IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

FSC Case No.: SC 01
2d DCA Case No.: 2D01-4591

TERRY COTE,

Respondent.

_____/

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

PETITIONER'S BRIEF ON JURISDICTION

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

ROBERT J. KRAUSS
Senior Assistant Attorney General
Chief of Criminal Law, Tampa
Florida Bar No.: 0238538

DANILO CRUZ-CARINO
ASSISTANT ATTORNEY GENERAL
Florida Bar No: 0113298
Concourse Center 43507 E. Frontage Road, Suite 200
Tampa, Florida 33607-7013
Phone: (813)287-7900
Fax: (813)281-5500

COUNSEL FOR PETITIONER

TABLE OF CONTENTS

TABLE OF CONTENTS ii

TABLE OF CITATIONS ii

STATEMENT OF THE CASE AND FACTS 1

SUMMARY OF ARGUMENT 2

ARGUMENT 2

ISSUE 2

THE SECOND DISTRICT COURT OF APPEAL'S OPINION IN TERRY COTE v. STATE, 28 Fla. L. Weekly D332b (Fla. 2d DCA January 29, 2003), IS IN DIRECT AND EXPRESS CONFLICT WITH REESE v. STATE, 763 So. 2d 537 (Fla. 4th DCA 2000), CAPRE v. STATE, 773 So. 2d 92 (Fla. 5th DCA 2000), AND HARVEY v. STATE, 786 So. 2d 595 (Fla. 1st DCA 2001), op. on denial of reh'g., 786 So. 2d 28 (Fla. 1st DCA 2001), review granted, 797 So. 2d 585 (Fla. 2001).

CONCLUSION 9

CERTIFICATE OF SERVICE 10

CERTIFICATE OF FONT COMPLIANCE 10

APPENDIX 11

TABLE OF CITATIONS

Page No.

Amendments to the Florida Rules of Appellate Procedure, 696 So. 2d 1103 (Fla. 1996) 4

Amendments to Florida Rules of Criminal Procedure 3.111(e) & 3.800 & Florida Rules of Appellate Procedure 9.020(h), 9.140, & 9.600, 761 So. 2d 1015 (Fla. 1999), reh'g. granted, 761 So. 2d at 1025 (Amendments II). 2,4,5,7,9,10

Capre v. State, 773 So. 2d 92 (Fla. 5th DCA 2000) 2,6,7,9

Harvey v. State, 786 So. 2d 595 (Fla. 1st DCA 2001),op on denial of reh'g, 786 So. 2d 28 (Fla. 1st DCA 2001),review granted, 797 So. 2d 585 (Fla. 2001) 2,5,6,8,9

Maddox v.State, 760 So. 2d 89 (Fla. 2000) 4,6,9

Mancha v. State, 768 So. 2d 1178 (Fla. 2d DCA 2000) 9

Reese v. State, 763 So. 2d 537 (Fla. 4th DCA 2000) 2,4,6,7,9

Terry Cote v. State, 28 Fla. L. Weekly D332b (Fla. 2d DCA January 29, 2003) 2,3,4,

OTHER AUTHORITIES

§ 924.051, Fla. Stat. (Supp. 1996) 4

The Florida Constitution, Article V, Section 3(b)(3) . . . 2

Florida Rule of Appellate Procedure 9.140(i) 3

Florida Rule of Appellate Procedure 9.210 (a)(2) 10

Florida Rule of Criminal Procedure 3.800(b)(2) . 3,5,6,7,8,9

Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv) . . 3

Florida Rule of Appellate Procedure 9.120(d) 3

Florida Rule of Criminal Procedure 3.850 5,9

Florida Rule of Criminal Procedure 3.800 (a) 5,9

STATEMENT OF THE CASE AND FACTS

On February 20, 2001, the State Attorney's Office for the Tenth Judicial Circuit, filed an Information charging Terry Cote, with one count of Possession of Cannabis in excess of 20 grams and with one count of Driving Under the Influence. (Vol.1;R:22-23). On September 28, 2001, the case went to trial and the jury returned a verdict of guilty on the one count of Possession of Cannabis in excess of 20 grams, and not guilty on the count of Driving Under the Influence. (Vol.1;R:25). Respondent was adjudicated guilty and sentenced to two (2) years probation with the condition that as part of his probationary term, he serve six (6) months in the Polk County Jail. (Vol.2;R:258-259). However, the Memo of Sentence/Order of the Court and the Judgment, both dated September 28, 2001, state that Appellant's probation is consecutive to his jail term. (Vol.1;R:33, and 42). Respondent filed his timely Notice of Appeal on September 28, 2001. (Vol.1;R:34).

Petitioner does not dispute that Appellant's written sentence varied from the trial court's oral pronouncement and resulted in a longer sanction than that orally imposed. However, the record is clear that Appellant failed to preserve this issue for review on appeal because it was never presented to the trial court either at the time of sentencing nor was an

appropriate motion filed pursuant to Fla. R. Crim. Pro. 3.800(b) prior to the filing of Appellant's notice of appeal or prior to Appellant's brief on the merits.

SUMMARY OF ARGUMENT

This Court should accept jurisdiction because the Second District Court of Appeal's opinion in Terry Cote v. State, 28 Fla. L. Weekly D332b (Fla. 2d DCA January 29, 2003), is in direct and express conflict with Reese v. State, 763 So. 2d 537 (Fla. 4th DCA 2000), Capre v. State, 773 So. 2d 92 (Fla. 5th DCA 2000), and Harvey v. State, 786 So. 2d 595 (Fla. 1st DCA 2001), op. on denial of reh'g., 786 So. 2d 28 (Fla. 1st DCA 2001), review granted, 797 So. 2d 585 (Fla. 2001).

ARGUMENT

ISSUE

THE SECOND DISTRICT COURT OF APPEAL'S OPINION IN TERRY COTE v. STATE, 28 Fla. L. Weekly D332b (Fla. 2d DCA January 29, 2003), IS IN DIRECT AND EXPRESS CONFLICT WITH REESE v. STATE, 763 So. 2d 537 (Fla. 4th DCA 2000), CAPRE v. STATE, 773 So. 2d 92 (Fla. 5th DCA 2000), AND HARVEY v. STATE, 786 So. 2d 595 (Fla. 1st DCA 2001), op. on denial of reh'g., 786 So. 2d 28 (Fla. 1st DCA 2001), review granted, 797 So. 2d 585 (Fla. 2001).

Florida's Supreme Court is vested with the specific authority to resolve conflicts within Florida law. The Florida

Constitution, article V, section 3(b)(3), authorizes this Court to review a decision of a district court of appeal that expressly and directly conflicts with a decision of another district court of appeal or with a decision of the Florida Supreme Court. This Court has discretionary jurisdiction to hear this matter pursuant to Florida Rules of Appellate Procedure 9.030(a)(2)(A)(iv), and 9.120(d).

The Second District Court's opinion in Terry Cote v. State, 28 Fla. L. Weekly D332b (Fla. 2d DCA January 29, 2003), reversed Appellant's conviction for possession of cannabis in excess of twenty grams. The opinion concluded that Appellant's written sentence varied from the trial court's oral pronouncement and resulted in a longer sanction than that orally imposed. The Court found the sentence was illegal and apparent from the face of the record. As a result, the District Court invoked its authority pursuant to Florida Rule of Appellate Procedure 9.140(i), reversed Appellant's sentence, and remanded for the trial court to resentence him in accordance with the orally pronounced sentence. The State timely filed a motion for rehearing which the Second District Court denied on March 5, 2003.

In this case, Appellant failed to preserve this issue for review on direct appeal because it was never presented to the

trial court either at the time of sentencing nor was an appropriate motion filed pursuant to Fla. R. Crim. Pro. 3.800(b) prior to the filing of Appellant's notice of appeal or prior to Appellant's brief on the merits. Appellant's sentencing error was unpreserved, and thus not cognizable on direct appeal.[1] Courts have consistently held that no unpreserved sentencing errors will be entertained on appeal if the defendant had available to him the procedural mechanism of the most recent amendments to Florida Rule of Criminal Procedure 3.800(b). See Harvey v. State, 786 So. 2d 595 (Fla. 1st DCA 2001), op. on denial of reh'g., 786 So. 2d 28, 32 (Fla. 1st DCA 2001), review granted, 797 So. 2d 585 (Fla. 2001); Reese v. State, 763 So. 2d 537 (Fla. 4th DCA 2000); Capre v. State, 773 So. 2d 92 (Fla. 5th DCA 2000).

In Maddox v. State, 760 So. 2d 89 (Fla. 2000), the Supreme Court addressed the issue of "whether any unpreserved errors related to sentencing can be raised on direct appeal in light of the adoption of Section 924.051, Florida Statutes (Supp. 1996), enacted as part of the Criminal Appeal Reform Act of 1996 (the Act), and this Court's procedural rules promulgated in Amendments to the Florida Rules of Appellate Procedure, 696

[1] Collateral Relief is available for Appellant in accordance with Florida Rules of Criminal Procedure 3.800 and 3.850.

So.2d 1103 (Fla. 1996) (hereinafter Amendments I).” Id. at 94. The Court found that appellate courts should continue to correct unpreserved sentencing errors that constitute fundamental error in the cases of noncapital defendants whose appeals fall into the window period between the effective date of the Criminal Appeal Reform Act of 1996 and the effective date of its amendment to rule 3.800 in Amendments to Florida Rules of Criminal Procedure 3.111(e) & 3.800 & Florida Rules of Appellate Procedure 9.020(h), 9.140, & 9.600, 761 So. 2d 1015 (Fla. 1999), reh'g. granted, 761 So. 2d at 1025 (Amendments II). Id. at 94,98. However, for those defendants who had available the procedural mechanism of the most recent amendments to Florida Rule of Criminal Procedure 3.800(b), the Court stated:

> “We anticipate that the amendments to rule 3.800(b) recently promulgated by this Court in Amendments to Florida Rules of Criminal Procedure 3.111(e) & 3.800 & Florida Rules of Appellate Procedure 9.020(h), 9.140, & 9.600, 761 So. 2d 1015 (Fla. 1999), reh'g. granted, 761 So. 2d at 1025 (hereinafter Amendments II), should eliminate the problem of unpreserved sentencing errors raised on direct appeal because the time in which a defendant can file a motion to correct a sentencing error in the trial court is expanded to the time the first appellate brief is filed.” Id. at 94.

These statements strongly imply a criminal defense bar that no unpreserved sentencing errors will be entertained on appeal if the defendant had available to him the procedural mechanism of the most recent amendments to Florida Rule of Criminal Procedure 3.800(b). See Harvey v. State, 786 So. 2d 595 (Fla. 1st DCA

2001), op. on denial of reh'g., 786 So. 2d 28, 32 (Fla. 1st DCA 2001), review granted, 797 So. 2d 585 (Fla. 2001). To hold otherwise, would diminish the intent of the legislature in enacting the Criminal Appeals Reform Act of 1996.

In this case, Appellant's case does not fall within the window period. The sentencing hearing in question took place on September 28, 2001, long after January 13, 2000, the effective date of the amendments in question.

Petitioner argues that this Court's opinion is also in direct and express conflict with Reese v. State, 763 So. 2d 537 (Fla. 4th DCA 2000)(holding that by never filing a 3.800(b) motion to correct a sentencing error, defendant waived his claim on appeal that trial court failed to orally sentence him as a habitual offender); Capre v. State, 773 So. 2d 92 (Fla. 5th DCA 2000)(holding that under Maddox, sentencing errors occurring after the effective date of amended rule 3.800(b), even fundamental ones, are barred if not raised at trial or in post-trial proceedings pursuant to rule 3.800.); and Harvey v. State, 786 So. 2d 595 (Fla. 1st DCA 2001), op. on denial of reh'g., 786 So. 2d 28 (Fla. 1st DCA 2001), review granted, 797 So. 2d 585 (Fla. 2001).

In Reese, the appellant appealed a sentence of seven years in prison as a habitual offender after a jury found him guilty of

delivery of cocaine. He argued that the trial court failed to orally sentence him as a habitual offender. The State countered that he waived this issue. The Fourth District Court of Appeal held that "in order for a sentencing error to be raised on direct appeal from a conviction and sentence, it must be preserved in the trial court either by objection at the time of sentencing or in a motion to correct sentence under Florida Rule of Criminal Procedure 3.800(b)." Id. at 539, citing Hyden v. State, 715 So. 2d 960, 961 (Fla. 4th DCA 1998). The Court went on to state that "while no objection can be made at the time of sentencing that the written judgment does not conform to the oral pronouncement, a defendant, if a notice of appeal has been filed, can file a rule 3.800(b)(2) motion to correct a sentencing error in the trial court at any time until the first appellate brief is filed." Id. at 539, citing Amendments of Florida Rules of Crim. Procedure 3.111(e) and 3.800 and Florida Rules of Appellate Procedure 9.020(h), 9.140, and 9.600, 761 So. 2d 1015 (Fla. 1999), reh'g. granted, 761 So. 2d at 1025 (Amendments II). Because the record showed that Reese never filed a rule 3.800(b)(2) motion to correct a sentencing error, the Court concluded that he may not raise this issue on appeal. Id. at 539. Here, as in Reese, Appellant failed to avail himself of the procedural mechanism of the most recent

amendments to Florida Rule of Criminal Procedure 3.800(b). Thus, the Second District Court of Appeal should have affirmed Appellant's judgment and sentence without prejudice to Appellant to seek relief through a Motion for Postconviction Relief filed pursuant to Florida Rule of Criminal Procedure 3.800(a). To hold otherwise, diminishes the intent of the legislature in enacting the Criminal Appeals Reform Act of 1996.

In Capre v. State, 773 So. 2d 92 (Fla. 5th DCA 2000), appellant asserted he received an improper vindictive sentence of 42 months because he elected to go to trial rather than accept the State's pre-trial offer of a non-state prison sentence of 51 weeks in the county jail. He did not raise this issue below, nor did he avail himself of the remedy by filing a motion pursuant to Florida Rule of Criminal Procedure 3.800(b). Capre's trial took place in February of 2000, after the effective date of amended rule 3.800(b). Id. at 92. The Fifth District Court held that under Maddox, sentencing errors occurring after the effective date of amended rule 3.800(b), even fundamental ones, are barred if not raised at trial or in post-trial proceedings pursuant to rule 3.800. Similarly, in this case, under Maddox, Appellant's sentencing error occurring after the effective date of amended rule 3.800(b), even if deemed fundamental, is barred if not raised at trial or in

post-trial proceedings pursuant to rule 3.800.

In Harvey, a case which is currently pending in the Florida Supreme Court, the First District Court held that even when a sentencing error appears on the face of the record in a direct appeal, and the State concedes error, such "unpreserved sentencing error will [not] be entertained on appeal if the defendant had available to him the procedural mechanism of the most recent amendments to Florida Rule of Criminal Procedure 3.800(b)". Id. at 30. The Court in Harvey went on to say that "for this court to read Maddox as appellant does--as a broad affirmation that the concept of fundamental sentencing error survived not only the 1996 Criminal Appeal Reform Act but also all of the amendments to Florida Rule of Criminal Procedure 3.800(b)--would render the limiting language in the opinion in Maddox itself meaningless." Id. at 30. Appellee agrees and argues that this Court's decision to grant relief from unpreserved errors to an appellant who had available the procedural mechanism of the most recent amendments to Florida Rule of Criminal Procedure 3.800(b), by exercising its inherent authority under rule 9.140(i), essentially creates an exception to Maddox and revives the concept of fundamental sentencing error. This therefore implies that the concept of a fundamental error survived not only the 1996 Criminal Appeal Reform Act but

also all of the amendments to Florida Rule of Criminal Procedure 3.800(b). The State hereby argues that in accordance with the Harvey opinion this exception "would render the limiting language in the Maddox opinion itself meaningless". Id. at 30; See also Mancha v. State, 768 So. 2d 1178 (Fla. 2d DCA 2000).

The Second District Court's opinion in this case expressly and directly conflicts with Reese v. State, 763 So. 2d 537 (Fla. 4th DCA 2000), Capre v. State, 773 So. 2d 92 (Fla. 5th DCA 2000), and Harvey v. State, 786 So. 2d 595 (Fla. 1st DCA 2001), op. on denial of reh'g., 786 So. 2d 28 (Fla. 1st DCA 2001), review granted, 797 So. 2d 585 (Fla. 2001), and with this Court's holdings in Maddox. Accordingly, this Court should grant jurisdiction in the instant case and review the Second District Court of Appeal's decision.

CONCLUSION

Based on the Second District Court of Appeal's opinion, as well as the foregoing arguments and authorities, the State respectfully

requests that this Honorable Court grant jurisdiction in the instant case.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Michael P. McDaniel, Esquire, C. Ray McDaniel, P.A., Post Office Box 226, Bartow, Florida 33831, on this ____ day of March, 2003.

_____
COUNSEL FOR APPELLEE

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,
CHARLES J. CRIST, JR.
ATTORNEY GENERAL

_____
ROBERT J. KRAUSS
Senior Assistant Attorney General
Chief of Criminal Law, Tampa
Florida Bar No.: 0238538

_____
DANILO CRUZ-CARINO
Assistant Attorney General
Florida Bar No.: 0113298
Concourse Center 4
3507 E. Frontage Road, Suite 200
Tampa, Florida 33607-7013
Phone: (813)287-7900
Fax: (813)281-5500
COUNSEL FOR PETITIONER

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

FSC Case No.: SC 01
2d DCA Case No.: 2D01-4591

TERRY COTE,

Respondent.

_____/

APPENDIX

1 Terry Cote v. State, 28 Fla. L. Weekly D332b (Fla. 2d DCA January 29, 2003).