

C/A 5-7-86

IN THE SUPREME COURT OF FLORIDA

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CLERK, SUPREME COURT

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MARTIN FRANCIS McGARRY,)
)
Petitioner,)
)
vs.)
)
STATE OF FLORIDA,)
)
Respondent.)
_____)

CASE NO. 67,506

PETITIONER'S BRIEF ON THE MERITS

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TABLE OF CONTENTS

	<u>PAGE</u>
Table of Contents	i
Authorities Cited	ii
Preliminary Statement	1
Statement of the Case and Facts	2-5
Summary of Argument	6-7
Argument	8-19

WHETHER THE DECISION BELOW AFFIRMING CONSECUTIVE SENTENCES OF 46 YEARS FOR PETITIONER'S FAILURE TO APPEAR AT SENTENCING, DESPITE ITS INCLUSION IN THE PLEA AGREEMENT, CONSTITUTES AN UNLAWFUL SENTENCE BECAUSE IT PUNISHES THE PETITIONER FOR A CRIME FOR WHICH HE HAD NOT BEEN CONVICTED AND WHICH OCCURRED SUBSEQUENT TO THE PLEA ENTRY HEARING?

Conclusion	20
Certificate of Service	20

AUTHORITIES CITED

<u>CASES</u>	<u>PAGE</u>
<u>Banks v. State</u> , 342 So.2d 469 (Fla. 1976)	17
<u>Bradley v. State</u> , 79 Fla. 651, 84 So. 677 (1920)	17
<u>Brown v. State</u> , 152 Fla. 853, 13 So.2d 458 (Fla. 1943)	17
<u>Codispoti v. Pennsylvania</u> , 418 U.S. 506 (1974)	15
<u>Dunn v. United States</u> , 442 U.S. 100 (1979)	14
<u>Eckles v. State</u> , 132 Fla. 526, 18 So. 764 (1938)	17
<u>Eger v. State</u> , 291 So.2d 676 (Fla. 3d DCA 1974)	17
<u>Fresneda v. State</u> , 347 So.2d 1021 (Fla. 1977)	18
<u>Harden v. State</u> , 428 So.2d 316 (Fla. 4th DCA 1983)	17
<u>Holmes v. State</u> , 342 So.2d 134 (Fla. 1st DCA 1977)	13,17
<u>Hubler v. State</u> , 458 So.2d 350 (Fla. 1st DCA 1984)	16
<u>McGee v. State</u> , 438 So.2d 127 (Fla. 1st DCA 1983)	13
<u>Miles v. State</u> , 418 So.2d 1070 (Fla. 5th DCA 1982)	13
<u>Monti v. State</u> , 11 F.L.W. 61 (Fla. 5th DCA Dec. 26, 1985)	14,15
<u>Moore v. State</u> , 339 So.2d 228 (Fla. 2d DCA 1976)	8,9,11
<u>Noble v. State</u> , 353 So.2d 819 (Fla. 1977)	13

<u>Pahud v. State</u> , 370 So.2d 66 (Fla. 4th DCA 1979)	12
<u>Pope v. State</u> , 56 Fla. 81, 47 So. 487 (1908)	17
<u>Robinson v. State</u> , 373 So.2d 898 (Fla. 1979)	17
<u>Robinson v. State</u> , 471 So.2d 671 (Fla. 2d DCA 1985)	16
<u>Solem v. Helm</u> , 463 U.S. 277 (1983)	16
<u>State v. Bateh</u> , 110 So.2d 7 (Fla. 1959)	12
<u>State v. Holmes</u> , No. 85-295 (Neb. Jan.7, 1986) 38 Criminal Law Reporter 2347	11
<u>Wyche v. State</u> , 178 So.2d 875 (Fla. 3d DCA 1965)	13

OTHER AUTHORITIES

Constitutional Provisions

8th Amendment, U.S. Constitution	16
Art. I, § 17, Florida Constitution	17

Florida Rule of Criminal Procedure

3.830	15
3.840	15

Florida Statutes

§ 775.082	11
§ 775.087	11
§ 775.089(1) (1983)	9,10,18
§ 843.15 (1983)	12,13
§ 948.03	9,10,18

PRELIMINARY STATEMENT

The petitioner was the defendant in the trial court and the appellant in the district court of appeal. He will be referred to as petitioner in this brief.

The record on appeal is bound in two volumes with the transcripts of the trial court proceedings contained therein. The record on appeal is consecutively numbered, and all references to the record on appeal will be by the symbol "R" followed by the appropriate page number in parentheses.

STATEMENT OF THE CASE AND FACTS

Petitioner, MARTIN F. McGARRY, was charged in the circuit court of the Fifteenth Judicial Circuit with numerous felony and misdemeanor charges based upon the issuance of worthless checks (R-72-75, 102-103, 124-125, 161-162, 195-196, 218-219, 242-243, 261-262). A negotiated plea was arrived at for the disposition of all of the pending charges (R-89).

On October 28, 1983, McGarry, accompanied by counsel, entered pleas of guilty to 16 third degree felony counts and to one misdemeanor count, subject to the following agreement concerning the sentence to be imposed:

If McGarry was able to make full restitution by the time of the sentencing date, set for January 3, 1984, he would receive probation with the condition that he serve a term of 364 days in the county jail, and would be eligible for work release after serving five months (R-33-34).

If McGarry failed to make full restitution by the sentencing date the trial court would impose a sentence of three years imprisonment on the charges, concurrently, and would impose a 364 day concurrent sentence on the misdemeanor count.

If McGarry failed to appear in court on the sentencing date, he would receive consecutive sentences (R-33-34).

McGarry failed to appear on the sentencing date. At the subsequently held sentencing hearing a sentence of 49 years

imprisonment was imposed, consisting of three year consecutive terms for each of the 16 felony counts and a one year consecutive misdemeanor sentence on the misdemeanor count (R-33-34).

At the plea entry hearing the trial court advised petitioner, at the conclusion of the colloquy, that if he failed to appear at sentencing "a capias will be issued for your arrest. You will arrested." (R-29). The court then seemed to equivocate in advising petitioner that if he failed to appear he would be brought back into court and "I'll be free then to sentence you to three years' imprisonment as to each of these charges, for a total of 48 years. . . ." (R-29). The court next stated, after petitioner indicated that he understood, that "if" the court sentenced him to 48 years imprisonment that there was a good likelihood that he would serve a substantial portion of that sentence (R-29). The trial court then adjudicated petitioner guilty on all but one count. In order to permit petitioner to remain on bond pending the sentencing scheduled for January 3, 1984 (R-33). The trial court then specified: "Failure to appear at that time will subject Mr. McGarry to three years Department of Corrections' time, consecutive at that time, for a total of 48 years." (R-33).

The court specifically stated that if petitioner appeared and proved that restitution had been made in the amount of \$33,601.20 "the court will sentence" petitioner to 364 days in the county jail plus probation (R-33).

The court further specified that if restitution was not paid by the time of sentencing that "the court will sentence" petitioner to three years in the Department of Corrections concurrently on the various charges, including one concurrent year on the misdemeanor charge (R-34).

At the conclusion of the hearing, the trial court set sentencing for 8:45 a.m. on January 3, 1984 (R-34).

Petitioner did not appear for sentencing on the scheduled date, and a *capias* was issued for his arrest (R-44). Sentencing was held on June 26, 1984, and the trial court denied a motion to withdraw filed by petitioner's privately retained counsel which was based on the ground that there had been an absence of any communication between counsel and his client which precluded the continued effective representation of petitioner by his attorney (R-146). The trial court denied the motion (R-49-50). Petitioner made a plea to the court for leniency saying that he "couldn't handle" going to prison and therefore tried to avoid sentencing because he had not been able to make restitution (R-55). The trial court then imposed consecutive sentences for a total of 49 years imprisonment (R-63-65).

Notice of appeal was timely filed from the judgments and sentences, and a consolidated appeal was taken to the District Court of Appeal, Fourth District, wherein petitioner argued that consecutive sentences totally 49 years were illegal because the record manifested clearly that petitioner was being punished by a 46 year sentence for failing to appear. The district court of

appeal issued an opinion in which the district court disapproved of the plea agreement but affirmed on the premise that the total sentence was lawful and had been voluntarily agreed to at the time of the plea entry. A timely motion for rehearing was denied, and notice of review was timely filed with this Court. Review was granted by an order issued by this Court on January 31, 1986.

SUMMARY OF ARGUMENT

Petitioner maintains that the 49 year sentence of imprisonment for failing to appear at sentencing on numerous charges arising from issuing worthless checks is unlawful. The basis for the negotiated sentence was that three years were imposed for the offenses and petitioner's inability to make restitution, while 46 years were added for his failure to appear as scheduled for sentencing.

Petitioner's arguments will be based on the following points:

Since the basis of the 46 year portion is clearly set forth in the record as solely occasioned by petitioner's failure to appear at the sentencing hearing, it exceeds the maximum allowed by law of five years for the offense of failing to appear.

The restitution requirement upon which the sentence also hinged is an improper method of conditioning future conduct. The use of probation is the only proper method of conditioning future conduct on the length of sentence.

Contempt cannot support the sentence because no order of contempt was issued, and a contempt sentence may not exceed six months without provision for petitioner to demand jury trial.

The term of 49 years is an excessive sentence so out of proportion to the total conduct, and 46 years of the sentence is

beyond the legislatively prescribed maximum punishment for failure to appear, that it violates both the Eighth Amendment of the Federal Constitution and Article I, Section 17, of the Florida Constitution.

Imposition of 46 years incarceration for an "offense," occurring after entry of the plea, that petitioner has not been charged or convicted of committing is not a proper basis for imposing a greater sentence for unrelated crimes.

ARGUMENT

POINT ON APPEAL

WHETHER THE DECISION BELOW AFFIRMING CONSECUTIVE SENTENCES OF 46 YEARS FOR PETITIONER'S FAILURE TO APPEAR AT SENTENCING, DESPITE ITS INCLUSION IN THE PLEA AGREEMENT, CONSTITUTES AN UNLAWFUL SENTENCE BECAUSE IT PUNISHES THE PETITIONER FOR A CRIME FOR WHICH HE HAD NOT BEEN CONVICTED AND WHICH OCCURRED SUBSEQUENT TO THE PLEA ENTRY HEARING?

The plea entry hearing and sentencing in this case demonstrate clearly that the imposition of a term of imprisonment beyond three years, in this case 46 additional years, was based upon petitioner's failure to appear at the sentencing hearing and not for the offenses for which he had been convicted (R-33-34, 207). The maximum sentence that the court would impose for the crimes committed was three years imprisonment (R-207). However, the court agreed at the change of plea hearing on October 28, 1983, to place petitioner on probation with condition that petitioner serve 364 days if petitioner made full restitution by the sentencing date of January 3, 1984 (R-33-34,207).

The length of sentence was conditioned in this case upon performance of this condition by petitioner subsequent to the entry of the plea and prior to the date of sentencing. In Moore v. State, 339 So.2d 228 (Fla. 2d DCA 1976), the court held that when a trial court conditions the length of sentence upon future

behavior the proper procedure is to impose probation, to prescribe certain terms, and then upon the orderly establishment of a violation to then revoke the probation. The court stated, id. at 220:

If the trial court had wished to tie the length of sentence to future behavior the appropriate procedure is to impose probation, prescribe certain terms and, upon the orderly establishment of a violation thereof, properly revoke the probation.

The decision of the district court of appeal below directly and expressly conflicts with the decision of the Second District Court of Appeal in Moore concerning the proper method by which a trial court may condition the length of sentence upon future conduct in a criminal case. In this respect both the condition of restitution prior to sentencing as well as conditioning the length of sentence upon timely appearance at the sentencing hearing are both erroneous under the decision in Moore. The decision in Moore is supported by the provisions of the sentencing statute concerning imposition of the requirement to make restitution.

In Section 775.089(1), Florida Statutes (1983), the Legislature has provided that "in addition to any punishment" the court may order restitution to the aggrieved party if the defendant is able or will be able to make such restitution. The statute also provides that the court may make the payment of restitution a condition to probation in accordance with Section 948.03, Florida Statutes. Section 775.089(1) provides as follows:

775.089 Restitution.--

(1) In addition to any punishment, the court may order the defendant to make restitution to the aggrieved party for damage or loss caused by the defendant's offense, if the defendant is able or will be able to make such restitution. Restitution may be monetary or nonmonetary restitution. The court may make the payment of restitution a condition to probation in accordance with s. 948.03.

The probation statute, Section 948.03, Florida Statutes (1983), provides that among the terms and conditions of probation the court may require the offender make reparation or restitution to the aggrieved party for the damage or loss caused by the offense. The statute provides as follows in Section 948.03 (1)(e), Florida Statutes (1983):

948.03 Terms and conditions of probation or community control.--

(1) The court shall determine the terms and conditions of probation or community control and may include among them the following, that the probationer or offender in community control shall:

(e) Make reparation or restitution to the aggrieved party for the damage or loss caused by his offense in an amount to be determined by the court. The court shall make such reparation or restitution a condition of probation, unless the court determines that compelling and extraordinary reasons exist to the contrary.

Restitution is specifically allowed in Section 775.089, Florida Statutes, to be "in addition to any punishment" the order to make restitution is not clearly a criminal penalty but is equally at least in the nature of a civil or administrative

sanction to indemnify the aggrieved party. Repayment to the aggrieved person, monetarily or otherwise, rather than to punish or dispossess the offender, is the purpose. Florida's provision concerning restitution is statutorily separate from the penalties for criminal offenses provided in Section 775.082 through 775.087, Florida Statutes. However, the provision concerning restitution in Section 775.089 is provided as a method of recompense. Unlike forfeiture it is not to dispossess the offender. This is consistent with the interpretation of restitution made by the Nebraska Supreme Court in State v. Holmes, No. 85-295 (Neb. January 17, 1986), reported in 38 Criminal Law Reporter 2347. That Court held that as contrasted to forfeiture, restitution is regarded as serving the purpose of indemnifying the victim rather than dispossessing the offender.

The trial court's order sub judice conditioning a prison sentence upon restitution is at odds with the statute concerning restitution. The court determined that a sentence of 364 days incarceration plus probation was an adequate punishment for petitioner's offenses if restitution could be made.

Petitioner submits that this Court should approve the decision in Moore and quash the decision of the district court of appeal below. The statutory authority for including restitution as a condition of probation is the appropriate method for conditioning any future behavior, including the making of restitution, on the length of sentence. The proper procedure is not to hold the sentence in abeyance from day to day or month to

month pending future conduct. See State v. Bateh, 110 So.2d 7 (Fla.1959), where this Court held that a trial court may not withhold imposition of sentence from day to day or term to term as an alternative to the imposition of probation, or as a combination of incarceration and probation. The advent of probation laws required the use of probation by appropriate conditions. Prior cases which had approved of withholding imposition of sentence conditioned on conduct, were on that basis disapproved.

Petitioner thus submits that this Court must remand with directions that the trial court place the petitioner on probation, subject to a restitution requirement to be set by the court consistent with petitioner's means or future ability to make restitution.

As for the 46 years imposed for failure to appear at sentencing, said term is unlawful. It exceeds the maximum provided by law for the offense of failure to appear. See Section 843.15 Florida Statutes (1983). This 46 year portion of the sentence is separate from the portion of the sentence imposed for the conduct resulting in or relating to the convictions. When a sentence contains both a valid or legal portion as well as an illegal portion, the legal portion is not open to modification but the unauthorized or invalid portion must be vacated. Pahud v. State, 370 So.2d 66 (Fla. 4th DCA 1979). An error in imposing sentence which results in a sentence in excess of the maximum

allowed by law for the offense being punished is a fundamental error. Noble v. State, 353 So.2d 819 (Fla. 1977); Wyche v. State, 178 So.2d 875,877 (Fla. 3d DCA 1965).

Since a trial court may impose penalties for particular criminal conduct only within the limits set by the Legislature for the offense, Holmes v. State, 342 So.2d 134 (Fla. 1st DCA 1977), the imposition of a term of years in excess of five years for failure to appear at the sentencing hearing is an unlawful penalty for failure to appear. The law is settled that failure of a person to appear for a single hearing, regardless of how many cases are set for hearing, when the appearance is set before the same court at the same time and place constitutes a single offense of failing to appear. See Miles v. State, 418 So.2d 1070 (Fla. 5th DCA 1982), and McGee v. State, 438 So.2d 127 (Fla. 1st DCA 1983). Therefore, petitioner's failure to appear at sentencing on January 3, 1984, constitutes a single offense for which Section 843.15, Florida Statutes (1981) specifies is a third degree felony, i.e., punishable up to five years imprisonment.

Since the record in this case unquestionably manifests the fact that the trial court imposed the 46 additional years, through the method of consecutive sentencing, solely for a failure to appear, that term is far in excess of the maximum provided by law for the conduct being punished by the increased sentence.

Petitioner further submits that the method by which the court punished him for failing to appear violates due process of law because the trial court punished conduct constituting a crime defined under Section 843.15, Florida Statutes (1983), without the benefit of a charge being filed, or a plea being entered. A court cannot uphold a "conviction" on a charge that was never made. Dunn v. United States, 442 U.S. 100 (1979).

The prosecuting authority and grand jury retain exclusive lawful right to make the charge of failing to appear, yet the petitioner has been punished for said conduct. He loses the right to plead former jeopardy because there was punishment without a valid procedural basis. Petitioner has been punished for that conduct by the sentence imposed in these cases, but since the court imposing the punishment did not have before it any charge and did not enter a conviction or contempt adjudication, the claim of former jeopardy by prior punishment may be unavailable to petitioner. The orderly procedure of punishing a criminal infraction and for use of formal probation for post judgment conditions must be followed to ensure that rights are not infringed and so that they may be observed.

It may be contended by appellee that the trial court has the power to punish for contempt for a failure to appear at sentencing. In Monti v. State, 11 F.L.W. 61 (Fla. 5th DCA December 26, 1985), the court stated that a sentence imposed under the sentencing guidelines may not depart from the guideline range because of the failure of the accused to appear for his presen-

tence investigation interviews or at sentencing. The court did indicate that the failure to appear would constitute a criminal contempt. However, in Monti there had been no conviction for criminal contempt. The court held that it was impermissible for the trial court to impose an additional sentence, in that case by deviation from the recommended sentencing range, for such crime that the accused had not been charged with or convicted of committing.

As a contempt, the imposition of a 46 year sentence is likewise unlawful because no charge of contempt had been placed. A jury trial on a charge of criminal contempt is required when the sentence exceeds six months. See Codispoti v. Pennsylvania, 418 U.S. 506 (1974). Moreover, in the present case the procedure required for utilizing the contempt power under Florida Rule of Criminal Procedure 3.830 and 3.840 has not been followed. The trial court entered no judgment of contempt and imposed no separate sentence for contempt. Thus, the sentence of 46 years imprisonment may not be upheld on the basis that the petitioner committed a criminal contempt. Petitioner doubts that it is a proper use of the contempt power for a court to punish for contempt, as an alternative to regular criminal proceedings, for conduct constituting a statutorily specified criminal offense that occurs outside the actual presence of the court.

The decision below is also in conflict with, and erroneous under the decision in Hubler v. State, 458 So.2d 350 (Fla. 1st DCA 1984), where it was held to be reversible error for a trial

court to sentence to a greater term of imprisonment because the court believed the defendant had suborned perjury at his trial by inducing witnesses to falsely testify. The trial court in Hubler did not have before it a charge or a conviction for that crime. It was therefore in error by punishing the offender to a harsher term of imprisonment for a crime the court supposed he committed. In the present case, the trial court likewise punished the petitioner for a criminal offense of failure to appear without affording the petitioner his right to be sentenced under the sentencing guidelines for that offense. The offense of failure to appear occurred on January 3, 1984, after the Florida sentencing guidelines went into effect. The imposition of a term of imprisonment for that infraction without resort to the sentencing guidelines for knowledge of and consideration of the presumptive sentence is an error independently requiring that the 46 year term be vacated. Robinson v. State, 471 So.2d 671 (Fla. 2d DCA 1985).

According to the ruling in Solem v. Helm, 463 U.S. 277 (1983), a punishment must under the Eighth Amendment to the United States Constitution be proportionate to the offense, although great deference must be given to the sentencing authority. No amount of deference makes 46 years imprisonment rationally proportionate to failure to appear at a single hearing. Under the Florida Constitution a term of imprisonment beyond the limit of legislatively prescribed punishment demarks the basic threshold of excessive punishment prohibited by Article I,

Section 17. Banks v. State, 342 So.2d 469 (Fla. 1976). In Eger v. State, 291 So.2d 676 (Fla. 3d DCA 1974), excessive consecutive punishments were reviewed in consideration of the ban on excessive punishments. In determining that the sentence was unlawful, the court gave effect to the legislative limit to punishment for a single offense. In the present case, the term imposed of 46 years, as the record shows, was for the failure to appear. The Legislature has limited punishment for such offense to five years. This limit may not be circumvented without running afoul of the rule that a court may impose penalties only within the limit set by the Legislature for the conduct being punished. Bradley v. State, 79 Fla. 651, 84 So. 677 (192); Brown v. State, 152 Fla. 853, 13 So.2d 458 (Fla. 1943); Holmes v. State, 342 So.2d 134 (Fla. 1st DCA 1977).

A guilty plea does not waive the limit of the authorized limit on the punishment provided by law. Pope v. State, 56 Fla. 81, 47 So. 487 (1908); Eckles v. State, 132 Fla. 526, 18 So. 764 (1938). Robinson v. State, 373 So.2d 898 (Fla. 1979), at 902, authorizes review of an illegal sentence imposed on a plea of guilty.

In conclusion, as held in Harden v. State, 428 So.2d 316 (Fla. 4th DCA 1983), a sentence within lawful limits which contains a defined portion imposed for invalid reasons is severable and the invalid portion must be stricken. The decision of the court below affirming petitioner's total sentence of 49 years should be quashed and the cause remanded with instructions

that the trial court be directed to impose sentence consistent with the punishment the court decided to impose for the criminal offense, namely three years probation with the condition of 364 days incarceration, while allowing the trial court to make a determination of whether the imposition of restitution as a condition of probation is appropriate in accordance with petitioner's expected ability to make restitution as provided in Section 948.03(1)(e), Florida Statutes (1983) and Section 775.089(1), Florida Statutes (1983). When these sections are read in pari materia they require the trial court to determine the defendant's ability or expected future ability to make restitution and then for the court itself to determine the amount and terms of the restitution requirement imposed as a condition of probation. In the present case the court did not determine the amount of restitution but instead allowed the prosecuting attorney to determine the amount (R-89,142-145). The requirement of Fresneda v. State, 347 So.2d 1021 (Fla. 1977), that a defendant have an opportunity to know and be heard as to the restitution before imposition has not been complied with.

Under the authorities set forth herein, the sentence of imprisonment beyond 364 days and the restitution condition of sentence must be stricken. The cause may be remanded for an order of probation to be entered containing a reasonable restitution requirement consistent with petitioner's ability to pay to be imposed as a condition consistent with the statutes cited above.

If under any construction of the law and the plea agreement it can be said that petitioner can be punished in these sentences for failure to appear, the lawful maximum is the maximum provided by the Legislature for said offense, and the sentences must be corrected accordingly.

CONCLUSION

WHEREFORE, based upon the authorities set forth above the petitioner submits that the district court of appeal decision below has erroneously and prejudicially affirmed a sentence which is invalid for the several reasons argued above, and that this Court should quash the decision of the district court of appeal below and remand with appropriate instructions to the trial court for a proper sentence to be imposed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by courier, to LEE ROSENTHAL, Assistant Attorney General, Counsel for Respondent, Elisha Newton Dimick Building, Room 204, 111 Georgia Avenue, West Palm Beach, FL 33401, this 7th day of March, 1986.



LOUIS G. CARRES
Assistant Public Defender