IN THE SUPREME COURT OF FLORIDA

WILFRID METELLUS,

Petitioner, S. CT. CASE NO. SC02-1494

vs. DCA CASE NO. 5D01-1044

STATE OF FLORIDA,

Respondent.
_____/

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT, AND THE NINTH JUDICIAL CIRCUIT IN AND FOR ORANGE COUNTY, FLORIDA

PETITIONER'S REPLY BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

The Petitioner was the Defendant and the Respondent was the Prosecution in the Ninth Judicial Circuit Court, in and for Orange County, Florida. In the Brief the Respondent will be called "Respondent" and the Defendant will be called "Petitioner."

The instant case is a consolidated appeal of six cases, CR99-43, CR99-699, CR99-736, CR99-1254, CR99-1907, CR98-14790. The record of CR99-699 will serve as the record on appeal. In the brief the following symbols will be used: "R"- Volume two of the Record on Appeal, "T"- Transcript of the hearing on the motion to vacate sentence and transcript of the resentencing, Volume one of the Record on Appeal, "S" - Supplemental Record on Appeal, "IB"- initial brief filed by Petitioner, and "AB"- answer brief filed by Respondent.

STATEMENT OF THE FACTS

Respondent's statement of the facts is substantially accurate, save for two statements which are potentially misleading. In an abundance of caution these statements are now refuted as follows:

I. Respondent states that, "Long after the notice of appeal had been filed, on July 10, 2001 Petitioner filed a motion to correct sentencing error." (AB16).

It is true that the notice of appeal was filed on April 3, 2001 and the motion to correct sentencing error was filed on July 3, 2001 (R 166;Vol.2,S 156-160; Vol.1). However, the Clerk of the Circuit Court did not certify the completed record until June 4, 2001 (R 172;Vol.2). Furthermore, Respondent never objected to the motion to correct sentencing error.

II. Respondent states that, "Petitioner had failed to include a transcript of this hearing in the appellate record." (AB17).

Petitioner would point out that under Florida Rule of Appellate Procedure 9.200 Respondent could have supplemented the record with a transcript of the hearing on the motion to correct sentencing error. Rules 9.200(e) and 9.200(f) provide:

> (e) Duties of Appellant or Petitioner. The burden to ensure that the record is prepared and transmitted in accordance with these rules shall be on the petitioner or

> appellant. *Any party may enforce the provisions of this rule by motion.*
> (f) Correcting and Supplementing Record.
> (1) If there is an error or omission in the record, the *parties by stipulation*, the lower tribunal before the record is transmitted, or the court may correct the record. (emphasis supplied)

Apparently Respondent did not find the hearing relevant, since no motion to supplement the record on appeal with a transcript of the hearing appears in the record.

Additionally, under Kimbrough v. State, 766 So.2d 1255 (Fla. 5th DCA 2000), the Petitioner's motion to correct sentencing error was deemed denied when the trial court failed to rule on the motion within sixty days.

ARGUMENT

IN REPLY TO RESPONDENT'S ASSERTION THAT THE COURT LACKS JURISDICTION OVER THIS APPEAL

I. Respondent asserts that Petitioner is incorrect in stating that the Second District Court resentenced Mr. Robie.

Petitioner concedes that an error was made on page 25 of the initial brief. On that page Petitioner states that, "The Second District Court vacated Mr. Robie's sentence and resentenced him to a longer sentence." (IB 25). The corrected statement should read: "The Trial Court vacated Mr. Robie's sentence and resentenced him to a longer sentence." Petitioner regrets any confusion that may have resulted from the error.

II. Respondent asserts that this Honorable Court lacks jurisdiction

The Fifth District Court of Appeal certified the instant case to be in direct conflict with the holdings of the Second District Court in Joslin v. State, 27 Fla. L. Weekly D686 (Fla. 2nd DCA March 22, 2002) and Robie v. State, 807 So.2d 781 (Fla. 2nd DCA 2002). Respondent claims that this Honorable Court is without jurisdiction to consider this appeal, because the instant case is factually distinguishable from the two cases with which the Fifth District Court of Appeal

certified conflict (AB 22-23). However, Respondent's argument must fail, because the cases are not factually distinguishable and Respondent fails to cite any relevant case law to support its position.

A. Respondent is incorrect in stating that Joslin and Robie are factually distinguishable from the instant case.

Respondent focuses on the fact that in both Joslin and Robie the Second District Court of Appeal did not explicitly declare that the State had filed a motion to vacate plea and sentence (AB 22-23). Respondent then argues that these cases are distinguishable from the instant case, since in the instant case the State "properly filed a motion to vacate plea and sentence to obtain relief under the rule". (AB 23). However, the issue in the instant case is that the State **did not properly** file a motion to vacate plea and sentence. The State did not file its "Motion to Vacate Sentence" until more than 60 days had passed from Petitioner's alleged noncompliance (IB 20-21). The State in the instant case, just like the State in Robie and Joslin, failed to take any action until after the time allowed under Rule 3.170, Florida Rules of Criminal Procedure. Therefore, the instant case is not factually distinguishable from Joslin and Robie.

B. Respondent lacks relevant case law to support its contention

Respondent only cites two cases to support its contention that this

Honorable Court lacks jurisdiction to entertain the instant appeal (AB 23). Neither one of these cases discuss appellate jurisdiction, nor do they explain how to determine if cases are or are not factually distinguishable.

In Robinson v. State, 770 So.2d 1167 (Fla. 2000), the Court merely states, in passing, that because there was no conflict with the alleged conflict cases, it lacked jurisdiction over the question of the proper role of appellate courts in evaluating the weight and sufficiency of newly discovered evidence. Robinson, 770 So. 2d at 1170. However, the Court does not explain how the cases were distinguishable. In fact, in the very next sentence the Court states that it does have jurisdiction through a conflict between the holding of the lower court in Robinson and the holding in a previously decided Florida Supreme Court case. Id. The remainder of the opinion expounds on the proper test courts should apply to determine if a new trial should be granted based on newly discovered evidence. There is absolutely nothing in the opinion that can be used to support Respondent's contention that the instant case does not conflict with Joslin and Robie.

Furthermore, Respondent fails to address the fact that the appeal in Robinson was before the Florida Supreme Court under Rule 9.030(2)(iv), Florida Rules of Appellate Procedure, which provides that discretionary jurisdiction may be sought to review decisions of the district court of appeal that "expressly and

directly conflict with a decision of another district court of appeal or of the supreme court on the same question of law". However, the instant case is before this court under Rule 9.030(2)(A)(vi), which allows jurisdiction to be sought from decisions of the district court that, "are certified to be in direct conflict with decisions of other district courts of appeal".

The only other case Respondent cites is Goins v. State, 672 So.2d 30 (Fla. 1996). But Respondent incorrectly cites the case in the answer brief and thereby fails to inform this Honorable Court that the quote from Goins is actually from the dissent. Goins, 672 So.2d at 33. Dissenting opinions are without precendential value.

The Fifth District Court of Appeal certified the instant case to be in direct conflict with the holdings of the Second District Court in Joslin and Robie. Respondent's argument to the contrary is unsupported and therefore, this appeal is properly before this Honorable Court.

CONCLUSION

Based upon the arguments and authorities cited herein and in Petitioner's Merit Brief, Petitioner respectfully requests this Honorable Court to quash the decision of the Fifth District in this appeal, vacate Petitioner's sentence, and remand this case for resentencing with an order to reinstate Petitioner's earlier sentence of 14 years.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
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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 Boulevard, 5th Floor, Daytona Beach, Florida 32118, via his basket at the Fifth District Court of Appeal and mailed to Wilfrid Metellus, DOC #X20492 H1-213L, Gulf Correctional Institution, 500 Ike Steel Road, Wewahitichka, FL 32465, on this 3rd day of October, 2002.

_____

MEGHAN ANN COLLINS
ASSISTANT PUBLIC DEFENDER

CERTIFICATE OF FONT

I HEREBY CERTIFY that the size and style of type used in the brief is 14 point proportionally spaced Times New Roman.

_____

MEGHAN ANN COLLINS
ASSISTANT PUBLIC DEFENDER