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IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE

GREG EDWARD CUSIC,
Petitioner,

OCT 31 1987

vs.

Case No. 71,268

CLERK, SUPREME COURT OF FLORIDA
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pl

STATE OF FLORIDA,
Respondent.

ON DISCRETIONARY REVIEW FROM THE
DISTRICT COURT OF APPEALS
SECOND DISTRICT, FLORIDA

JURISDICTION BRIEF OF PETITIONER

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PETITIONER Pro-Se

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Preliminary Statement

Greg Edward Cusic is the Petitioner in this case and will be referred to as the Petitioner or his last name "Cusic".

SUMMARY OF ARGUMENT

This petitioner requests for the Florida Supreme Court to take and has jurisdiction, provided by Article V Section 3(b) (3) of the Florida Constitution for discretionary review of this case Cusic v. State, 12 FLW 2225 (Fla. 2d DCA Sept. 11, 1987).

Which was affirmed under the authority of McCuiston v. State, 507 So.2d 1185 (Fla. 2d DCA 1987). But in doing so the Second District Court of Appeals, acknowledged that it's decision was in direct conflict of the decision of Hall v. State, 12 FLW 1901 (Fla. 1st DCA August 5, 1987).

STATEMENT OF THE CASE AND FACTS

The Petitioner was convicted and sentenced in 1985.

His conviction and sentence were affirmed by the Second District Court, Cusic v. State, 490 So.2d 950 (FLA. 1986).

On July 6, 1987, the Petitioner filed a Motion to Correct an Illegal Sentence alleging that the court erred by going outside the recommended sentence the Petitioner was sentenced to a eight year sentence, solely based on the fact that the Petitioner is an habitual-offender.

On July 24, 1987, the State filed it's Response to the Motion to Correct an Illegal Sentence arguing that Cusic was barred from relief under this motion because the law of the case precludes the litigation of "all issues upon appeal could have been taken", but which were not appealed citing Alford v. Sumerlin, 423 S0.2d 482 (Fla. 1st DCA 1982); Airvac, Inc. v. Ranger Ins. Co., 330 So.2d 467 (FLA. 1976); Marine Midland Bank Central v. Cote, 384 So.2d 658 (Fla. 5th DCA 1980); Gaskin v. State, 12 FLW 657 (Fla. 2d DCA Feburary 25, 1987).

Order Denying Motion to Correct an Illegal Sentence was filed in Pinellas County Courthouse on July 27, 1987.

The Petitioner filed a Notice of Appeal on August 10, 1987.

On September 11, 1987, the District Court of Appeals,

Second District, Florida filed an opinion and affirmed the denial of Cusic's motion on the authority of McCuiston v. State, 507 So.2d 1185 (Fla. 2d DCA 1987). And, in doing so, the District Court acknowledge a conflict with Hall v. State, 12 FLW 1901 (Fla. 1st DCA August 5, 1987). On October 5, 1987, the Petitioner filed a Notice to Invoke Jurisdiction.

ARGUMENT

ISSUE

THE SECOND DISTRICT COURT DECISION IS IN DIRECT CONFLICT WITH THE FIRST DISTRICT COURT'S DECISION.

The Second District Courts of Appeals affirmed the denial of Cusic's motion pursuant to FLA. R. CRIM. P. 3.800 (a) on authority of McCuiston v. State, 507 So2d 1185 (Fla. 2d DCA 1987) see Appendix A. McCuiston had appealed the summary denial of his motion for post-conviction relief pursuant to FLA. R. CRIM. P. 3.850. The District Court had answered the squarely present issue of whether or not Whitehead v. State, 498 So.2d 863 (FLA 1986) is to be applied retroactively. In other words, is the rule of Whitehead a change of law sufficient to support a challenge to a conviction and sentence that were valid when made? Only the Florida Supreme Court and the United States Supreme Court can adopt a change in law sufficient to support such a challenge. Witt v. State, 465 So.2d 510@512 (FLA. 1985), citing Witt v. State, 387 So.2d 922 (FLA. 1980).

The court went futher and cited Kiser v. State, 505 So. 2d 9 (Fla. 1st DCA 1987). The court reasoned:

In Witt v. State, 387 So.2d 922 (FLA. 1980), cert. denied, 101 S.Ct. 769 (1980), the Florida Supreme Court held that only 'fundamental and constitutional law changes which cast serious doubt on the veracity or moral rectitude of the original trial proceedings' will be grounds for allowing post-conviction relief. 387 So.2d 929.

The disapproval of a previously valid reason for departure from the sentencing guidelines is not such a change.

Ardley v. State, 491 So.2d 1259 (Fla. 1st DCA 1986).

And thus this opinion authorized the affirmed judgment of Cusic v. State, 12 FLW 2225 (Fla. 2d DCA September 11, 1987). But in doing so the court acknowledge a conflict in its decision with Hall v. State, 12 FLW 1901 (Fla. 1st DCA August 5, 1987), this case was decided 68 days before the petitioner's case was under sub judice. In Hall he appealed the trial court's denial of his motion for post-conviction relief pursuant to FLA. R. CRIM. P. 3.850.

And the First District Court of Appeals approved Hall's habitual-offender status as a valid reason for departure, citing Shull v. State, 481 So.2d 1294 (Fla. 1st DCA 1986) but reversed for resentencing because the reason for departure was his habitual-offender status. On October 30, 1987, Hall filed the instant motion for post-conviction relief.

He alleges that his 20 year sentence was grossly in excess

of the guidelines for the reason of habitual-offender status, on that same date, the supreme court released Whitehead v. State, 498 So.2d 863 (FLA. 1987). Finding that a defendant to be a habitual-offender is not a legally sufficient reason for departure from the sentencing guidelines' recommended sentence. Obviously Hall's motion could not refer to the decision, but it was clearly the applicable law at the time the trial court denied the motion on November 18, 1986.

And the question that was before the District Courts, is whether Hall's motion for post-conviction relief should be granted on the basis of that decision, which overturned the entire legal foundation of Hall's departure sentence. The decision of Witt v. State, 387 So.2d 922 (FLA. 1980), cert. denied, 101 S.Ct. 769 (1980) (also Stovall v. Denno, 388 U.S. 293 (1967); and Linkletter v. Walker, 85 S.Ct. 1731), however, these cases was handed down before the supreme court's recent decision in Bass v. State, 12 FLW 289 (FLA. June 11, 1987). As Justice Ehrich observed in his dissent, the majority opinion in Bass appeared to turn the Witt decision on its head, at least in respect to the consideration and construction of statutes governing the length of sentences that may be imposed under statutory law.

Bass involved the stacking of minimum mandatory three

year terms. After Bass's sentence became final. The supreme court held that such stacking is illegal in Palmer v. State, 438 So.2d 1 (FLA. 1983). The supreme court held that Bass could challenge his sentence by way of rule 3.850 motion even though Palmer was released after Bass's sentence became final. The court reasoned that it need not decide whether Palmer should retroactively apply to invalidate Bass's sentence because the Palmer decision did not interpreted preexisting statutory law and "corrected mistakes in it implementation". 12 FLW at 289, the court then continued:

It would be inherently unjust to allow the imposition of an illegal sentence without providing a mechanism to attack that sentence, simply because courts were unaware of its illegality at the time of imposition of the sentence. Because the motion seeks to correct or "vacate a sentence which exceeds the limits provided by law", the motion may be filed at any time." FLA. R. CRIM. P. 3.850

Also there is another question, and that is, does rule 3.800(a) provide the same or similar mechanism to attack a sentence, because the motion gives the court authority to correct an illegal sentence imposed by it at any time; FLA. R. CRIM. P. 3.800(a). But, the First District Court had experienced some difficulty discerning the precise ef-

fect of the holding in Bass on the issue before the District Court. The decision appears to be based exclusively on the legal principle that the courts construction of a statute gives it meaning from the inception of the statute (unless otherwise specified in the decision, see generally 13 Jur. 2d Courts and Judges subsection 159 (1979)) to the complete exclusion of the legal doctrines of law of the cases and the correlative concept of finality of decision. 13 Fla. Jur. 2d Courts and Judges subsection 137 (1979).

Why, then, does Bass seem to accord different treatment and effect TO change in sentencing laws than does Witt?

Perhaps, therefore, the material distinction between Bass and Witt lies in the fact that Palmer overruled a lower courts' construction of a statute bearing on the permissible length of sentence that could be imposed. Because the First District Court could not find no other basis for distinguishing these cases, and believe Bass-not-Witt to be the controlling precedent on the issue before them. In this case, as in Bass, the supreme court overruled a lower court construction of a statute, with the result that the length of a sentence that could be lawfully imposed was changed.

Whitehead expressly construed section 921.001 Florida

Statutes (1983) and the implementing provision of the guidelines rules approved by the legislature to mean that section 784.084 Florida Statutes (1983) does not provide an exemption from the limitation imposed by the recommended guidelines sentence on the basis of the criteria of the habitual-offender statute was impermissible because it conflicted with the provisions of the sentencing guideline rules as previously construed in Hendrix v. State, 475 So.2d 1218 (FLA. 1985).

CONCLUSION

The Petitioner asks the Supreme Court to take and accept jurisdiction over this case, were there is a direct conflict. And for the total interest of justice rule on this case, on the basis of Hall's ruling.

CERTIFICATE OF SERVICE

I hereby certify that I have furnished a true and correct copy hereof to the Office of the Attorney General of Florida, The Capitol, Tallahassee, Florida 32302, By U.S. Mail, on this 20 day of October, 1987.

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