SUPREME COURT OF FLORIDA

MARCUS JOHNSON,
Petitioner,

v.

Case No. SC05-1933
L.T. No. 2D05-2356

STATE OF FLORIDA,
Respondent.

TOMMY L. WILLIAMS,
Petitioner,

v.

Case No. SC05-1976
L.T. No. 2D05-2026

STATE OF FLORIDA,
Respondent

ON APPEAL FROM THE DISTRICT COURT OF APPEAL, SECOND DISTRICT, STATE OF FLORIDA

CONSOLIDATED INITIAL BRIEF OF PETITIONERS MARCUS JOHNSON AND TOMMY L. WILLIAMS

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Nature of the Case

These consolidated cases come to the Court on questions certified by the Second District Court of Appeal to be of great public importance. In both cases, the district court denied petitions for belated appeal filed by pro se criminal defendants who sought to appeal denials of their motions to correct an illegal sentence under Rule of Criminal Procedure 3.800(a). The central issue is whether a criminal defendant is entitled to a belated appeal of an order denying a Rule 3.800 motion when he was not advised of the time to file an appeal.

Course of Proceedings

Marcus Johnson

In 2004, Petitioner Marcus Johnson filed a pro se motion to correct illegal sentence pursuant to Rule 3.800(a) in circuit court in Manatee County. (Appendix ("App.") 6.)[1] The circuit court denied that motion in December 2004. (App. 6-8.) The order denying the motion does not address Mr. Johnson's appellate rights in any manner. (App. 6-8.)

[1] The Court has consolidated these two cases for all appellate purposes. Because both records are extremely brief and, with respect to the district court's opinion, duplicative, the relevant record documents are included in the attached appendix for the convenience of the Court. The brief cites to the pages in the appendix, and the index to the appendix provides the corresponding citations to each record below.

In May 2005, Mr. Johnson, still acting pro se, filed a petition for belated appeal in the district court. (App. 1-8.) He alleged that the circuit court's order denying his motion was "insufficient" and that he "was not notifide [sic] of his right of (30) days to seek review by this Court as required." (App. 3.) He cited to Florida Rule of Appellate Procedure 9.141(c)(4)(A)(i), which he characterized as authorizing a belated appeal for a petitioner who "was not advise [sic] of right to appeal." (App. 3.) He further alleged, "Being Pro Se, and a layman of the law not being properly advised as required by law caused the Petitioner prejudice to his right to seek review by this Court." (App. 3.)

The State did not respond to Mr. Johnson's petition, and the district court did not request a response.

Tommy L. Williams

Also in 2004, Petitioner Tommy L. Williams filed a pro se Rule 3.800(a) motion in the circuit court in Pinellas County. (App. 15.) The circuit court denied this motion in November 2004. (App. 15-16.) This order also failed to address Mr. Williams' appellate rights in any manner. (App. 15-16.)

In April 2005, Mr. Williams, still acting pro se, filed a petition for belated appeal in the district court. (App. 9-16.) He alleged that the circuit court did not inform him of his right to appeal within thirty days, and he argued that Rule 9.141(c) "provides for belated appeal in exactly this situation." (App. 11.)

The district court ordered the State to file a response to Mr. Williams' petition (App. 17), but the State's response did not refute Mr. Williams' factual allegation or his argument. (App. 18-19.) The State did not even ask the district court to deny the petition; it merely confirmed the factual allegations and concluded, "WHEREFORE, this Honorable Court should rule accordingly." (App. 18.)

Disposition Below

On its own motion, the district court consolidated the two cases (and a third that is not pending before this Court) for purposes of its opinion. (App. 21.) The court summarized its holding as follows:

> Because rule 3.800(a) does not expressly require the trial court to notify a defendant of the time limits for an appeal from an order denying such a motion [to correct an illegal sentence], we deny all of these petitions, but certify two questions to the supreme court as matters of great public importance.

(App. 21.)

Writing for the court, Judge Altenbernd began the analysis section of the opinion by acknowledging that in every other typical context in which trial courts finally dispose of criminal issues, the Florida Rules of Criminal Procedure require the court to inform the defendant that he or she has thirty days in which to file an appeal. (App. 24-25.) He noted that Rule 3.670 requires the defendant to be so informed whenever a judge enters a final order in the direct criminal case and that

a "similar notice of the right to appeal is required for two of the three typical motions for postconviction relief filed in non-death penalty cases," which the court identified as motions for relief under Rules 3.850 and 3.853.[2] (App. 25.)

Judge Altenbernd then compared the history of Rule 3.850, governing motions to set aside a criminal conviction, and Rule 3.800, governing motions to correct an illegal sentence. (App. 25-26.) He noted that originally neither rule (nor their predecessors) expressly required the trial court to notify the defendant of his or her appellate rights when a motion was denied. (App. 25-26.) This Court, however, approved the exercise of appellate jurisdiction over an untimely appeal of the denial of a Rule 3.850 motion in *State ex rel. Shevin v. District Court of Appeal, Third District*, 316 So. 2d 50 (Fla. 1975), because the trial court had not informed the defendant of the time for filing an appeal. (App. 26.)

Judge Altenbernd then explained that shortly after deciding *Shevin*, this Court amended Rule 3.850 to clarify two points regarding the time to appeal by (1) requiring the trial court to inform the defendant he has a right to appeal within thirty days and (2) authorizing a motion for rehearing, which tolls the time for

[2] A motion to correct an illegal sentence under Rule 3.800 is the third "typical" motion.

filing an appeal. (App. 26 (citing *The Fla. Bar re Fla. R. Crim. P.*, 343 So. 2d 1247 (Fla. 1977)).) However, he noted, "For reasons that are not apparent, rule 3.800(a) was not amended in 1977 in a similar fashion. . . ." (App. 26.)

Judge Altenbernd then expressed concern that as a result of this anomaly between the rules, "over the years the district courts have regularly received untimely appeals from orders denying motions under rule 3.800(a)." (App. 26.) He noted that after repeated calls from Judge Sharp of the Fifth District, this Court amended Rule 3.800 to authorize motions for rehearing. (App. 27 (citing *Amends. to Fla. R. Crim.*, 886 So. 2d 197, 199-200 (Fla. 2004).) After this amendment, Judge Altenbernd concluded that "the only remaining anomaly in rule 3.800(a) is the absence of a requirement that the trial court notify the defendant in an order denying a motion that he or she has a right to appeal within thirty days." (App. 27.)

He noted that the district court was "tempted" to simply grant the belated appeals in this case consistent with *Shevin*, but concluded that the panel was "not convinced" that it could properly do this. (App. 28.) He noted that the procedural posture of these cases was different from *Shevin* because in that case the Third District simply declined to dismiss an untimely filed appeal, whereas in this case, the Petitioners were affirmatively invoking the court's power to authorize an untimely appeal. (App. 27-28.) He also noted that to grant a belated appeal in

these circumstances would have significant policy implications because it "would essentially reopen the time to appeal many orders that were not appealed in the past." (App. 29.) On the other hand, he acknowledged that the "issue of notice in these cases has a due process component." (App. 29.) Thus, the court determined that the matter was best suited for resolution by this Court pursuant to the following questions, which the district court certified to be 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?

II.

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

(App. 29.)

The Petitioners timely filed notices to invoke this Court's discretionary jurisdiction, and the Court appointed the undersigned counsel to represent them in these proceedings.

SUMMARY OF ARGUMENT

Both questions raise pure issues of law and are thus subject to de novo review. Because the second question certified by the district court is of most direct importance to the Petitioners, the questions are addressed in reverse order.

As an initial matter, the second question should be rephrased because it erroneously presumes that Florida Rule of Appellate Procedure 9.141(c)(4) governs the circumstances under which a belated appeal should be granted. The entitlement to a belated appeal, however, is a matter of constitutional law, not procedural law.

Regardless of how the question is phrased, this Court has already answered it in the affirmative by holding in *State ex rel. Shevin v. District Court of Appeal, Third District*, 316 So. 2d 50 (Fla. 1975), that a defendant who was not advised of the time for filing an appeal of the denial of postconviction relief is entitled to file an appeal out of time. While the postconviction motion in *Shevin* was filed under Florida Rule of Criminal Procedure 3.850, and the postconviction motions in these cases were filed under Rule 3.800(a), any relevance to the distinction works in the Petitioners' favor. In the trial court, a Rule 3.800(a) motion may be filed at any time, while there is a strict two-year deadline for filing a Rule 3.850 motion. Thus, if anything, the rules for the time to appeal the denial of Rule 3.800(a) should be more liberal, not more strict than for the denial of a Rule 3.850 motion.

Moreover, by removing the deadline for filing a belated appeal petition based on the trial court's failure to advise the defendant of the right to appeal, at least where the defendant "should not have ascertained" his or her appellate rights "by the exercise of reasonable diligence," Rule 9.141(c)(4) presupposes that a petition for a belated appeal that is filed within two years will be granted where the trial court failed to advise the defendant of the right to appeal.

As to the first question certified by the district court, this Court should amend Rule 3.800(a) to require trial courts to advise defendants of their appellate rights. This is precisely what the Court did with regard to Rule 3.850 after *Shevin*. Such an amendment would help reduce the workload on the appellate courts and, more importantly, would provide greater certainty and finality to the criminal process.

ARGUMENT

Standard of Review. Both questions raise pure issues of law, which are reviewed de novo. *See State v. Trowell*, 739 So. 2d 77 (Fla. 1999) (reviewing question of when belated appeal is available with no deference to district court's ruling); *see also e.g., Hendrix v. State*, 908 So. 2d 412, 423 (Fla. 2005) (expressly applying de novo standard to application of law to undisputed facts); *Smith v. Smith*, 902 So. 2d 859, 861 (Fla. 1st DCA 2005) (expressly applying de novo standard to interpretation of rules of procedure).

The district court certified two questions. The first is whether a trial court is required to inform a defendant of his or her appellate rights when it denies a motion to correct an illegal sentence, and the second is whether a defendant, like Petitioners in these cases, is entitled to a belated appeal where he is not advised of the time to appeal. Because the second question is of most direct importance to the Petitioners, the questions are addressed in reverse order.

I. A DEFENDANT IS ENTITLED TO A BELATED APPEAL OF THE DENIAL OF A MOTION TO CORRECT AN ILLEGAL SENTENCE WHERE THE DEFENDANT WAS NEVER ADVISED OF THE TIME TO APPEAL.

As an initial matter, the second question should be rephrased because Florida Rule of Appellate Procedure 9.141(c)(4) does not govern when a belated appeal petition should be granted, it only addresses the time limit for filing such a petition. The relevant language of the rule provides as follows:

> **(4) Time Limits**.
>
> (A) A petition for belated appeal shall not be filed more than 2 years after the expiration of time for filing the notice of appeal from a final order, unless it alleges under oath with a specific factual basis that the petitioner
>
> (i) was unaware an appeal had not been timely 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.

Fla. R. App. P. 9.141(c)(4)(A). Although the rule provides for an exception to the time limit for petitions for belated appeal based on certain grounds, this

subdivision does not purport to set forth the substantive standards for granting a belated appeal.

Indeed, nothing in Rule 9.141 provides a standard for granting a belated appeal. The closest the rule comes to this is its requirement that a petition for belated appeal must state

> the specific acts sworn to by the petitioner or petitioner's counsel that constitute the alleged ineffective assistance of counsel or *basis for entitlement to belated appeal*, including in the case of a petition for belated appeal, whether the petitioner requested counsel to proceed with the appeal.

Fla. R. App. P. 9.141(c)(3)(F) (emphasis added). Exactly what grounds form a legally sufficient "basis for entitlement to belated appeal" is a question that is simply not addressed in the rule.

Instead, the grounds for a belated appeal have been developed by court decision, largely as a matter of constitutional law. For example, in *Williams v. State*, 777 So. 2d 947 (Fla. 2000), this Court decided that, as a matter of constitutional due process, a defendant is entitled to a belated appeal of the denial of a Rule 3.850 motion where his counsel had agreed to timely file an appeal, but failed to do so. *Id.* at 950. The court emphasized that postconviction remedies, including appeals from their denial, "are subject to the more flexible standards of due process announced in the Fifth Amendment, Constitution of the United States." *Id.* (quoting *State v. Weeks*, 166 So. 2d 892, 896 (Fla. 1964)).

Because entitlement to a belated appeal is not governed by Rule 9.141, the second question certified by the district court should be rephrased as follows:

> IS A DEFENDANT ENTITLED TO A BELATED APPEAL OF AN ORDER DENYING A MOTION TO CORRECT AN ILLEGAL SENTENCE WHERE THE TRIAL COURT DID NOT NOTIFY HIM OR HER OF THE TIME LIMIT TO APPEAL?

As rephrased, the answer to this question is "yes," at least under the circumstances present in this case.

This Court's decision in *State ex rel. Shevin v. District Court of Appeal, Third District*, 316 So. 2d 50 (Fla. 1975), should be dispositive. There, this Court held that the Third District properly accepted an untimely appeal of the denial of Rule 3.850 motion to vacate the defendant's conviction because the trial court had not advised him of the deadline for filing an appeal. *Id.* at 51. The defendant had filed his notice of appeal more than thirty days after the trial court denied his Rule 3.850 motion, and the State moved to dismiss the appeal. *Id.* The defendant admitted that the notice of appeal was untimely filed, but "alleged that the untimeliness was due to State action since he was not advised of his right to appeal the denials of his Rule 3.850 Motion." *Id.* The district court then denied the motion to dismiss, and the State sought a writ of prohibition in this Court. *Id.*

In denying prohibition, this Court expressly approved the Second District's construction in *O'Malley v. Wainwright*, 237 So. 2d 813 (Fla. 2d DCA 1970), of this Court's earlier decision in *Baggett v. Wainwright*, 229 So. 2d 239 (Fla. 1969),

as holding that "a movant under Rule 3.850 must be notified of his right to appeal any denial of the requested relief." *Shevin*, 316 So. 2d at 51. The Court went on to reason:

> Rule 3.850 grants a right of appeal to a movant who has received an adverse ruling. This right is rendered useless if the movant is not informed of its existence and of the time limitations governing its utilization.

Id. The Court therefore concluded that the district court had "correctly treated the appeal as one timely filed." *Id.*

While *Shevin* dealt with the appeal of the denial of a motion for postconviction relief under Rule 3.850, as opposed to a motion to correct an illegal sentence under Rule 3.800(a), there is no reason in logic or policy for applying a stricter rule to 3.800 appeals. Not only did Judge Altenbernd note that there is no "apparent reason" for differing treatment (App. 26), Judge Sharp of the Fifth District has also noted, "It is a discrepancy without a reason and a trap for the unwary." *Cotterrell v. State*, 890 So. 2d 315, 316 (Fla. 5th DCA 2004). *Cotterrell* is one of a line of decisions by other district courts that have reached the same conclusion the district court reached below, but these decisions do not address *Shevin* and offer no analysis other than to note that Rule 3.800 does not require the

trial court to notify the defendant of the time to appeal.[3] *See., e.g., Betty v. State*, 756 So. 2d 164, 164 (Fla. 4th DCA 2000); *Dunbar v. State*, 688 So. 2d 993, 993 (Fla. 5th DCA 1997); *Simmons v. State*, 684 So. 2d 860, 861 (Fla. 5th DCA 1996); *Jordan v. State*, 549 So. 2d 805, 806 (Fla. 1st DCA 1989). Because there is no rationale basis on which to distinguish belated appeals in these two situations, all of these decisions should be disapproved.

To the extent there is a relevant distinction between relief under the two rules, the rules implicitly recognize that defendants should have substantially more procedural leeway to correct an illegal sentence than to obtain other postconviction relief. A motion under Rule 3.850 must be filed within two years of the underlying conviction and sentence, but a Rule 3.800 motion to correct an illegal sentence may be filed "at any time." *See Judge v. State*, 596 So. 2d 73, 77 (Fla. 2d DCA 1991) (en banc) ("If for any reason a defendant receives a sentence that exceeds such a maximum possible sentence for the adjudicated crime, the defendant has a fundamental right *at all times* to seek relief and obtain a sentence that fits within the confines of the law." (emphasis added)). Indeed, Justice Anstead has explained that Rule 3.800 serves to protect a "fundamental right to request *at any time* a

[3] That Judge Altenbernd's opinion for the Second District is the first to closely examine this issue, even though the issue arises very frequently, is explained by the fact that untimely Rule 3.800(a) appeals are almost always filed by unrepresented prisoners. Thus, the district courts typically do not have the opportunity to consider thorough, adversarial briefing by the parties.

sentence that fits within the confines of the law" and warned that any arbitrary, technical limitation on the availability of relief from an illegal sentence under Rule 3.800 "emasculates the purpose and usefulness of Rule 3.800." *Bedford v. State*, 617 So. 2d 1134, 1135-36 (Fla. 4th DCA 1993) (Anstead, J., dissenting) (emphases in original), *quashed*, 633 So. 2d 13 (Fla. 1994).[4] These purposes would be similarly undermined if this Court were to adopt the Second District's holding that a belated appeal is available to vacate a conviction under Rule 3.850 (e.g., a conviction obtained as a result of ineffective assistance of counsel), but is not available under the same circumstances to correct a facially illegal sentence under Rule 3.800(a) (e.g., a sentence that exceeds the statutory maximum for the offense of conviction).

Moreover, the underpinnings of *Shevin* were based on the fact that a criminal case was involved, not that the case involved a Rule 3.850 motion. The sole authority on which the Court relied was its prior decision in *Baggett* (as interpreted by the Second District in *O'Malley*). *Id.* In *Baggett*, the Court held that a defendant was entitled to a belated *direct appeal* of a conviction and sentence where he had asked the trial court to appoint appellate counsel to file an appeal, but

[4] Then a district judge, he was dissenting from the district court's decision that the doctrine of law of the case precludes relief on a motion to correct an illegal sentence where the sentence had been affirmed by this Court on direct appeal). This Court granted review, quashed the district court's opinion, and unanimously and expressly approved then-Judge Anstead's dissent. *Bedford v. State*, 633 So. 2d 13, 14 (Fla. 1994).

the public defender never filed the appeal. 229 So. 3d at 240, 243. In short, there is no reason to allow a belated appeal of the denial of a Rule 3.850 motion, but to prohibit the belated appeal of the denial of a Rule 3.800 under the same circumstances.

Though not expressly addressed to the standard for granting a belated appeal, the text of Rule 9.141(c)(4) (which does not distinguish between belated appeals from convictions, sentences, orders denying Rule 3.850 motions, or orders denying Rule 3.800 motions) demonstrates that the failure of the trial court to notify the defendant of the right to an appeal is a recognized ground for granting a belated appeal. This subsection provides that the normal two-year time limit for seeking a belated appeal does not apply where the trial court failed to advise the defendant of the right to appeal and the defendant "should not have ascertained" his or her appellate rights "by the exercise of reasonable diligence." This subsection presupposes that a petition for a belated appeal that is filed within two years will be granted where the trial court failed to advise the defendant of the right to appeal.

Finally, the difference between the procedural posture in *Shevin* and this case is irrelevant. This Court expressly held that the district court in that case "correctly treated the appeal as one timely filed." 316 So. 2d at 51. That is precisely what an order granting a petition for belated appeal does: it treats the

petition as a timely filed notice of appeal. *See* Fla. R. App. P. 9.141(c)(5)(D) ("An order granting a petition for belated appeal shall be filed with the lower tribunal and treated as the notice of appeal, if no previous notice has been filed."). Thus, this Court should adhere to *Shevin*, answer the dispositive, second question in the affirmative, and reverse.

II. TRIAL COURTS SHOULD BE REQUIRED TO ADVISE DEFENDANTS OF THEIR RIGHT TO APPEAL THE DENIAL OF A MOTION TO CORRECT AN ILLEGAL SENTENCE WITHIN THIRTY DAYS.

The first question certified by the district court of appeal – whether a trial court is required to notify a defendant of his or her appellate rights – is largely academic as to the Petitioners because, regardless of whether a trial court is required to do so, a defendant not so advised is entitled to a belated appeal. As a matter of common sense, however, the answer to this question should be "yes" and Rule 3.800 should be amended to include this requirement. This Court has not hesitated to amend the rules regarding postconviction relief motions and appeals to accommodate similar concerns. *See, e.g., Williams*, 777 So. 2d at 950-51 (holding that defendant is entitled to belated appeal where he asked attorney to file timely appeal of denial of Rule 3.850 motion but counsel failed to do so and amending Rule 3.850 to authorize such an appeal). Indeed, as Judge Altenbernd noted, the Court did precisely the same thing with regard to Rule 3.850 after its opinion in *Shevin*. (App. 26 (citing *The Fla. Bar re Fla. R. Crim. P.*, 343 So. 2d

1247 (Fla. 1977)).) As he noted, there are no "apparent" reasons for not amending Rule 3.800 to mirror Rule 3.850 in this regard. (App. 26.) *See also Cotterrel,* 890 So. 2d 316 (Sharp, J., urging that Rule 3.800 be amended to avoid "trap for unwary").

By requiring trial courts to advise defendants of their appellate rights, the need for belated appeals would be substantially reduced. This would have two important public policy benefits. First, it would help reduce the workload on the appellate courts by reducing the number of belated appeal petitions. Second, it would provide far greater certainty and finality to the criminal process in much the same manner as the appellate deadlines do. Defendants will have thirty days to appeal an order denying a motion to correct an illegal sentence and the flood gates of indefinite periods to appeal these orders, which concerned the district court, will remain closed.

As far as the form of the amendment to Rule 3.800, counsel notes that slight restructuring may be appropriate. The recent amendment to authorize a motion for rehearing from the denial of an order denying a motion to correct an illegal sentence placed this language in a subdivision that is addressed to motions filed before an appeal, even though the terms of the amended language make clear that it applies to all motions to correct an illegal sentence. *See* Fla. R. Crim. P. 3.800(b)(1)(B) (2005), *amended by Amends. to Fla. R. Crim.*, 886 So. 2d 197, 199-

200 (Fla. 2004). Consequently, it is respectfully submitted that the motion for rehearing language should be moved from subdivision (b)(1)(B) and put with a new provision requiring notification of the right to appeal into a new subdivision (b)(3) that is identical to Florida Rule of Criminal Procedure 3.850(g), which addresses the same issues with regard to motions to vacate, set aside, or correct sentences.

CONCLUSION

For the foregoing reasons, this Court should answer both certified questions in the affirmative and reverse the district court's denial of Petitioners' petitions for belated appeal.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY certify that I have delivered a copy of the foregoing by U.S. Mail to **Hon. Charles J. Crist, Jr.**, Attorney General, Office of the Attorney General, 400 South Monroe Street, # PL-01, Tallahassee, Florida 32399-6536, and **Tonja Rene Vickers**, Assistant Attorney General, Office of the Attorney General, 3507 East Frontage Road, Suite 200, Tampa, Florida 33607-1793, attorneys for Respondent, this 5th day of January, 2006.

_____

Attorney

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief uses Times New Roman 14-point font and complies with the font requirements of Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

_____

Attorney

APPENDIX