

No.: 24-5891

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

FILED
OCT 21 2024
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SUPREME COURT, U.S.

KIMBERLY CANNON – PETITIONER

vs.

STATE OF FLORIDA – RESPONDENT(S)

ON PETITION FOR WRIT OF CERTIORARI TO
THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIRST DISTRICT

PETITION FOR WRIT OF CERTIORARI

Legal Mail Recieved
OCT 21 2024
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QUESTION(S) PRESENTED

- I. Is it fundamental error for a trial court to consider a subsequent offence without arrest or conviction is fashioning a sentence for a violation of probation which had been violated two (2) years prior?
- II. Is it an unreasonable application of law where a trial court imposes a sentence on a defendant for the “entire depth of her criminality” and not the actual violation of probation?

LIST OF PARTIES

☒ All parties appear in the caption of the case on the cover page.

☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

Kimberly Cannon v. State of Florida, CASE NO.: 1D23-1501

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☐ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

☒ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

The opinion of the Florida Supreme Court court appears at Appendix D to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

JURISDICTION

☐ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

☐ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☒ For cases from **state courts**:

The date on which the highest state court decided my case was June 12, 2024. A copy of that decision appears at Appendix A.

☒ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix B.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

STATEMENT OF THE CASE

Ms. Cannon was initially sentenced to five (5) years in the Florida Department of Corrections followed by five (5) years on probation on one count of burglary and three (3) counts of false statements to a police officer. Ms. Cannon was released from prison on May 5, 2008 and was re-arrested on May 8, 2008 for charges that were a decade old as well as new law violations by the arresting officials. This arrest violated her probation on May 8, 2008.

Two years later during her violation of probation hearing held on October 22, 2010 the prosecution introduced an amended affidavit of violation of probation adding 'Count 4' which consisted of two new offenses to which Ms. Cannon had not yet been charged. The transcripts from the hearing will show the prosecution admitting that while Ms. Cannon had not yet been prosecuted for those offenses the trial court should still sentence her for the "entire depth of her criminality and not whether she violated..." The Trial Court found the information 'significant' and based the sentence given on what he's 'heard today.' This is clearly a fundamental error which violated Ms. Cannon's due process rights. The State bears the burden of proof

from the record that the trial court did not consider impermissible factors during sentencing.

REASONS FOR GRANTING THE PETITION

The decision of the lower court is erroneous and conflicts with decisions of the other appellate courts as well as decisions by the Florida Supreme Court. It is of national importance that this Honorable Court decide on the question for the benefit of others similarly situated and to ensure the conformity of the decisions rendered in the future.

The Florida Supreme Court adopted a 'Bright Line Rule' in Norvil v. State, 191 So. 3d 406, which set the standard that a trial court may not consider a subsequent arrest without conviction during sentencing for the primary offense. Yisrael v. State, 65 So. 3d 1177 (Fla. 1st DCA 2011); Gray v. State, 964 So. 2d 884 (Fla. 2nd DCA 2007); and Mirutil v. State, 30 So. 3d 588 (Fla. 3d DCA 2010). This precedence was upheld recently in Wyrich v. State, 370 So. 3d 1000 (2nd DCA 2023), where constitutionally impermissible factors were considered during sentencing causing fundamental error, which is materially indistinguishable from this case. The First District Court

of Appeal held in both Nawaz v. State, 28 So. 3d 122 and Williams v. State, 193 So. 3d 1017 that “...when the sentence is based on constitutionally impermissible factors, such as unsubstantiated allegations of wrongdoing...or surmise violates the fundamental constitutional rights of the defendant.” The State cannot show that the trial court did not rely on the illegal addition of offenses for which an arrest had not yet occurred in the instant case.

All abovementioned cases as well as Pollis v. State, 581 So. 2d 991 and Berry v. State, 458 So. 2d 1155 were remanded for resentencing as the Florida Rules of Criminal Procedure 3.701 prohibits the court from considering offenses for which the defendant has not been convicted. Florida’s Criminal Punishment Code “CPC” 921.0021(4)(5), Fla. Stat. 2010 and Florida Statute 921.231(1)(c) (2010) specifically state that prior arrests and convictions, not subsequent arrests are appropriate for sentencing consideration. A trial court cannot consider factors not authorized in the “CPC” during sentencing. In Lacey v. State, 312 So. 3d 97, the state conceded error where the trial court impermissibly considered subsequent uncharged conduct in sentencing. Also, Baehren v. State, 234 So. 3d

799 and Charles v. State, 2016 Fla. App. LEXIS 8186, 204 So. 3d 63 (Fla. 4th DCA 2016).

The trial court also erred in allowing the State's addition of 'Count 4' into an Amended Affidavit of Violation of Probation. These offenses in 'Count 4' were allegations for which Ms. Cannon had not yet been arrested for convicted and did not violate her already revoked probation. Ms. Cannon had not entered a plea to the offenses therefore the State could not prove a new law violation occurred for purposes of revoking probation on that basis and was insufficient to sustain a revocation. Herrera v. State, 286 So. 3d 867; Contreras v. State, 274 So. 3d 532; Hodges v. State, 920 So. 2d 158.

A Supreme Court's holding is legally binding on lower courts. Clear factual error in rendering a decision contrary to the 'Bright Line Rule' adopted by the Florida Supreme Court and its own prior decisions indicated an underlying unreasonableness to the decision. No written opinion makes it impossible to address what points of fact or law the court may have overlooked or misapprehended. Failure of this court to resolve this issue would result in a manifest injustice where Ms. Cannon's sentence far exceeds what it would have been

without the consideration of constitutionally impermissible factors. The error is plain on the face of the record, affects her right to due process, and the fundamental fairness of the proceeding.

This court should exercise its discretion to decide this important issue to create uniformity in the interpretation and application of the law consistent with previous decisions and precedents.

CONCLUSION

Based on the aforementioned reasons, the petition for a writ of certiorari should be granted.