

IN THE SUPREME COURT OF THE STATE OF FLORIDA

BRYAN PERRY,)
)
Petitioner,)
)
vs.)
)
STATE OF FLORIDA,)
)
Respondent.)
_____)

Case No. SC 97-119

D.C.A. Case No. 5D99-320

**APPEAL FROM THE DISTRICT COURT
OF APPEAL, FIFTH DISTRICT**

PETITIONER’S REPLY BRIEF ON THE MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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SUMMARY OF ARGUMENT

Petitioner offers the following argument in response to the Respondent's Brief on the Merits:

The Petitioner can demonstrate that his life sentence is unlawful; and the District Court does not dispute Petitioner's claim, it simply refuses to hear it. The Respondent argues that the Petitioner should serve a life sentence, even if he is entitled to a sentence well short of a life term, because the Petitioner's trial counsel failed to utter the "magic words" that would now entitle the Petitioner, and others like him, to relief. The Respondent's argument regarding preservation of sentencing errors - which tracks the position adopted by the Fifth District Court - is evidence in and of itself, that the Maddox decision of the Fifth District Court should be reversed. The courts should never close their doors to the defendant who has been deprived of due process, and who can demonstrate entitlement to relief.

ARGUMENT

THE MADDOX AND SECCIA OPINIONS INCORRECTLY INTERPRET THE CRIMINAL APPEAL REFORM ACT, THUS ALLOWING SUBSTANTIAL SENTENCING ERRORS TO REMAIN UNDETECTED, AND/OR UNREMEDIED.

The State argues that the defendant's complaint as to his original sentence was waived because he did not challenge the sentence when it was first imposed. The Respondent's argument is infirm for two reasons: First, we do not know, because the original judgment and sentence were affirmed without opinion¹, whether the defendant challenged his sentence when it was first imposed, in 1987. However, it is possible that the Petitioner did not challenge his sentence originally, because it was stipulated in the trial court. At the time it was imposed, departures could be founded upon valid plea agreements; and that is how the Petitioner was originally sentenced - pursuant to a negotiated plea. Second, and more important; the Petitioner's present argument does not include any complaint regarding his original sentence. It is the sentence imposed upon revocation that is unlawful; and it is the District Court's refusal to rule on the merits of that argument which has led to the instant petition. And, there can be no question that contrary to the State's present argument, the

¹ Perry v. State, 529 So. 2d 708 (Fla. 5th DCA 1988)

Petitioner's sentence exceeds that applicable guideline range.

The cases cited by the Respondent² support the Petitioner's argument, not the respondent's. This Court, in Franklin v. State, 545 So. 2d 851,852 (Fla. 1988), ruled as follows:

Upon the violation of probation, however, the judge then may sentence the defendant to any period of incarceration permitted by the guidelines up to the maximum provided by the one-cell upward increase, with credit for time served.

In Poore v. State, 531 So. 2d 161,165 (Fla. 1988), this Court stated:

We stress, however, that the cumulative incarceration imposed after violation of probation always will be subject to any limitations imposed by the sentencing guidelines recommendation. We reject any suggestion that the guidelines do not limit the cumulative prison term of any split sentence upon a violation of probation. To the contrary, the guidelines manifestly are intended to apply to any incarceration imposed after their effective date, whether characterized as a resentencing or revocation of probation. [...]

Upon remand, the trial court shall not be permitted to order petitioner's incarceration for any period exceeding either the guidelines recommendation or the remainder of the original split sentence, *whichever is less*. (Emphasis added)

The trial court, in this case, was thus limited to a one cell "bump" upward, from

² Respondent's Brief, Pg. 9.

the departure sentence to which the defendant originally agreed. It must be stressed that the District Court in this case did not refute this premise; it simply refused to apply it to the undisputed facts. The State, here, as the District Court ruled, appears to argue³ that while the defendant's life sentence may well be illegal, it is "not unfair" to have him continue to suffer it, unless or until he succeeds in overturning it by collateral attack. Petitioner must ask: "not unfair" to whom? Is this situation unfair to the Petitioner? The answer is "yes". As this Court noted⁴, many defendants similarly situated are unaware of the need to pursue post-conviction remedies. Or, even if aware, they may nevertheless forfeit relief because they have neither the skill nor financial resources to pursue it. Would resolution of this issue on direct appeal be unfair to the State? It is difficult to imagine how it would be. Would resolution on direct appeal be unfair to the District Court? Again, it is difficult to imagine how it is unfair to ask the intermediate appellate court to resolve an issue for which the relevant facts and law have been presented. Indeed, it is "not unfair" to say that such is the function of the District Courts. Prisoners like the Petitioner should not serve life terms, despite their entitlement to release after serving

³ Respondent's Brief, Pg. 12.

⁴ Amendment to Fla. Rules of Procedure, 24 Fla. L. Weekly S530,531 (Fla. Nov. 12, 1999)

a far shorter term of years, simply because the trial attorney, the prosecutor, and the sentencing judge were unaware that the life sentence was unlawful.

CONCLUSION

Based upon the foregoing arguments, and the authorities cited therein, Petitioner respectfully requests that this Court overturn the Maddox and Seccia Opinions of the lower courts, and remand this case to the District Court for a decision on the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been delivered to the Honorable Robert Butterworth, Attorney General, 444 Seabreeze Blvd., Fifth Floor, Daytona Beach, FL 32118, and mailed to: Mr. Bryan Perry, DC # 109552, Liberty Correctional Institution, H.C.R. 2, Box 144, Bristol FL 32321-9711, on this _____ day of April, 2000.

NOEL A. PELELLA
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CERTIFICATE OF FONT

I hereby certify that the size and style of type used in this brief is
point proportionally spaced Times New Roman, 14 pt.

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