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DEBBIE CAUSSEAU

MAY 26 1999

CLERK, SUPREME COURT
By *[Signature]*

IN THE SUPREME COURT OF FLORIDA

MATTHEW THOGODE,)
)
 Petitioner,)
)
 versus)
)
 STATE OF FLORIDA,)
)
 Respondent.)
 _____)

S.CT CASE NO. 95,665

DCA CASE NO. 97-3117

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

PETITIONER'S BRIEF ON JURISDICTION

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

KENNETH WITTS
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COUNSEL FOR PETITIONER

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Florida Supreme Court case number 92,805

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STATEMENT OF THE CASE AND FACTS

Petitioner, Matthew Thogode, was charged by information with six counts of capital sexual battery against a single victim (R5-6). Petitioner was tried on September 22 and 23, 1997, before the Honorable Jack Springstead, in the Circuit Court for Hernando County (T1-468)¹. Petitioner moved for judgements of acquittal on Counts IV, V and VI arguing that the State had not proved digital penetration (T397). The motion was denied (T401). The jury found Petitioner guilty of three counts of sexual battery, one count of attempted sexual battery and two counts of lewd act (T462-463).

Petitioner's recommended sentence was 180-300 months imprisonment (R269). Petitioner was sentenced to life imprisonment on each of the sexual battery convictions, 22.3 years imprisonment for attempted sexual battery and fifteen years imprisonment on each lewd act conviction, all sentences to run consecutive to each other (R244-262).

Petitioner appealed his convictions and sentence to the Fifth District Court of Appeal. The Fifth District Court's opinion dealt only with the argument that it

¹ In this brief "T" refers to transcript pages and "R" refers to the remainder of the record.

was error for the lower court to run the sentences for the non-capital offenses consecutive. The Court wrote that this was not fundamental error, and even if it was, it could not be raised for the first time on appeal. The Fifth District Court cited Maddox v. State, 708 So.2d 617 (Fla. 5th DCA 1998), *review granted*, 718 So.2d 169 (Fla. 1998). Petitioner now seeks this Court's discretionary jurisdiction.

SUMMARY OF THE ARGUMENT

The Fifth District Court relied on a case which is currently before this Court in reaching its decision in this case. This Court has discretionary jurisdiction under Jollie v. State, 405 So. 2d 418 (Fla. 1981).

POINT

THIS COURT SHOULD EXERCISE ITS DISCRETIONARY JURISDICTION. THIS COURT HAS JURISDICTION BECAUSE THE LOWER COURT BASED ITS DECISION ON A CASE CURRENTLY BEFORE THIS COURT FOR REVIEW.

The Fifth District Court's two paragraph opinion in this case first summarized the facts then held that the sentencing issue could not be raised based on Maddox v. State, 708 So.2d 617 (Fla. 5th DCA 1998), *review granted*, 718 So.2d 169 (Fla. 1998). Maddox was the only case cited in the opinion.

This Court heard oral argument in Maddox and some related cases two weeks prior to this brief being submitted. Maddox, Florida Supreme Court Case Number 92,805 has not been decided as yet.

This Court has discretionary jurisdiction over this case according to Jollie v. State, 405 So.2d 418 (Fla. 1981). This is because the Fifth District Court cited as controlling authority a case which is pending review by this Court. This Court currently has before it a number of cases dealing with the Criminal Appeals Reform Act and the Maddox decision. Petitioner asks this Court to use its discretionary jurisdiction to review the decision the Fifth District Court made in this case.

CONCLUSION

BASED UPON the argument and authorities expressed herein, Petitioner respectfully requests that this Honorable Court exercise discretionary jurisdiction over this case.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

Kenneth Witts

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon the Honorable Robert E. Butterworth, Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, in his basket at the Fifth District Court of Appeal, and mailed to Matthew Thogode, Inmate No. U-02064, MB# 1156, Charlotte Correctional Institution, 33123 Oil Well Road, Punta Gorda, Florida 33955, on this 24th day of May, 1999.

Kenneth Witts

KENNETH WITTS

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

JANUARY TERM 1999

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

MATTHEW THOGODE,

Appellant,

v.

CASE NO. 97-3117

STATE OF FLORIDA,

Appellee.

RECEIVED

Opinion Filed April 16, 1999

Appeal from the Circuit Court
for Hernando County,
John W. Springstead, Judge.

James B. Gibson, Public Defender, and
Kenneth Witts, Assistant Public Defender,
Daytona Beach, for Appellant.

Robert A. Butterworth, Attorney General,
Tallahassee, and Carmen F. Corrente,
Assistant Attorney General, Daytona Beach,
for Appellee.

GRIFFIN, C.J.

Matthew Thogode ["defendant"] appeals his judgments and sentences for three counts of sexual battery upon a person less than twelve years of age, one count attempted sexual battery upon a person less than twelve years of age, and two counts committing lewd and lascivious acts upon a child. He received three life sentences for three sexual batteries.

Defendant was sentenced to 22.3 years in prison for the attempted sexual batte

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

and 15 years in prison for each lewd act, all to be served consecutively. We find no error that would warrant reversal of the convictions. Appellant contends for the first time on appeal that it was error to make the sentences for the non-capital crimes consecutive because they constitute an upward departure sentence without written reasons. It is claimed that this error is fundamental. Even if it were a fundamental error, it cannot be raised first on appeal. *Maddox v. State*, 708 So. 2d 617 (Fla. 5th DCA 1998), *reversed*, 718 So. 2d 169 (Fla. 1998).

AFFIRMED.

COBB and THOMPSON, JJ., concur.

IN THE SUPREME COURT OF FLORIDA

MATTHEW THOGODE,)
)
 Petitioner,)
)
 versus)
)
 STATE OF FLORIDA,)
)
 Respondent.)
 _____)

S.CT. CASE NO. _____
DCA CASE NO. 97-3117

CERTIFICATE OF FONT

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

Respectfully submitted,

JAMES B. GIBSON
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SEVENTH JUDICIAL CIRCUIT

Kenneth Witts

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JAMES R. WULCHAK
Chief, Appellate Division

CHRISTOPHER S. QUARLES
Chief, Capital Appeals

MARLEAH K. HILBRANT
Administrative Assistant

May 24, 1999

FILED
DEBBIE CAUSSEAU

MAY 26 1999

CLERK, SUPREME COURT
By _____

Honorable Debbie Causseaux
Acting Clerk
Supreme Court of Florida
500 South Duval Street
Tallahassee, Florida 32399-1925

Re: Matthew Thogode v. State, Our file No. 99-372, DCA Case No. 97-3117, S.Ct. Case No.

Dear Ms. Causseaux:

Enclosed please find the original and five copies of the jurisdictional brief of the Petitioner. Attached as an appendix is a copy of the Fifth District Court of Appeal opinion dated April 16, 1999. Also attached is a copy of the Certificate of Font.

If you have any suggestions or questions, please do not hesitate to let me know.

Sincerely yours,

A handwritten signature in cursive script that reads "Kenneth Witts".

KENNETH WITTS
Assistant Public Defender

KW/lbh

Enclosures