuit Court for Sumter County. AFFIRMED. *State v. E.D.P.*, 23 Fla. Law Weekly S524 (Fla. Oct. 8, 1998).

KUBINSKI v. STATE. 5th District. #98-299. December 11, 1998. Appeal from the Circuit Court for Orange County. AFFIRMED. *See Hardwick v. State*, 630 So. 2d 1212 (Fla. 5th DCA 1994).

RAIMONDO v. AMERICAN UNITED LIFE INSURANCE COMPANY. 5th District. #s 97-3582 & 98-1250. December 11, 1998. Appeal from the Circuit Court for Volusia County. AFFIRMED. *See McMullen Oil Co., Inc. v. ISS Int'l Service System, Inc.*, 698 So. 2d 372 (Fla. 2d DCA 1997); *Murphy v. Tucker*, 689 So. 2d 1164 (Fla. 2d DCA 1997).

PRUETT v. DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION. 5th District. #97-3210. December 11, 1998. Administrative Appeal from the Department of Business and Professional Regulation. AFFIRMED. *See Walker v. Florida Department of Business and Professional Regulation*, 705 So. 2d 652 (Fla. 5th DCA 1998).

SMITH v. STATE. 5th District. #97-2647. December 11, 1998. Appeal from the Circuit Court for Orange County. AFFIRMED. *See Maddox v. State*, 708 So. 2d 617 (Fla. 5th DCA), *rev. granted*, 718 So. 2d 169 (Fla. 1998).

* * *