

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

JULY TERM 2011

WILLIE FRED SIMS,

Petitioner,

v.

Case No. 5D11-2665

STATE OF FLORIDA,

Respondent.

_____ /

Opinion filed December 16, 2011

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

Willie Fred Sims, Milton, pro se.

Pamela Jo Bondi, Attorney General,
Tallahassee, and Rebecca Rock
McGuigan, Assistant Attorney General,
Daytona Beach, for Respondent.

PER CURIAM.

Petitioner, Willie Fred Sims ["Sims"], asserts that the jury instruction for manslaughter by intentional act given at his trial constituted fundamental error and that appellate counsel rendered ineffective assistance when he failed to raise this issue on direct appeal. This Court's decisions in *Hodges v. State*, 64 So. 3d 142 (Fla. 5th DCA 2011), and *Burton v. State*, 36 Fla. L. Weekly D738 (Fla. 5th DCA Apr. 8, 2011), compel that we grant relief to Sims.

Sims argues that his appellate counsel was ineffective for failing to raise the unpreserved but fundamental error caused by the court giving the standard jury

instruction for manslaughter by act, which was held to be defective in State v. Montgomery, 39 So. 3d 252 (Fla. 2010), *approving Montgomery v. State*, 70 So. 3d 603 (Fla. 1st DCA 2009).

Sims was tried in March 2009, just after the First District's decision in *Montgomery* was released, and his appeal was in the pipeline at the time that *State v. Montgomery* was decided by the supreme court. *State v. Montgomery* was decided on April 8, 2010, and the mandate was issued in Sims' direct appeal in October 2010.

In *Hodges*, the defendant was convicted of attempted second-degree murder after being tried for attempted first-degree murder. He 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. In *Hodges*, as in this case, the error was unpreserved below. As noted in the *Hodges* opinion: "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" *Hodges*, 64 So. 3d at 143 (citing *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); *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 grant the petition and remand for a new trial on the attempted first-degree murder charge.

PETITION GRANTED; REMANDED.

GRIFFIN, PALMER and EVANDER, JJ., concur.