O/a 1-13-84

IN THE SUPREME COURT OF FLORIDA

THOMAS RAPHAEL FASENMYER,

Petitioner,

v. CASE NO. 63, 382

STATE OF FLORIDA,

Respondent.

PETITIONER'S REPLY BRIEF ON THE MERITS

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TABLE OF CITATIONS

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Petitioner accepts Respondent's Statement of the Case and Facts with one exception. Respondent states: "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...."

This is not true. Petitioner's allegation in the instant case is that his sentence for Count II had expired and the trial court could not lawfully impose another, second sentence for Count II without violating the Fifth Amendment prohibition against double jeopardy. Petitioner made it quite clear on the concluding page of his Initial Brief on the Merits that this action attacked the sentence imposed for Count II ONLY.

Petitioner's case is not similar to North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), or Simpson v. Rice, relied upon by Respondent. In Pearce and Simpson, following reversal, the slate was wiped clean and any sentence, not offending due process

was permissible. In the instant case, the slate was not wiped clean; only one of three counts was vacated and remanded for entry of proper judgment and resentencing. See Fasenmyer v. State, 413 So.2d 33 (Fla. 1st DCA 1981). The judgment and sentence for Count II and Count III was not, indeed has not to this date, ever been vacated or set aside by any court on any level. Thus, the Petitioner is presently serving a second sentence for Count II after having fully served and been discharged from the sentence previously imposed for Count II.

Respondent next relies upon United States v. Busic, 639 F.2d 940 (3rd Cir. 1981). But Busic is clearly distinguishable from the instant case in two ways: (1) In Busic, even though only one count of two was attacked by the defendant and reversed by the United States Supreme Court, the Busic Court vacated sentences for both counts and remanded to the trial court for sentencing de novo. This is not the same as in the instant case where the District Court of Appeals vacated the conviction of one of three counts but did not reverse and remand the other two counts. (2) Further, and more importantly, Busic affirmed the indisputable premise that a sentence already served in full and expired was beyond the reach of the court to modify. Busic at 949.

Despite Respondnet's argument that Herring v. State, 411 So.2d 966 (Fla. 3 DCA 1982) supports the State, Petitioner continues to rely on Herring to show conflict between the decision in this case by the court below and the Herring decision. The facts in Herring are not the same as the instant case. The Herring court vacated sentence on all ten

counts for all ten sentences were illegal, while the District Court of Appeals in the instant case vacated only Count I and did not disturb the legal sentence for Count II. Respondent, himself, candidly admits on Page 5 of his Jurisdiction Brief that the Herring Court did hold that an unattacked legal sentence could not be touched on resentencing. The conflict arises in that the court below affirmed the imposition of a new sentence for Count II even though the trial court's earlier sentence for Count II was an unattacked legal sentence, never vacated or set aside by any court, and fully expired prior to the imposition of the new sentence.

The Herring Court carefully pointed out:

> "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."
> —Herring, supra, at 969.

Hence, Herring supports the Petitioner's argument that Count II was untouchable by the trial court when correcting the illegal sentence for Count I, and clearly is in conflict with the Opinion of the court below in the instant case.

Respondent's reliance on this Court's recent opinion in Beech v. State, 436 So.2d 82 (Fla. 1983) is misplaced. That case dealt with the propriety of resentence following a successful attack of a split sentence alternative. Those cases consolidated in Beech, ALL dealt with ONE SENTENCE which had been vacated, and Beech is not at all on point where, as in the instant case, of three sentences for three counts, on reversal and remand for resentence of one count, only, the legality

of the increase of sentence for the unattacked, unreversed, unremanded other counts is questioned.

Respondent's reliance on Barringer v. State, 372 So.2d 196 (Fla. 2d DCA 1979) is also misplaced. Barringer dealt with ONE general sentence for conviction of two counts, which was remanded for imposition of separate sentences for each count. No already-imposed, already-expired legal sentence for an individual count was involved in Barringer.

Finally, Petitioner does not maintain that the First District found no error affected Count II and Count III, Petitioner quotes from the Court opinion found at 413 So.2d 33:

"No error affects appellant's other convictions."

Clearly, this Honorable Court saw the true conflict presented by Petitioner when it accepted discretionary jurisdiction.

The decision of the 1st District Court of Appeal at 425 So.2d 151 which affirmed increasing the sentence for Count II when only Count I was reversed as illegal and remanded, is in clear conflict with the decision of Herring v. State, supra, which held that when correcting an illegal sentence for one count, the legal sentence for another count is untouchable.

The decision of the Court below is in direct conflict with the decision of Brown v. State, 264 So.2d 29 (Fla. 1st DCA 1972) which held that an unattacked legal sentence could not be disturbed when correcting another, illegal sentence.

The proper test to resolve the issue in this case is this: Are three sentences, imposed for three counts, self-contained and independent

of one another, or is their total considered as but one sentence? If they are considered as but one total sentence, the Petitioner has no colorful issue. But if each sentence for each count in a self-contained sentence in and of itself, then the increase of the legal sentence imposed for Count II while correcting the illegal sentence imposed for Count I was an illegal increase.

It is the State's position that all the sentences for each of the counts are, in effect, but one sentence, and the accumulation of sentences imposed in 1982 did not exceed the total time of the accumulation of sentences imposed in 1980, hence there was no sentence increase. It is the Petitioner's position that each sentence imposed for the various counts is self-contained and that the increase of a previously-imposed legal sentence on one count to compensate for the mandated reduction of sentence for another count is constitutionally prohibited.

Petitioner finds support for his position in the reasoning of the court in the case of Barringer v. State, 372 So.2d 196 (Fla. 2d DCA 1979), improperly relied upon by the Respondent. The Barringer court reversed a general sentence imposed by the trial court and remanded for imposition of individual sentences for each count. The condemnation of the general sentence as explained by the court was that if the trial court committed error on one count, the general sentence caused that error to affect all counts. The converse of this, of course, is that individual sentences for each count allow the correction of error on one count without disturbing any other, errorless count. If the correcting

of an illegal sentence for one count opened the door to the modification of the legal sentence on other counts, there would be no objection to a general sentence, for the two situations are anologous.

Herein lies the conflict between Opinions of different District Courts of Appeal of Florida. The Herring decision announces each sentence on various counts to be self-contained, and an unattacked legal sentence on one count untouchable while correcting the illegal sentence on another count.

The Brown court also held it was improper for the trial court to vacate the legal sentnece imposed for Count II (in that case) and to increase that sentence on resentence after the appellate court had ordered the trial court to vacate an illegal sentence imposed for Count I.

In the instant case, the District Court of Appeals held that it is constitutionally permissible to increase an unattacked, legal sentence, while correcting another, illegal sentence, so long as the total accumulation of sentences does not offend the due process considerations enumerated in North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969).

This, in itself, is conflict enough, but if various legal sentences imposed for various counts are self-contained and independent of the others (as held by Herring, Brown, and implied by Barringer), then the decision of the court below in the instant case is in direct conflict with Rizzo v. State, 8 FLW 906, Pooley v. State, 403 So.2d 593 (1st DCA 1981, Andrews v. State, 357 So.2d 489 (Fla. 1st DCA 1978), Katz v. State, 335 So.2d 608 (Fla. 2d DCA 1976), Hardwick v. State 357 So.2d 265,

(Fla. 3rd DCA 1978), Beaham v. State, 227 So.2d 232 (2d DCA 1969), Smith v. Brown, 185 So. 732 (Fla. 1938), all of which held that once service of a legal sentence had commenced, it was constitutionally impermissible to increase that sentence at a later date.

Not only had Petitioner commenced the sentence previously imposed for Count II, but he had actually expired the sentence, served it day-for-day and been discharged from it when the trial court imposed a new sentence in 1982.

Had the previously-imposed sentence for Count II been vacated, that would have given birth to another question, but since it was not, the Opinion of the court below is in direct conflict with the case of Flowers v. State, 351 So.2d 387 (1st DCA 1977) which held that a second sentence for the same criminal episode amounted to a violation of the Fifth Amendment prescription against double jeopardy.

Finally, because the sentence for Court II was fully served and expired at the time the trial court imposed a second sentence for Count II in 1982, the decision of t he District Court of Appeals in the instant case is in direct conflict with this Court's Opinion in Troupe v. Rose, 283 So.2d 857, which, by Respondent's own argument (Page 5, Brief on Jurisdiction) was decided on double jeopardy grounds.

C O N C L U S I O N

The court below clearly did NOT vacate the judgment and sentence for Count II. See 413 So.2d 33. The imposition of two judgments and two

sentences by the trial court for the same criminal episode clearly violates the Fifth Amendment of the Constitution of the United States. The State cannot deny that the 1980 judgment and sentence for Count II has never been vacated or set aside by any court at any level, and that the previously-imposed sentence for Count II was fully served and expired, day-for-day, on June 28, 1978. So the 1982 judgment and sentence imposed for Count II, four years after the Petitioner had been discharged from the previously-imposed sentence for Count II, constitutes a second judgment and sentence, not a modified sentence, and cannot possibly be constitutional.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petitioner's Reply 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 2ND day of NOVEMBER, 1983.

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