IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

CANOM KHADAYA WILLIAMS,

Appellant,

CASE NO. 1D09-3707

v.

STATE OF FLORIDA,

Appellee.

_____/

Opinion filed July 13, 2010.

An appeal from the Circuit Court for Bay County.
Richard Albritton, Judge.

Nancy A. Daniels, Public Defender and Richard M. Summa, Assistant Public Defender, Tallahassee, for Appellant.

Bill McCollum, Attorney General and Charlie McCoy, Assistant Attorney General, Tallahassee, for Appellee.

ON MOTION FOR REHEARING

PER CURIAM.

We withdraw our opinion issued on May 28, 2010, and substitute this opinion in its place. In light of this substituted opinion, we deny Appellant's motion for rehearing, clarification, rehearing en banc, and certification.

Appellant was convicted of trafficking cocaine and possession of marijuana with intent to deliver and sentenced to consecutive prison terms of 30 years for the trafficking offense and five years for the possession offense. In Williams v. State, 8 So. 3d 1266 (Fla. 1st DCA 2009), we affirmed Appellant's convictions, but remanded for resentencing. On remand, the trial court sentenced Appellant to 20 years in prison for the trafficking offense and five years concurrent for the possession offense.

Appellant appealed and thereafter filed a motion pursuant to Florida Rule of Criminal Procedure 3.800(b)(2) in which he argued that his sentences are unconstitutional because, by virtue of section 893.101, Florida Statutes, his offenses are "strict liability offenses" for which the maximum sentences that can be imposed consistent with due process are no more than one year in jail. The trial court denied the motion on the grounds that Appellant's claim was not a "sentencing error" that could be raised in a rule 3.800(b)(2) motion, and even if it was properly raised, the claim was without merit based upon Harris v. State, 932 So. 2d 551 (Fla. 1st DCA 2006), rev. denied, 962 So. 2d 336 (Fla. 2007). Appellant presents this same argument on appeal, and he also argues for the first time that section 893.101 and his convictions violate due process for the same reasons that his sentences are unconstitutional.

Even if Appellant's claims were properly preserved and are not procedurally barred for not having been raised in the first appeal, they are without merit. We rejected these same claims in Harris,[*] and our sister courts have also rejected these claims. See, e.g., Taylor v. State, 929 So. 2d 665 (Fla. 3d DCA 2006), rev. denied,

[*] Appellant's counsel was also appellate counsel for the appellant in Harris. The initial brief in this case did not even mention Harris even though the trial court relied on that case in denying Appellant's rule 3.800(b)(2) motion and the opinion in Harris rejected the argument that section 893.101 rendered the appellant's convictions unconstitutional. See 932 So. 2d at 552. And, as Appellant's counsel acknowledged for the first time in the motion for rehearing, "Appellant's alternative argument (ISSUE II) that the sentences imposed for the offenses of convictions were unconstitutional ... was indeed raised in Harris" (emphasis in original). This directly contradicts what Appellant's counsel argued in the briefs, as well as what he argued to the trial court in connection with the rule 3.800(b)(2) motion where he stated that Harris "has no bearing" on the argument that Appellant's sentences are unconstitutional because the opinion only addressed the constitutionality of the appellant's convictions. Thus, although Appellant's counsel asserted that our opinion in Harris was "ambiguous and poorly written," the opinion could not have been more clear in its rejection of the arguments raised in this case. See 932 So. 2d at 552 ("We affirm all issues raised on appeal."). We have also rejected these same arguments made by Appellant's counsel in numerous other cases subsequent to Harris. See, e.g., Henry v. State, 29 So. 3d 294 (Fla. 1st DCA 2010) (table); Pugh v. State, 25 So. 3d 563 (Fla. 1st DCA 2010) (table); Knox v. State, 25 So. 3d 563 (Fla. 1st DCA 2010) (table); Schofield v. State, 993 So. 2d 968 (Fla. 1st DCA 2008) (table); Rasheed v. State, 992 So. 2d 258 (Fla. 1st DCA 2008) (table); Robinson v. State, 969 So. 2d 1023 (Fla. 1st DCA 2007) (table); Sanders v. State, 965 So. 2d 128 (Fla. 1st DCA 2007) (table); Canty v. State, 954 So. 2d 1158 (Fla. 1st DCA 2007) (table); Davis v. State, 944 So. 2d 351 (Fla. 1st DCA 2006) (table); Williams v. State, 940 So. 2d 1172 (Fla. 1st DCA 2006) (table). It is one thing for counsel to argue for a change in the law in the face of these adverse decisions or for counsel to simply preserve an issue for purposes of subsequent review; but, it is an entirely different thing to continue to argue an issue that has been consistently rejected by the courts without even acknowledging that the argument has been rejected, which is what Appellant's counsel did in this case.

952 So. 2d 1191 (Fla. 2007); Wright v. State, 920 So. 2d 21, 25 (Fla. 4th DCA 2005), rev. denied, 915 So. 2d 1198 (Fla. 2005); Burnette v. State, 901 So. 2d 925, 927-28 (Fla. 2d DCA 2005). Accordingly, we affirm Appellant's convictions and sentences.

AFFIRMED.

WETHERELL and MARSTILLER, JJ., CONCUR; WEBSTER, J., CONCURS IN RESULT ONLY, WITH OPINION.

WEBSTER, J., concurring in result only.

Appellant raises two issues in the alternative: (1) "whether the Florida statutes proscribing trafficking in cocaine and possession with intent to sell marijuana are facially unconstitutional (violate due process) insofar as they classify these strict liability offenses as felonies"; and (2) "whether the imposition of felony punishment for the strict liability offenses of trafficking in cocaine and possession with intent to sell marijuana violates due process." I agree that these two issues are either procedurally barred because not raised on the prior appeal from his conviction or not properly preserved. However, for the reasons discussed below, I am unable to agree with the majority's treatment of appellant's lawyer. Accordingly, I concur in the result only.

The majority takes appellant's lawyer to task for "argu[ing] an issue that has been consistently rejected by the courts without even acknowledging that the argument has been rejected." Majority Opinion, at 3 n.*. In support, the majority identifies eleven cases from this court and three from other district courts of appeal which it says have rejected the same claims appellant makes here. I disagree.

Of course, Florida's Rules of Professional Conduct require that a lawyer "disclose to [a] tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel." R. Regulating Fla. Bar 4-3.3(3). Principles of professionalism

would suggest the propriety of disclosing decisions of other coordinate courts that are on point, as well. However, it strikes me that a decision can constitute "authority" for a point of law only if it has precedential value. A per curiam decision with no written opinion has no precedential value. Dep't of Legal Affairs v. Dist. Court of Appeal, 5th Dist., 434 So. 2d 310, 311 (Fla. 1983). Of the eleven cases from this court relied on by the majority, ten are per curiam affirmances without opinion.

The final case from this court cited by the majority is Harris v. State, 932 So. 2d 551 (Fla. 1st DCA 2006), review denied, 962 So. 2d 336 (Fla. 2007). Although, apparently, there was more than one issue raised in Harris, see 932 So. 2d at 552, the only one identified is whether section 893.101, Florida Statutes (2004), violated the due process clauses of the federal and state constitutions because it "eliminate[d] knowledge of the illicit nature of a substance as an element of the offense." Id. While this issue might have been based on an argument similar to one of those made here, it is certainly not clear that it was, particularly in light of the citations in the opinion to Wright v. State, 920 So. 2d 21 (Fla. 4th DCA 2005), and Burnette v. State, 901 So. 2d 925 (Fla. 2d DCA 2005), two of the cases from other districts on which the majority here relies.

As I read the opinions in Wright and Burnette, the due process argument being made by the appellants in both cases was that section 893.101, Florida

Statutes, was unconstitutional because it impermissibly shifted the burden of proof as to one of the elements. That is not one of the arguments being made here.

The final case relied on by the majority is Taylor v. State, 929 So. 2d 665 (Fla. 3d DCA 2006). That case merely holds that the failure of section 893.101 to require "knowledge of the unlawful nature of the offending substance as an element of the crime" does not render the statute unconstitutional, citing Wright and Burnette. Id. at 665. Again, that does not seem to me to be one of the arguments being made here.

Based on the foregoing analysis, I am unable to say that any of the cases relied on by the majority necessarily requires rejection of either of the issues raised by appellant's lawyer in this case. Moreover, it strikes me that a lawyer defending a client in a criminal matter has special obligations. Among them, it seems to me, is a responsibility to attempt to obtain a ruling squarely addressing the issues raised, so that the lawyer may seek review by a higher court if unhappy with that ruling. When there are federal constitutional issues raised, that responsibility also extends to preserving arguments in courts like ours so that, if unfavorably resolved, they may be presented in federal collateral proceedings. Finally, as our Rules of Professional Conduct recognize, because "the law is not always clear and never is static . . . , in determining the proper scope of advocacy, account must be taken of

the law's ambiguities and potential for change." R. Regulating Fla. Bar 4-3.1 (Comment).