OA 3.10.86 087

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

RONNIE E. CHAPLIN,

Respondent.
_____/

Case No. 67,492

RESPONDENT'S BRIEF ON THE MERITS

F. TOWNSEND HAWKES
CARLTON, FIELDS, WARD, EMMANUEL
SMITH & CUTLER, P.A.
Post Office Drawer 190
Tallahassee, Florida 32302
(904)224-1585

TABLE OF CONTENTS

TABLE OF CASES AND CITATIONS

CITATIONS

STATEMENT OF THE CASE AND FACTS

Although the Petitioner's, State of Florida, Statement of the Case and Facts is generally correct, Respondent, Ronnie E. Chaplin, submits this statement as being more complete.

Chaplin was found guilty of two counts of armed robbery and was sentenced, at his election, under the guidelines of Fla.R.Crim.P. 3.701. See Chaplin v. State, 473 So.2d 842 (Fla. 1st DCA 1985). This rule established recommended sentencing ranges which a judge cannot ignore without setting forth in writing clear and convincing reasons for not following the guidelines. The State Attorney prepared the sentencing guidelines scoresheet which contained a scoring error. (Transcript of Sentencing Hearing 254, 257). Chaplin's public defender trial counsel did not detect the error, and failed to object. The trial judge, Judge Soud of the Circuit Court, Duval County, imposed the highest sentence of 12 years utilizing the incorrect recommended range. This same public defender counsel failed to raise this point on direct appeal of the convictions and sentences, which were affirmed. See Chaplin v. State 449 So.2d 981 (Fla. 1st DCA 1984).

After examining his own file, Chaplin discovered the sentencing error and moved pro se, pursuant to Fla.R.Crim.P. 3.850, for the trial court to correct its erroneous sentence. (App. A). The trial court refused to correct the sentencing error, and Chaplin appealed pro se to the District Court of Appeal, First District.

On appeal, the State conceded that a sentencing error had been made, and that the recommended range should have been 7-9 years rather than 9-12 years, as used by the trial court. Chaplin v. State, 473 So.2d 842-43. The error occured because of the mistaken inclusion by the State of a prior conviction in the original scoresheet, which was improperly used to increase Chaplin's guidelines score. Id.

In spite of conceded error in the sentencing process, the State contended on appeal that Chaplin had waived this error by his counsel's failure to raise it at the trial or appellate levels. The District Court rejected the State's position, reasoning that since many courts had allowed post-conviction relief under Rule 3.850 for errors in computation of credit for jail time, Chaplin should be allowed to raise by Rule 3.850 an error in computing the recommended sentence range under the guidelines. Chaplin's sentence was vacated and his case remanded for resentencing.

The State sought review of the District Court's opinion, and this Court granted discretionary review based on direct conflict of decisions. See Art. V, §3(b)(3), Florida Constitution.

SUMMARY OF ARGUMENT

This case is controlled by State v. Stacey, 10 F.L.W. 563 (Fla. Oct. 17, 1985), in which this Court recognized that an error relating to sentencing could initially be raised by means of a Rule 3.850 petition when a defendant was denied effective assistance of counsel. Because Chaplin's trial and appellate counsel failed to raise an obvious computational error in application of the sentencing guidelines, his counsel was legally ineffective. Chaplin was therefore entitled to raise ineffective assistance of counsel initially by way of Rule 3.850, and his sentencing, which the State has conceded was in error, could be corrected through resentencing by the trial court.

Chaplin is also entitled to raise a computational error in application of the sentencing guidelines because this type of error has been traditionally corrected through a Rule 3.850 petition. Many courts have allowed post-conviction relief for sentencing errors involving incorrect credit for jail time served by a defendant. This sentencing guidelines error in this case is analogous to cases allowing correction for an erroneous jail time credit.

The policies underlying the sentencing guidelines are furthered by allowing correction of computational errors through Rule 3.850. The central goal of sentencing guidelines is to

eliminate unwarranted sentencing variations. This goal is enhanced by allowing correction of obvious or conceded sentencing errors, which are inherently irrational. A main principle of sentencing guidelines is that limited correctional facilities should be conserved through imposition of the shortest, practical sentence. Again, allowing correction of sentencing errors which arbitrarily consume these limited resources serves this principle of the guidelines by reducing needless incarceration.

Sentencing guidelines error contained in the scoresheet prepared by the State Attorney should fairly be correctable by Rule 3.850. Otherwise, a defendant would suffer from an undetected error initiated by the State. Moreover, sentences imposed which do not follow the guidelines are tantamount to illegal sentences, because the guidelines are mandated by the Legislature in Florida law. As the State acknowledges, an illegal sentence is always correctable through collateral relief.

ARGUMENT

I. UNDER STATE V. STACEY, RESPONDENT WAS CLEARLY DENIED EFFECTIVE ASSISTANCE OF COUNSEL, WHICH MAY BE INITIALLY RAISED BY MEANS OF FLA.R.CRIM.P. 3.850

II. A COMPUTATIONAL ERROR IN APPLYING SENTENCING GUIDELINES MAY INITIALLY BE RAISED FOR CORRECTION UNDER FLA.R.CRIM.P. 3.850

I. UNDER STATE V. STACEY, RESPONDENT WAS CLEARLY DENIED EFFECTIVE ASSISTANCE OF COUNSEL, WHICH MAY BE INITIALLY RAISED BY MEANS OF FLA.R.CRIM.P. 3.850

Although conceding a computational error in application of sentencing guidelines, the State argues that Respondent Chaplin waived his right to raise this error because his counsel failed to object at either the trial or on appeal. The State ignores, however, that this case is remarkably similar to and controlled by a recent decision of this Court, State v. Stacey, 10 F.L.W. 563 (Fla. Oct. 17, 1985). (App. B).

In State v. Stacey, a prisoner filed a pro se Rule 3.850 petition after his trial and appellate counsel had failed to raise the trial court's improper retention of jurisdiction over the first one-third of the sentence. In that case, the State also argued that this issue could not be raised by means of Rule 3.850 since it should have been raised on direct appeal. This Court tersely rejected the State's position, holding in Stacey that a clear case of ineffective assistance of counsel existed, because both trial and appellate counsel failed to recognize that the trial court's retention of jurisdiction was improper. Although the prisoner had failed to allege ineffective assistance of counsel in his pro se petition, this Court granted the proper relief, and refused to hold the pro se petition to exact pleading standards. Id.

Chaplin similarly has applied pro se under Rule 3.850 for relief from a clear error affecting the length of his sentence. His trial and appellate counsel failed to raise the computational error contained in his sentencing guidelines scoresheet, an error so obvious that the State has even conceded it was incorrect. Such a failure of Chaplin's counsel to recognize an obvious error in calculation of the length of his sentence amounts to a clear case of ineffective assistance of counsel.

The standards for determining ineffective assistance of counsel have been established by this Court in Knight v. State, 394 So.2d 997 (Fla. 1981), and require Chaplin to prove the following:

1. A specific omission upon which a claim of ineffective assistance of counsel is based.

2. The omission was a substantial and serious deficiency measurably below that of competence of counsel.

3. Prejudice to the extent that omission likely affected the case's outcome.

394 So.2d at 1001. The specific omission in this case is trial and appellate counsel's failure to recognize the sentencing error. This error is patently a serious deficiency since a cursory perusal of the scoresheet would have revealed the improper inclusion of an inconsistent prior conviction. The mistake is so clear that the State has conceded error.[1]

[1]Indeed, the public defender was allowed to withdraw from representing Chaplin by this Court due to the likelihood that Chaplin had been provided ineffective public counsel, creating a conflict of interest concerning this issue.

Prejudice is clear because Chaplin was entitled to have a recommended range of three years less than was actually applied. Under Fla.R.Crim.P. 3.701, the trial judge cannot exceed the recommended range unless clear and convincing reasons are articulated in writing by the trial judge. Chaplin was therefore entitled to either a shorter sentence by three years or clear and convincing articulated reasons for exceeding that sentence. Denial of these protections at a minimum denied Chaplin due process of law as guaranteed by the Fourteenth Amendment of the United States Constitution and Article I, Section 9 of the Florida Constitution.

Likewise, Chaplin's case meets the comparable standards established in Strickland v. Washington, 104 S.Ct. 2052 (1984):[2]

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

104 S.Ct. 2064. By failing to recognize the error in the sentencing guidelines scoresheet, trial and appellate counsel

---

Respondent's pro bono counsel was then appointed by this Court.

[2]This Court has held that the standards of Knight do not differ significantly from those of Strickland v. Washington. See Jackson v. State, 452 So.2d 533 (Fla. 1984).

were simply not functioning as counsel protecting a defendant's legal rights. This failure resulted in serious prejudice to Chaplin who was sentenced to three years more than he presumptively deserved under the guidelines.

Apparently recognizing that Stacey controls this case, the State argues that this Court should recede from its recent position, and follow federal courts in requiring proof of "cause and prejudice", as in Engle v. Isaac, 456 U.S. 107 (1982), and Wainwright v. Sykes,433 U.S. 72 (1977). This line of cases cited by the State deals with the federal habeas corpus standard for overcoming a state procedural waiver of an error. These cases require federal courts, on the basis of federalism and comity, to honor a state's procedural requirements for raising errors unless "cause and prejudice" are shown.

The State's argument that federal cases should be followed is obviously circular, because these cases merely honor whatever a state determines are procedural requirements. The entire point of Engle v. Isaac was that the "States possess primary authority for defining and enforcing the criminal law". 456 U.S. at 128. To argue that this Court should follow federal courts which defer under Sykes-Engle to this Court is nonsense. Moreover, in light of the United States Supreme Court's clear holding in Strickland v. Washington that the "cause and prejudice" standards are not to be applied to claims for ineffective assistance of counsel, the continued authority of the cases cited by the State is extremely suspect.[3]

The State relies on Anderson v. State, 467 So.2d 781 (Fla. 3d DCA 1985), for the proposition that ineffective assistance of counsel should not be recognized when predicated on counsel's failure to raise an issue. This notion is clearly at odds with Stacey. Further, Anderson involved defense counsel's failure to object to improper opening and closing comments of the State Attorney. The court determined that this silence could have been an acceptable trial tactic to avoid emphasizing the comments. In contrast, the failure of Chaplin's counsel to raise a computational error in the sentencing process was hardly a deliberate trial tactic as nothing could be gained by failure to object. The State's position that the mere inadvertance or omission of counsel cannot amount to ineffective assistance of counsel collides with logic as well as numerous holdings of Florida courts. See Barclay v. Wainwright, 444 So.2d 956 (Fla. 1984) (appellate counsel's omission of full argument on all points is ineffective counsel); State v. Meyer, 430 So.2d 440

---

[3] "The principles governing ineffectiveness claims should apply in federal collateral proceedings as they do on direct appeal or in motions for a new trial. As indicated by the 'cause and prejudice' test for overcoming procedural waivers of claims of error, the presumption that a criminal judgment is final is at its strongest in collateral attacks on that judgment. An ineffectiveness claim, however, as our articulation of the standards that govern decision of such claims makes clear, is an attack on the fundamental fairness of the proceeding whose result is challenged. Since fundamental fairness is the central concern of the writ of habeas corpus, no special standards ought to apply to ineffectiveness claims made in habeas proceedings." Strickland v. Washington, 104 S.Ct. at 2070 (citations omitted).

(Fla. 1983) (appointed counsel's inadvertent failure to file appeal is ineffective counsel); Bridges v. State, 466 So.2d 348 (Fla. 4th DCA 1985) (failure of defense counsel to pursue viable defense amounts to ineffective assistance of counsel); Robinson v. State, 462 So.2d 471 (Fla. 1st DCA 1984) (failure of trial counsel to file for motion for new trial, preventing judicial review of evidentiary weight, is ineffective assistance), cert. denied, 471 So.2d 44 (Fla. 1985); Wright v. State, 446 So.2d 208 (Fla. 3d DCA 1984) (defense counsel's inadvertent introduction of harmful evidence is ineffective assistance of counsel).

Under Florida precedent, Chaplin's appointed counsel was undeniably ineffective in his failure to recognize the error in sentencing computation. As an indigent, Chaplin is, of course, entitled to the effective assistance of his appointed counsel. See Chiles v. State, 454 So.2d 726 (Fla. 1st DCA 1984). Because of ineffective counsel, Chaplin was entitled to raise this issue for the first time by collateral attack under Rule 3.850 . See Quince v. State, 477 So.2d 535, 536 (Fla. 1985) (Rule 3.850 is proper method for raising ineffective assistance of counsel). Under Stacey, Chaplin's implied claim for ineffective assistance of counsel will be recognized in a pro se 3.850 petition.

Thus, the decision of the District Court of Appeal, First District, should be approved on the basis that Chaplin was rendered ineffective assistance of counsel and could therefore implicitly raise this issue for the first time by means of collateral attack.

II. A COMPUTATIONAL ERROR IN APPLYING SENTENCING GUIDELINES MAY INITIALLY BE RAISED FOR CORRECTION UNDER FLA.R.CRIM.P. 3.850

Sentencing errors which result in a defendant serving more time than is justified are properly raised for the first time by means of Fla.R.Crim.P. 3.850. This rationale underlies the holding of the First District Court in this case, and is supported by analogy to cases in which improper credit has been given for jail time already served by a defendant. A consistent line of these cases has recognized that incorrect jail time credit can be initially raised by a 3.850 petition. See Roesch v. State, 446 So.2d 269 (Fla. 2d DCA 1984); Lamar v. State, 443 So.2d 414 (Fla. 4th DCA 1984); Jablonskis v. State, 422 So.2d 356 (Fla. 5th DCA 1982).

These cases recognize the maxim that post-conviction relief should fairly be given to defendants incarcerated through error:

> Where, as here, the sentencing error can cause or require a defendant to be incarcerated or restrained for a greater length of time than provided by law in the absence of the sentencing

> error, that sentencing error is fundamental and endures and petitioner is entitled to relief in any and every legal manner possible, viz: on direct appeal although not first presented to the trial court, by post-conviction relief under Rule 3.850, or by extraordinary remedy. As to such a fundamental sentencing error he is entitled to relief under an alternative remedy notwithstanding that he could have, but did not, raise the error on appeal.

Reynolds v. State, 429 So.2d 1331, 1333 (Fla. 5th DCA 1983). Fla.R.Crim.P. 3.800(a) also recognizes that a correction of sentence may be accomplished at any time.

The State's only effort to distinguish these cases allowing 3.850 correction of improper jail time credit is to claim that no court has allowed such a correction after the January 1, 1985 effective date of the new wording of Fla.R.Crim.P. 3.850.[4] First, because several courts have allowed such a correction after January 1, 1985, this assertion is simply false. See Chapple v. State, 478 So.2d 103 (Fla 2d DCA Nov. 1, 1985); Cunningham v. State, 472 So.2d 899 (Fla. 2d DCA July 24, 1985); Frye v. State, 471 So.2d 214 (Fla. 1st DCA June 25, 1985). Second, the amended 3.850 language merely incorporated existing case law which already generally prohibited the raising

[4]Respondent would point out that his pro se 3.850 petition was filed on September 27, 1984, so that his petition should fairly be assessed as to other qualifications under the general language existing prior to the January 1, 1985 amendment.

of issues by 3.850 which could have been raised on appeal. See, e.g., Demps v. State, 416 So.2d 808 (Fla. 1982).[5] Therefore, cases decided under the former language of Rule 3.850 have equal application under the amended language.

The State argues that because this error could not have been raised on appeal due to lack of an objection, it cannot be raised by 3.850. The State also inconsistently argues that because this error could have been raised on appeal, it cannot be raised by 3.850. This is a difficult position to properly address, but one which need not concern this Court since its resolution does not determine whether the error in this case can be raised by 3.850. First, lack of an objection is not necessarily a bar to raising a sentencing error because "[t]he purpose for the contemporaneous objection rule [to preserve fresh testimony] is not present in the sentencing process." State v. Rhoden, 448 So.2d 1013, 1016 (Fla. 1984); see also Parker v. State, 478 So.2d 823 (Fla. 2d DCA 1985); Tucker v. State, 464 So.2d 211 (Fla. 3d DCA 1985); Whitfield v. State, 471 So.2d 633 (Fla. 1st DCA 1985); but see Dailey v. State, 471 So.2d 1349 (Fla. 1st DCA 1985) (factual matter not apparent from record, requires objection). Second, even though a sentencing error

[5]The State argues both sides of the fence on this point. First, it asserts at p. 6 of its Brief that the amended 3.850 language is merely a codification of the "well-established principle" that issues which could have been raised on appeal cannot be raised by 3.850. Then, at pp. 14-15, the State argues that the amended language represents a change so significant that jail time credit cases decided prior to the effective date of the amended language must be discounted.

could have been raised on appeal, relief from sentencing errors in computing jail time has nevertheless been cognizable under 3.850. See James v. State, 443 So.2d 510 (Fla. 1st DCA 1984); Polk v. State, 418 So.2d 388 (Fla. 1st DCA 1982); see also Styles v. State, 465 So.2d 1369 (Fla. 2d DCA 1985) (even though issue of improper retention of jurisdiction over sentence could have been raised on appeal, issue may also be raised by 3.850). It is thus apparent that resolution of whether the error here could or could not have been raised on appeal will not assist in resolving the principal 3.850 issue.

Instead, one must examine the principles and procedures of the sentencing guidelines themselves:

> The purpose of sentencing guidelines is to establish a uniform set of standards to guide the sentencing judge . . . . Sentencing guidelines are intended to eliminate unwarranted variation in the sentencing process by reducing the subjectivity . . ..

Fla.R.Crim.P. 3.701(b)(1984). This purpose of the guidelines is enhanced by allowing corrections of sentencing errors under 3.850 since unwarranted sentencing variations can be eliminated. The State evidently seeks to preserve these unwarranted variations, contrary to the very intent of the guidelines.

One of the explicit principles of sentencing guidelines is that limited correctional facilities should be conserved through imposition of the least restrictive, practical sentence:

> Because the capacities of state and local correctional facilities are finite, use of incarcerative

> sanctions should be limited to those persons convicted of more serious offenses or those who have longer criminal histories. To ensure such usage of finite resources, sanctions used in sentencing convicted felons should be the least restrictive necessary to achieve the purposes of the sentence.

Fla.R.Crim.P. 3.701(b)(7) (1984). Likewise, this principle of the sentencing guidelines is fostered by allowing errors which impose excessive sentences to be corrected under Rule 3.850. By allowing such a correction, the least restrictive, practical sentence can be achieved, rather than perpetuating an erroneously lengthy sentence which irrationally consumes limited correctional facilities.

Further, the procedure of sentencing guidelines provides that the State Attorney prepare defendant's sentencing scoresheet. See Fla.R.Crim.P. 3.701(d)(1)(1984). Errors in the scoresheet prepared by the State may go undetected until after appeal, as in this case. Certainly these errors, which were initiated by the State, should fairly be correctable under 3.850 when they are finally discovered. Otherwise, a defendant must suffer by serving a longer sentence due to an initially undetected error which the State originated.

The State argues that sentencing guidelines errors are not correctable under 3.850 because an incorrect guidelines sentence is not an "illegal" sentence, which the State concedes would be within the purview of 3.850. The State posits that this is so because the guidelines are not law. This, again, is

incorrect. The Legislature specifically required establishment of sentencing guidelines through Section 921.001, Florida Statutes (1983). Any change in sentencing guidelines must be approved by the Legislature. See §921.001(4)(b), Fla. Stat. The sentencing guidelines are not merely procedural rules of this Court, but are laws pursuant to section 921.001, Florida Statutes. As such, failure to comply with sentencing guidelines unquestionably leads to an "illegal" sentence which may always be remedied under Rule 3.850. See Thomas v. State, 472 So.2d 1221 (Fla. 1st DCA 1985); Styles v. State; contra Wahl v. State, 460 So.2d 579 (Fla. 2d DCA 1984).

The State predicts that the Florida criminal justice system will crumble if this Court allows 3.850 relief for computational errors in applying sentencing guidelines, because federal courts will feel invited to expand such relief. The State ignores its own cited cases of Sykes and Engle which specifically prohibit federal courts from ignoring state procedural requirements in federal habeas corpus proceedings. Under established limitations, federal courts cannot grant relief from a state procedural default beyond that specifically allowed by a state, in the absence of the difficult showing of "cause and prejudice". See supra at 9. In light of this line of federal cases vigilantly honoring federalism, the State's forecast appears unduly ominous.

This Court must obviously be sensitive to preserving the judicial resources of Florida. Yet, the Court should not

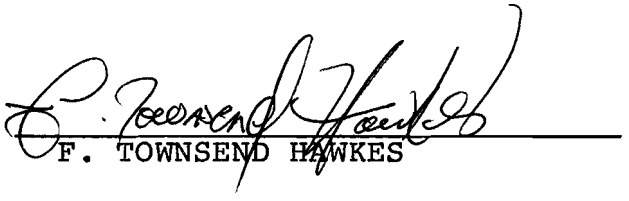
refuse to allow correction of a sentencing error merely because this may entail more work for this state's courts. The State's argument that it is simply too much trouble to allow Chaplin to correct this conceded error is unseemly. Especially in sentencing guidelines cases, errors may be corrected expeditiously through a brief resentencing hearing, imposing a relatively small demand on judicial resources. The State's thirst for finality must be tempered by the flexibility necessary to correct obvious mistakes.

CONCLUSION

Respondent Chaplin was sentenced by a judge who used the wrong presumptive range under the sentencing guidelines. This is conceded by the State. Chaplin should be permitted to correct this error by means of Rule 3.850 both because his counsel was ineffective in failing to raise the error, and because this type of sentencing mistake should properly and fairly be remedied by post-conviction relief. The system should not appear to be unfair. The opinion of the District Court of Appeal, First District, in this case should, therefore, be approved.

Respectfully submitted

F. TOWNSEND HAWKES
CARLTON, FIELDS, WARD, EMMANUEL
SMITH & CUTLER, P.A.
Post Office Drawer 190
Tallahassee, Florida 32302
(904)224-1585



F. TOWNSEND HAWKES

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of foregoing has been furnished by United States Mail to Gregory G. Costas, Assistant Attorney General, Counsel for Petitioner, The Capitol, Tallahassee, Florida 32301 this 12th day of February, 1986.

F. TOWNSEND HAWKES