IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

Case No. 2000-80

Fifth DCA Case No. 99-2834

DONALD L. THOMAS,

Respondent.
_____/

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

JURISDICTIONAL BRIEF OF PETITIONER

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CERTIFICATR OF FONT AND TYPE SIZE

The undersigned counsel certifies that this brief was typed using 12 point Courier New, a font that is not proportionately spaced.

STATEMENT OF FACTS

The relevant facts are set forth in the opinion of the district court below:

> Thomas was convicted of two counts of a lewd and lascivious act in the presence of a child. At sentencing on June 8, 1998, the prosecutor presented evidence that Thomas qualified as both a violent career criminal and as a prison releasee reoffender. See generally, sections 775.084 (l)(d) and 775.082(9), Fla. Stat. (1999). When asked to respond, defense counsel indicated that the prosecutor had to elect an enhancement, and further argued that the Prison Releasee Reoffender Act was unconstitutional.
>
> The trial court declared that Thomas was a violent career criminal and sentenced him to thirty years on each count, to run concurrently. The trial court also found Thomas to be a prison releasee reoffender and orally pronounced a fifteen year term of imprisonment on each count, to run concurrently with his violent career criminal sentences. After sentencing was imposed, defense counsel raised an objection as to the "double sentencing." The trial judge overruled the objection, stating he did not think that double jeopardy would prohibit the sentencing scheme, and added that the appellate court would review it and might make some decision on it.

Thomas v. State, 24 Fla. L. Weekly D2763 (Fla. 5th DCA December 10, 1999).

SUMMARY OF ARGUMENT

This Court should accept jurisdiction of this case because the opinion of the district court upholding Thomas's sentence as a violent career criminal expressly and directly conflicts with State v. Thompson, Case No. 92,831 (Fla. December 22, 1999). Also, the decision of the district court finding that Thomas's sentence violated of the constitutional protection against double jeopardy expressly and directly conflicts with Grant v. State, 24 Fla. L. Weekly D2627 (Fla. 2d DCA November 24, 1999).

ARGUMENT

THIS COURT SHOULD ACCEPT JURISDICTION OF THIS CASE BECAUSE THE OPINION OF THE FIFTH DISTRICT COURT OF APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH A DECISION OF THIS COURT AND A DECISION OF ANOTHER DISTRICT COURT.

This Court has jurisdiction under article V, section (3)(b)(3) of the Florida Constitution where a decision of a district court "expressly and directly conflicts" with a decision of this Court or another district court. This Court has repeatedly held that such conflict must be express and direct, that is, "it must appear within the four corners of the majority decision." Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986).

Here, the district court concluded that Thomas's concurrent sentences as both a violent career criminal and a prison releasee reoffender violated the constitutional protection against double jeopardy because he was sentenced twice for the same crime. See Thomas, 24 Fla. L. Weekly at D2763. Finding the dual sentences unconstitutional, the district court upheld Thomas's thirty year sentence as a violent career criminal and vacated his concurrent fifteen year sentence as a prison releasee reoffender. Id.

This determination expressly and directly conflicts with the opinion of this Court in State v. Thompson, Case NO. 92,831 (Fla. December 22, 1999) wherein this Court declared that the violent career criminal sentencing scheme violated the single subject rule,

and was unconstitutional. Because the opinion of the district court here upholding the violent career criminal sentence expressly and directly conflicts with Thompson, this Court must accept jurisdiction of this case to strike the violent career criminal sentence and reinstate the prison releasee reoffender sentence.

In addition, the finding that Thomas's sentence as both a violent career criminal and a prison releasee reoffender violates double jeopardy expressly and directly conflicts with Grant v. State, 24 Fla. L. Weekly D2627 (Fla. 2d DCA November 24, 1999). There, the Second District determined that there was no double jeopardy violation for the defendant's sentence as both a habitual felony offender and a prison releasee reoffender because the minimum mandatory sentence as a prison releasee reoffender was to run concurrently with the habitual felony offender sentence. Grant, 24 Fla. L. Weekly at D2628. Because the sentences ran concurrently, there was no double jeopardy violation. Id.

This determination expressly and directly conflicts the opinion of the district court here as this Court determined that the concurrent prison releasee reoffender and violent career criminal sentences did violate double jeopardy. Thomas, 24 Fla. L. Weekly at D2763. See also See also Melton v. State, 24 Fla. L. Weekly D2719 (Fla. 4th DCA December 8, 1999)(sentence as both prison releasee reoffender and habitual felony offender violated double jeopardy); Adams v. State, 24 Fla. L. Weekly D2394 (Fla. 4th

DCA October 20, 1999)(same).

Because an express and direct conflict exists regarding the implication of double jeopardy when a mandatory minimum sentence is imposed concurrently with a prison release reoffender sentence, this Court should accept jurisdiction of this case.

CONCLUSION

Based on the foregoing argument and authority, the State respectfully requests that this Court accept jurisdiction of this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing brief on jurisdiction has been furnished by United States Mail to Donald L. Thomas, DOC No. 092093, Madison Correctional Institution, P.O. Box 692, Madison, Florida, 32341-0692, this 10th day of January, 2000.

MARY G. JOLLEY
COUNSEL FOR/PETITIONER

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,
Petitioner,

v. Case No.

Fifth DCA Case No. 99-2834

DONALD L. THOMAS,

Respondent.
_____/

APPENDIX

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there is no evidence tosupportthe finding that restitution outweighs the need for a guidelines sentence and because it is clear this multi-offender fits the profile of those who need to be segregated from the general public, it was error to allow him to stay out of prison. He was not a minor participant, he admitted being a dealer in stolen propcrty and the facts support his having been the burglar and thief.

The sentence is vacated and this cause remanded for a sentence in accordance with the guidelines.

SENTENCE VACATED; REMANDED. (ANTOON, C.J., and HARRIS, J., concur.)

* * *

Criminal law-Habeas corpus-Belated appeal-Petition alleging that counsel failed to file notice of appeal despite defendant's timely request that notice of appeal be filed is facially insufficient where petition was not made under oath

RONDALE HALL, Petitioner, v. STATE OF FLORIDA, Respondent. 5th District. Case No. 99-2583. Opinion filed December 10, 1999. Petition for Writ of Habeas Corpus. A Case of Original Jurisdiction. Counsel: Rondale Hall. Chipley, pm se. Robert A. Butterworth, Attorney General. Tallahassee, and Kellie A. Nielan, Assistant Attorney General, Daytona Beach, for Respondent.

(THOMPSON, J.) Petitioner, Rondale Hall, seeks a petition for writ of habeas corpus for a belated appeal claiming that he timely requested his attorney to file a notice of appeal and the attorney did not. Wedenythepetitionwithout prejudice because Hall's petition is legally insufficient. Hall may refile his petition under oath.

Florida Rule of Appellate Procedure 9.140(j)(2)(F) provides that a petition seeking a belated appeal shall include "the specific facts sworn to by the petitioner or petitioner's counsel that constitute the alleged ineffective assistance of counsel . . . ." However, the petition in this case was not madeunderoath. Therefore, it is facially insufficient. See *State* v. *Trowell*, 739 So. 2d 77 (Fla. 1999) (court should grant belated appeal if petitioner complies with Rule 9.140(j)(2)(F) and alleges that he made a timely request ofcounsel to file notice of appeal, and counsel failed to do so).

Petition for Writ of Habeas Corpus DENIED without Prejudice. (ANTOON, C.J., and SHARP, W., J., concur.)

* * *

Criminal law--Post conviction relief-Defendant prohibited from filing frivolousappeals, pleadings, petitions or motions-Violation of court's instructions will result in order directing forfeiture of gain time and issuance of show cause order as to why defendant should not be denied further access to court

WAYNE CARNES, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 99-2656. Opinion filed December 10, 1999. 3.850 Appeal from the Circuit Court for Volusia County, William C. Johnson, Jr., Judge. Counsel: Wayne Carnes, Starke. pro se. No Appearance fur Appellee.

(PER CURIAM.) Appellant's latest request for post-conviction relief is rejected.

We prohibit Carnes from filing any more frivolous appeals, pleadings, petitions, or motions. There will be consequences if he persists. First, any future violations of this court's instruction will result in an order directed to the Department of Corrections to forfeit Carnes's gain time pursuant to sections 944.279, 944.28(2)(a), Florida Statutes (1997). ***See Rivera v. State, 728 So.*** 2d 1165 (Fla. 1998); ***Bradley*** v. *State*, 703 So. 2d 1176 (Fla. 5th DCA 1997); ***Hall*** v. ***State, 698 So.*** 2d 576 (Fla. 5th DCA 1997). ***rev. granted, 698 So.*** 2d 576 (Fla. 1998). Second, this court will issue a show cause order pursuant to ***State v. Spencer,*** 1999 WL 742294 (Fla. Sept. 23, 1999), as to why he should not be denied further access to this court.

AFFIRMED. (DAUKSCH and SHARP, W., JJ., concur. GRIFFIN, J., concurs specially, with opinion.)

-(GRIFFIN, J., concurring specially.) I concur because the majority opinion is consistent with prior case law of this court. I continue to maintain, however, as I did in ***Bradley v. State, 703 So.*** 2d 1176 (Fla. 5th DCA 1997) (Griffin, J., dissenting) that when section 944.279 was enacted, criminal appeals were not intended by the legislature tobeincluded. *See also Saucer v.* ***State,*** 736 So. 2d 10, 12 (Fla. 1st DCA 1998) (Webster, J., dissenting). I also agree with the decision of the Second District Court of Appeal in *Mercade v. State,* 698 So. 2d 1313 (Fla. 2dDCA 1997) and the First District in *Martin* v. *Singletary*, 713 So. 2d 1056 (Fla. 1st DCA 1998) that the decision whetherto forfeit gain time lies with the Department of Corrections, not with the appellate court.

* * *

Criminal law—Habeas corpus-Ineffcctivcncss of appellate counsel-Appellate counsel was ineffective for failing to assert on appeal that imposition of violent career criminal sentence and prison releasee reoffender sentence for the same offense violated defendant's double jeopardy rights-Prison releasee reoffender sentences vacated

DONALD L. THOMAS, Petitioner, v. STATE OF FLORIDA, Respondent. 5th District. Case No. 99-2834. Opinion filed December 10, 1999. Petition for Writ of Habeas Corpus, A Case of Original Jurisdiction. Counsel: Donald L. Thomas Madison, pm se. Robert A. Butterworth, Attorney General, Tallahassee, and Mary G. Jolley, Assistant Attorney General, Daytona Beach, for Respondent.

(COBB, J.) Petitioner, Donald L. Thomas, alleges ineffective assistance of appellate counsel for not raising a double jeopardy issue on appeal. See Fla. R. App. P. 9.140(j). Thomas was convicted of two counts of a lewd and lascivious act in the presence of a child. At sentencing on June 8, 1998, the prosecutor presented evidence that Thomas qualified as both a violent career criminal and as a prison releasee reoffender. *See generally*, §§ 775.084(1)(d) and 775.082(9), Fla. Stat. (1999). When asked to respond, defense counsel indicated that the prosecutor had to elect an enhancement, and further argued that the Prison Releasee Reoffender Act was unconstitutional.

The trial court declared that Thomas was a violent career criminal and sentenced him to thirty years incarceration on each count, to run concurrently. The trial court also found Thomas to be a prison releasee reoffender and orally pronounced a fifteen year term of imprisonment on each count, to run concurrently with his violent career criminal sentences. After sentence was imposed, defense counsel raised anobjection as to the "double sentencing." The trial judge overruled the objection, stating that he did not think that double jeopardy would prohibit the sentencing scheme, and added that the appellate court would review it and might make some decision on it.

On direct appeal, appellate counsel filed an *Anders* brief, and the double jeopardy issue was not raised. Although the initial brief stated that the court found Thomas to be a prison releasee reoffender. the brief did not mention that the court imposed fifteen year sentences in addition to the thirty year sentences.

It is fundamental that a person cannot be sentenced twice for the same offense, yet in this case that is precisely what happened when the judge imposed two sentences for each conviction. This was a violationofthe constitutional prohibition against double jeopardy. *See Adams* v. ***State,*** 24 Fla. L. Weekly D2394 (Fla. 4th DCA Oct. 20, 1999). A double jeopardy violation constitutes fundamental error,[2] and appellate counsel was ineffective for failing to raise this issue on appeal.

The petition alleging ineffective assistance of appellate counsel is granted. As the record before us shows that Thomas was sentenced twice for each offense, it would serve no useful purpose to allowasecond appeal. ***Cf. Johnson v. Wainwright, 498 So.*** 2d 938 (Fla. 1986). We therefore vacate the fifteen year PRR sentences. *See* §775.082(9)(c), Fla. Stat. (1999).

PETITIONGRANTED: SENTENCES VACATED. (PETERSON and THOMPSON, JJ., concur.)

[1] *See generally*, U.S. Const. amend. V; Art. I. § 9, Fla. Const.

[2] *See Lippman v. State. 633 So.* 2d *1061* (Fla. *1994); State v. Johnson, 483 SO.* 2d 420 (Fla. 1986).

* * *

Contempt-Habeas corpus-Incarceration for failure to pay child support-Where petitioner failed to comply with order to supplement record on appeal with several items, including transcript of hearing, and lower court found in judgment and sentence for contempt that petitioner had present ability to pay, there is no basis for appellate court to determine that trial court's finding was not supported by competent substantial evidence-Writ denied

NICHOLAS D. ROEHRICK, Petitioner, v. KELLY L. WHEELER, Respondent. 5th District. Case No. 99-3050. Opinion filed December 10, 1999. Petition for Writ of Habeas Corpus, A Case of Original Jurisdiction, Counsel: Sarah E. Arnold, of Sarah E. Arnold, P.A., Orlando, for Petitioner. No Appearance for