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SID J. WHITE

MAR 18 1999

IN THE SUPREME COURT OF FLORIDA

MC

CLERK SUPREME COURT
By RT
Chief Deputy Clerk

TOMMY TERRY)
)
Petitioner,)
vs.)
)
STATE OF FLORIDA,)
)
Respondent.)
_____)

DCA CASE NO. 98-1488
SUPREME COURT CASE NO. 95,149

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

PETITIONER'S JURISDICTIONAL BRIEF

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

STEPHANIE H. PARK
ASSISTANT PUBLIC DEFENDER
Florida Bar Number 0047562
112 Orange Avenue, Suite A
Daytona Beach, Florida 32114
Phone: 904/252-3367

COUNSEL FOR APPELLANT

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STATEMENT OF THE CASE AND FACTS

On May 28, 1998, the Petitioner, Tommy Terry, was sentenced on three different circuit court cases (90-20131, 97-10358, and 98-02328). In cases 97-20131 and 98-02328, the trial court sentenced Petitioner to a total of twenty years imprisonment as a habitual offender. With regard to case number 90-20131, a violation of probation, the trial court revoked the Petitioner's original five year term of probation on count III and imposed a new, ten-year sentence. Count III was a third degree felony with a statutory maximum of five years incarceration. §775.082, Fla. Stat. The trial court gave no credit for the time that the Petitioner had already served on probation on this offense before violating. While Petitioner's trial attorney did remind the court that the charge carried a five year statutory maximum, no specific objection was lodged to this illegal sentence at the time of sentencing. On appeal, Petitioner argued that the sentence imposed on circuit court case number 90-20131 was illegal, fundamental error which may be corrected at any time.

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. Terry v. State, 23

Fla.L.Weekly _____ (Fla. 5th DCA March 12, 1998); (Appendix A). 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 March 16, 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 sentence which exceeded the statutory maximum. 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,

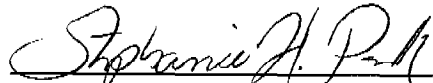
We thus conclude that a district court of appeal per curiam opinion which cites as controlling authority a decision that is either pending review in or has been reversed by the Court continues to constitute prima facie express conflict and allows this court to exercise its jurisdiction.

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.

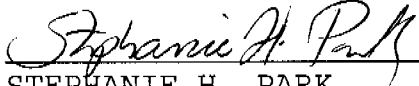
Respectfully submitted,
JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT


STEPHANIE H. PARK
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 0047562
112 Orange Avenue, Suite A
Daytona Beach, Florida 32114
Phone: 904/252-3367

COUNSEL FOR APPELLANT

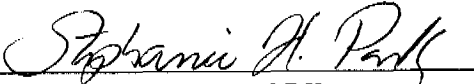
CERTIFICATE OF SERVICE

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. Tommy Terry, DC# 701689, Jackson Correction Institution, 5563 10th Street, Malone, FL 32445-3144, on this 16th day of March, 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. 98-1488
) SUPREME COURT CASE NO. _____
 STATE OF FLORIDA,)
)
 Respondent.)
 _____)

APPENDIX

Terry v. State,
23 Fla.L.Weekly _____ (Fla. 5th DCA March 12, 1998)

Appendix A

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

98-662
SP
JANUARY TERM 1999

NOT FINAL UNTIL THE TIME EXPIRES
TO FILE REHEARING MOTION, AND,
IF FILED, DISPOSED OF.

TOMMY TERRY,

Appellant,

v.

Case No. 98-1488

STATE OF FLORIDA,

Appellee.

RECEIVED

Opinion filed March 12, 1999

Appeal from the Circuit Court
for Brevard County,
W. C. Burk, Judge.

MAR 12 1999

James B. Gibson, Public Defender, and
Stephanie H. Park, Assistant Public
Defender, Daytona Beach, for Appellant.

Robert A. Butterworth, Attorney General,
Tallahassee, and Pamela J. Koller, Assistant
Attorney General, Daytona Beach, for Appellee.

PUBLIC DEFENDER'S OFFICE
7th CIR. APP. DIV.

PER CURIAM.

AFFIRMED. See Maddox v. State, 708 So. 2d 617 (Fla. 5th DCA 1998), rev.
granted, 718 So. 2d 169 (Fla. 1998).

DAUKSCH, COBB and SHARP, W., JJ., concur.