Filing # 9369947 Electronically Filed 01/21/2014 01:58:03 PM

RECEIVED, 1/21/2014 13:59:10, John A. Tomasino, Clerk, Supreme Court

IN THE SUPREME COURT OF FLORIDA

DARRICK L. MCFADDEN, :

Petitioner, :

vs. : Case No. 2D11-6172

STATE OF FLORIDA, :

Respondent. :

_____ :

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

BRIEF OF PETITIONER ON JURISDICTION

HOWARD L. "REX" DIMMIG, II
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

KAREN M. KINNEY
Assistant Public Defender
FLORIDA BAR NUMBER 0856932

Public Defender's Office
Polk County Courthouse
P. O. Box 9000--Drawer PD
Bartow, FL 33831
(863) 534-4200

ATTORNEYS FOR PETITIONER

TOPICAL INDEX TO BRIEF

TABLE OF CITATIONS

STATEMENT OF THE CASE AND FACTS

The State filed a motion in the trial court to reduce or suspend Petitioner Darrick L. McFadden's sentence based on his having provided substantial assistance to the State Attorney. The motion was filed pursuant to section 921.186, Florida Statutes (2010). The trial court held a hearing and denied the State's motion. Mr. McFadden filed a direct appeal in the Second District Court of Appeal, arguing that the trial court considered and relied upon improper factors when it denied the State's motion to reduce McFadden's sentence.

The Second District Court of Appeal issued an opinion on November 8, 2013, affirming the denial of the motion to reduce McFadden's sentence. The court addressed whether the trial court's order was appealable at all, and it found that although the order was appealable, the "decision to reduce or suspend a defendant's sentence falls squarely within the discretion of the trial court." The Second District concluded: "[W]e certify conflict with the First District's opinion in Cooper v. State, 106 So. 3d 32, 32 (Fla. 1st DCA 2013), which holds 'that orders denying motions filed pursuant to section 921.186, Florida Statutes, are not appealable.'" McFadden v. State, 2D11-6172, 2013 WL 5951876 (Fla. 2d DCA Nov. 8, 2013). McFadden's motions for rehearing and rehearing en banc were denied on December 16, 2013.

SUMMARY OF THE ARGUMENT

This Court should exercise its jurisdiction to review this case for two reasons. First, there is certified conflict between the First and Second District Courts of Appeal on the question of whether a district court has jurisdiction to review an order of a circuit court denying a motion filed under section 921.186, Florida Statutes (2010). Second, this Court should exercise its jurisdiction because the Second District's opinion expressly and directly conflicts with decisions of other district courts and of this Court on the standard of review for a claim that a circuit court utilized improper factors when denying a motion to reduce or suspend a sentence for providing substantial assistance.

ARGUMENT

ISSUE

THIS COURT SHOULD GRANT REVIEW TO RESOLVE (1) THE CERTIFIED CONFLICT AS TO A DISTRICT COURT'S JURISDICTION OVER FINAL ORDERS IN SECTION 921.186 PROCEEDINGS AND (2) THE EXPRESS AND DIRECT CONFLICT AS TO THE STANDARD OF REVIEW THAT APPLIES TO A CLAIM THAT THE TRIAL COURT BASED ITS RULING ON IMPROPER (I.E. ILLEGAL) FACTORS.

A. Certified Conflict re: Jurisdiction of District Court

Section 921.186, Florida Statutes (2010), enacted by Laws 2010, c. 2010-218, § 1, eff. July 1, 2010, gives the State Attorney authority to move a sentencing court to reduce or suspend the sentence of any person who provides substantial assistance in the prosecution of another. The statute provides:

> Notwithstanding any other law, the state attorney may move the sentencing court to reduce or suspend the sentence of any person who is convicted of violating any felony offense and who provides substantial assistance in the identification, arrest, or conviction of any of that person's accomplices, accessories, coconspirators, or principals or of any other person engaged in criminal activity that would constitute a felony. The arresting agency shall be given an opportunity to be heard in aggravation or mitigation in reference to any such motion. Upon good cause shown, the motion may be filed and heard in camera. The judge hearing the motion may reduce or suspend the sentence if the judge finds that the defendant rendered such substantial assistance.

(Emphasis added). At issue here is the question of a district court's jurisdictional authority over an appeal arising from a proceeding that originates in the trial court under section 921.186, Florida Statutes (2010). The Second District certified conflict with the First District's opinion in Cooper v. State, 106 So. 3d 32 (Fla. 1st DCA 2013). In Cooper, the First District dismissed an appeal from a section 921.186 proceeding based on lack of jurisdiction. The Second District holds that it has some limited jurisdiction (which depends upon the issue being presented for appeal). Petitioner contends that neither court has accurately perceived its full jurisdiction and obligation to review a final order denying a motion filed by the State under 921.186, Florida Statutes (2010).

Once the State Attorney files a motion under section 921.186, a new cause is initiated that confers jurisdiction on the trial court for which a defendant is entitled to due process. The

defendant must live up to his end of the bargain by providing substantial assistance to the State in exchange for the State's promise to file the motion. Once the motion is filed, the trial judge has a duty to fairly adjudicate the motion based on the terms of the statute.

The First District in Cooper v. State, 106 So. 3d 32 (Fla. 1st DCA 2013), likened the appeal from the denial of a motion filed under section 921.186, Florida Statutes, to the appeal of a motion filed under Florida Rule of Criminal Procedure 3.800(c), and held that any order arising out of a motion filed under section 921.186 is nonappealable. The Cooper opinion is wrongly decided because the statute confers substantive and procedural rights and obligations that distinguish it from rule 3.800(c).

Unlike rule 3.800(c), which is a procedural rule that deals with 60 and 90 day time limits on a trial court's jurisdiction to reduce or modify a sentence, section 921.186 can be invoked only by the State Attorney, and it can be invoked at any time. A State Attorney may invoke the statute years after a conviction and sentence are final, thereby restoring jurisdiction over a final criminal case to a circuit court. This is a difference between the statute and rule 3.800(c), and it is one of many reasons why the statute and rule 3.800(c) cannot be treated the same for appellate purposes, as the First DCA did in Cooper.

Section 921.186 substantively changes the possible legal sentence for a person convicted of a felony. Unlike rule

3.800(c), which does not change the substance of any sentencing laws governing a case, the invocation of the circuit court's jurisdiction under section 921.186 changes the legal limits (the sentencing floor) governing a felony case and overrides all other sentencing provisions. This statute gives a sentencing judge renewed jurisdiction over a previously final sentence for any felony offense and gives the judge the power to suspend the sentence entirely or reduce the sentence by any amount without regard for minimum mandatory provisions or any other statutory constrictions on the court's sentencing discretion. In contrast, rule 3.800(c) confers no change to the substantive sentencing laws that govern the conviction. The rule says explicitly that it is "not applicable to . . . those cases in which the trial judge has imposed the minimum mandatory sentence or has no sentencing discretion." And the rule is not applicable in cases in which the defendant was sentenced pursuant to a plea agreement. See State v. Brooks, 890 So. 2d 503 (Fla. 2d DCA 2005).

Unlike rule 3.800(c), the filing of a motion under section 921.186 provides a new and discrete basis for jurisdiction in the trial court. And, based on the plain language of the statute, a hearing must be held on the motion. The State Attorney's motion filed under this section initiates a de novo sentencing proceeding with entirely new parameters defining the legality of the sentence. Contrast this with the treatment of a motion filed under rule 3.800(c), for which no hearing is required or allowed

in most cases, and it is clear that section 921.186 proceedings require a completely different and greater degree of due process.

Rule 3.800(c) motions are generally filed by defendants in a one-sided attempt to get a reduced sentence. In contrast, before the section 921.186 motion is filed by the State Attorney, a relationship is forged between the parties and the Defendant has provided consideration to the State in the form of his service in providing substantial assistance. The trial judge, when considering the uncontested motion, has the duty to comply with the statute, to entertain the State's motion as an impartial jurist, to hold a hearing, and to decide initially whether the Defendant performed substantial assistance. There are many issues implicated by the statute that must be subject to review upon entry of a final order. The statute changes the legal structure for what is a permissible penalty for the crime and it creates a right to a de novo sentencing hearing, the result of which must be subject to appeal. If the trial judge refused to hear the motion at all and denied the motion without a hearing, the resulting final order would have to be subject to de novo review. For the First District to say in Cooper that no order entered on a motion filed pursuant to section 921.186 can be appealed and for the Second District to say in this case that a decision on the motion falls squarely within the discretion of the trial court shows that both courts misunderstand the import of the statute, the trial court's obligations under the statute, and the appellate court's

responsibility to exercise its jurisdiction to review the trial judge's order.

In its opinion, the Second District cites a federal case from 1996 as authority for its decision on the jurisdictional question. This citation illustrates the court's profound misunderstanding of the jurisdictional question. United States v. Manella, 86 F.3d 201 (11th Cir. 1996), cannot shed light on the Second District's jurisdiction to review the order entered by the trial court because (1) the Manella decision is grounded in distinct federal statutory provisions and (2) the jurisdictional issue in this case is grounded in the Florida Constitution. See Art. V, § 4(b)(1), Fla. Const. ("District courts of appeal shall have jurisdiction to hear appeals, that may be taken as a matter of right, from final judgments or orders of trial courts . . . not directly appealable to the supreme court or a circuit court."); see also Robbins v. Cipes, 181 So. 2d 521, 522 (Fla. 1966) ("Appeals to the Supreme Court and the District Courts of Appeal are constitutionally guaranteed rights in this State."). This Court should grant review of this case to resolve this very important certified conflict issue on the district court's jurisdiction over final orders from proceedings arising under section 921.186.

B. Express and Direct Conflict re Standard of Review

A pure question of law is implicated by the issue of whether the trial court based its ruling on improper (i.e. illegal)

factors in denying the State's motion to reduce the sentence.

> Although an appellate court generally may not review a sentence that is within statutory limits, an exception exists when the trial court considers constitutionally impermissible factors in imposing a sentence. Nawaz v. State, 28 So.3d 122, 124 (Fla. 1st DCA 2010). Reliance on constitutionally impermissible factors is a violation of a defendant's due process rights. See Ritter v. State, 885 So. 2d 413, 414 (Fla. 1st DCA 2004); see also Holton v. State, 573 So. 2d 284, 292 (Fla. 1990). Examples of factors that are constitutionally impermissible or totally irrelevant to the sentencing process include the race, religion or political affiliation of the defendant.

Santisteban v. State, 72 So. 3d 187, 197 (Fla. 4th DCA 2011).

A district court has jurisdiction to hear challenges to the lawfulness of the method used by the circuit court in making any sentencing decision. See Ritter v. State, 885 So. 2d 413, 414 (Fla. 1st DCA 2004) (holding that a trial court's reliance on impermissible sentencing factors, i.e. that a defendant continues to maintain his innocence and is unwilling to admit guilt, violates a defendant's due process rights and is an issue that is cognizable on direct appeal).

But the opinion of the Second District in this case says that any decision on a motion filed by the State under section 921.186 would "fall squarely within the discretion of the trial court." By this statement, the opinion brings conflict and confusion to the established standard of review for legal error. This court has always employed a de novo review to a question of law such as whether a trial court relied on improper factors to make a legal ruling or to determine an appropriate sentence for a defendant.

In Sims v. State, 998 So. 2d 494, 504 (Fla. 2008), this court held that a trial court's decision on whether to impose victim-injury points is subject to an abuse-of-discretion standard. But a claim that the trial court did not follow the law and instead misinterpreted statutory sentencing provisions "is a pure question of law, which is subject to de novo review." Id. at 504. This Court cited Borden v. East-European Ins. Co., 921 So.2d 587, 591 (Fla. 2006), and Jupiter v. State, 833 So.2d 169, 170 (Fla. 1st DCA 2002), for the proposition that the sentencing decision is a pure issue of law subject to de novo review. In Sanders v. State, 35 So. 3d 864, 868 (Fla. 2010), this Court reaffirmed that a legal question, requiring interpretation of statutes and rules of criminal procedure, is a pure question of law, which is subject to de novo review. See also Hilton v. State, 961 So. 2d 284, 288 (Fla. 2007) ("Statutory interpretation is a question of law subject to de novo review.").

The Second District's decision is in express and direct conflict with Santisteban, Ritter, Sims, Sanders, and Hilton because the Second District purports to hold that a trial court has the *discretion* to deny a motion to reduce or suspend a sentence of an inmate who provides substantial assistance to the State, even where the trial court's ruling rests on *improper factors*. A trial judge cannot be granted discretion to ignore the law. The issue presented by the Appellant in the Second District Court of Appeal was a legal issue for which he was entitled to de

novo review. Instead, the Second District indicated that the ruling fell "squarely within the discretion of the trial court."

This Court should exercise its authority to review this case because the Second District's opinion is in express and direct conflict with decisions of this Court on the proper standard of review to be employed when a defendant raises an issue of law with regard to the underlying basis for a trial court's ruling on a motion to reduce or suspend sentence for providing substantial assistance.

CONCLUSION

Petitioner Darrick L. McFadden respectfully requests this Court to grant review of this case based on the certified conflict and the express and direct conflict of decisions.

APPENDIX

2013 WL 5951876

NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

District Court of Appeal of Florida,
Second District.

Darrick L. McFADDEN, Appellant,
v.
STATE of Florida, Appellee.

No. 2D11–6172. | Nov. 8, 2013.

Synopsis

Background: State filed motion to reduce or suspend defendant's sentence for providing substantial assistance. The Circuit Court, Lee County, Jack R. Schoonover, Associate Senior Judge, denied the motion. Defendant appealed.

Holding: The District Court of Appeal, Black, J., held that District Court of Appeal had jurisdiction to review trial court's denial of the motion.

Affirmed.

Attorneys and Law Firms

Howard L. Dimmig, II, Public Defender, and Karen M. Kinney, Assistant Public Defender, Bartow, for Appellant.

Pamela Jo Bondi, Attorney General, Tallahassee, and Timothy A. Freeland, Assistant Attorney General, Tampa, for Appellee.

Opinion

BLACK, Judge.

**1 Darrick L. McFadden appeals the trial court's order denying the State's motion filed pursuant to section 921.186, Florida Statutes (2010), to reduce or suspend his sentence for providing substantial assistance. We affirm the trial court's order without comment. In so affirming, however, we certify conflict with the First District's opinion in *Cooper v. State,* 106 So.3d 32, 32 (Fla. 1st DCA 2013), which holds "that orders denying motions filed pursuant to section 921.186, Florida Statutes, are not appealable."

McFadden argues on appeal that the trial court erred because it based the denial upon the consideration of improper factors. Though we agree with the First District that the decision to reduce or suspend a defendant's sentence falls squarely within the discretion of the trial court, *see Cooper,* 106 So.3d at 32, we nonetheless hold that we have jurisdiction to review a trial court's order denying a motion filed pursuant to section 921.186 where the defendant alleges, as McFadden has here, that the trial court misapplied the statute. *See United States v. Manella,* 86 F.3d 201, 203 (11th Cir.1996) (holding that although the lower court's decision to grant or deny the government's motion to reduce the defendant's sentence for providing substantial assistance "is a discretionary one from which an appeal generally will not lie," the appellate court's exercise of jurisdiction to review the order is proper where the defendant has alleged a misapplication of the law).

To the extent that *Cooper* holds that an order denying a motion filed pursuant to section 921.186 is never appealable, we certify conflict.

Affirmed; conflict certified.

DAVIS, C.J., and ALTENBERND, J., Concur.

Parallel Citations

38 Fla. L. Weekly D2333

End of Document

App 1

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
SECOND DISTRICT, POST OFFICE BOX 327, LAKELAND, FL 33802-0327

December 16, 2013

CASE NO.: 2D11-6172
L.T. No. : 07-CF-17159

Darrick L. Mc Fadden v. State Of Florida

Appellant / Petitioner(s), Appellee / Respondent(s).

BY ORDER OF THE COURT:

Appellant's motion for rehearing is denied.
Appellant's motion for rehearing en banc is denied.
Appellant's amended motion for rehearing en banc is denied.

I HEREBY CERTIFY that the foregoing is a true copy of the original court order.

Served:

Darrick L. Mc Fadden Timothy A. Freeland, A.A.G. Linda Doggett, Clerk

Karen Kinney, A.P.D.

me

James Birkhold
Clerk

App 2

CERTIFICATE OF SERVICE

I certify that a copy has been e-mailed to Timothy A. Freeland at the Office of the Attorney General at CrimappTPA@myfloridalegal.com, on this 21st day of January, 2014.

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,

/s/Karen M. Kinney

KAREN M. KINNEY
Assistant Public Defender
Florida Bar Number 0856932
P. O. Box 9000 - Drawer PD
Bartow, FL 33831
appealfilings@pd10.state.fl.us
kkinney@pd10.state.fl.us
mjudino@pd10.state.fl.us

HOWARD L. "REX" DIMMIG, II
Public Defender
Tenth Judicial Circuit
(863) 534-4200

kmk