IN THE SUPREME COURT OF FLORIDA

JOSEPH DUANE SAUCER,

Petitioner,

v. CASE NO. 95,031

STATE OF FLORIDA,

Respondent.
_____/

PETITIONER'S INITIAL BRIEF ON THE MERITS

R. Mitchell Prugh, Esq.
Florida Bar Number 935980
Middleton & Prugh, P.A.
303 State Road 26
Melrose, Florida 32666
(352) 475-1611 (telephone)
(352) 475-5968 (facsimile)
Court-Appointed Counsel
for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

CONSTITUTIONS

PREFACE

The record on appeal will be referred to by "R." followed by the page number where the information may be found.

The transcript of the evidentiary hearing held February 23, 1998 will be referred to by "T." followed by the page number where the information may be found.

CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was typed using font style Courier New type size 12.

STATEMENT OF THE CASE AND FACTS

Petitioner filed a petition for writ of habeas corpus seeking a belated appeal in the First District Court of Appeal on October 24, 1997. (R. 1). The First District ordered the Petitioner to file an amended petition identifying the counsel whom the request for appeal was made and the dates of the request. (R. 5). Petitioner timely filed a one-paragraph amended petition in response to the order on November 13, 1997. (R. 6). The First District issued a second order requiring the Petitioner to state that his request for appeal was made within the 30 days allowed for appeal on November 19, 1997. (R. 9). Two day later the First

District issued an order to the State to show cause why the petition should not be granted. (R. 10). The State filed its response requesting appointment of a special commissioner to hold an evidentiary hearing. (R. 11, 13). The State acknowledged in its response that under the authority of *Trowell v. State*, 706 So. 2d 332 (1st DCA 1998) (en banc), *appv'd*, 739 So. 2d 77 (Fla. 1999) that a defendant has an unlimited right to appeal from a guilty plea. (R. 14).

The First District issued its order requesting appointment of a special master to conduct a hearing. (R. 16). The Attorney General filed a motion for rehearing the First District's order in which the Attorney General objected, among other things, that it is not the Attorney General's responsibility to represent the State in post-conviction proceedings in circuit court. (R. 18, 19). The First District denied the motion for rehearing. (R. 24).

The evidentiary hearing was held February 23, 1998. (R. 23). The State was represented by the State Attorney's Office, Fourth Judicial Circuit, who conceded that Petitioner had filed a valid pleading. (T. 2, 5). The Petitioner was *pro se*. (T. 2, 4).

Conflicting testimony was received at the hearing. Under questioning by the special master, the Petitioner testified he had requested to assistant public defender Wilson on January 29, 1996

at a change of plea and February 5, 1996 sentencing hearing that an appeal be taken. (T. 36, 37). Assistant public defender Wilson testified she had earlier discussed an appeal of a ruling denying defendant's motion to suppress with the Petitioner. (T. 15, 12).[1] Assistant public defender Wilson testified that Petitioner never requested her to file an appeal after the change of plea. (T. 13, 16-17).[2] The special master concluded that "sufficient and substantial evidence exists to establish" that the Petitioner knew that his guilty plea waived right to appeal the suppression ruling. The special master did not expressly resolve the conflicting testimony, or, make a finding that the filing was brought with knowledge of false information. (R. 25). The First District denied the petition for writ of habeas corpus without comment.

---

[1] Ms. Wilson inconsistently testified earlier that an appeal was taken from the motion to suppress. (T. 8, lines 23-25 through T. 9, line 1).

[2] Ms. Wilson testified earlier that she did not discuss an appeal of the sentence with the Petitioner. (T. 10, lines 4-11). Ms. Wilson also confirmed that she advised the Petitioner before entry of the change of plea that he could not appeal the motion to suppress ruling after entry of the guilty plea. (T. 12, lines 15-24; T. 13, lines 13-15).

Saucer v. State, 718 So. 2d 1238 (1st DCA 1998) (table), *rev. dism*. 729 So. 2d 394 (Fla. 1999) (table).

The First District then indicates that the State asked for a forfeiture of gain-time under Section 944.28(2)(a), Florida Statutes. (R. 42). The State's motion for forfeiture of gain-time is not contained in the record on appeal before this Court. It is not known from the record whether the State Attorney or the Attorney General requested the forfeiture.

A three-judge panel of the First District, on rehearing, withdrew an prior opinion and substituted an opinion holding that Section 944.28(2)(a) applied to criminal proceedings. (R. 44). Regarding the forfeiture motion, the First District ruled: "The motion to forfeit gain-time is granted, in part, and we find the petitioner either knowingly or with reckless disregard for the truth brought false information before the court." (R. 44). There is no indication from the record before this Court what part of the State's motion was granted or not granted. There is also no indication from the record before this Court on what evidence the First District entered its finding of false information, or, whether a hearing was permitted before it reached its finding.

The First District also certified the following questions to this Court as a question of great public importance:

> May the gain-time forfeiture provisions of Section 944.28(2)(a) apply in criminal and collateral criminal proceedings?

(R. 44).

This Court granted review on March 23, 1999 and vacated the First District order. *Saucer v. State*, 743 So. 2d 510 (Fla. 1999) (table).

SUMMARY OF ARGUMENT

This case is controlled by this Court's recent decision in *Hall v. State*, 2000 WL 44045 (Fla. Jan. 20, 2000) (Case No. SC 91,122). In *Hall*, this Court held that Section 944.28(2)(a) does not apply to collateral proceedings. *Hall*, 2000 WL 44045, *3. This Court also held that a court could not order the Department of Corrections to forfeit gain-time. *Hall*, 2000 WL 44045, *5. This Court expressly disapproved of the First District decision *Saucer v. State*, 736 So. 2d 10 (Fla. 1st DCA 1998), to the extent it is inconsistent with the *Hall* decision. *Hall*, 2000 WL 44045, *5.

Because both the holding in *Saucer v. State* that subsection 944.28(2)(a) applies to collateral proceedings, and, the First District's grant of the motion to forfeit Petitioner's gain-time are inconsistent with *Hall*, this Court should quash the First District's decision in *Saucer* and remand for further proceedings consistent with the *Hall* opinion.

ARGUMENT

This case is controlled by this Court's recent decision in *Hall v. State*, 2000 WL 44045 (Fla. Jan. 20, 2000) (Case No. SC 91,122). A copy of the opinion in *Hall* is attached to this brief as Appendix A.

In *Hall*, this Court held that Section 944.28(2)(a) does not apply to collateral criminal proceedings. *Hall*, 2000 WL 44045, *3. The First District expressly found Petitioner's filing to be a criminal proceeding. *Saucer v. State*, 729 So. 2d 394 (Fla. 1st DCA 1998); R. 42-43. Section 944.279, Florida Statutes expressly excludes collateral criminal proceedings from its scope. § 944.279(2), *Fla. Stat.* (1997); *see also*, *Hall v. State*, 2000 WL 44045, *1 (Fla. Jan. 20, 2000) (citing this exclusion). The First District opinion forfeiting the Petitioner's gain-time must therefore be quashed because there remains no statute upon which to forfeit gain-time due to Petitioner's petition for writ of habeas corpus.

This Court also held that a court could not order the Department of Corrections to forfeit gain-time. *Hall*, 2000 WL 44045, *5. Here the First District ruled: "The motion to forfeit gain-time is granted, in part, and we find the petitioner either knowingly or with reckless disregard for the truth brought false

information before the court." (R. 44). The First District's grant of forfeiture is contrary to both *Hall* and the separation of powers between the judiciary and executive branches. *Hall*, 2000 WL 44045, *5; Art. II, § 3, *Fla. Const.* The First District opinion must therefore be quashed on this basis also.

There is also no indication from the record before this Court on what basis or evidence the First District entered its finding of false information or whether a hearing was permitted before it reached its finding. The State's moton for forfeiture is also not in the record. Clearly constitutional due process requires that the Petitioner at least be advised of what information is alleged to be false information and an opportunity to respond to the allegation. Amend. XIV, *U.S. Const.*; Art. I, § 9, *Fla. Const.*

Finally, this Court expressly disapproved of the First District decision *Saucer v. State*, 736 So. 2d 10 (Fla. 1st DCA 1998), to the extent it is inconsistent with the *Hall* decision. *Hall*, 2000 WL 44045, *5. Because both the holding in *Saucer v. State* that subsection 944.28(2)(a) applies to collateral proceedings, and, the First District's grant to forfeit Petitioner's gain-time are inconsistent with Hall, the First

District decision should be quashed and remanded to the First District for further proceedings.

CONCLUSION

This Court should quash the First District's decision in *Saucer* and remand for further proceedings consistent with the *Hall* opinion.

R. MITCHELL PRUGH, ESQ.
Florida Bar Number 935980
Middleton & Prugh, P.A.
303 State Road 26
Melrose, Florida 32666
(352) 475-1611 (telephone)
(352) 475-5968 (facsimile)
Court-Appointed Attorney for Petitioner

CERTIFICATE OF SERVICE

I CERTIFY that a true and correct copy of the foregoing Initial Brief On the Merits was sent to JAMES W. ROGERS, ESQ., Tallahassee Bureau Chief Criminal Appeals, The Capitol, Tallahassee, Florida, 32399-1050; TRISHA E. MEGGS, ESQ., Assistant Attorney General, Office of the Attorney General, The Capitol, Tallahassee, Florida, 32399-1050, by U.S. Mail this 28th day of January 2000.

_____

R. MITCHELL PRUGH, ESQ.