

RECEIVED, 6/24/2013 11:03:32, Thomas D. Hall, Clerk, Supreme Court

IN THE SUPREME COURT OF FLORIDA

GEORGE LEWIS, DC# 116590

Petitioner,

vs.

Case No. SC13-982

District Court Case No. 1D12-2806

FLORIDA PAROLE COMMISSION,

Respondent.

RESPONDENT'S BRIEF ON JURIDICTION

On petition for discretionary review from a decision
of the District Court of Appeal, First District of Florida

MARK HIERS

Attorney for the Respondent

Assistant General Counsel

Florida Parole Commission

4070 Esplanade Way

Tallahassee, Florida 32399-2450

(850) 488-4460

Fla. Bar # 0992712

MarkHiers@fpc.state.fl.us

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PRELIMINARY STATEMENT

The Petitioner, George Lewis, will be referred to as “Petitioner” in this brief. Respondent, the Florida Parole Commission, will be referred to either as the “Respondent” or “the Commission”.

STATEMENT OF THE CASE AND THE FACTS

1. Petitioner is a state prison inmate convicted of First Degree Murder and Sexual Battery and serving an overall life sentence.

2. Petitioner’s Presumptive Parole Release Date (PPRD) was established by the Commission in October, 2010.

3. Petitioner filed his Petition for Writ of Mandamus on or about January 20, 2012, challenging the PPRD. Following the Second Circuit’s Order to Show Cause, the Commission moved to dismiss the petition as untimely under section 95.11(5)(f), Florida Statutes.

4. Petitioner filed his Reply, now for the first time arguing against the constitutionality of section 95.11(5)(f), Florida Statutes. He alleged that section 95.11(5)(f), Florida Statutes, violated the separation of powers

5. The Honorable Kevin J. Carroll dismissed the Petition for Writ of Mandamus on May 22, 2012, stating as follows:

THIS CAUSE comes before the Court upon Petitioner's "Complaint for Writ of Mandamus" filed on January 20, 2012. Having reviewed the petition, the Motion to Dismiss filed by Defendant Parole Commission, the Plaintiff's Reply, and all other pleadings filed in this case, and being otherwise fully advised in the premises, the Court hereby FINDS:

On June 2, 1989, Plaintiff was sentenced to life imprisonment with a minimum mandatory twenty-five (25) years for count I, murder in the first degree, and twelve (12) years for count II, sexual battery, in Pinellas County case number 86-3400CFANO. The Plaintiff was interviewed for parole March 26, 2010. At the following Commission meeting, the Commission established Plaintiff's PPRD at August 30, 2051. The Plaintiff requested review of the PPRD, and on October 20, 2010, the Commission reviewed the PPRD, but decided to make no changes. The Plaintiff did not challenge this action until the instant petition for writ of mandamus was filed by his attorney on January 20, 2012.

Plaintiff challenges the Parole Commission's decision setting his presumptive PPRD. The Court finds, however, that his claim regarding the Commission's action is time-barred pursuant to Section 95.11(5)(f), Florida Statutes. Section 95.11(5)(f), provides that, except for challenges to disciplinary reports that must be brought within 30 days, and challenges to criminal convictions, all extraordinary writ petitions filed by or on behalf of a prisoner must be brought within one year. Pursuant to section 95.031, the one year statute of limitations began to run from the time that the cause of action accrued, in this case when Plaintiff's PPRD action became final, after review, on October 20, 2010.

In his reply to the Parole Commission's response Petitioner argues that section 95.11(5)(f) is unconstitutional and a violation of separation of powers, and therefore his complaint was timely filed. This argument is meritless, the First District Court of Appeal has upheld section 95.11(5)(f), and settled the question of its applicability to parole determinations in Moger v. Florida Parole Commission, 22 So.3d 138 (Fla. 1st DCA 2009), cert. den. 32 So.3d 59 (Fla. 2010). The Moger court held that mandamus petitions have long been considered the proper method of challenging PPRD decisions, and because mandamus relief is a non-habeas extraordinary writ, section 95.11, applies.

Petitioner is also incorrect in his application of Jones v. Florida Parole Commission, 48 So.3d 704 (Fla. 2010) to the case at hand. The court in Jones held that application of a one-year statute of limitations on a habeas corpus petition violated the doctrine of separation of powers. Habeas corpus petitions and writ of mandamus are two very different vehicles of extraordinary relief and it's the special nature of habeas and a petitioner's ability to challenge his present detention that makes time barring such an action unconstitutional. Because this action is a *non-habeas* extraordinary writ and Plaintiff's petition was filed beyond the one-year limitations period, the petition is subject to dismissal.

It is therefore ORDERED and ADJUDGED that the Plaintiff's "Complaint for Writ of Mandamus" is hereby DISMISSED as untimely.

DONE AND ORDERED on this 22nd day of May, 2012.

6. The Petitioner then appealed to the First District Court of Appeal.

His sole argument was the constitutionality of section 95.11(5)(f), Florida Statutes, again claiming that it violated the separation of powers.

7. On March 6, 2013, the First District Court rejected Petitioner's constitutional claim of a separation of powers issue, relying on this Court's rationale in *Kalway v. Singletary*, 708 So. 2d 267 (Fla. 1998). (Petitioner's Brief on Jurisdiction Appendix, Exhibit A)

STATEMENT OF THE ISSUE

While the lower court may have expressly declared Section 95.11(5)(f), Florida Statutes, valid and construed the separation of powers provision, discretionary jurisdiction does not exist under conflict jurisdiction pursuant to Rule 9.030(a)(2)(A)(iv), Florida Rules of Appellate Procedure. Even if discretionary jurisdiction exists, the Court should decline to exercise such jurisdiction.

SUMMARY OF THE ARGUMENTS

The Petitioner asserts that this Court should accept jurisdiction because the First District Court of Appeal opinion in this case (1) expressly declared valid a state statute, (2) expressly construed a provision of the state constitution, and (3) conflicts with decisions of this Court on the same question of law.

The Commission cannot dispute that the Court may have discretionary jurisdiction under Rule 9.030(a)(2)(A)(i) and (ii), Florida Rules of Appellate Procedure. The Commission does dispute that conflict jurisdiction exists under Rule 9.030(a)(2)(A)(iv), Florida Rules of Appellate Procedure. The conflict cited by the Petitioner is this Court's language in *Jones v. Florida Parole Commission*, 48 So.3d 704, 708 (Fla. 2010), where the Court made clear that it had not ceded to the Legislature the power to control the time in which extraordinary writ actions must be commenced. There is no dispute that this Court has that power and has never surrendered it to the Legislature. However, no conflict exists because *Jones*, dealt with the application of section 95.11(5)(f), Florida Statutes, to habeas corpus actions and has no application to mandamus actions filed by prisoners challenging a PPRD establishment.

While discretionary jurisdiction may exist in the lower court's approval of section 95.11(5)(f), Florida Statutes, and its determination that it does not violate separation of powers, the Court should decline jurisdiction. The lower court properly applied this Court's rationale in *Kalway v. Singletary*, 708 So.2d 267 (Fla. 1998), which approved time limitations on mandamus actions challenging prisoner disciplinary proceedings. The same rationale holds true in this case. Further judicial review is unnecessary.

ARGUMENT

For this Court to accept discretionary jurisdiction pursuant to Rule 9.030(a)(2)(A), Florida Rules of Appellate Procedure, it must be established that the decision of the district court "expressly and directly conflict[s] with a decision of another district court of appeal or of the supreme court on the same question of law."

No Conflict Jurisdiction Exists

The opinion of the district court involved in this case contains no language which conflicts with the opinions in *Allen v. Butterworth*, 756 So.2d 52 (Fla. 2000) and *Jones v. Florida Parole Commission*, 48 So.3d 704, 708 (Fla. 2010). In fact, the district court, as did the trial court in this case, specifically recognized and explained the distinction in *Jones*, and the application of section 95.11(5)(f), Florida Statutes, to habeas actions.

The reason Florida Rule of Civil Procedure 1.630 and Kalway did not apply in Jones and Allen was because of the special constitutional protections related to habeas corpus. The application of section 95.11(5)(f) in the instant situation does not raise the same concerns.

Lewis v. Fla. Parole Comm'n, 2013 Fla. App. LEXIS 3623, 8-9 (Fla. Dist. Ct. App. 1st Dist. Mar. 6, 2013)

Petitioner's reliance on this Court's re-affirmation that it did not "cede" to the legislature the power to control the times in which extraordinary writ petitions could be brought, demonstrates no conflict. It is undisputed that the Court has that power. The lower court interpreted that language to mean that "*while the supreme court could always override the Legislature in this area, absent action by the court, the 'as provided by law' language in Florida Rule of Civil Procedure 1.630 gave the Legislature the opportunity to adopt reasonable time limitations.*" *Lewis v. Fla. Parole Comm'n*, 2013 Fla. App. LEXIS 3623, 8 (Fla. Dist. Ct. App. 1st Dist. Mar. 6, 2013). That this Court has not ceded or surrendered its power, does not mean, as this Court has recognized that,

[T]he two branches of state government cannot work hand in hand in promoting the public good or implementing the public will as evidenced by our recent decision in Amendments to the Florida Rules of Appellate Procedure, 685 So.2d 773 (Fla. 1996), wherein we deferred to the legislature in limited matters relating to the constitutional right to appeal.

Kalway, 708 So.2d at 269. The purported conflict between the lower court's decision and this Court's opinion in the habeas case of *Jones*, is nonexistent.

The Court Should Decline Jurisdiction

Even if a basis for discretionary jurisdiction exists, the Court should decline review. The lower court's decision was based in large part on this Court's rationale in *Kalway*.

In *Kalway*, *supra*, the Court addressed a separation of powers challenge to section 95.11(8), Florida Statutes. That statute limited to 30 days the time an inmate could judicially challenge a prison disciplinary proceeding. The Court acknowledged that separation of powers did not mean that judicial and legislative branches could not work together for the public good or public will. *Id.* at 269. In rejecting the constitutional challenge the Court specifically noted Florida Rules of Civil Procedure 1.630(c), provides that the time frames for bringing an extraordinary relief action would be within the "time provided by law." The Court further noted that the "time provided by law" was set forth in section 95.11(8), Florida Statutes, stating,

The setting of an interim time frame for challenging the Department's disciplinary action following the exhaustion of intra-departmental proceedings is a technical matter not outside the purview of the legislature. We do not view such action as an intrusion on this Court's jurisdiction over the practice and procedure in Florida courts.

Id.

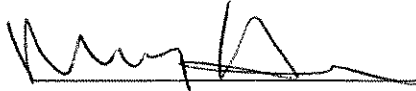
Likewise, the setting of a time frame of one year for a Florida prisoner to bring a petition for extraordinary writ (except for disciplinary proceedings and criminal conviction challenges) is also not outside the purview of the legislature or an intrusion on the practice and procedures of the Courts. This Court noted its deference to the legislature in certain appellate matters as set forth in the Criminal Appeal Reform Act of 1996 in *Amendments to the Florida Rules of Appellate Procedure*, 685 So.2d 773 (Fla. 1996). The Court recognized that the legislature could place reasonable conditions on appellate matters “so long as they do not thwart the litigant’s legitimate appellate rights.” *Amendments*, 696 So.2d at 1104. This Court noted that the deferral in rule 1.630(c) “as provided by law” was “far less extensive than that in *Amendments*.” *Kalway*, 708 So. 2d at 269 (Fla. 1998).

The lower court’s decision was proper based on this Court’s analysis of the interplay between the Florida Rule of Civil Procedure 1.630 and section 95.11(8), Florida Statutes. The same analysis holds true in the interplay between the rule and section 95.11(5)(f), Florida Statutes. The lower court’s decision was correct and on point. The Court should decline jurisdiction based on the propriety of the First District’s opinion.

CONCLUSION

The Commission respectfully urges the Court to decline discretionary jurisdiction in this case.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Mark Hiers', written over a horizontal line.

MARK HIERS

Attorney for the Respondent
Assistant General Counsel
Florida Parole Commission
4070 Esplanade Way
Tallahassee, Florida 32399-2450
(850) 488-4460
Fla. Bar # 0992712
MarkHiers@fpc.state.fl.us

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT a true copy of the foregoing has been furnished by E-Mail to: Counsel for Petitioner, Michael Ufferman, at ufferman@uffermanlaw.com this 24th day of June, 2013.


MARK HIERS
Assistant General Counsel

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY THAT the instant pleading was produced in Times New Roman, 14-point font.


MARK HIERS
Assistant General Counsel