

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

ALVIN SHARPE,

Petitioner,

v.

NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED.

CASE NO. 1D09-5806

STATE OF FLORIDA,

Respondent.

/

Opinion filed May 21, 2010.

Petition Alleging Ineffective Assistance of Appellate Counsel -- Original Jurisdiction.

Alvin Sharpe, pro se, Petitioner.

Bill McCollum, Attorney General, and Giselle Denise Lylen, Assistant Attorney General, Tallahassee, for Respondent.

PER CURIAM.

Petitioner presents a timely claim of ineffective assistance of appellate counsel. We grant the petition as to the argument concerning the erroneous jury

instruction. This disposition renders moot the challenge to the alleged sentencing error.

Petitioner was convicted and sentenced for attempted second-degree murder. After briefing was complete in his appeal, but before this court ruled on the merits of petitioner's appeal, this court issued its opinion in Montgomery v. State, 34 Fla. L. Weekly D360 (Fla. 1st DCA Feb. 12, 2009), which held that the giving of the standard jury instruction on manslaughter in a case of this nature was fundamental error. The Florida Supreme Court has recently affirmed the decision of this court in Montgomery v. State, 35 Fla. L. Weekly S204 (Fla. Apr. 8, 2010). This case is similar to that of Toby v. State, 29 So. 3d 1138 (Fla. 1st DCA 2009). We therefore grant the petition and reverse the conviction and sentence and remand to the trial court for further proceedings. The challenge to the alleged sentencing error is dismissed as moot.

PETITION GRANTED IN PART.

KAHN, ROWE, and MARSTILLER, JJ., CONCUR.