O/a 1-13-84

IN THE SUPREME COURT OF FLORIDA

THOMAS RAPHAEL FASENMYER,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

CASE NO. 63, 382

PETITION FOR DISCRETIONARY REVIEW
DISTRICT COURT OF APPEAL
FIRST DISTRICT
NO. AL-454

PETITIONER'S INITIAL BRIEF ON THE MERITS

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TABLE OF CITATIONS

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Comes now the Petitioner, Thomas Raphael Fasenmyer, by and through his undersigned counsel, and, pursuant to Rule 9.210, Fla. App. Rules, files this, his Initial Brief on the Merits.

J U R I S D I C T I O N

Jurisdiction has been accepted by this Honorable Court by Order dated September 14, 1983, to resolve the direct conflict of the decision of the 1st District Court of Appeal in the above-styled cause to be found at 425 So.2d 151 with the decisions of this Honorable Court in Troupe v. Rowe, 283 So.2d 857 (Fla. 1973), with the decision of the 3rd District Court of Appeal in Herring v. State, 411 So.2d 966 (Fla. 3rd DCA 1982), with the decision of the 4th District Court of Appeal in Pahud v. State, 370 So.2d 66 (Fla. 4th DCA 1979).

STATEMENT OF THE CASE AND FACTS

On November 15, 1973, Petitioner was convicted of:

Count I: Breaking & Entering While Armed;

Count II Grand Theft

Count II: Possession of a Firearm during Commission of a felony

in the Fourth Judicial Circuit Court, in and for Duval County.

Following reversal and retrial and reconviction on all counts, on September 30, 1980, Petitioner was sentenced:

Count I: Fifty (50) years, with credit for seven (7) years, 94 days already served;

Count II: Five (5) years, CONCURRENT WITH Count I, with credit for seven (7) years, 94 days already served;

Count III: Zero (0) years.

The sentence for Count II being fully expired at the moment of imposition and no sentence being imposed for Count III, Petitioner was imprisoned for Count I.

On September 29, 1981, the First District Court of Appeal reversed Count I, holding insufficient evidence of Breaking and remanded to the trial court to enter Judgment for Count I of Entering without Breaking and resentence accordingly. 413 So.2d 33. The decision of the DCA clearly announced it did NOT affect Counts II and III.

Even so, on resentence, in order to compensate for the mandated reduction of sentence for Count I, on

April 21, 1982, the trial court entered new judgments on all counts and increased the previously-imposed sentences for Counts II and III thus:

Count I: Five (5) years

Count II: Five (5) years CONSECUTIVE TO Count I

Count III: Fifteen (15) years consecutive to Count II

The District Court of Appeal affirmed this new sentencing array at 425 So.2d 151.

A R G U M E N T

First of all, the trial court, in entering new judgments and new sentences for Counts II and III has caused Petitioner to be under two judgments and two sentences for Count II and two judgments and two sentences for Count III, because the original judgment and sentence for these two counts has never been vacated or set aside by any court, anywhere.

In affirming the new sentencing array, the District Court (hereinafter, Fasenmyer Court) relied on its own decision of Brown v. State, 264 So.2d 29, and noted that it had, in that case, held that an unattacked legal sentence could not be disturbed when correcting another, illegal sentence. The Brown court also held that there are various exceptions to the rule that a trial court is generally without power to set aside a criminal judgment after it had been partly satisfied by the defendant. The Fasenmyer court applied that exception, out of context, to excuse the prohibition in Brown against disturbing a legal sentence when correcting another, illegal sentence.

The Fasenmyer court also correctly noted that the 4th DCA case of Pahud v. State, 370 So.2d 66, was in accord with Brown, supra. The Pahud court held that a court may not

increase or make more severe the valid portions of any sentence originally imposed if service of the legal portion of the sentence has commenced, and since the concurrent term of the sentences first imposed was a valid portion of those sentences, the change thereof to consecutive terms was held to be unconstitutional. Further, that no exception to this general rule could be made even though the purpose of the "increase" from concurrent to consecutive was to carry out the purportedly original intention of the trial judge to impose a twenty-year term.

Next, the Fasenmyer court held that the subsequent case of Herring v. State, 411 So.2d 966 (Fla. 3 DCA 1982) overruled Brown's and Pahud's prohibition against increasing one, legal sentence, when correcting another, illegal sentence. But this is not so. The Herring decision in fact affirmed and re-enforced those portions of Brown and Pahud.

> "The cases which hold that an unattacked legal sentence cannot be disturbed when an illegal sentence is set aside and a new sentence imposed arise in a setting where a sentence on one count is legal and the sentence on another, illegal. In that context, the legal sentence is considered untouchable because it is self-contained." (Emphasis added). Herring at 969.

In the instant case, the sentences for Counts II and III were legal, the sentence for Count I illegal. Hence, Herring supports Petitioner's position that Counts II and

III were untouchable while correcting the illegal sentence of Count I.

Finally, the Fasenmyer court rejected the controlling federal law, Chandler v. United States, 468 F.2d 834 (5th Cir. 1972) in favor of persuasive federal law, United States v. Busic, 639 F.2d 940 (3rd Cir. 1981), holding Busic to be a "better reasoned" decision than Chandler. The Chandler court held, as did Brown, Pahud and Herring, that a legal sentence for one count could not be increased to compensate for a mandated reduction of an illegal sentence for another count.

While the Busic decision is indeed in conflict with Chandler, supra, the facts in Busic are not at all anologous to the facts sub judice. The Busic court, compelled to vacate sentence for one count on remand from the United States Supreme Court, conferred upon itself the authority to vacate sentences for both counts and remanded to the trial court for sentencing de novo. This was not done in the instant case; the decision of the DCA remanding this case back to the trial court clearly stated it did NOT affect Counts II and III. 413 So.2d 33.

The Busic court rejected the widely accepted rule that it is unconstitutional to alter a sentence once service of that sentence had begun, which emanated from

Ex Parte Lange, 85 U. S. (18 Wall) 163, 21 L.Ed. 872 (1873) and adopted by this Honorable Court in Troupe v. Rowe, 283 So.2d 857 (Fla. 1973), by announcing that all the courts have, for over 100 years, mis-interpreted Lange. The sentence in Lange had been fully satisfied. Thus, (according to the Busic court) a partially-satisfied sentence did not fall under this prohibition and could lawfully be changed. But even the Busic court acknowledged that a fully satisfied sentence could never be increased. Busic, supra, at 949.

In the instant case, the sentence imposed for Count II on September 30, 1980, five (5) years concurrent with Count I, with credit for seven (7) years, 94 days already served, was fully and completely served and expired and the Petitioner discharged from it when the trial court changed it on April 21, 1982, to read consecutive to Count I.

Further, irrespective of the effect of Busic on resentencing, before a new judgment and new sentence can be imposed, the original judgment and sentence must be vacated by some court. In the instant case, the original judgment and sentence for Count I was vacated by the 1st District Court of Appeal at 413 So.2d 33, but the original judgment and sentence for Counts II and III has never been vacated or set aside by any court, hence the second judgment and

and second sentence imposed for these two counts is a clear violation of the Fifth Amendment prohibition against double jeopardy.

Petitioner limits his argument to this one, simple allegation that the increase of the sentence for Count II from concurrent with Count I to consecutive to Count I in 1982 was clearly unconstitutional, as the original sentence for Count II was completely served and expired at the time of the increase. Petitioner limits his argument because he has served sufficient time that he will be instantly discharged if this unconstitutional increase is voided.

Petitioner further limits his argument to this one point to keep the State from making this a complex case and to confine it to defend an increase of a sentence already expired, in violation of Brown, Herring, Pahud, Chandler, Ex Parte Lange, supra, and even contrary to the decision relied upon by the court below, United States v. Busic, supra.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petitioner's Initial Brief on the Merits has been furnished to: Mr. Lawrence A. Kaden, Assistant Attorney General, Department of Legal Affairs, Suite 1501 THE CAPITOL, Tallahassee, Florida 32301, by U.S. Mail on this 28th day of SEPTEMBER, 1983.

Attorney