

IN THE SUPREME COURT OF FLORIDA

SIDNEY NORVIL, Jr.,)
)
 Petitioner,)
)
 vs.)
)
 STATE OF FLORIDA,)
)
 Respondent.)
)
 _____)

CASE NO. SC14-_____
 DCA No. 4D11-1740

PETITIONER’S JURISDICTIONAL BRIEF

On Review from the District Court of Appeal, Fourth District, State of Florida

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STATEMENT OF THE CASE AND FACTS

In this case the petitioner, Sidney Norvil, Jr., went to trial for one count of burglary while armed with a firearm, and three counts of grand theft. He was convicted of the grand theft charges, but the jury deadlocked on the burglary charge and the trial judge declared a mistrial on that count. Later petitioner decided to enter an open guilty plea to the reduced charge of burglary while armed with a weapon.

The Fourth District described what happened next:

Before sentencing, the state filed a sentencing memorandum recommending that the court consider a new charge pending against the defendant for burglary of a vehicle. Defense counsel responded with a sentencing memorandum objecting to the state's recommendation.

At the sentencing hearing, defense counsel renewed her objection and asked that the court not consider the pending burglary charge. She explained that the defendant had denied the charge and that she had not had an opportunity to investigate the facts of the case. The trial court, however, inquired about the nature and status of the pending burglary case. The state informed the court that the new charge involved burglary of a retired deputy's vehicle. The state further advised the trial court that a fingerprint technician's report revealed that the defendant's fingerprints were found on CD cases stacked on the center console of the vehicle.

Before pronouncing sentence, the trial court referred to the pending burglary charge, along with a trespass charge to which the defendant had already entered a plea, and noted that both arrests occurred while

the defendant was out on bond awaiting trial in this case. The court commented:

We have two Sidney Junior Norvils. We have the Sidney Norvil that [defense counsel] knows and that meets with her, expresses all these positive things about his outlook in life. We have the Sidney Norvil that comes to court respectful, in business attire, conducts himself as a gentleman.

And then we have the Sidney Norvil who acts out on the street and constantly is getting arrested while out on bond, arrested for trespass at a place, at a mall, arrested now for burglary of a retired deputy sheriff's car, with fingerprint identification. And these arrests aren't distant arrests. These arrests occur while out on bond in this case.

....

[T]he Sidney Norvil that is committing crimes is the Sidney Norvil that's running around with his friends breaking into people's cars—breaking into people's houses.

The trial court declined to sentence the defendant as a youthful offender, and instead sentenced him to twelve years in prison.

Norvil v. State, 39 Fla. L. Weekly D520 (Fla. 4th DCA 2014)

On appeal he argued that the trial court improperly considered subsequent charges pending against him at sentencing. *Id.* The Fourth District considered the case en banc, and rejected that argument. Its holding is the subject of this jurisdictional brief.

The Fourth District upheld consideration of the defendant's subsequent arrest and charges at sentencing because of these factors: (1) the new charge was relevant; (2) the allegations of criminal conduct were supported by evidence in the record; (3) the defendant had not been acquitted of the charge that arose from the subsequent arrest; (4) the record does not show that the trial court placed undue emphasis on the subsequent arrest and charge in imposing sentence; and (5) the defendant had an opportunity to explain or present evidence on the issue of his prior and subsequent arrests. *Id.*

The Fourth District issued its decision March 12, 2014. Norvil filed his notice of discretionary jurisdiction on April 8, 2014.

SUMMARY OF THE ARGUMENT

The Fourth District Court of Appeal held that it was proper for the trial court to consider subsequent conduct at sentencing because of these factors: (1) the new charge was relevant; (2) the allegations of criminal conduct were supported by evidence in the record; (3) the defendant had not been acquitted of the charge that arose from the subsequent arrest; (4) the record does not show that the trial court placed undue emphasis on the subsequent arrest and charge in imposing sentence; and (5) the defendant had an opportunity to explain or present evidence on the issue of his prior and subsequent arrests. *Norvil v. State*, 39 Fla. L. Weekly D520 (Fla. 4th DCA 2014). This holding expressly and directly conflicts with holdings from the First, Second, and Third District Courts of Appeal. Accordingly, this Court has jurisdiction under article V, section § 3(b)(3), Florida Constitution, and Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv).

ARGUMENT

THIS COURT HAS JURISDICTION TO REVIEW THE DECISION BELOW BECAUSE IT CONFLICTS WITH THE DECISIONS OF OTHER DISTRICT COURTS OF APPEAL.

Norvil entered an open guilty plea to burglary while armed with a weapon. In his sentencing deliberations the trial court took into consideration a pending charge against Norvil of burglary of a vehicle.

The Fourth District held that the trial court could consider Norvil's subsequent arrest and charge during sentencing because of these factors: (1) the new charge was relevant; (2) the allegations of criminal conduct were supported by evidence in the record; (3) the defendant had not been acquitted of the charge that arose from the subsequent arrest; (4) the record does not show that the trial court placed undue emphasis on the subsequent arrest and charge in imposing sentence; and (5) the defendant had an opportunity to explain or present evidence on the issue of his prior and subsequent arrests. *Norvil v. State*, 39 Fla. L. Weekly D520 (Fla. 4th DCA 2014).

But other District Courts have held that it is a denial of a defendant's due process rights to consider pending charges. *Yisrael v. State*, 65 So. 3d 1177, 1178 (Fla. 1st DCA 2011)(Consideration of pending or dismissed charges during sentencing results in a denial of the defendant's due process rights); *Mirutil v. State*, 30 So. 3d 588, 590 (Fla. 3d DCA 2010)(It was improper for the judge to

consider the details of the pending charges alleged to have occurred after the offenses for which Mirutil was to be sentenced); *Gray v. State*, 964 So. 2d 884-885 (Fla. 2d DCA 2007)(In sentencing the defendant for manslaughter, the trial court could not consider new cases pending against the defendant).

In *Mirutil*, it was held that the trial court could not depend upon evidence of new alleged violations in determining the sentence for the current event. 30 So.3d at 590. Whether an adult or juvenile hearing, it is inappropriate for a judge to consider details of pending charges that occurred after the current offenses or for a person to be penalized for being under indictment. *Id.*

The Third District did allow pending charges to be considered if the evidence was relevant to sentencing since the defendant was not being punished for his pending charge, and the defendant was given the opportunity to explain or offer evidence. *Whitehead v. State*, 21 So. 3d. 157, 160 (Fla. 3d DCA 2009). However, *Mirutil* held that *Whitehead* was distinguishable as the defendant in *Whitehead* had admitted to the pending charges as opposed to *Mirutil* who had declared his innocence. *Id.*

Earlier the Fourth District asked an interesting question when examining a statute which made it a second degree felony to commit a felony while under indictment-- “If an individual is presumed innocent until proven guilty, however, how can it validly be assumed that individuals “under indictment” necessarily

present a greater risk to society than other citizens?” *Potts v. State*, 526 So. 2d 104 (Fla. 4th DCA 1987) approved, 526 So. 2d 63 (Fla. 1988). The answer, approved by this Court, was that the statute was unconstitutional as it penalized the defendant for merely being under indictment or accused of a crime. The ruling of the Fourth District in Norvil’s case has the same effect in the context of sentencing.

The Fourth District’s decision that pending charges can be considered by the trial judge in passing sentence is in conflict with *Yisrael*, *Mirutil*, and *Gray*. Moreover, it violates his federal due process rights. Amend. XIV, U.S. Const. On a policy basis this Court should take jurisdiction to determine the requirements of due process during sentencing.

Because this Court has jurisdiction to review a decision that expressly and directly conflicts with a decision of this Court or another district court of appeal under article V, section 3(b)(3), Florida Constitution, this Court should accept review.

CONCLUSION

Based on the foregoing arguments and authorities, this Court should accept jurisdiction.

CERTIFICATE OF SERVICE AND ELECTRONIC FILING

I certify that this jurisdictional brief has been electronically filed with the Court and a copy of it has been served to Jeanine Germanowicz, Assistant Attorney General, Office of the Attorney General, Ninth Floor, 1515 N. Flagler Drive, West Palm Beach, Florida 33401-3432, by email at CrimAppWPB@MyFloridaLegal.com, this 14th day of April, 2014.

/s/ Patrick B. Burke
Patrick B. Burke

CERTIFICATE OF FONT TYPE AND SIZE

I HEREBY CERTIFY the instant brief has been prepared with 14 point Times New Roman type, in compliance with a Fla. R. App. P. 9.210(a)(2).

/s/ Patrick B. Burke
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