IN THE SUPREME COURT OF FLORIDA

ERIC GRIFFIN,	:	
Petitioner,	:	
vs.	:	Case SC07-168
STATE OF FLORIDA,	:	No.
Respondent.	:	
	:	

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

BRIEF OF PETITIONER ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

On September 24, 2003, the Hillsborough County State Attorney charged the Petitioner, Eric Griffin, with sexual battery using a deadly weapon and burglary with battery, in violation of Florida Statutes 794.011 and 810.02. (R18-22)

Briefly, the state charged that on November 2, 2002, the Petitioner met the victim at issue about 2:30 in the morning on a roadside near Ybor City where she was looking for a house key she'd accidentally thrown out of her car. (T68-69) The state said the evidence showed Petitioner offered to buy her breakfast but needed to stop at his apartment to get money. (T69-70) The state said the evidence showed after the victim went into the apartment, Petitioner attacked and raped her. (T70-72) The defense responded that the victim had consensual sex with the Petitioner. (T79-80)

The Honorable Wayne Timmerman, Circuit Judge, conducted jury trial beginning November 17, 2004. (T1)[1] The jury acquitted Mr. Griffin of Count Two, and returned a lesser-included verdict of sexual battery with the threat of force. (R65) On November 18, 2004, Judge Timmerman sentenced Mr. Griffin to 30 years prison as a prison releasee reoffender.

[1] In the brief that follows, references to the record proper will be made through the use of the letter "R," followed by the appropriate page number. ("R1," etc.) References to the transcript of trial will be made through the use of the letter "T," followed by the appropriate page number. ("T1," etc.)

(R69-77) Mr. Griffin filed a timely notice of appeal on November 19, 2004. (R84) Thereafter, on June 29, 2005, the Petitioner's counsel filed an initial motion to correct sentencing error, and November 17, 2005, filed a second or amended motion to correct. (R93-153,213-40)

After the Second District issued its opinion on January 5, 2007, the Petitioner filed a notice to invoke discretionary jurisdiction on January 29, 2007, and that petition follows.

SUMMARY OF THE ARGUMENT

This Honorable Court should accept jurisdiction first based on certified conflict between the instant opinion and Ridgeway v. State, 892 So.2d 538 (Fla. 1st DCA 2005). But the Court should also accept jurisdiction because the opinion of the Second District arguably and too-severely limits motions to correct sentencing error (under Rule 3.800(b)) to only two situations, first where the sentence is illegal (and thus arguably correctable under Rule 3.800(a)), and second only in those cases where certain sentencing documents were created and served after the sentencing hearing, "resulting in written sentences with terms and conditions not imposed in open court."

ARGUMENT

ISSUE

THIS COURT SHOULD ACCEPT JURISDICTION BASED ON CERTIFIED CONFLICT BETWEEN THE INSTANT CASE AND RIDGEWAY V. STATE, AND BECAUSE THE DISTRICT COURT'S OPINION DRASTICALLY LIMITS THE INTENDED SCOPE OF MOTIONS TO CORRECT SENTENCING ERROR UNDER FLA. RULE APP. PRO. 3.800(b).

In this case, Griffin v. State, --- So.2d ----, 32 Fla. L. Weekly D179 (Fla. 2 DCA January 5, 2007), the Second District certified conflict with Ridgeway v. State, 892 So.2d 538 (Fla. 1st DCA 2005), regarding the "application of ex post facto principles to costs imposed at sentencing." See slip opinion, pages 7-9. The Second District noted Ridgeway's holding the imposition of certain costs after the effective date of the statute implementing those costs "violates ex post facto prohibitions only when the length of an inmate's sentence can be increased by failure to pay the costs," and/or because the statute(s) at issue do not "subject a violator to criminal penalties such as additional prison time or loss of gain-time for failure to pay the cost." See, slip opinion, pages 7-8.

The Second District disagreed with the analysis in Ridgeway, and thus ordered struck in this case a $65 cost pursuant to section 939.185 and costs of $2 and $150 pursuant

to section 938.085, then as noted certified conflict with Ridgeway.

In light of the foregoing, this Court should exercise its jurisdiction in this casein order to resolve this issue substantially affecting the uniform administration of justice in this case. That is, while the costs in any given case may seem relatively inconsequential, they must be multiplied by the number of such cases affected at least since the First District issued Ridgeway in 2005. Moreover, the assessment of such fees - after the effective date of the statute or statutes implementing those costs - clearly affects the public's perception of this state's court system, as those fees strongly appear to violate ex post facto. Thus if such fees are to be assessed "ex post facto" at all, they should be assessed uniformly throughout this state, rather than subject to one standard of review in one appellate district and another standard in a separate district.

Aside from the foregoing, there exists a separate critical issue this Honorable Court should correct, to wit: the Second District's opinion which appears to severely restrict the scope of motions to correct sentencing error.

To begin with, the Second District specifically wrote to "address various sentencing issues that were raised in the trial court by way of motions to correct sentencing errors

pursuant to Florida Rule of Criminal Procedure 3.800(b)(2).” See, slip opinion, pages 1-2. The Second District noted the Petitioner’s counsel filed two motions to correct sentencing error, the second arguing in part that “certain documents admitted at sentencing to support the prison releasee reoffender sentence were not properly authenticated and were therefore inadmissible.” See, slip opinion, page 2.

In due course, the Second District concluded that the issue regarding proof of Petitioner’s status as a prison releasee reoffender was both waived because it was not raised by trial counsel, and was not the type of sentencing error that could be addressed in a motion under Rule 3.800(b):

> [W]e conclude that any issue regarding the admissibility of evidence presented at the sentencing hearing to support prison releasee reoffender sentencing was waived when Mr. Griffin's [trial] counsel failed to object to the evidence. It could not be resurrected by a motion to correct sentencing error.

See slip opinion, pages 3-4. The Second District ultimately held the admission into evidence of a “’crime and time’ letter prepared by the Department of Corrections without proper authentication,” so as to prove a defendant’s status as a prison releasee reoffender (PRR), was not a “proper subject for a motion under rule 3.800(b),” and thereafter appeared to drastically limit the scope of such motions, thus appearing to thwart the intent of both the Legislature and this Honorable

Court:

> "Sentencing error" for purposes of this motion was never intended to cover any and all issues that arise at sentencing hearings and could have been subject to objection at the hearing. The rule was not intended to circumvent rules requiring contemporaneous objections or enforcing principles of waiver. It was not intended to give a defendant a "second bite at the apple" to contest evidentiary rulings made at sentencing to which the defendant could have objected but chose not to do so. It was not intended as a broad substitute for a postconviction claim of ineffective assistance of counsel for counsel's representation at a sentencing hearing. Instead, it was intended to address errors to which the defendant had no meaningful opportunity to object and matters that rendered the sentence otherwise subject to review under rule 3.800(a).

See, slip opinion, page 4. In doing so, the Second District acknowledged clear legislative intent "that all claims of error are [to be] raised and resolved at the first opportunity," but instead of permitting such an error affecting a "PRR" sentence to be resolved at that first opportunity – that is, during the process of appeal – the Second District would require such an arguable sentencing error to be corrected, if at all, following direct appeal and only through a Rule 3.850 motion for post-conviction relief alleging ineffective assistance of trial counsel. See, slip opinion, pages 4-6.

The Second District noted that sentencing documents are often "created and served after the sentencing hearing," resulting in written sentences with terms and conditions not

imposed in open court, and as to which the defendant never got a chance to object. See slip opinion, page 5:

> Rule 3.800(b) was created to address these issues. It also permits counsel to correct the kinds of issues that can be raised at any time because they render the sentence illegal. This distinction may admittedly be a little imprecise at times, but what is clear is that the motion was never intended to permit counsel to reopen a sentencing hearing merely to do a better job than was done at that hearing.

The Petitioner agrees that Rule 3.800(b) was probably not implemented to enable a defendant or his attorney "merely to do a better job" a second time than was done at the original sentencing hearing. However, the opinion of the Second District - as it now stands, appears to permit such Rule 3.800(b) motions only to correct two types of error, an illegal sentence (and thus already "correctable" under Rule 3.800(a)), and a sentence where the implementing documents were created and served after the sentencing hearing, "resulting in written sentences with terms and conditions not imposed in open court."

With all due respect, the Petitioner suggests that Rule 3.800(b) was not designed and implemented – by the Legislature and/or by this Honorable Court – to be limited to only those two situations, one of which is already covered by Rule 3.800(a).

Further, the decision as it now stands would require a defendant - whose attorney failed to object to a sentencing

error apparent on the record – to wait until he can serve a motion for post-conviction relief to correct such a patent error:

> Mr. Griffin's trial counsel appeared at sentencing and could have objected to the lack of authentication of the "crime and time" letter. His failure to do so waived this issue. Indeed, our record now reflects that counsel's failure to object may well have arisen from the fact that the document's contents were accurate and thus the document could have been properly authenticated, albeit by further effort and inconvenience to the State. When evidentiary rulings are unchallenged at sentencing, the defendant generally waives any objection. Of course, if the failure to object somehow prejudices the defendant - i.e., an unauthenticated document turns out to be inaccurate and the authentic document would not permit the sentence imposed - then the defendant may have grounds for a motion for postconviction relief alleging ineffective assistance of counsel. We therefore affirm the imposition of the prison releasee reoffender sentence in this case.

See slip opinion, pages 5-6. Moreover, in this case there appeared to be a very good reason why the Petitioner's trial attorney didn't object, as the Second District required.

That is, while the Petitioner was sentenced on November 18, 2004, the cases cited in his second motion to correct sentencing error were not issued until the following year. That is, the First District issued Gray v. State, 910 So. 2d 867 (Fla. 1st DCA 2005), Desue v. State, 908 So. 2d 1116 (Fla. 1st DCA 2005), and Peterson v. State, 911 So. 2d 184 (Fla. 1st DCA 2005), in July and/or September 2005, and in those cases the First District arguably clarified the "necessary

authentication of documents when the state seeks sentencing under the PRR act,” in a manner arguably not available to the Petitioner’s trial attorney.

CONCLUSION

Wherefore, and in light of the foregoing, the Petitioner respectfully requests that this Court accept jurisdiction of his case for further review, based both on certified conflict and on the Second District's appearing to limit the scope of motions under Rule 3.800(b), contrary to the intent of this Honorable Court, the Florida Legislature, or both.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been mailed to the Attorney General, Concourse Center #4, 3507 E. Frontage Rd. - Suite 200, Tampa, FL 33607, (813) 287-7900, on this _____ day of March, 2007.

CERTIFICATION OF FONT SIZE

I hereby certify that this document was generated by computer using Microsoft Word with Courier New 12-point font in compliance with Fla. R. App. P. 9.210 (a)(2).

Respectfully submitted,

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APPENDIX

A. Opinion of the Court of Appeal, Second District, Issued on January 5, 2007