ORIGINAL

In The Supreme Court of Florida

DOCKET NO. 95,949

BRIAN McLEAN,

Petitioner,

v.

THE STATE OF FLORIDA,

Respondent
_____/

ON PETITION FOR DISCRETIONARY REVIEW
OF A DECISION OF THE DISTRICT COURT OF APPEAL,
FIRST DISTRICT OF FLORIDA

JURISDICTIONAL BRIEF OF PETITIONER

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PRELIMINARY STATEMENT

BRIAN McLEAN was the defendant in the trial court and appellant before the District Court of Appeal, First District. He will be referred to in this brief as "petitioner," "defendant," or by his proper name.

Citations in this brief to designate record references are as follows:

"R. ____" – Record on Appeal, Vol. I, including transcript of sentencing (R. 178-192);

"T. ____" – Transcript of trial proceedings, Vols. II through IV.

Filed with this brief is an appendix containing a copy of the decision on which review is sought, *McLean v. State*, 24 Fla. L. Weekly D_____ (Fla. 1st DCA June 2, 1999). Reference to the

appendix will be "A ____." All cited references will be followed by the relevant page number(s). All other citations will be self-explanatory or will otherwise be explained.

Pursuant to an Administrative Order of this Court dated July 13, 1998, counsel certifies this brief is printed in Courier New 10 cpi, a non-proportional font.

STATEMENT OF THE CASE AND THE FACTS

At sentencing on January 23, 1998, the court imposed a sentence of 10 years on each count, count II to be consecutive to Count I. The court also announced the imposition of a total of $253 in mandatory costs and credit for time in custody. [R. 191].

The prosecutor stated to the court that he had two restitution orders. However, the court did not announce that it was imposing restitution nor did it refer to restitution as part of the sentence [R. 191]. Nor did the court reserve jurisdiction to determine whether restitution was due or to determine the amount thereof. The court did not advise the defendant that he had a right to a hearing on the issue of restitution or upon the amount of restitution to be imposed, nor did the court elicit from the defendant waivers on a hearing or determination of restitution.

However, on January 23, 1998, the court rendered two Judgments and Restitution Orders, one in the sum of $90 to the Sexual Assault Treatment Center and a second in the amount of $150 to the Victim Compensation Trust Fund [R. 88-91].

The record shows that the defendant did not object to the imposition of restitution in the trial court or file a Rule 3.800(b) motion to correct or challenge the judgments of restitution.

On appeal to the district court of appeal, the petitioner

argued, *inter alia*, that the failure of the court altogether to announce the imposition of restitution and the amount thereof constituted a procedural due process violation when the court then entered restitution judgments against the defendant, and that the failure to announce the imposition of restitution and the failure to give notice of the right to a hearing thereon in violation of due process is fundamental such that it may be addressed on direct appeal.

The district court concluded that the issue of the failure to announce the imposition of restitution or give the defendant notice of the intent to impose restitution and notice of the right to have a hearing hereon was not preserved for appeal, citing *Locke v. State*, 719 So. 2d 1249 (Fla. 1st DCA 1998), *rev. pending*, Case No. 94,396, and *Lorenzana v. State*, 717 So. 2d 119 (Fla. 4th DCA 1998). *See* Appendix, attached.

In *Locke v. State*, upon which the District Court relied in rejecting appellant's claim of fundamental error in the post-sentencing imposition of restitution without notice or reservation of jurisdiction, the District Court en banc certified the following question:

> DOES THE FAILURE OF THE TRIAL COURT TO ORALLY PRONOUNCE EACH STATUTORILY AUTHORIZED COST INDIVIDUALLY AT THE TIME OF SENTENCING CONSTITUTE FUNDAMENTAL ERROR?

On July 2, 1999, petitioner filed a timely Notice to Invoke Discretionary Jurisdiction of this Court.

SUMMARY OF ARGUMENT

The district court's decision that the claim regarding imposition of restitution without pronouncement at sentencing or the giving of notice thereof was not preserved, in reliance on *Locke v. State*, is in direct conflict with this court's holding in *State v. Mancino* that "A sentence that patently fails to comport with statutory or constitutional limitations is by definition 'illegal.'" and is, therefor, fundamental error.

The decision is also in conflict with this court's decisions in *Henriquez v. State*, *Jenkins v. State*, *Wood v. State*, and *Beasley v. State*, holding the failure to give notice at sentencing of the imposition of costs and fees and a notice of the right to hearing thereon is fundamental error addressable upon appeal, as well as this Court's decisions in *Hopkins v. State*, 632 So.2d 1372 (Fla. 1994) and *Ray v. State*, 403 So.2d 956 (Fla.1981), holding if a procedural defect is declared fundamental error, then the error can be considered on appeal even though no objection was raised in the lower court.

Further, the decision is in conflict with the Second District Court's decisions in *Denson v. State*, 711 So. 2d 1225 (Fla. 2d DCA 1998), and *Bain v. State*, 730 So. 2d 296 (Fla. 2d DCA 1999)(en banc)(each holding a reviewing court has judicial discretion to address patent errors in record if there is another, preserved issue giving appellate jurisdiction), because

the district court had other preserved issues before it.

This, this Court has discretionary jurisdiction pursuant to Article V, Section (b)(3) and Fla. R. App. P. 9.030(a)(2)(A)(iv).

ARGUMENT

THIS COURT HAS DISCRETIONARY JURISDICTION TO REVIEW THE DECISION OF THE DISTRICT COURT.

In *Harris v. State*, 593 So. 2d 1169, 1170 (Fla. 1st DCA 1992), it was observed that "since the amount of restitution and the manner of its payment were not announced at the sentencing hearing, appellant was not afforded an opportunity to object, in any real sense." *See* § 775.089, Fla Stat. The decision of the district court in the instant case is in conflict with this Court's decision in *State v. Mancino*, 714 So. 2d 429 (Fla. 1998) ("A sentence that patently fails to comport with statutory or constitutional limitations is by definition 'illegal.'" and is fundamental error).

The decision of the district court is also in conflict with this Court's decisions in *Hopkins v. State*, 632 So.2d 1372 (Fla. 1994) and *Ray v. State*, 403 So.2d 956 (Fla.1981), holding if a procedural defect is declared fundamental error, then the error can be considered on appeal even though no objection was raised in the lower court, and in *Henriquez v. State*, 545 So. 2d 1340 (Fla. 1989); *Jenkins v. State*, 444 So. 2d 947 (Fla. 1984); *Wood v. State*, 544 So. 2d 1004 (Fla. 1989); and *Beasley v. State*, 580 So. 2d 139 (Fla. 1991), holding the failure to give notice at sentencing of the imposition of costs and fees and a notice of the right to hearing thereon is fundamental error addressable

upon appeal. *Locke*, upon which the district court relied in holding that petitioner's claim regarding imposition of restitution which was not imposed without notice at sentencing was not preserved, had concluded that this Court's holdings in *Henriquez*, *Jenkins*, *Wood*, and *Beasley* were no longer viable, and is itself in direct conflict with those decisions as well as certifying the question now pending for review by this Court.

The district court decision is also directly conflicts with *Denson v. State*, 711 So. 2d 1225 (Fla. 2d DCA 1998), and *Bain v. State*, 730 So. 2d 296 (Fla. 2d DCA 1999)(en banc)(each holding a reviewing court has judicial discretion to address patent errors in record if there is another, preserved issue giving appellate jurisdiction), because the district court had other preserved issues before it.

For each of the foregoing reasons, this Court has discretionary jurisdiction to review the decision of the district court pursuant to Article V, Section (b)(3), Fla. Const., and Fla. R. App. P. 9.030(a)(2)(A)(iv).

CONCLUSION

Petitioner, BRIAN McLEAN, based on the foregoing analysis and authorities, respectfully argues that he has established that this Court has jurisdiction and requests the Court to issue an order accepting jurisdiction of this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by delivery to Tina Kramer, Esq., Office of the Attorney General, The Capitol, Plaza Level, Tallahassee, Florida, and to the Appellant by U.S. Mail, first-class postage prepaid, on July 12, 1999.

Fred P. Bingham II