D/a 1-13-84

IN THE SUPREME COURT OF FLORIDA

THOMAS RAPHAEL FASENMYER,

Petitioner,

vs. CASE NO. 63,382

STATE OF FLORIDA,

Respondent.

_____/

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the defendant in the Circuit Court of Duval County and the Appellant in the First District Court of Appeal. Respondent, State of Florida, was the prosecuting authority and the Appellee, respectively. Citations to the Record on Appeal and Appendix will be made by use of the symbols "R" and "A," respectively.

STATEMENT OF THE CASE AND FACTS

Petitioner's statement of the case and facts is not written in a light most favorable to sustain the rulings of either the trial court or the First District Court of Appeal and is unacceptable. The following statement of the case and facts is submitted.

Petitioner has been tried three times for the offenses which he now stands convicted. See Fasenmyer v. State, 305 So.2d 99 (Fla. 1st DCA 1974), cert. denied 315 So.2d 188 (Fla. 1975); Fasenmyer v. State, 383 So.2d 706 (Fla. 1st DCA), cert. denied 389 So.2d 1109 (Fla. 1980); Fasenmyer v. State, 413 So.2d 33 (Fla. 1st DCA 1981), cert. denied sub nom., State v. Fasenmyer, 413 So.2d 877 (Fla. 1982). After his third direct appeal was decided by the First District, Petitioner was resentenced, and the First District's opinion on direct appeal from that resentencing is reported as Fasenmyer v. State, 425 So.2d 151 (Fla. 1st DCA 1983). Petitioner then sought certiorari review in this Court.

At Petitioner's first trial on November 16, 1973, Petitioner was charged in a second amended information with the offenses of breaking and entering with intent to commit

a felony, robbery, and use of a firearm during the commission of a felony (A 1-3). Petitioner was convicted of the offenses of breaking and entering a dwelling with intent to commit grand larceny, robbery, and use of a firearm during the commission of a felony; Petitioner received sentences of 100 years for the breaking and entering conviction, 5 years on the grand larceny conviction (consecutive to sentence for breaking and entering), and 15 years for the use of a firearm during the commission of a felony conviction (consecutive to both previous sentences) (A 4-6). Thus, Petitioner received a collective total of 120 consecutive years in prison after his first trial.

Although Petitioner's judgments and sentences were affirmed by the First District Court of Appeal in a per curiam opinion, Fasenmyer v. State, 305 So.2d 99 (Fla. 1st DCA 1974), and certiorari was denied by this Court, 315 So.2d 188 (Fla. 1975), Petitioner received a second trial after a Federal District Court issued a writ of habeas corpus based on Petitioner's alleged ineffective assistance of counsel during the first trial. See Fasenmyer v. State, 383 So.2d 706, 707 (Fla. 1st DCA 1980). It should be noted that one of the issues which was decided on this appeal concerned Petitioner's

contention that a photographic display and a gun display were both impermissibly suggestive, contrary to the principles of Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972). Petitioner is still litigating this contention in Federal Court in Middle District of Florida Case No. 82-672-CIV-J-JHM. That case has been fully briefed, but as of the date this brief is being prepared, no decision has been announced by the Federal District Court.

On Petitioner's second direct appeal, the First District reversed "and remanded for a new trial." Fasenmyer v. State, 383 So.2d 706, 708 (Fla. 1st DCA 1980). Reversible error had been found because of a Williams rule violation and because of a discovery violation. Id. It is significant that the First District treated the case as involving two burglaries although Petitioner had been charged with one burglary. The State's proof had demonstrated that Petitioner and an accomplice had broken into a house, become frightened off, and then left the house leaving a window open. Later, they returned through the open window and completed the burglary. This would become significant later during the third trial.

Prior to his third trial, the State filed a third amended information (R 1) which charged breaking and entering with intent to commit a felony (Count I), grand larceny (Count II), and use of a firearm during the commission of a felony (Count III). The amendment was necessary because Petitioner had previously been convicted of grand larceny instead of robbery. Petitioner was found guilty as charged and received a 50 year sentence for Count I, a 5 year concurrent sentence for Count II, and no sentence for Count III since the trial court found that the use of a firearm offense merged with the breaking and entering while armed offense (R 3-5).

Petitioner then appealed to the First District Court of Appeal which reversed Petitioner's breaking and entering while armed conviction, finding that there was insufficient evidence to demonstrate that Petitioner had broken into the open window when he returned to complete the burglary. See Fasenmyer v. State, 413 So.2d 33 (Fla. 1st DCA 1981). At trial, the State had recognized that the First District's previous opinion referred to two burglaries and that the fact that there were two burglaries would be res judicata. The prosecutor argued that under the old breaking and entering

statute, proof that a defendant opened a door after he had walked into an open house or building constituted the necessary breaking. The prosecutor relied upon Cartey v. State, 337 So.2d 835 (Fla. 2d DCA 1976), which had held that the breaking of an inner door within an open building constituted a break-in for the purpose of the breaking and entering statute. Although the First District upheld the propriety of a special jury instruction concerning the principle of Cartey, the First District found that there was insufficient evidence that Petitioner had broken in the residence the second time and ordered that Petitioner's breaking and entering while armed conviction be reduced to entering without breaking while armed. On rehearing, Petitioner successfully convinced the First District that there was no such crime, and the First District then ordered that the conviction be reduced to entering without breaking. The First District reversed and "REMANDED for entry of an appropriate judgment and for resentencing." Fasenmyer v. State, 413 So.2d 33 (Fla. 1st DCA 1981). The undersigned then sought certiorari review in this Court based upon the direct conflict with Cartey. This Court declined to review the case.

Petitioner then went back to the trial court for resentencing. At that time, Petitioner stood convicted of the following offenses: Count I--entering without breaking; Count II--grand larceny; Count III--use of a firearm during the commission of a felony. After a hearing, the trial court then entered a corrected judgment and sentence (R 24-29), in which Petitioner received 5 years for Count I, 5 years for Count II (consecutive to Count I), and 15 years for Count III (consecutive to the other two sentences). Thus Petitioner received a total of 25 consecutive years in the state prison.

Petitioner then appealed one more time to the First District which affirmed Petitioner's new sentencing array. See Fasenmyer v. State, 425 So.2d 151 (Fla. 1st DCA 1983). The First District specifically noted that Petitioner had challenged all three of his judgments and sentences and that the trial court was permitted to achieve his original sentencing goal (originally 120 years and then 50 years), by changing Petitioner's concurrent sentences to consecutive sentences. Id. at 425 So.2d 152, n. 3.

Petitioner then sought review in this Court. Petitioner alleged that his sentence for Count III had expired and that

the trial court could no longer give him a lawful sentence--the State disagreed and pointed out in its jurisdictional brief that when Petitioner was sentenced after his third trial in 1980, he had not received a sentence for Count III because that Count at that time merged with Count I (R 5).[1]

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[1] The State wishes to emphasize that this case does not involve the propriety of the trial court's mistaken assumption that the offense of use of a firearm during the commission of a felony merged with breaking and entering while armed. That issue has never been litigated in either the trial court or district court and is not being raised now. If it could be raised at this late date, the State would argue that since it is possible to break and enter while armed, without ever using the firearm, the offenses are separate and distinct crimes and could not merge. See State v. Rodriguez, 402 So.2d 86 (Fla. 3rd DCA 1981). See also Borges v. State, 415 So.2d 1265 (Fla. 1982); State v. Carpenter, 417 So.2d 986 (Fla. 1982); State v. Gibson, ___ So.2d ___, 8 F.L.W. 199 (Fla. 1983); Albernaz v. United States, 450 U.S. 333, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981). The issue in the case sub judice should be limited to whether Petitioner's sentences could be ordered to be served consecutively after resentencing and whether the sentence for Count III was proper since no sentence was imposed originally (after the third trial).

ARGUMENT

PETITIONER WAS LAWFULLY SENTENCED ON ALL THREE COUNTS WHEN HE WAS RESENTENCED BY THE TRIAL COURT.

Presumably, this Court granted certiorari to review Petitioner's allegation that he had been resentenced illegally in that on resentencing he was given a 15 year consecutive sentence for Count III even though the sentence for Count III had already expired. If that is the case, the State submits that certiorari was improvidently granted because the record clearly reveals that Petitioner had not been sentenced for Count III after his third trial because Count III (use of a firearm during the commission of a felony) merged with Count I (breaking and entering while armed) (R 5).

Petitioner's case is controlled by the United States Supreme Court's decision in North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d. 656 (1969). In that case, the Court clearly held that it was constitutionally permissible to impose a greater sentence upon reconviction after a defendant successfully appeals prior judgments and sentences as long as the reasons for the greater sentences affirmatively appear on the record. Id. at 395 U.S. 726, 23 L.Ed.2d 670.

It is significant that although defendant Pearce's case involved only one judgment and sentence, North Carolina v. Pearce also involved an Alabama case, Simpson v. Rice, in which Mr. Rice had originally been found guilty of four separate burglary charges. Initially, he was sentenced to four years in prison for one count, and two years upon each of the other three counts, the sentences to be served consecutively. Id. at 395 U.S. 714, 23 L.Ed.2d 663, n. 3. All four of Rice's judgments and sentences were vacated on a collateral attack and he was retried on three of the four counts by the State of Alabama. After he was reconvicted, he received a ten year sentence on the first count, a consecutive ten years on the second count, and a consecutive five years on the third count--a total of 25 consecutive years compared to the original ten consecutive years. The United State Supreme Court clearly held that this new sentence was constitutionally permissible although it ultimately affirmed the granting of habeas corpus because it did not affirmatively appear on the record why the sentence had been increased. Id. at 395 U.S. 726, 23 L.Ed.2d 670. Of course, Petitioner's situation is somewhat different--he originally received 120 consecutive years which was subsequently reduced to 50 consecutive years.

After his third trial, which is the case under review by this Court, Petitioner received only 25 years. Thus, since there has been no increase in the sentence after the retrials, the principles of North Carolina v. Pearce are satisfied and Petitioner cannot be heard to complain about his sentence.

Of course, Petitioner has attempted to phrase the issue differently. According to Petitioner, his original sentences for Count II and III were legal and it was only Count I which was illegal. However, this overlooks the fact that Petitioner did not receive a sentence for Count III after his third trial (R 5). Although Petitioner received a sentence for Count III after his original trial in 1973, as the trial court correctly found, this sentence was totally wiped out when Petitioner was awarded a new trial. Surely, even Petitioner would admit that had he been found not guilty after either his second or third trials, he would not have been forced to serve the sentences imposed after the first trial.

The Third Circuit's opinion in United States v. Busic, 639 F.2d 940 (3rd Cir. 1981), upon which the First District relied, is directly on point. In Busic, the Third Circuit noted that North Carolina v. Pearce allowed for longer sentences

upon reconviction after the original conviction "at the defendant's behest" had been wholly nullified and the slate wiped clean. Id. at 639 F.2d 947. In Busic, the Court permitted resentencing on counts which had not been disturbed when another count was vacated. The Court specifically allowed greater sentences on the undisturbed counts in order to allow the sentencing court to achieve its original sentencing goal. The Court quoted from Pollard v. United States, 352 U.S. 354, 361, 77 S.Ct. 481, 485, 1 L.Ed.2d 393 (1957)--"to hold otherwise would allow the guilty to escape punishment through a legal accident." Id. at 639 F.2d 950. The Court also noted that because the initial composite sentences would not be longer upon resentencing, the due process ramifications against vindictiveness alluded to in North Carolina v. Pearce, supra, were not relevant. This is precisely the situation in Petitioner's case since his total exposure to prison is now 25 years as opposed to 120 years or 50 years, which were the first two sentencing arrays.

Petitioner has contended that the First District should have followed "controlling" federal law on the subject, i.e., Chandler v. United States, 468 F.2d 834 (5th Cir. 1972). Petitioner is mistaken for two reasons. First, the only

controlling federal law is that decided by either this Court or the United States Supreme Court as far as the First District is concerned. Second, Chandler is no longer viable in light of the Fifth Circuit's subsequent decision in United States v. Hodges, 628 F.2d 350 (5th Cir. 1980), which was cited in Busic, supra.

In summary, Petitioner's sentencing array was totally wiped clean when he received a new trial after his judgments and sentences were reversed by the First District in Fasenmyer v. State, 383 So.2d 706 (Fla. 1st DCA 1980). At the conclusion of his third trial, Petitioner was not sentenced on Count III because that Count merged with Count I--but, when the conviction for Count I was reduced by the First District, 413 So.2d 33, Count III no longer merged with Count I and the trial court was permitted to sentence Petitioner on Count III. Since North Carolina v. Pearce, supra, has clearly rejected the "once concurrent--always concurrent" doctrine, the trial court was permitted to impose three consecutive sentences for a total of 25 years upon resentencing.

Petitioner has attempted to establish direct conflict with several cases in order to demonstrate this Court's jurisdiction. The State submits that there is no conflict with

any of the cases relied upon by Petitioner. In Troupe v. Rowe, 283 So.2d 857 (Fla. 1973), this Court held that it was impermissible to resentence a defendant once the defendant has been sentenced and begun serving his term and has not actively sought through appeal or collateral attack a vacation of the original judgment and sentence. In Troupe, the defendant had been sentenced and the hearing had been concluded when a different State Attorney persuaded the trial court to reopen the hearing and impose a greater sentence. Of course, Petitioner's situation is different--the slate had been wiped clean when Petitioner was awarded a third trial. At the conclusion of that trial, he was not sentenced on Count III (R 5) initially, but when the judgment for Count I was reduced from breaking and entering while armed to entering without breaking, Count III no longer merged with Count I and a sentence for Count III was constitutionally permissible. North Carolina v. Pearce, supra.

Petitioner has alleged that his case expressly and directly conflicts with Herring v. State, 411 So.2d 966 (Fla. 3rd DCA 1982). The State disagrees. In fact, Herring was relied upon by the State in the briefs filed in the First

District in this case. In Herring, the Third District found that the defendant had been improperly sentenced for 15 counts of grand theft because the sentences imposed exceeded the statutory maximum. The Court vacated all 15 counts for resentencing but explicitly stated that upon resentencing the Court could impose consecutive sentences as long as the due process/vindictiveness ramifications of North Carolina v. Pearce, supra, were met. See Herring v. State, supra at 411 So.2d 967. Although Petitioner has relied upon Pahud v. State, 370 So.2d 66 (Fla. 4th DCA 1979), this reliance is misplaced in light of the Third District's explanation in Herring why Pahud was incorrectly decided. See Herring, supra at 411 So.2d 967-971. The Third District specifically noted that after North Carolina v. Pearce, supra, Pahud had to be incorrect because there simply was no right to a "legal" part of an "illegal" sentence. Moreover, it should be noted that the cases relied upon in Pahud were criticized in United States v. Busic, supra, in light of subsequent decisions by the United States Supreme Court.

The State's position is supported by this Court's recent opinion of Beech v. State, 436 So.2d 82 , 8 F.L.W. 283 (Fla., opinion filed July 28, 1983). In that case, the issue

was whether a defendant who obtained a Villery reversal [Villery v. Florida Parole and Probation Commission, 396 So.2d 1107 (Fla. 1981)], could on resentencing receive a term of imprisonment longer than the original sentence of imprisonment. The Court answered the question in the affirmative and held that upon resentencing, a trial judge could impose a sentence of imprisonment as long as the originally ordered combined period of incarceration and probation. Id. at 436 So.2d 33. The Court specifically stated that North Carolina v. Pearce, supra, stood for the proposition that upon a resentencing caused by a defendant who had the original sentence vacated, the trial court could impose a sentence as long as could have been originally imposed for the original sentences which were vacated. The only proscription against a longer sentence upon resentencing is vindictiveness which would violate the due process clause--in Beech, the Court stated that it would not presume vindictiveness and that unless a defendant could show from the record that a sentence was more severe and imposed in retaliation for the defendant's seeking his right to appeal, the lengthier sentences would not be disturbed. Id. Of course, as has been previously stated, Petitioner's sentences were not more severe than the 120 and 50 years which had been imposed after the first two trials. The fact that the sentences were ordered to be served consecutively

after the third trial rather than concurrently is of no significance since the principles of North Carolina v. Pearce are met. See also Herring, supra. In accord, Pizarro v. State, 403 So.2d 1364 (Fla. 4th DCA 1981), cert. denied, 412 So.2d 469 (Fla. 1982). It is significant that the Fourth District in Pizarro, distinguished Pahud, supra and limited "it to its context." Pizarro, supra at 403 So.2d 1367. Specifically, the Court noted that the original sentences in Pahud had exceeded those authorized by law. Of course, in Petitioner's case, the original sentences totaling 120 years and later totaling 50 years did not exceed the term of years authorized by law, but rather, were later found illegal only in the sense that the conviction for breaking and entering while armed was later reduced to a lesser offense. Therefore since the Fourth District has in effect, overruled Pahud, Petitioner cannot establish the requisite conflict. See Herring, supra, where the Third District points out that Pahud is simply incorrect.

The State's position is also supported by Barringer v. State, 372 So.2d 196 (Fla. 2d DCA 1979), in which sentences were upheld on resentencing against a North Carolina v. Pearce,

supra, challenge. The defendant had originally been given a general four year sentence for conviction of two counts of possession and sale of marijuana, but on appeal the general sentence had been thrown out and the case had been remanded for resentencing. On resentencing the defendant received a four year sentence for the offense of sale of marijuana, and no sentence was given for the possession count which the trial court found had merged with the sale count. In other words, the Second District upheld the defendant's four year sentence for one count although he had originally received four years for both counts.

See also State v. Payne, 404 So.2d 1055, 1057 (Fla. 1981). Baggett v. State, 302 So.2d 206 (Fla. 2d DCA 1974).

In addition to the fact that the case law does not support Petitioner's argument, common sense requires that the State's argument be approved. It is undisputed that Petitioner was convicted of carrying and using a firearm during the commission of the entering without breaking offense. If Petitioner is correct in that he can no longer be sentenced for Count III (use of a firearm during the commission of a felony), then the trial court would be forced to ignore that Petitioner carried and used a firearm during his crimes.

Surely, this was not the Legislature's intent when it enacted Section 790.07(2), Fla. Stat.

Petitioner also argued in the First District that the trial court had no jurisdiction to resentence him on either Counts II or III. However, it is clear that the First District's opinion specifically ordered resentencing, and the trial court merely complied with the appellate court's opinion. Petitioner has maintained that the First District found that no error affected either Count II or III, but Petitioner's prayer for relief asked that he receive a new trial. Petitioner's jurisdictional argument is without merit.

CONCLUSION

After North Carolina v. Pearce, supra, it is clear that the "once concurrent--always concurrent" doctrine is no longer viable in terms of federal constitutional law. Since Florida's double jeopardy equivalent is identical to the double jeopardy portion of the Fifth Amendment of the United States Constitution, State v. Cantrell, 417 So.2d 260 (Fla. 1982), federal law as enunciated by the United States Supreme Court is controlling, and Petitioner's argument that the trial court was without power to change his concurrent sentences to consecutive sentences is without merit. Likewise, since after Appellant's third trial, he was not initially sentenced on Count III because the trial court believed that Count III (use of a firearm during the commission of a felony) merged with Count I (breaking and entering while armed), when the breaking and entering while armed conviction was later reduced to entering without breaking, the offenses no longer merged, and a sentence for Count III was constitutionally permissible. Finally, since Appellant's ultimate sentences (25 consecutive years) were not lengthier than Appellant's first two sentences (120 consecutive years and 50 consecutive years), under Beech, supra, due process is not an issue.

The State respectfully submits that the Fourth District's opinion in Pahud, supra, to the extent it conflicts with federal constitutional law, be disapproved and that the decision of the First District Court of Appeal in Petitioner's case be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Quentin T. Till, 255 Liberty Street, Jacksonville, Florida, 32202, by U.S. Mail on this 19th day October, 1983.

Lawrence A. Kaden

LAWRENCE A. KADEN

OF COUNSEL