IN THE SUPREME COURT OF FLORIDA

MARK CHARLES,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent,

DCA CASE NO. 98-871
CASE NO. 95,253

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

PETITIONER'S JURISDICTIONAL BRIEF

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

ROSEMARIE FARRELL
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ATTORNEY FOR PETITIONER

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STATEMENT OF THE CASE AND FACTS

The Petitioner, MARK CHARLES, was convicted of one count of lewd and lascivious assault upon a child under the age of sixteen in case 89-1569 CF-M, and three counts of lewd and lascivious assault upon a child under the age of sixteen in case 89-1910CF-M, second degree felony violations of Section 800.04 (2), Florida Statutes (1988). Charles was sentenced to fifteen years in prison in case 89-1569, to be followed by consecutive probationary periods of fifteen years, in each of the three counts (i.e., 45 years) in case 89-1910. With credit for time served, Charles completed his prison sentence after six years, and began serving his probationary period on August 26, 1996. On September 5, 1997 an affidavit of violation of probation (VOP) was filed, alleging a new law violation, that the Appellant had exposed his genitals to his seven-year-old granddaughter in Tennessee.

At his VOP hearing on January 16, 1998 before the Honorable William Parsons, Charles entered a best interests, "no contest" plea to violation of condition five of his probation, and the court ordered preparation of a pre-sentence investigation (PSI). The petitioner claimed that the new law violation resulted from an innocent act, and that he had entered his plea to save his

granddaughter from having to testify at trial. At his sentencing hearing before Judge Parsons, Charles explained:

> Your Honor, when my granddaughter walked through that door, it was an innocent act, but when she went to mamma's four months later now, nothing was ever said. Four months later my granddaughter said to mamma, I seen grandpa's wee-wee. From that point on, she didn't call my son, she didn't call my daughter, she called the police. When she called the police, they checked my record, sure enough I'm on probation for a sexual case. Hence, I was on a quick railroad, Your Honor. And that is the truth.

(R 43) Consistent with the report on the charges, the petitioner claimed that he had been changing his clothes in the basement laundry room, and the seven year old came to the door.

Defense counsel complained, at sentencing, that there had been no PSI, and that he didn't "have one scrap of paper" telling him from where the facts averred by the state, were coming. His counsel contended that Charles should get credit for the time served on the primary offense in case 89-1569, but the state claimed that the two cases had nothing to do with one another.

The defense argued two bases for mitigation of sentence for the violation of probation: that Charles immediately cooperated with the authority, entered into a plea and gave nobody any trouble, and in essence, said he was sorry that this thing had

happened, and that his plea to the new law violation was solely for the purpose of keeping his granddaughter out of court. Defense counsel requested a low end guidelines sentence of twelve years. The state did not have a copy of the new law conviction, but relying upon a conversation that someone had with "the people up there in Tennessee," maintained that the Appellant was going back to his old ways and deserved a maximum sentence of twenty two years in prison.

The court revoked the petitioner's probation and sentenced him to twenty years in prison, fifteen years in count one, and two and one half years each, on counts two and three.

On appeal, Charles raised the court's refusal to credit time served and credited on the primary offense to the sentence imposed upon revocation of consecutive probation. However, the district court issued a per curiam affirmance citing the cases of ***Howard v. State***, 705 So.2d 947, 948 (Fla. 1st DCA 1998) and ***Maddox v. State***, 708 So.2d 617 (Fla. 5th DCA 1998)(discretionary review pending in this Court), as controlling authority for the affirmance. ***Charles v. State***, 24 Fla. L. Weekly D1091 (Fla. 5th DCA April 30, 1999).

Maddox holds that The Criminal Appeal Reform Act as codified

in Section 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.

A defense motion to stay issuance of mandate pending this court's decision on ***Maddox*** was denied on May 20, 1999.

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), the Petitioner filed his Notice to Invoke the Discretionary Jurisdiction of this Court on June 1, 1999. This brief on jurisdiction follows.

SUMMARY OF ARGUMENT

The decision of the district court, by citing as controlling authority a case pending review in this Court, directly and expressly conflicts with decisions of this Court or other district courts of appeal on the same issue of law. The other case cited is within the same stream of cases which address treatment of unpreserved sentencing error, which issue is pending before this Court.

ARGUMENT

THE DECISION OF THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT, IN ***CHARLES v. STATE***, 24 Fla. L. Weekly D1091(Fla. 5th DCA April 30, 1999), EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF THE SUPREME COURT OF FLORIDA OR OTHER DISTRICT COURTS OF APPEAL.

On appeal, the petitioner raised the issue of the court's failure to grant credit for time served and credited on the primary offense upon revocation of consecutive probation on the additional offenses in a companion case, sentenced on the same 1989 scoresheet. The per curiam affirmance opinion of the Fifth District in the instant case cited as controlling authority the cases ***Howard v. State***, 705 So.2d D248 (Fla. 1st DCA 1998), and ***Maddox v. State***, 708 So.2d 617 (Fla. 5th DCA 1998). ***Maddox*** is currently pending review by this Court. ***Howard*** held that the failure to award credit for time served pursuant to ***Tripp v. State***, 622 So.2d 941 (Fla. 1993) could not be reached on appeal even if the error was apparent on the face of the record, unless it had been preserved, pursuant to The Criminal Appeals Reform Act. ***Howard***, and the cases upon which it relies, address the same issue presently in controversy before the Florida Supreme Court in ***Maddox v. State***, No. 92, 805, 708 So.2d 617 (Fla. 5th

DCA 1998); ***Edwards v. State***, No. 93, 000, 707 So.2d 969 (Fla. 5th DCA 1998); ***Speights v. State***, No. 93, 207, 711 So.2d 167 (Fla. 1st DCA 1998); ***Hyden v. State***, No. 93, 966, 715 So.2d 960 (Fla. 4th DCA 1998), among others. 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.***; Fla. Stat. Section 924.051 (1996). In his appeal to the Florida Supreme Court, Maddox has argued the decision conflicts with ***State v. Hewitt***, 702 So.2d 633 (Fla. 1st DCA 1977); ***Chojnowski v. State***, 705 So.2d 915 (Fla. 2d DCA 1997); ***Pryor v. State***, 704 So.2d 217 (Fla. 3d DCA 1998) and ***Callins v. State***, 698 So.2d 883 (Fla. 4th DCA 1997). More recently, both ***Maddox*** and the instant ***Charles*** case also conflict with ***Mizell v. State***, 23 Fla. L. Weekly D1978 (Fla. 3d DCA August 26, 1998), and its progeny.

Pursuant to ***Jollie v. State***, 405 So.2d 418 (Fla. 1981), where a case is cited by the district Court as controlling authority and that case is currently pending review by the Supreme Court, conflict jurisdiction will lie.

Thus, this Court's discretionary review should be exercised and the decision of the Fifth District Court of Appeal reversed.

CONCLUSION

BASED UPON the cases, authorities, and policies cited herein, the petitioner requests that this Honorable Court accept jurisdiction of this cause, vacate the decision of the District Court of Appeal, Fifth District, and remand with instructions for the District Court to decide the appeal on the merits.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

ROSEMARIE FARRELL
ASSISTANT PUBLIC DEFENDER
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112 Orange Avenue - Suite A
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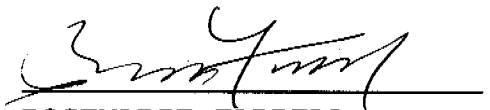
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to: The Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Blvd., Fifth Floor, Daytona Beach, FL 32118, via his basket at the Fifth District Court of Appeal, and mailed to: Mark Charles, this 11th day of June, 1999.



ROSEMARIE FARRELL
ASSISTANT PUBLIC DEFENDER

STATEMENT CERTIFYING FONT

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

ROSEMARIE FARRELL
Assistant Public Defender

IN THE SUPREME COURT OF FLORIDA

MARK CHARLES,	)	
	)	
Petitioner,	)	
	)	
vs.	)	DCA CASE NO. 98-871
	)	CASE NO.
STATE OF FLORIDA,	)	
	)	
Respondent,	)	
	)	

APPENDIX

Charles v. State **Appendix A**
24 Fla.L.Weekly D1091 (Fla.5th DCA April 30, 1999)

So. 2d 831 (Fla. 1997). (BOOTH, JOANOS and WEBSTER, JJ., CONCUR.)

* * *

DWAYNE A. ILES, Appellant, v. GREG DRAKE, et al., Appellee. 1st District. Case No. 98-3312. Opinion filed April 27, 1999. An appeal from the Circuit Court for Taylor County. James Roy Bean, Judge. Counsel: Appellant, pro se. Robert A. Butterworth, Attorney General, Tallahassee, for Appellee.

(PER CURIAM.) DISMISSED. Such dismissal is without prejudice to appellant's right to file a timely notice of appeal upon rendition of a final order in the case below. (WOLF, KAHN and LAWRENCE, JJ., CONCUR.)

* * *

SABINA MARIA VAN TUYN, Appellant, vs. THE STATE OF FLORIDA, Appellee. 3rd District. Case No. 98-1429. L.T. Case No. 86-34279. Opinion filed April 28, 1999. An appeal from the Circuit Court for Dade County, Robert N. Scola, Jr., Judge. Counsel: Frederick C. Sake, for appellant. Robert A. Butterworth, Attorney General and Michael J. Neimand, Assistant Attorney General, for appellee.

(Before COPE, GODERICH, and GREEN, JJ.)

(PER CURIAM.) Based upon this court's decision in *Peart v. State*, 705 So. 2d 1059 (Fla. 3d DCA), *review granted*, 722 So. 2d 193 (Fla. 1998), the appellant's petition for writ of error coram nobis was properly denied.

Affirmed.

* * *

RODERICK D. CLARK, Appellant, vs. METRIC ENGINEERING, INC., Appellee. 3rd District. Case No. 98-1805. L.T. Case No. 96-15144. Opinion filed April 28, 1999. An Appeal from the Circuit Court for Dade County, Alan L. Postman, Judge. Counsel: Cone & Cone; Podhurst, Orseck, Josefsberg, Eaton, Meadow, Olin & Perwin, and Joel S. Perwin, for appellant. Daniels, Kashtan & Fornaris, and John E. Oramas, for appellee.

(Before GERSTEN, GODERICH, and GREEN, JJ.)

(PER CURIAM.) Affirmed. *See Clark v. L. & A. Contracting Co.*, 23 Fla. L. Weekly D2692 (Fla. 3d DCA Dec. 9, 1998); *Metropolitan Dade County v. Colina*, 456 So. 2d 1233 (Fla. 3d DCA 1984), *review denied*, 464 So. 2d 554 (Fla. 1985). (GERSTEN and GODERICH, JJ., concur.)

(GREEN, J., specially concurring.) By virtue of this court's denial of the motion for en banc rehearing of *Clark v. L. & A. Contracting Co.*, 23 Fla. L. Weekly D2692 (Fla. 3d DCA Dec. 9, 1998) (Shevin, J., dissenting), I agree that we are compelled to affirm the summary judgment in this cause. However, with all due respect, I believe that *Clark* was not correctly decided for the reasons expressed in Judge Shevin's dissent in that case. *See id.* at D2692.

* * *

JOSE MENDEZ, Appellant, vs. JOSE MIGUEL BATTLE, et al., Appellees. 3rd District. Case No. 98-2240. L.T. Case No. 97-25817. Opinion filed April 28, 1999. An Appeal from the Circuit Court for Dade County, David L. Tobin, Judge. Counsel: John J. Spittler, Jr., for appellant. Robert C. Maland; Jack R. Blumenfeld; Ross & Tilghman and Lauri Waldman Ross, for appellee.

(Before COPE, LEVY, and GODERICH, JJ.)

(PER CURIAM.) In view of the fact that the record does not reflect an abuse of discretion by the trial court, the order appealed from is affirmed.

* * *

STAMBAUGH'S AIR SERVICE, INC., Appellant, vs. AVIATION ENTERPRISES INTERNATIONAL, INC., Appellee. 3rd District. Case No. 98-2875. L.T. Case No. 96-19320. Opinion filed April 28, 1999. An Appeal from the Circuit Court for Dade County, David L. Tobin, Judge. Counsel: Seipp, Flick & Kissane and Daniel J. Kissane, for appellant. McDonald & McDonald and H.C. Palmer, III, for appellee.

(Before COPE, LEVY, and GODERICH, JJ.)

(PER CURIAM.) The Final Judgment entered by the trial court is affirmed in all respects, including the finding that appellee is entitled to recover reasonable attorney's fees.[1]

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[1]After finding that appellee was entitled to recover reasonable attorney's fees, the trial court reserved jurisdiction to determine the amount of those fees at a later date.

* * *

DAVID BRUNSON, Appellant, v. STATE OF FLORIDA, Appellee. 4th District. Case No. 98-0387. Opinion filed April 28, 1999. Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Robert B. Carney, Judge; L.T. Case No. 96-7733 CF 10 A. Counsel: Richard L. Jorandby, Public Defender, and Valentin Rodriguez, Jr. of Valentin Rodriguez, P.A., West Palm Beach, Special Assistant Public Defender, for appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Don M. Rogers, Assistant Attorney General, West Palm Beach, for appellee.

(PER CURIAM.) Affirmed without prejudice to appellant seeking post-conviction relief on the issue of his sentence as a habitual violent felony offender. (GUNTHER, FARMER and TAYLOR, JJ., concur.)

* * *

ANTHONY PARKS, Appellant, v. PROVENCE CONDOMINIUM ASSOCIATION, INC., Appellee. 4th District. Case Nos. 97-1320 and 97-4287. Opinion filed April 28, 1999. Consolidated appeals from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Kathleen J. Kroll and Walter N. Colbath, Jr., Judges; L.T. Case No. 96-1521 AG. Counsel: Anthony Parks, Boca Raton, pro se. Charles L. Jaffee, Deerfield Beach, for appellee.

ON MOTION FOR REHEARING

(PER CURIAM.) We deny appellant's motion for rehearing. Case No. 97-4287 was previously consolidated with Case No. 97-1320 by court order. We, therefore, substitute the following for the decision issued March 3, 1999 to correct the style of the case and to include the per curiam affirmance of Case # 97-4287.

AFFIRMED. (DELL, STEVENSON and HAZOURI, JJ., concur.)

* * *

CHARLES v. STATE. 5th District. #98-871. April 30, 1999. Appeal from the Circuit Court for Putnam County. AFFIRMED. *Howard v. State*, 705 So. 2d 947, 948 (Fla. 1st DCA 1998); *see also Maddox v. State*, 708 So. 2d 617 (Fla. 5th DCA 1998), *rev. granted*, Table No. 92,805 (Fla. Feb. 17, 1999).

CARSON v. STATE. 5th District. #98-2281. April 30, 1999. Appeal from the Circuit Court for Orange County. AFFIRMED. *See* § 921.0012, 775.0845, 777.04; *Lamont v. State*, 610 So.2d 435 (Fla. 1992); *Maddox v. State*, 708 So.2d 617 (Fla. 5th DCA), *rev. granted*, 718 So.2d 169 (Fla. 1998); *Sanders v. State*, 621 So.2d 723 (Fla. 5th DCA 1993).

CHANDRA v. GODODIA. 5th District. #98-1547. April 30, 1999. Appeal from the Circuit Court for Brevard County. AFFIRMED. *See Moritz v. Hoyt Enterprises, Inc.*, 604 So. 2d 807 (Fla. 1992).

SHAKAR v. STATE. 5th District. #98-1456. April 30, 1999. Appeal from the Circuit Court for Seminole County. AFFIRMED. *See State v. Schopp*, 653 So. 2d 1016 (Fla. 1995).

WARD v. SIKES. 5th District. #97-2566. April 30, 1999. Appeal from the Circuit Court for Hernando County. The final judgment is affirmed. *See Providence Square Association, Inc. v. Biancardi*, 507 So. 2d 1366 (Fla. 1987); *In re Estate of Barry*, 689 So. 2d 1186 (Fla. 4th DCA 1997); *Seaside Community Development Corp. v. Edwards*, 573 So. 2d 142, 145 (Fla. 1st DCA 1991); *Ivens Corp. v. Hobe Cie Ltd.*, 555 So. 2d 425 (Fla. 3d DCA 1989), *rev. denied*, 564 So. 2d 1086 (Fla. 1990); *Engle Mortgage Co., Inc. v. Dowd*, 355 So. 2d 1210 (Fla. 1st DCA 1977), *cert. denied*, 358 So. 2d 130 (Fla. 1978); *GAC Properties, Inc. v. Carmine*, 258 So. 2d 466 (Fla. 3d DCA 1971).

AFFIRMED.

* * *

HICKS v. STATE. 4th District. #98-3242. April 28, 1999. Appeal from the Circuit Court for the Nineteenth Judicial Circuit, Indian River County. AFFIRMED. *See Bakos v. State*, 698 So.2d 943 (Fla. 4th DCA 1997).