IN THE SUPREME COURT OF FLORIDA

MELVIN B. THOMPSON,

Petitioner,

VS. CASE NO. SC07-489
Lower Tribunal No.
STATE OF FLORIDA, 1D06-0420

Respondent.

_____/

SECOND AMENDED JURISDICTIONAL BRIEF OF PETITIONER

PRELIMINARY STATEMENT

Petitioner was the defendant in the trial court and the appellant in the lower tribunal. Thompson will be referred to either by his name or the "petitioner". The respondent will be referred to in this brief as either the "respondent" or the "State". Attached as an Appendix is a copy of the decision of the lower tribunal.

STATEMENT OF THE CASE AND FACTS

On September 19, 1995, petitioner was charged by information with armed sexual battery by penetration, armed burglary of a dwelling, aggravated assault with a deadly weapon, and false imprisonment.

At a pre-trial hearing, the trial judge announced that he intended to impose a guidelines departure sentence of life in prison without parole if petitioner was found guilty at trial.

See record on appeal, volume 4, pages 683-689. Fourteen days later, defense counsel filed a motion to recuse the trial judge and alleged that he had pre-judged the case without hearing any of the testimony, seeing any of the evidence, or hearing any argument from counsel. That motion was denied as being legally insufficient for being filed beyond the ten day period for moving to recuse, as required by Judicial Administration Rule 2.160(e).

Thereafter, he was tried by a jury and found guilty of each offense as charged. As promised, the trial judge departed from the recommended guidelines sentence of 122.5 to 204.2 months incarceration, and ordered petitioner to spend the remainder of his life in prison.

Notice of appeal was timely filed. Petitioner/appellant argued in the First District Court that defense counsel's failure to file a timely motion to disqualify the trial judge amounted to ineffective assistance of counsel on the face of the record. In the alternative, petitioner/appellant asserted that the ten day requirement for moving to disqualify as set out in Judicial Administration Rules 2.160(e), was not jurisdictional, and that the trial court erred by not granting the motion to recuse.

Both arguments were rejected, Thompson v. State, 764 So.

2d 630 (Fla. 1st DCA 2000)(Thompson I). The district court noted that Mr. Thompson had stated a valid reason for recusal but held that the issue(s) Acan be best addressed in a post-conviction proceeding@ Id, and refrained from addressing petitioner/ appellant=s claim of ineffective assistance of counsel.

Thereafter, petitioner filed a motion for post-conviction relief in which he asserted that being tried by a judge who had pre-judged a case before trial created a structural defect in the proceedings for which actual prejudice was not required to be shown. In the alternative, petitioner asserted that pre-judging what sentence would be imposed before hearing testimony or seeing the evidence in a case was de facto prejudice.

The district court disagreed with both arguments and held that if the trial judge was actually prejudice

> Ahe would have certainly recused himself pursuant to the dictates of the Canon 3, Florida Code of Judicial Administration. Appellant has made no allegation of any unethical conduct on the part of Judge Smith. Here, appellant=s argument is merely that he had a reason to believe that the trial judge appeared to be biased. It goes without saying that the appearance of bias, is different from the existence of actual bias, which is checked by a judge=s ethical obligation to recuse himself even if no motion to disqualify is ever filed.@

Thompson v. State, 949 So. 2d 1169, n. 3 (Fla. 1st DCA 2007)(Thompson II).

The First District Court recognized that this decision created conflict with decisions from the Fourth and Second District Courts in Goines v. State 708 So. 2d 656 (Fla. 4th DCA 1998) and Kleppinger v. State, 884 So. 2d 146 (Fla. 2d DCA 2004).

SUMMARY OF ARGUMENT

The decision of the First District Court in Thompson II, is in express and direct conflict with decisions from the Second and Fourth District Courts on the same question of law. Goines v. State, infra; Kleppinger v. State, infra.

The First district Court held that an appellant must show actual prejudice, or that the outcome of the case would have been different in order to prevail on a post-conviction claim of ineffective assistance of counsel for failure to timely file an otherwise valid motion to recuse. Thompson II.

The Second and Fourth District Court have held that the appearance of impropriety alone is sufficient to grant post-conviction relief on an ineffective assistance of counsel claim for failing to file a valid motion to recuse. Goines v. State, infra; Kleppinger v. State, infra. Both courts

specifically rejected the position taken by the First District Court.

This Court should accept jurisdiction of this case and resolve this conflict in decisions on this issue.

ARGUMENT

ISSUE PRESENTED

THE DISTRICT COURT=S DECISION IN THOMPSON V. STATE, SUPRA, IS IN EXPRESS AND DIRECT CONFLICT WITH THE SECOND DISTRICT COURT=S DECISION IN KLEPPINGER V. STATE, SUPRA AND THE FOURTH DISTRICT COURT=S DECISION IN GOINES V. STATE, SUPRA, IN THAT THOMPSON EXPRESSLY HELD THAT ACTUAL PREJUDICE MUST BE SHOWN TO PROVE AN INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM BASED ON COUNSEL=S FAILURE TO PROPERLY DISQUALIFY A TRIAL JUDGE, WHILE KLEPPINGER AND GOINES EXPRESSLY HELD THAT ACTUAL PREJUDICE NEED NOT BE SHOWN.

The constitutional standard for establishing conflict jurisdiction of the Florida Supreme Court is Awhether the decision of the District Court on its face collides with a prior decision of this Court or another District Court on the same point of law so as to create an inconsistency or conflict among the precedents.@ Kincaid v. World Insurance Company, 157 So. 2d 517 (Fla. 1963).

The First District Court=s decision in Thompson II, supra, collides with prior decisions of the Second and Fourth District Courts on the same point of law so as to create an inconsistency or conflict among the precedents. See, Kleppinger v. State, supra; Goines v. State, supra.

In Thompson II, supra, the issue was whether the second prong of the Strickland[1] test for ineffective assistance of

[1] Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052,

counsel i.e., the prejudice prong, applied when counsel was alleged to be ineffective for failing to file a legally sufficient motion to disqualify the presiding judge. The First District Court held that Mr. Thompson was not entitled to relief because Ahe is unable to demonstrate any prejudice from the deficient performance he has alleged.@ Thompson II, supra. Although the life sentence imposed on Mr Thompson was a guidelines departure sentence, the district court found that it was a legal sentence that any judge could have imposed under the facts of the case.

The First District Court also held that no structural defect was demonstrated because such a claim required a showing of actual prejudice by the trial judge. The court concluded, AIf the trial judge had actually been biased, then he would have certainly recused himself pursuant to the dictates of the Canon 3, Florida Code of Judicial Conduct and rule 2.160(i), Florida Rules of Judicial Administration.@ Id at n.3.

In Goines v. State, 708 So. 2d 656 (Fla. 4th DCA 1998), the defendant requested trial counsel to move to disqualify the presiding judge because that judge, when working as an assistant state attorney, prosecuted Goines on a drug charge,

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80 L.Ed. 2d 674 (1984).

the conviction for which was to be used as the basis for a habitual felony offender sentence. Trial counsel forgot to file the motion and the judge in question tried and sentenced Goines.

Goines then moved for post-conviction relief and asserted that trial counsel provided ineffective assistance by not moving to recuse the trial judge. The trial court denied relief because Goines failed to prove that the outcome of the case would have been different with a different judge presiding.

On appeal, the Fourth District Court reversed for a new trial before a different judge. In so doing, the Fourth District Court reasoned that Aan analysis focusing solely on mere outcome determination without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective,@ Id. noting that this Court[2] Ahas held that trial before a judge whose impartiality may reasonably be questioned >would present grave due process concerns,= because >proceedings involving criminal charges... must both be and appear to be fundamentally fair.=@ The Fourth District Court concluded:

> AThe primary evil in having a judge whose impartiality might reasonably be questioned

[2] In Steinhorst v. State, 636 So. 2d 498 (Fla. 1994).

> is not in the actual results of that judge=s decision making. Rather, it is the intolerable appearance of unfairness that such a circumstance imposes on the system of justice. Public acceptance of judicial decision making turns on popular trust in judges as neutral magistrates. The judicial system fails to present a plausible basis for respect when a judge=s impartiality can reasonable be questioned.@

Id. at 660.

Similarly, in Kleppinger v. State, 884 So. 2d 146 (Fla. 2d DCA 2004), the issue before the court was whether trial counsel provided ineffective assistance of counsel when he failed to move to disqualify the trial judge, whose son, a jail guard, was beaten by Kleppinger as Kleppinger tried to escape from the county jail. That district court concluded:

> AA disqualification issue in the context of an ineffective assistance claim requires a defendant to allege both deficiency and prejudice. Goines v. State, 708 So. 2d 656 (Fla. 4th DCA 1998). The finding of prejudice turns on whether the disqualification would have been required, not on whether the outcome of a new trial would have been different.@

Id, at 149.

The case was remanded to the trial court for an evidentiary hearing to determine if counsel had a strategic reason for not moving to recuse the trial judge.

Thus, the First District=s decision in Thompson, supra, required a showing of actual prejudice by a trial judge before

a post-conviction claim of ineffective assistance based on a failure to recuse would be granted. In reaching that conclusion, the First District Court specifically rejected the rationale and results reached in both Goines and Kleppinger.

Goines and Kleppinger, on the other hand, merely require a motion filed in good faith that stated the accused had a well-founded fear of not receiving a fair and impartial trial. Both court specifically rejected the rationale used by the First District Court that actual prejudice must be shown in the context of ineffective assistance of counsel for failing to properly move to recuse a trial judge.

Accordingly, this Court should accept jurisdiction of this case and resolve the inconsistency between the First District Court and the Second and Fourth District Courts regarding whether actual prejudice must be demonstrated before post-conviction relief will be granted on a claim of ineffective assistance of counsel for failing to properly recuse a presiding trial judge.

If it is true that ineffective assistance of counsel is rarely found on the face of the record, see, Henley v. State, 719 So. 2d 990 (Fla. 4th DCA 1998), then the decision by the First District Court will require all post-conviction litigants to prove that a sitting trial judge was actually

prejudice, with a presumption that every judge with any prejudices will automatically recuse him or herself, before obtaining relief on a claim of ineffective assistance of counsel for failing to properly recuse the judge. Such an intolerable burden should not be placed on someone who merely seeks a fair trial before a neutral and detached judge.

CONCLUSION

Based on the foregoing argument, reasoning and citations to authorities, this Court should accept jurisdiction of this case and resolve the inconsistencies it created between the First District Court and the Second and Fourth District Courts.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to **Trisha Meggs Pate**, Assistant Attorney General, Counsel for the State of Florida, The Capitol, PL-01, Tallahassee, FL 32399-1050; and to **Melvin B. Thompson**, DC #959252, Washington Correctional Institution, 4455 Sam Mitchell Drive, Chipley, Florida 32428-3597, on this date, May _____, 2007.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using Courier New 12 point font in compliance with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

Respectfully submitted,

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ON PETITION FOR DISCRETIONARY REVIEW
OF A DECISION OF THE DISTRICT COURT OF APPEAL
FIRST DISTRICT COURT OF FLORIDA

SECOND AMENDED JURISDICTIONAL BRIEF OF PETITIONER

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