

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

JANUARY TERM 2011

WILLIE HODGES,

Petitioner,

v.

Case No. 5D10-3134

STATE OF FLORIDA,

Respondent.

_____ /

Opinion filed June 10, 2011

Petition Alleging Ineffectiveness
of Appellate Counsel,
A Case of Original Jurisdiction.

Willie Hodges, Belle Glade, pro se.

Pamela J. Bondi, Attorney General, Tallahassee
and Megan Saillant, Assistant Attorney General,
Daytona Beach, for Respondent.

ON MOTION FOR REHEARING

PER CURIAM.

We grant Petitioner's motion for rehearing, withdraw our prior order denying the petition alleging ineffective assistance of counsel and substitute the following opinion in its stead.

Petitioner, Willie Hodges ["Hodges"], convicted of attempted second degree murder, has filed a petition alleging ineffective assistance of appellate counsel because appellate counsel failed to raise the issue of whether the attempted manslaughter jury instruction given in his trial was fundamental error. He relies on *State v. Montgomery*,

39 So. 3d 252 (Fla. 2010) and related cases, such as *Minnich v. State*, 36 Fla. L. Weekly D216 (Fla. 1st DCA, Jan. 28, 2011); *Bailey v. State*, 36 Fla. L. Weekly D217 (Fla. 1st DCA, Jan. 28, 2011).

Hodges was charged by amended information with attempted first degree murder on a law enforcement officer with a firearm, possession of a firearm by a convicted felon, and aggravated assault with a firearm. The State later dismissed the charge of possession of a firearm by a convicted felon. The jury found Hodges guilty of the lesser included offense of attempted second degree murder of a law enforcement officer with a firearm and aggravated assault with a firearm. On November 25, 2008, Hodges filed an appeal. This Court issued a *per curiam* affirmance, and the mandate issued on June 9, 2010.

In September 2010, Hodges filed a petition for writ of habeas corpus, alleging ineffective assistance of appellate counsel. He alleges that his appellate counsel was ineffective in failing to argue that the trial court committed fundamental error when it included in the attempted manslaughter jury instruction the element of intent to kill. The jury instruction for attempted manslaughter included the language: "Hodges committed an act which was intended to cause death."

We initially denied the petition, citing to *Williams v. State*, 40 So. 3d 72 (Fla. 4th DCA 2010), a decision of the Fourth District Court of Appeal. During the pendency of Hodges' motion for rehearing, however, we have reconsidered *Williams* and have concluded that our reliance on it was wrong. See *Burton v. State*, 36 Fla. L. Weekly D738 (Fla. 5th DCA, Apr. 8, 2011). Given the Florida Supreme Court's April 2010 *Montgomery* decision, we are bound to conclude that appellate counsel should have

raised the issue at the appellate level before our decision in the appeal was final. See *Minnich*, 36 Fla. L. Weekly D216; *Bailey*, 36 Fla. L. Weekly D217; *Sharpe v. State*, 39 So. 3d 342 (Fla. 1st DCA 2010); *Asberry v. State*, 32 So. 3d 718 (Fla. 1st DCA 2010); *Toby v. State*, 29 So. 3d 1138 (Fla. 1st DCA 2009). We accordingly grant the writ, vacate the judgment and remand for a new trial.

Petition GRANTED; Judgment VACATED; and REMANDED.

GRIFFIN, TORPY and COHEN, JJ., concur.