IN THE SUPREME COURT OF FLORIDA

Case No. SC06-1800

WILLIE EARL LUTON,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

PETITIONER'S BRIEF ON JURISDICTION

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INTRODUCTION

Petitioner Willie Earl Luton was the defendant in the trial court and the appellant on appeal. Respondent State of Florida was the prosecution in the trial court and the appellee on appeal. The parties will be referred to in this brief as "Mr. Luton" and "the state." The symbol "A" will constitute a reference to the appendix being filed along this brief.

STATEMENT OF THE CASE AND FACTS

On appeal to the Third District Court of Appeal, Mr. Luton challenged the trial court's denial of his motion to correct sentencing error, which had been filed pursuant to Florida Rule of Criminal Procedure 3.800(b)(2) (A 7). He asserted that his sentence as a habitual violent felony offender was unlawful under the dictates of *Blakely v. Washington*, 542 U.S. 296 (2004) (A 2-5), which was decided while the appeal was pending (A 7). That contention was based on the fact that there had been no jury determination that the statutory requirements for such sentencing had been met (A 3-4).

Although it subsequently went on to discuss the merits of Mr. Luton's claim (A 5), the district court, in its initial opinion, disposed of the issue by stating (A 4):

> First, the defendant made no objection in the trial court that the jury, rather than the judge, must determine whether the defendant qualified as a HVFO. Since there was no timely objection to the trial court sitting as the trier of fact on the habitualization

> issue, the point is not properly preserved for appellate review. *See McGregor v. State*, 789 So. 2d 976, 977 (Fla. 2001).

In a second opinion granting clarification and denying rehearing and certification (A 8), the district court rejected Mr. Luton's assertion that the issue was preserved by the motion to correct sentencing error. The court stated (A 6-7):

> We adhere to the view that the defendant did not timely raise this issue below. If a defendant believes that he is entitled to a jury trial on the question whether he qualifies for habitualization, logically he must raise that issue before, not after, the sentencing proceeding. The defendant neither requested a jury not objected to the trial judge sitting as the trier of fact for purposes of habitual offender sentencing.
>
> The defendant may be arguing that he could not have made a *Blakely* argument at the time of his sentencing because *Blakely* had not been decided at that time. The *Blakely* decision was announced after this appeal had commenced. That fact makes no difference. To raise the issue timely, and thus preserve the point for appellate review, the defendant needed to request a jury trial on sentencing, or object to the trial judge sitting as the trier of fact, prior to the sentencing hearing. As stated in an analogous case, "To benefit from the change in law, the defendant must have timely objected at trial if an objection was required to preserve the issue for appellate review." *See Smith v. State*, 598 So. 2d 1063, 1066 (Fla. 1992) (citation omitted [by the district court]).
>
> Since the point was not timely raised in the trial court, it is not properly preserved for appellate review. *See* § 924.051(1)(b), (3), Fla. Stat. …

This proceeding follows.

SUMMARY OF ARGUMENT

The decision under review is in express and direct conflict with the decision of the Second District Court of Appeal in *Edison v. State*, 848 So. 2d 498 (Fla. 2d DCA 2003). In the present case, the court specifically concluded that a challenge to habitual offender sentencing must be raised prior to or at the time of sentencing and that such a challenge is therefore not preserved for review when raised in a motion to correct sentencing error (A 7-8). Considering the exact same question in *Edison*, the Second District held that the issue is preserved when raised for the first in a motion to correct sentencing error. 848 So. 2d at 499. The decision also conflicts with *Sheffield v. State*, 903 So. 2d 1009 (Fla. 4th DCA 2005), because the court there dealt with precisely the claim presented by Mr. Luton on review of denial of a motion to correct sentencing error.

To the extent that the decision under review is read to mean that issues based on *Blakely v. Washington*, 542 U.S. 296 (2004), are not preserved when raised for the first time in a motion to correct sentencing error, it directly and expressly conflicts with the decision in *Plummer v. State*, ___ So. 2d ___, 31 Fla. L. Weekly D1807, D1808 (Fla. 1st DCA Aug. 4, 2006), which stated that the *Blakely* challenge there was preserved because was raised in a "motion under rule 3.800(b)(2)." By the same

token, the decision here conflicts with a line of cases in which Florida appellate courts have considered *Blakely* issues that were raised for the first time by motion to correct sentencing error.

In *Amendments to Florida Rule of Appellate Procedure 9.020(g) and Florida Rule of Criminal Procedure 3.800*, 675 So. 2d 1374, 1375 (Fla. 1996), the decision that adopted the rule revision that allows for sentencing challenges to be made by motion to correct sentencing error during the pendency of appeals, this court stated that "[t]he purpose of these amendments is to ensure that that a defendant will have the opportunity to raise sentencing errors on appeal." Expanding on this concept, the Fifth District Court of Appeal in *Davis v. State,* 868 So. 2d 647, 649 (Fla. 5th DCA 2004), *quashed on other grounds,* 887 So. 2d 1286 (Fla. 2004), noted that "a principal objective of the rule is to allow a defendant to preserve an otherwise unpreserved error." Although these decisions encompass all sentencing errors, the decision in the present case carves out an exception for the sort of error presented here and, by doing so, it creates express and direct conflict.

ARGUMENT

I

BY CONCLUDING THAT A DEFENDANT DOES NOT PRESERVE FOR REVIEW A CHALLENGE TO A HABITUAL OFFENDER SENTENCE RAISED IN A MOTION TO CORRECT SENTENCING ERROR, THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL IN THE PRESENT CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL IN *EDISON V. STATE*, 848 SO. 2D 498 (FLA. 2D DCA 2003) AND WITH THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL IN *SHEFFIELD V. STATE*, 903 SO. 2D 1009 (FLA. 4TH DCA 2005).

As recognized by the Third District Court of Appeal (A 7), Mr. Luton, in his motion to correct sentencing error filed pursuant to Florida Rule of Criminal Procedure 3.800(b)(2), asserted that his habitual violent felony offender sentence violated the dictates of *Blakely v. Washington*, 542 So. 2d 296 (2004).

The district court nonetheless determined that the issue was not preserved for appellate review, stating, "If a defendant believes that he is entitled to a jury trial on the question whether he qualifies for habitualization, logically he must raise that issue before, not after, the sentencing proceeding (A 7)" Applying those dictates to Mr. Luton, the court concluded, "To raise the issue timely, and thus preserve the point for appellate review, the defendant needed to request a jury trial on sentencing, or object to the trial judge sitting as the trier of fact, prior to the sentencing hearing (A 7)."

The Second District Court of Appeal reached precisely the opposite conclusion in *Edison v. State*, 848 So. 2d 498 (Fla. 2d DCA 2003). In that case, as here, the defendant did not object to his habitual offender sentence either before or during the sentencing, but did so in a motion to correct sentencing error. The court stated, 848 So. 2d at 499:

> Although Edison did not object to his HFO sentence during sentencing, he has preserved the issue for review by filing a motion to correct sentencing error pursuant to Florida Rule of Criminal Procedure 3.800(b)(2).

Clearly, the present case directly and expressly conflicts with *Edison*.

In addition, the present case conflicts with the decision in *Sheffield v. State*, 903 So. 2d 1009 (Fla. 4th DCA 2005). The defendant there not only challenged his habitual violent felony offender sentence pursuant to a Rule 3.800 motion, but he did so by specifically alleging that it violated *Blakely*, 903 So. 2d at 1010, the exact nature of the challenge made by Mr. Luton (A 6-7). The Fourth District in *Sheffield* dealt with issue solely on the merits, thereby recognizing that a defendant preserves such an issue by raising it in a Rule 3.800 motion.

II

TO THE EXTENT THAT THE DECISION IN THE PRESENT CASE IS READ TO MEAN THAT SENTENCING CHALLENGES BASED ON THE DECSION IN *BLAKELY V. WASHINGTON*, 542 U.S. 296 (2004), ARE NOT PRESERVED WHEN RAISED FOR THE FIRST TIME IN A MOTION TO CORRECT SENTENCING ERRORS, IT EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL IN *PLUMMER V. STATE,* ___ SO. 2D ___, 31 FLA. L. WEEKLY D1807 (FLA. 1ST DCA AUG. 4, 2006), AND WITH A PANOPLY OF DECISIONS IN CASES THAT REVIEWED *BLAKELY* ISSUES THAT AROSE IN PRECISELY SUCH MOTIONS.

To the extent that the decision in the present case is read to mean that *Blakely* issues are not preserved when raised for the first time in a motion to correct sentencing error, it is in conflict with the decision in *Plummer v. State*, ___ So. 2d ___, 31 Fla. L. Weekly D1807 (Fla 1st DCA July 3, 2006). There, the defendant asserted in a Rule 3.800(b) motion that the scoresheet points were illegal pursuant to *Blakely* and the First District found that "because Appellant filed the motion under rule 3.800(b)(2), his contentions are preserved for our review." 31 Fla. L. Weekly at D1808.[1]

[1] *Plummer* is just one of many cases in which Florida appellate courts have reviewed *Blakely* issues that were raised in motions to correct sentencing errors. *See, e.g., Glennon v. State,* ___ So. 2d ___, 31 Fla. L. Weekly D2241 (Fla. 5th DCA Aug. 25, 2006); *Morrow v. State,* ___ So. 2d ___, 31 Fla. L. Weekly D466 (Fla. 1st DCA Feb. 13, 2006); *Coggins v. State,* 921 So. 2d 758 (Fla. 1st DCA 2006); *Richardson v. State,* 915 So. 2d 766 (Fla. 2d DCA 2005); *Williams v. State,* 907 So. 2d 1224 (Fla. 5th DCA 2005). The decision under review conflicts with this entire line of cases.

III

BY SINGLING OUT THE ISSUE IN THIS CASE AS THE ONE SENTENCING ISSUE THAT CANNOT BE PRESERVED BY THE USE OF A MOTION TO CORRECT SENTENCING ERROR, THE DECISION IN THIS CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THIS COURT IN *AMENDMENTS TO FLORIDA RULE OF APPELLATE PROCEDURE 9.020(g) AND FLORIDA RULE OF CRIMINAL PROCEDURE 3.800*, 675 SO. 2D 1374 (FLA. 1996), AND THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL IN *DAVIS V. STATE*, 868 SO. 2D 647 (FLA. 5TH DCA 2004), *QUASHED ON OTHER GROUNDS*, 887 SO. 2D 1286 (FLA. 2004).

The district court decision here singles out the sentencing issue this case presents and determines that it alone cannot be preserved by the use of motion to correct sentencing error (A 7). In doing so, it expressly and directly conflicts with the decision of this court that adopted the procedure for filing motions to correct sentencing errors during the pendency of appeals. In *Amendments to Florida Rule of Appellate Procedure 9.020(g) and Florida Rule of Criminal Procedure 3.800*, 675 So. 2d 1374, 1375 (Fla. 1996), this court stated that "[t]he purpose of these amendments is to ensure that a defendant will have the opportunity to raise sentencing errors on appeal." It made no exceptions for the sort of issue presented here, or for any other sort of sentencing issue.

Expanding on the concept expressed by this court, the Fifth District Court of Appeal noted that "a principal objective of the rule is to allow a defendant to preserve an otherwise unpreserved error." *Davis v. State,* 868 So. 2d 647, 649 (Fla.

5th DCA 2004), *quashed on other grounds*, 887 So. 2d 1286 (Fla. 2004). The decision under review also conflicts with this case.

CONCLUSION

Based upon the foregoing argument and authorities, Mr. Luton respectfully submits that this court should accept jurisdiction in the present case.[2]

Respectfully submitted,

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_____

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[2] The fact that the district court in the present case, after finding that the asserted error was not preserved, also indicated its disagreement with Mr. Luton's position on the merits should not impact the decision as to whether this court should accept this case. The determination by the district court that the issue was not preserved may well have a substantial impact on Mr. Luton. Should he seek habeas corpus in a federal court, the determination could keep that court from reaching the merits of his claim. Moreover, regardless of the impact on Mr. Luton, the conflict discussed in this brief will create confusion in the courts of this state, so a determination of the question by this court is important.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was forwarded to Linda S. Katz, Assistant Attorney General, 444 Brickell Avenue, Ste. 950, Miami, FL 33131 this ___ day of _____, 2006.

_____
ANTHONY C. MUSTO

CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENTS

I HEREBY CERTIFY that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

_____
ANTHONY C. MUSTO