IN THE SUPREME COURT OF FLORIDA

MARCUS JOHNSON,

Petitioner,

v. Case No. SC05-1976 & SC05-1933

STATE OF FLORIDA, Consolidated

Respondent.

TOMMY L. WILLIAMS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ON DISCRETIONARY REVIEW FROM THE SECOND DISTRICT COURT OF APPEAL STATE OF FLORIDA

MERITS BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF CITATIONS

CASES

OTHER AUTHORITIES

STATEMENT OF THE CASE AND FACTS

The Second District in Harris v. State, 911 So. 2d 221 (Fla. 2d DCA 2005), refused to grant jurisdiction to Tommy L. Williams (2D05-2026) and Marcus Johnson (2D05-2356), who each sought a belated appeal of the denial of their motions to correct illegal sentence filed pursuant to Florida Rule of Criminal Procedure 3.800(a). The Second District concluded the Petitioners had no right to appeal the denial of their rule 3.800(a) motions based on the failure of the trial courts to advise them of their right to appeal within thirty (30) days of the denial.

In lower tribunal case number 02-21397 (Pinellas County), **Petitioner, TOMMY L. WILLIAMS**, sought a belated appeal on grounds the trial court's order, in denying his motion to correct illegal sentence, failed to advise him of his right to appeal the denial within thirty (30) days. In his petition for writ of habeas corpus, Williams alleged his sentence of twelve years imprisonment exceeded the permissible guideline sentence. See Petitioner's Appendix at 9-16. Williams further alleged that although he entered a "straight up" plea of no contest with no agreed upon sentence, he believed he would receive a guideline sentence (Pet. App. 10-11). Williams' sole, sworn basis for relief was stated as follows:

> "Judge Baird did not inform petitioner of his right to appeal within 30 days after the order was issued. Petitioner now seeks appellate review. The state will not be prejudiced by petitioner seeking and receiving belated appeal.

(Pet. App. 10-11). According to the petition, the trial court denied Petitioner Williams' motion to correct illegal sentence on November 23, 2004. Williams presented his habeas petition to prison officials for mailing on April 19, 2005.

In lower tribunal, case number 2001-CF-1847 (Manatee County), **Petitioner**, **MARCUS JOHNSON**, sought a belated appeal after the trial court denied his motion to correct illegal sentence filed pursuant to Fla. R. Crim P. 3.800(a). Johnson was originally sentenced to twenty years imprisonment in September of 2002. In October of 2002, Johnson unsuccessfully sought to modify his sentence or to withdraw his no contest plea. On direct appeal to the Second District, the Petitioner's judgment and sentence were affirmed per curium. Johnson v. State, 865 So. 2d 245 (Fla. 2d DCA 2003)(Table decision).

Subsequently, Johnson sought, but was denied, post-conviction relief. On December 9, 2004, the Petitioner filed a motion to correct illegal sentence pursuant to Fla. R. Crim. P. 3.800(a). When the trial court denied Petitioner's motion on December 22, 2004, Johnson filed a petition for writ of habeas

corpus seeking a belated appeal of the denial. As with Petitioner Williams, Petitioner Johnson's sole basis for obtaining jurisdiction was the failure of the trial court to state in its order that Petitioner had thirty (30) days to appeal the denial. Mr. Johnson alleged that pursuant to Fla. R. App. P. 9.141(c)(4), the trial court's failure to advise him of his right to appeal was the type of circumstance which warranted receiving a belated appeal. See, Petitioner's Appendix at page 2-3.

The Second District disagreed with Petitioners Williams and Johnsons' assertion they were entitled to a belated appeal pursuant to Fla. R. App. P. 9.141(c)(4), based on the trial court's failure to provide notice of the right to appeal the denial.[1] The Second District certified the following questions as ones of great public importance:

I.

> ARE TRIAL COURTS REQUIRED TO NOTIFY DEFENDANTS OF THE TIME LIMIT FOR AN APPEAL OF A FINAL ORDER RESOLVING A MOTION UNDER FLORIDA RULE OF CRIMINAL PROCEDURE 3.800(A), EVEN THOUGH THE RULE DOES NOT EXPRESSLY CONTAIN THIS REQUIREMENT?

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1 Williams, the court concluded, could have timely challenged his sentence by filing a motion for post-conviction relief. Johnson, however, had previously filed a motion for post-conviction relief and a second motion would have been successive.

II.

IF A TRIAL COURT DOES NOT NOTIFY A DEFENDANT OF THE TIME LIMIT FOR SUCH AN APPEAL, DOES FLORIDA RULE OF APPELATE PROCEDURE 9.141(c)(4) ENTITLE THE DEFENDANT TO SEEK A BELATED APPEAL?

Harris, 911 So. 2d at 226. The Court itself answered both questions in the negative. It appears Petitioners Williams and Johnson have timely invoked the jurisdiction of this Court.[2]

2 Mr. Johnson filed his Notice to Invoke Discretionary Jurisdiction on October 14, 2005. Mr. Williams filed his Notice to Invoke Discretionary Jurisdiction on October 18, 2005.

SUMMARY OF THE ARGUMENT

This Court will initially need to determine whether the failure of Florida Rule of Criminal Procedure 3.800(a) to expressly state that a defendant has a right to appeal an adverse ruling within thirty (30) days nevertheless requires a trial court to provide notice of said right. If a trial court is not required to notify a defendant of his right to appeal the denial of a rule 3.800(a) motion, this Court must determine whether the lack of notice entitles a defendant to receive a belated appeal under the provisions of Florida Rule of Appellate Procedure 9.141(c)(4).

The Respondent respectfully submits the Second District correctly concluded that, as written, rule 3.800(a) does not require a trial court to notify a defendant of his right to appeal an adverse ruling. Also, Respondent submits the Second District properly determined the failure to notify a defendant of his right to appeal an adverse ruling under rule 3.800(a) cannot serve as grounds for a belated appeal pursuant to rule 9.141. Consequently, in absence of an amendment to rule 3.800(a), trial courts are not required to notify a defendant of the right to appeal an adverse ruling, and the lack of notice does not entitle a defendant to a belated appeal.

ARGUMENT

WHETHER A DEFENDANT IS ENTITLED TO A BELATED APPEAL FOLLOWING THE DENIAL OF A RULE 3.800(A) MOTION WHERE RULE 3.800(A) DOES NOT ESPRESSLY REQUIRE NOTICE OF TIME TO APPEAL AN ADVERSE RULING AND THE LACK OF NOTICE WOULD NOT SERVE AS GROUNDS TO RECEIVE A BELATED APPEAL.

The Petitioners assert a defendant is entitled to a belated appeal of an adverse ruling on a rule 3.800(a) motion when a trial court fails to advise them of the time to appeal the ruling. Such a result is required, Petitioners assert, even in absence of the provisions of Fla. R. App. P. 9.141(c)(4) because the latter does not set forth any substantive standards for granting a belated appeal. The Respondent disagrees and submits the Second District correctly determined Petitioners were not entitled to a belated appeal.

The ruling of the district court, which is a pure question of law, is subject to de novo review. State v. Glatzmayer, 789 So. 2d 297, 301, n.7 (Fla. 2001)("If the ruling consists of a pure question of law, the ruling is subject to de novo review); Phillip J. Padovano, Florida Appellate Practice § 9.4, at 147 (2d ed. 1997).

In challenging the lower court's ruling, Petitioners

initially allege that Florida Rule of Appellate Procedure 9.141(c)(4) does not govern ones entitlement to a belated appeal, as it does not contain any substantive grounds upon which a court may determine a defendant's entitlement. Although rule 9.141 does not outline any substantive grounds upon which entitlement may be obtained, rule 9.141(c)(4) does establish whether a defendant may seek a belated appeal. In the practical application of rule 9.141(c)(4), a trial court determines entitlement based on a case-by-case analysis. Under rule 9.141, a defendant is entitled to relief if he sets forth facts, under oath, which demonstrate he is entitled to a belated appeal. Thus, entitlement stems from the defendant's ability to meet all of the requirements of rule 9.141(c)(4). Although Petitioners acknowledge rule 9.141 permits review by means of a belated appeal, they maintain their entitlement to a belated appeal rests with this Court's decision in *State ex rel. Shevin v. District Court of Appeal, Third District*, 316 So. 2d 50 (Fla. 1975), and not rule 9.141(c)(4). The Respondent respectfully disagrees and asserts that in absence of an express rule authorizing notification, a trial court is not required to so inform a defendant of his right to appeal the denial of his rule 3.800(a) motion.

In *Shevin*, the defendant, after receiving a denial on his post-conviction relief motion (filed pursuant to Florida Rule of Criminal Procedure 3.850), sought to appeal the denial. The defendant, however, filed his notice to appeal six days outside of the 30 days proscribed for filing a notice of appeal. In the Third District, the state unsuccessfully sought to dismiss the appeal as untimely. Upon seeking a writ of prohibition in the Florida Supreme Court, the state maintained the lower court lacked jurisdiction over the untimely appeal. This Court, however, found a defendant seeking relief pursuant to rule 3.850 should be advised of their right to appeal the denial of said motion. Id. at 51. The Court reasoned that because Rule 3.850 specifically permits a defendant the right to appeal a denial, such right would be of no effect, if the defendant was not advised he possessed the right. Id.

The Second District, in denying relief in the instant cases stated:

> None of the petitions in this case simply filed an untimely appeal from the post-conviction proceeding, as apparently occurred in the *Shevin* case. Instead, all three rely on Rule 9.141(c)(4) and seek a belated appeal.

Harris, 911 So. 2d at 225.

The provisions of rule 9.141(c)(4) permit a defendant to

petition for a belated appeal within two years after the time for filing a notice of appeal of a final order. A defendant may seek an appeal beyond the two year time-limit if the petitioner, under oath, states he:

(i) was unaware an appeal had not been filed or was not advised of the right to an appeal; and

(ii) should not have ascertained such facts by the exercise of reasonable diligence.

As the Second District pointed out, none of the Petitioners alleged their appeals were untimely, due to the lack of notice, as in *Shevin*, but instead challenged that the failure of the trial court to advise them of the right to appeal the denial of their 3.800(a) motions, entitled them to a belated appeal. The district court below noted it could find no precedent for permitting such relief on the grounds asserted by the petitioners. Harris, 911 So. 2d at 225.

Thus, the Second District, by refusing jurisdiction in the instant cases, declined to apply the reasoning and result of *Shevin* in order to permit review of a rule 3.800(a) denial. The court stated:

> At this time, after all of the reported precedent, we are not convinced that we should simply exercise jurisdiction in this context, as the Third District did in *Shevin*, and expect the State to test our ruling through a petition for writ of

prohibition in the supreme court.

Id. The Respondent submits the district court's refusal to exercise jurisdiction over the Petitioners' cases should be upheld in absence of an express provision requiring defendants be so notified. The court below opined that the application of *Shevin* to rule 3.800(a) motions would allow defendants the ability to challenge adverse rulings long beyond the time permitted to appeal such orders. The court stated:

> We would essentially reopen the time to appeal many orders that were not appealed in the past. We are unprepared to make such a drastic change.

Harris, 911 So. 2d at 225-226.

Petitioners suggest the procedural leniency of Rule 3.800(a), which allows a challenge to an illegally imposed sentence, at any time, should carry over and permit lenient review of adverse rulings. According to Petitioners, courts should treat a rule 3.800(a) denial and a denial under rule 3.850, in the same manner, pursuant to *Shevin*. Respondent disagrees, as it does not appear, *Shevin* has given the district courts carte blanche to grant belated appeals to review 3.800(a) denials.

On the contrary, as the Harris decision noted, district

courts confronted with untimely requests to review 3.800(a) denials have routinely, though reluctantly, denied review based on untimeliness. See, Cotterell v. State, 890 So. 2d 315 (Fla. 5th DCA 2004)(Defendant's challenge of 3.800(a) denial was dismissed as untimely after notice of appeal was filed five days late). Moreover, because the *Shevin* decision brought about the amendment of rule 3.850, to require courts to notify a defendant of his right to appeal an adverse ruling, there is a clear distinction in the treatment of denials under the former rule and rule 3.800(a).

At present, there is no requirement under rule 3.800(a), for a trial court to notify a defendant he has a right to appeal an adverse ruling within thirty days following a denial. Consequently, the Second District correctly determined the trial courts, in the cases below, were not required to provide notice of a right to appeal the adverse rulings.

Therefore, the Respondent respectfully submits a defendant is not entitled to a belated appeal pursuant to Fla. R. App. P. 9.141(c)(4), on grounds the trial court failed to notify him of his right to appeal the denial of his rule 3.800 motion. The Petitioners assert that a defendant has a right to appeal a rule 3.800(a) denial, absent the express notification, based on the

provisions of Fla. R. App. P. 9.141(c)(4). As previously noted above, rule 9.141, allows a belated appeal in certain circumstances, including where a defendant is not notified of his right to appeal an adverse ruling.

Respondent submits that on the facts of the record before this Court, the Petitioners cannot demonstrate they are entitled to a belated appeal under the provisions of rule 9.141. Under rule 9.141(c)(4), a defendant must not only assert he was unaware of his right to appeal, but also must allege he would not have ascertained such facts by the exercise of reasonable diligence.

The Harris Court commented below that the decisions of Despart v. State, 871 So. 2d 312 (Fla. 5th DCA 2004) and Proctor v. State, 845 So. 2d 1007 (Fla. 5th DCA 2003), may permit a belated appeal of a Rule 3.800(a) denial, by seeking entitlement under rule 9.141(c)(4). These decisions, however, cannot support a consistent application of rule 9.141 in circumstances as presented by the Petitioners. Despart, is a succinct opinion, wherein the Fifth District dismissed a defendant's appeal as untimely, but asserted the defendant could petition the court for a belated appeal, under rule 9.141. In Proctor, a defendant sought to appeal the denial of his rule 3.850 motion; however, the Fifth District, finding the appeal untimely,

dismissed the cause without prejudice for the defendant to seek a belated appeal pursuant to rule 9.141. The Proctor court held the defendant must meet *all* the requirements of Rule 9.141, by submitting facts to demonstrate the defendant is entitled to a belated appeal.[3] (*Emphasis added*). Here, neither Petitioner Johnson, nor Petitioner Williams has alleged he "should not have ascertained such facts by the exercise of reasonable diligence," as required by rule 9.141. Instead, Petitioners allege lack of notice, but fail to state any other facts, which might demonstrate an entitlement to relief. The Petitioners have failed to meet all of the requirements of rule 9.141, and therefore are not entitled to relief. Moreover, as the Petitioners cannot rely on the lack of notice to establish relief, none should be granted.

Finally, the Respondent acknowledges that in absence of an amendment of Rule 3.800(a), the district courts of this state will continue to determine, on a case-by-case basis, whether the facts set forth in a rule 9.141(c)(4) petition support the granting of a belated appeal. As the Second District noted,

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3 The court noted the defendant could establish he was entitled to a belated appeal by presenting such facts as he had timely submitted his papers to prison officials. Id. at 1008.

although a defendant may, at anytime, seek to have an illegal sentence corrected pursuant to rule 3.800(a), his ability to appeal the denial, seemingly, at anytime, under the provisions of Rule 9.141(c)(4), would create an insurmountable burden on the courts to review untimely rule 3.800(a) denials. Moreover, the granting of such relief would prejudice the state by denying it the finality of the judgment and sentence.

Under the current provisions of Rule 3.800(a), a trial court is not required to advise a defendant of his right to appeal an adverse ruling. Assuming the defendant is not entitled to be advised of such right, it should follow a defendant cannot assert the lack of notice, as grounds to secure an appeal, pursuant to Rule 9.141(c)(4). Consequently, without an amendment to Rule 3.800(a), no notice is required, and where no notice is required, the lack of notice cannot be the means, by which a petitioner may seek and obtain appellate review. The Petitioners are not entitled to relief.

CONCLUSION

Respondent respectfully requests that this Honorable Court answer the certified questions in the negative and deny relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to John S. Mills, Esq., Mills & Carlin, P.A., 865 May Street, Jacksonville, Florida 32204, this 1st day of March, 2006.

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,

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