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IN THE SUPREME COURT OF FLORIDA

FILED
THOMAS D. HALL
JUL 26 2000
CLERK, SUPREME COURT
BY_____

PAUL WAYNE NEW,
a/k/a JOHN WAYNE NEW,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.
_____/

CASE NO.: 00-1240
L.T. CASE NO.: 1D99-3888

APPELLANT'S BRIEF ON MERITS

(pursuant to Fla.R.App.P., Rule 9.120(f))

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CERTIFICATE OF FONT SIZE AND TYPE

The Appellant certifies that the type font used in this brief is Legal Prestige 10 point.

PRELIMINARY STATEMENT

In this brief, the Appellant is Paul Wayne New and shall be referred to as the Appellant or Defendant throughout this brief. The Appellee is the State of Florida, and shall be referred as the State or the Appellee.

SUMMARY OF ARGUMENT

The Appellant argues that State V. Hudson, 698 So.2d 831 (Fla. 1997), which this Honorable Court clarified that Florida Statute § 775.084(4)(a) and (4)(b) is permissive, not mandatory and should be applied retroactively. Clearly a manatory sentence keeps a person incarcerated for a longer period than a permissive sentence does. Thus, this becomes fundamental and requires retroactive application.

STATEMENT OF THE FACTS AND CASE

Appellant plead guilty on November 1, 1994, to three counts of robbery and was sentenced as an Habitual Violent Felony Offender (H.V.F.O.) to fifteen years of incarceration for each count, with the sentences running concurrently. Each sentence also contained a H.V.F.O. minimum mandatory term of ten years. The Appellant did not take a direct appeal of his convictions and sentences.

Appellant addressed two issues in his Motion for Post-Conviction Relief 1) claiming ineffective assistance of counsel and; 2) that the trial court unknowingly failed to exercise it's discretion in sentencing the Appellant.

The sole justification by the trial court for the denial of Appellant's motion as being procedurally barred was that it was untimely filed more than two years after his convictions became final, citing, **Gust V. State**, 535 So.2d 642 (Fla. 1DCA, 1988). The trial court only attached the court records that referred to the sentencing and plea.

Appellant expressed in his Motion for Rehearing that the trial court overlooked the controlling case of **Adams V. State**, 543 So.2d 1244 (Fla. 1989) which addresses how long a prisoner has to seek relief after a fundamental change occurs. The Florida Supreme Court explained that a prisoner has two years from the time a fundamental change is "announced" in which to file for relief pursuant to rule 3.850(b)(2). The Second District Court of Appeal echoed this exact opinion in **Sikes V. State**, 683 So.2d 599 at 600 (Fla. 2DCA, 1996).

Appellant cited **State V. Hudson**, 698 So.2d 831 (Fla. 1997) as the relevant change in the law which was announced on August 28, 1997, therefore, the Appellant had until August 28, 1999 to file this motion for post-conviction relief.

Appellant cited **Newell V. State**, 714 So.2d 434 (Fla. 1998) which clarified that a motion for post-conviction relief was the proper vehicle to use to address this issue as to Florida Statute § 775.084(4)(b) being permissive and not mandatory.

For the forgoing reasons, Appellant appealed to the First District Court of Appeal and respectfully asked the Court to direct the trial court to reverse and remand with directions to either attach portions of the record to refute the Appellant's allegations or to proceed with an evidentary/resentencing hearing.

The District Court rendered their opinion on May 15, 2000, cited as **New V. State**, 25 FLW D1223, stating the following: "(PER CURIAM.) Affirmed. See **Anthony V. State**, 25 Fla. L. Weekly D289 (Fla.2d DCA, Jan. 26, 2000). We certify conflict with **Crawford V. State**, 735 So.2d 514 (Fla. 3d DCA, 1999). (Allen, Lawrence, and Benton, JJ., CONCUR.)"

Appellant timely submits this Brief on the Merits pursuant to Fla.R.App.P., Rule 9.120(f) to this Honorable Court addressing the certified conflict. Appellant also invokes "The Mail Box Rule", pursuant to **Haag V. State**, 591 So.2d 614 (Fla. 1992), by placing it in the Florida Department of Corrections Institutional mail on this 21st day of July, 2000.

The Appellant prayers that this Honorable Court is lenient with this pro se, prisoner's litigations, this Court has a long history of liberal interpretation of pro se prisoners as in **Roy V. Wainwright**, 151 So.2d 825 (Fla. 1963).

ARGUMENT

WHETHER STATE V. HUDSON, 698 So.2d 831 (Fla. 1997) APPLIES RETROACTIVELY REGARDING FLA. STAT. § 775.084(4)(a) AND (4)(b) BEING PERMISSIVE AND NOT MANDATORY?

The Appellant claims that there was a relevant change in the law. This change cleared up the haze surrounding whether the habitual violent offender must be sentenced, or at the judge's discretion can be sentenced, to a minimum mandatory sentence. Refer to **State V. Hudson**, 698 So.2d 831 (Fla. 1997), this Court clarified this flaw on August 28, 1997, saying:

> "...we held that sentencing under both subsection (4)(a) and (4)(b) **is permissive** and not mandatory. Burdick, 594 So.2d at 267-68." (Emphasis added)

The Appellant while citing **Hudson**, also cited Fla.R.Crim.P., Rule 3.850(b)(1). It became obvious that the trial court and the First District Court did not recognize either of the aforementioned authorities.

This Honorable Court further clarified and held in **Newell V. State**, 714 So.2d 434 (Fla. 1998) that a motion for post-conviction relief was the proper remedy to use when addressing this issue as to Fla.Stat. § 775.084(4)(b) being permissive and not mandatory.

To address the issue of whether this Honorable Court should apply **Hudson** retroactively, the Appellate brings forth the cases of **Adams V. Dugger**, 816 F.2d 1493, 1497 (C.A. 11, 1987) and **Gilliam V. State**, 582 So.2d 610, 612 (Fla. 1991). **Adams**, quotes the following:

> "Reynolds V. State, 429 So.2d 1331, 1333 (Fla. App. 1983) (**sentencing error that could cause defendant to be incarcerated for greater length of time than provided by law is fundamental** and 'petitioner is entitled to relief in any and every manner possible'). In Fact, Adams' Caldwell claim is the very type of claim for which Florida created the Rule 3.850 procedure." (Emphasis added)

In this case sub judice, the Appellant is faced, as **Adams** was with greater incarceration. The trial court stated that he was obligated by law to sentence the Appellant to a minimum mandatory sentence, instead of a straight sentence which would permit the Appellant to earn gain time; therefore, he would be released from custody sooner.

This Honorable Court applied the adoption of the fundamental issue in **Gilliam**, and presented the follow opinion:

> "As we said in Witt V. State, 387 So.2d 922, 929 (Fla. 1980) **only 'fundamental** and constitutional law changes which cast serious doubt on the veracity or integrity of the original trial proceeding' -- in effect, 'jurisprudential upheavals' -- **require retroactive application**;" (Emphasis added)

When applying the elements of what constitutes "fundamental" and how fundamental applies to "retroactive" this Court can clearly justify the need of the retroactive requirement of **Hudson**. Mandatory versus permissive sentencing is beyond any doubt much harsher, causing the Appellant to remain incarcerated for a longer length of time.

CONCLUSION

Based on the foregoing argument, reasoning, and citation of authority, Appellant respectfully asks this Honorable Court to reverse the judgment of the First District Court of Appeal and direct the trial judge to resentence the Appellant in accordance with **Hudson**.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to the Office of the Attorney General, Dept. of Legal Affairs, The Capitol, PL01, Tallahassee, Florida 32399-1050 on this 21st day of July, 2000.

Respectfully submitted,

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