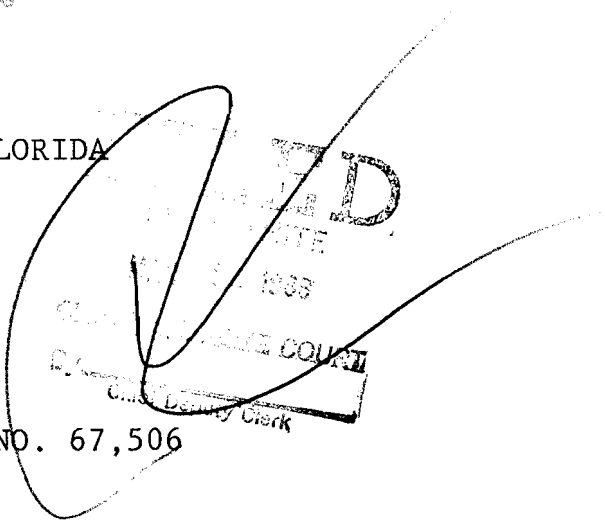
OIA 5-7-86

IN THE SUPREME COURT OF FLORIDA



MARTIN FRANCIS McGARRY,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 67,506

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the Appellant in the District Court of Appeal, Fourth District, and the Defendant in the Criminal Division of the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida.

The Respondent was the Appellee in the Fourth District and the prosecution in the trial court.

In the brief, the parties will be referred to as they appear before this Honorable Court except that Petitioner may also be referred to as the State.

The following symbols will be used:

"R" Record on Appeal

"PB" Petitioner's Brief

All emphasis has been added by Respondent unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's Statement of the Case and his Statement of the Facts to the extent that they present an accurate, non-argumentative recitation of proceedings in the trial court and to the extent relative to the point on appeal, with the following additions and clarifications:

In exchange for Petitioner's guilty plea, the State agreed to "nolle prossequi misdemeanor cases 83-3613 and 83-20256 and not to file any charges regarding the worthless checks which correspond with the restitution sum of $33,601.20" (R. 3). Petitioner was given the opportunity to make restitution up to and including January 3, 1984, in which case his sentence would have amounted to "364 days in jail with recommendation for work release after serving five months of jail time" (R. 4). However, it was also understood that if Petitioner did not show up for sentencing on January 3rd, the court would impose consecutive sentences on the 16 felony counts and one misdemeanor count, rather than concurrent sentences (R. 4, 25).

Petitioner admitted a factual basis for his plea (R. 8-12, 16, 18), that his plea was made knowingly (R. 14-16), and voluntarily (R. 21, 22), and without any promise being made to him outside the record (R. 30). Petitioner also admitted he had had sufficient time to discuss the matter with his attorney (R. 31).

Petitioner also knowingly waived his rights to be sentenced under the sentencing guideline (R. 26). The trial judge took care to inform Petitioner of the fact that his failure to appear at the January 3rd sentencing would result in the imposition of consecutive sentences, rather than concurrent sentences (R. 25). Petitioner indicated he understood the consequences for his failure to appear (R. 29), and yet on January 3, 1984, he in fact failed to appear for sentencing. Petitioner had stated that he was satisfied with the plea bargain (R. 31).

The trial judge imposed consecutive sentences, on June 26, 1984, pursuant to the agreement entered into at the plea conference of October 28, 1983 (R. 62, 63). The trial judge then stated his belief that Petitioner would not serve anywhere near the 49 years. The trial judge stated that "based on my understanding of the parole system, you may do 10" (R. 65).

POINT ON APPEAL

WHETHER THE TRIAL COURT WAS CORRECT IN IMPOSING, AND THE DISTRICT COURT WAS CORRECT IN AFFIRMING, THE SENTENCE IMPOSED BECAUSE THE TRIAL JUDGE ACTED WITHIN HIS STATUTORY AUTHORITY? (Restated).

SUMMARY OF THE ARGUMENT

Since the record clearly reveals the fact that Petitioner was sentenced to 49 years imprisonment based upon the negotiated plea bargain and the imposition of consecutive sentences the trial judge acted within his discretion.

Petitioner's "restitution" argument was not properly preserved in the trial court, nor was it argued before the district court. Since the restitution portion of Petitioner's sentence was agreed to by Petitioner in the lower court, Petitioner cannot now complain about it. Petitioner's sentence was not conditioned upon his "future conduct" in the sense of referred to by the district court in Moore v. State, infra. The main feature of the trial court's conditional sentence was that Petitioner was to show up at his sentencing.

The term of years imposed upon Petitioner was fairly bargained for by him, and he cannot now complain because the worst possible scenario has occurred. Petitioner has not been given a punishment in excess of that statutorily authorized and he therefore cannot complain that his punishment violates either the Eighth Amendment of the Federal Constitution nor Article I, Section 17 of the Florida Constitution. It is settled law that an appellate court will not disturb the legally imposed sentence of a trial court.

Petitioner was not punished for the crime of contempt, nor was he punished for the crime of failure to appear. Petitioner was merely punished in accordance with the plea bargain which he himself voluntarily entered into. This being the case Petioner's arguments regarding "comtempt," "failure to appear," or "failure to impose the sentencing guidelines" or pure speculation and conjecture.

ARGUMENT

THE TRIAL COURT WAS CORRECT IN IMPOSING, AND THE DISTRICT COURT WAS CORRECT IN AFFIRMING THE SENTENCE IMPOSED BECAUSE THE TRIAL JUDGE ACTED WITHIN HIS STATUTORY AUTHORITY. (Restated).

Before proceeding with arguing the merits of this case, Respondent must reassert the position that Petitioner has not demonstrated conflict with other state appellate decisions from the face of the decision sub judice, that the decision does not conflict with other decisions, and that this Honorable Court therefore lacks the necessary basis for conflict jurisdiction.

It is well-settled that in order to establish conflict jurisdiction, the decision sought to be reviewed must expressly and directly create conflict. Jenkins v. State, 385 So.2d 1356, 1359 (Fla. 1980). Petitioner contends that the decisions below conflicts with Moore v. State, 339 So.2d 228 (Fla. 2nd DCA 1976), because there the district court said:

> 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.

Id. at 230.

The trial judge in Moore had initiated a renegotiation of the plea and, sua sponte, proposed to defer sentence for six months, give Moore a polygraph test "to see if he committed

other crimes," and sentence him accordingly. Moore was to receive a three-year sentence if his subsequent behavior was considered satisfactory by, the trial judge, and a 15-year sentence "if he's not clean." Supra at 23. Subsequently Mr. Moore was charged with rape, found not guilty, but admitted to committing a fornication and adultery. Id. Despite the lack of proof of any subsequent crime, supra at 231, Moore was sentenced to 15 years for the crime of breaking and entering.

Given the circumstances in Moore, it is no wonder that the Second District Court advised the trial judge to impose probation, rather than defer sentence. State v. Bateh, 110 So.2d 7, cert. denied 361 U.S. 826 (Fla. 1959), was cited by the Moore court for the proposition that the trial court was without authority to defer the imposition of sentence. Moore, supra at 230. This Court, in Bateh has held however, that there may be justifiable delay in sentencing for good and valid reasons. Bateh, supra at 10; see also, Slay v. State, 347 So.2d 730, 731 n. 3 (Fla. 1st DCA 1977).

In the instant case sentence was deferred two months from the date of the negotiated plea settlement (R. 3, 231), in order to allow Petitioner the opportunity to make restitution (R. 3). Respondent submits that this reason for delaying sentence was good and valid in that it allowed the trial court to gain information necessary to the imposition of a just sentence. Unlike Moore, Petitioner's sentence was not

conditioned on his future behavior, unrelated to the crime charged. Sub judice, Petitioner was only required to show up on January 3rd, to insure a three-year concurrent sentence. This requirement should not be considered "future behavior" in the same sense the district court meant in Moore.

Additionally, in Moore v. State, supra at 231, the district court held that when a trial judge and a defendant enter into a negotiated plea, the judge should not reject the terms of the plea negotiations without first allowing the defendant an opportunity to withdraw his plea. Here, the trial judge never rejected the terms of the plea negotiation, he merely enforced those terms to the letter. Thus, no conflict with the holding in Moore can be demonstrated.

Petitioner also argued that the instant decision is in conflict with Hubler v. State, 458 So.2d 590 (Fla. 1st DCA 1984), because it was error to impose a greater sentence for a crime that a defendant was not convicted for. Petitioner's interpretation of the facts is clearly refuted by the record, and that being the case, no conflict with Hubler has been demonstrated.

As to the merits, Petitioner contends that the imposition of a term of 49 years imprisonment was occasioned solely by his failure to appear at the January 3rd sentencing hearing (PB. 13). However, the record shows no penalty, pursuant to §843.15 Fla. Stats. (1981), was imposed. Quite

to the contrary, the record reveals that Petitioner obtained the benefits of his plea bargain, but did not take advantage of the opportunity afforded him.

In exchange for Petitioner's guilty plea, the State agreed to "nolle prossequi misdemeanor cases 83-3613 and 83-20256 and not to file any charges regarding the worthless checks which correspond with the restitution sum of $33,601.20" (R. 3). Petitioner was given the opportunity to make restitution up to and including January 3rd, in which case his sentence would have amounted to "364 days in jail with recommendation for work release after serving five months of jail time" (R. 4). However, it was also understood that if Petitioner did not show up for sentencing on January 3rd, the court would impose consecutive sentences on the 16 felony counts and one misdemeanor count, rather than concurrent sentences (R. 4).

Petitioner admitted a factual basis for his plea (R. 8-12, 16, 18), that his plea was made knowingly (R. 14-16), and voluntarily (R. 21, 22), and without any promise being made to him outside the record (R. 30). Petitioner also admitted he had had sufficient time to discuss the matter with his attorney (R. 31).

Petitioner also knowingly waived his rights to be sentenced under the sentencing guidelines (R. 26). The trial judge took care to inform Petitioner of the fact that his

failure to appear at the January 3rd sentencing would result in the imposition of consecutive sentences, rather than concurrent sentences (R. 25). Petitioner indicated he understood the consequences for his failure to appear (R. 29), and yet on January 3, 1984, he failed to appear for sentencing, offering no excuse or justification when he finally was brought before the trial judge, some six months later, for sentencing.

Thus the record clearly indicates the terms of the original plea bargain by which Petitioner must now abide. Loving v. State, 379 So.2d 968, 969 (Fla. 1st DCA 1980). It is settled law, in Florida, that the sentencing judge may order consecutive sentences for separate offenses:

> (4) Whoever, in the course of one criminal transaction or episode, commits separate criminal offenses, upon conviction and adjudication of guilt, shall be sentenced separately for each criminal offense: and the sentencing judge may order the sentences to be served concurrently or consecutively. For the purposes of this subsection, offenses are separate if each offense requires proof of an element that the other does not, without regard to the accusatory pleading or the proof adduced at trial.

§775.021, Florida Statutes (1983); see also, §921.16(1) Florida Statutes (1983); Rozmestor v. State, 381 So.2d 324 (Fla. 5th DCA 1950).

Despite the above-cited law, Petitioner still contends that he is being punished, pursuant to §843.15, Fla. Stats. (1981). This simply is not the case. The record clearly

shows the trial judge imposed consecutive sentences in accordance with the original plea bargain contemplated (R. 62-63), and, of course, the trial judge does have discretion to impose consecutive or concurrent sentences. Loving v. State, supra; Snell v. State, 438 So.2d 1038, 1040 (Fla. 2nd DCA 1983). Thus Petitioner's cited cases of Miles v. State, 418 So.2d 1070 (Fla. 5th DCA 1982), and McGee v. State, 438 So.2d 127 (Fla. 1st DCA 1983), are completely inapposite to the instant case.

Petitioner's interpretation of the facts at bar, (i.e.) that a greater sentence was imposed, is the same argument the Fourth District Court rejected, stating:

> The record is abundantly clear and explicit in reflecting appellant's voluntary agreement to a plea arrangement that called for the very sentence eventually imposed if he did not appear for sentencing. (Petitioner's Appendix, pg. 2).

What has occurred in the case at bar, was the trial court accepting a negotiated plea in accordance with all the necessary safeguards enunciated in Davis v. State, 308 So.2d 27, 29 (Fla. 1975). The fact that Petitioner's actual sentence was "the worst possible scenario" (R. 62) envisioned when he entered into the agreement, does not mean he did not receive that which he had bargained for. Cf., Richmond v. State, 375 So.2d 1132 (Fla. 1st DCA 1979). Petitioner was not held in contempt, he was not punished for the crime of

failure to appear, nor was his sentence deferred in order to observe his "future behavior." Cf., Moore v. State, 339 So.2d 228 (Fla. 2nd DCA 1976).

Petitioner further contends, for the first time, that his sentence was constitutionally excessive (PB. 16, 17). Basic to the contention is Petitioner's assertion that he was punished beyond the legislative limit for his failure to appear. Again Respondent must reply that Petitioner was not charged, nor convicted for the crime of failure to appear. Petitioner's repeated assertions to the contrary cannot change the facts...no matter how often this assertion is repeated.

Petitioner does not claim that the statutes he was convicted under were invalid, and this Court has held:

> The law is well settled that, where the sentence imposed is within the lawful limits prescribed by statute, such sentence will not be inquired into by an appellate court.

Gibbs v. Wainwright, 303 So.2d 7, 8 (Fla. 1974), citing Brown v. State, 152 Fla. 853, 13 So.2d 458 (1943). The fact that the trial judge imposed consecutive sentences does not operate to make the punishment cruel and unusual. Gause v. State, 270 So.2d 383, 384 (Fla. 3rd DCA 1972); Cole v. State, 262 So.2d 902, 903 (Fla. 3rd DCA 1972); Chavigny v. State, 112 So.2d 910, 915 (Fla. 2nd DCA 1959); Palmer v. State, 416 So.2d 878, 881 (Fla. 4th DCA 1982). In fact, since

the sentence imposed was within the limits prescribed by the legislature, even if this Court were tempted to commend Petitioner to more merciful treatment, it should still hold that it has no jurisdiction to interfere. Banks v. State, 342 So.2d 469, 470 (Fla. 1977); Hutley v. State, 94 So.2d 815, 817 (Fla. 1957); Florida Real Estate Commission v. Rogers, 179 So.2d 65, 66 (Fla. 1965). Certainly harsh sentences have been imposed and affirmed so long as they have been legally imposed. E.g., Laird v. State, 394 So.2d 1121 (Fla. 5th DCA 1981); McInnes v. State, 345 So.2d 781 (Fla. 4th DCA 1977).

Petitioner's chief case concerning this point is Solem v. Helm, 77 L.Ed.2d 637 (1983). Respondent submits this case is controlled by Rummel v. Estelle, 445 U.S. 263 (1983), and not Solem v. Helm, supra. In Rummel the court approved a recidivist statute whereupon a defendant got a life sentence after his third felony conviction. In Solem v. Helm, the court disapproved an habitual offender statute mandating a life sentence after a seventh, non-violent felony conviction. The court did not overrule Rummel, but distinguished it on the basis that in Rummel there was a parole system and an opportunity to earn gain time, whereas in Solem v. Helm, the sentence was life without parole. Accordingly, the Fifth Circuit has held that where parole is available, Rummel controls, and only where it is not, an analysis must be done under Solem v. Helm. Whitmore v. Maggio, 742 F.2d 230 (5th Cir. 1984).

In the instant case, Petitioner was given a 49-year sentence due to multiple felony convictions, not on the basis of a recidivist statute. As in Rummel, Petitioner has an opportunity to earn gain time, Fla. Stat. §944.275 (1985), and become eligible for parole. Petitioner should actually be eligible for parole within 24 months of the initial date of confinement. Fla. Stat. §947.16(1)(e)(1985). Thus, unlike in Solem, Petitioner need not rely on the process of commutation to obtain his release, nor has Petitioner been given a life sentence without the possibility of parole. Since Petitioner is eligible for a reasonably early parole, even the Solem decision would not afford him relief. 77 L.Ed.2d at 658 n. 32.

Finally, Petitioner now makes the argument that a prison sentence conditioned on restitution is invalid (PB. 11). This argument, like others now made by Petitioner, was not presented to the Fourth District Court of Appeal. Moreover, this argument was never made to the trial court. Respondent asserts that since the condition of restitution was part of a negotiated plea agreement, Petitioner may not now complain about the "bargain" he made. G.H. v. State, 414 So.2d 1135 (Fla. 1st DCA 1982); Crowder v. State, 334 So.2d 819 (Fla. 4th DCA 1976). As noted by the court in G.H., supra, if the condition of restitution is part of a defendant's negotiated plea agreement, his argument constituted an "impermissible 'gotcha' maneuver" and the agreement would stand. Id. at 1137. Likewise, here, Petitioner must be bound by his plea agreement.

Before concluding, Respondent feels obliged to mention the reason why he will not address Petitioner's "contempt" argument (PB 15, 16). Petitioner's discussion of the invalidity of a sentence for the crime of contempt is pure speculation. Petitioner's argument regarding his punishment for the crime of failure to appear is, likewise, pure speculation. Since Petitioner's basic factual premise is false, his arguments (e.g., failure to resort to sentencing guidelines) derived from this premise are pure conjecture. It seems elementary to observe that, on appeal, only facts that occurred should be argued, not what might have been. This Court has repeatedly stated the principle that reversible error cannot be predicated on conjecture, Sullivan v. State, 303 So.2d 632 (Fla. 1974), yet that is precisely what Petitioner asks this Court to do.

Respondent submits that the instant sentence was legal, valid, bargained for, and should therefore be upheld; the facts are clear on the record and summarized correctly by the Fourth District Court of Appeal.

CONCLUSION

Based upon the foregoing argument, supported by the circumstances and authorities cited therein, Respondent would respectfully request that this Honorable Court affirm the judgment and sentence of the trial court, and the opinion of the Fourth District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Respondent's Brief on the Merits has been furnished by courier, this 27th day of March, 1986, to: LOUIS G. CARRES, Assistant Public Defender, 224 Datura Street - 13th Floor, West Palm Beach, Florida 33401.

Lee Rosenthal

Of Counsel