IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 75,218

FILED
SID J. WHITE
MAR 21 1990
CLERK, SUPREME COURT
By
Deputy Clerk

EDWIN GOENE A/K/A RUSSELL DEAN GORHAM,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

****

AN APPEAL FROM THE CIRCUIT COURT OF THE SEVENTEENTH
JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA
CRIMINAL DIVISION

****

ANSWER BRIEF OF RESPONDENT

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PRELIMINARY STATEMENT

Edwin Goene a/k/a Russell Dean Gorham was the defendant below and will be referred to as "petitioner" in this brief. The State of Florida will be referred to as "respondent."

References to the record will be preceded by "R."

STATEMENT OF THE CASE AND FACTS

Respondent agrees with petitioner's statement of the case and facts with the following additions, clarifications or exceptions:

During all phases of the prosecution, petitioner affirmatively represented that his real name was Edwin Goene and that he had no criminal history (R 231-32, 280, initial brief p. 6). Following petitioner's conviction, respondent requested time for a presentence investigation, stating that it had been unable to find a record on petitioner (R 226). Nothing showed up on the NCIC (R 226). Defense counsel stated that petitioner had nothing to hide (R 226). The trial court ordered that sentencing be set for April 5, 1988 (R 227). At that hearing the probation officer indicated that he or she had been unable to locate any records on the defendant (R 232). Petitioner insisted that his name was Edwin Goene and that he lived in Alabama (R 232-33). Petitioner was sentenced under the guidelines to four and one-half (4 1/2) years' imprisonment.

On May 24, 1988, the State filed a motion indicating that petitioner had misrepresented his identity and his past (R 280). On June 1, 1988, a hearing was held on that motion (R 237). Testimony at that hearing revealed that petitioner's actual score under the guidelines produced a sentence of up to seventeen (17) years, an increase of twelve and one-half years (R 276, 283). Petitioner's counsel argued that the trial court had lost jurisdiction and that to

resentence petitioner would constitute double jeopardy (R 239-40). The trial judge resentenced petitioner to seventeen years imprisonment (R 283).

SUMMARY OF THE ARGUMENT

The original sentencing order was procured by fraud. Under Burton, infra, the trial court had the power to resentence petitioner. Double jeopardy principles were not violated as petitioner had no legitimate expectation of finality.

Rule 3.800(a) provides a second basis for the trial court's action. The original sentence was illegal and incorrectly calculated under the guidelines because of petitioner's misrepresentations.

ARGUMENT

THE TRIAL COURT DID NOT ERR IN RESENTENCING PETITIONER AFTER HE AFFIRMATIVELY MISREPRESENTED HIS IDENTITY.

Petitioner first argues that the trial court could not increase his sentence pursuant to State v. Bruton, 314 So.2d 136 (Fla. 1975), because to do so would violate the double jeopardy principles. Petitioner relies on Troupe v. Rowe, 283 So.2d 857 (Fla. 1973). Troupe stated:

> This Court has consistently held that a trial judge in a criminal case may modify the sentence imposed upon a defendant during the same term of court, but this rule is subject of course to the constitutional guaranty of against double jeopardy.

283 So.2d at 859. It cannot be seriously argued that petitioner's double jeopardy rights were violated.

In United States v. DiFrancesco, 449 U.S. 117, 101 S.Ct. 426, 66 L.Ed.2d 328 (1980), the Court clarified double jeopardy rights. The Court noted that the pronouncement of sentence does not have the qualities of constitutional finality that attend an acquittal. Id. at 133-135. Furthermore, the double jeopardy clause protects only a defendant's legitimate expectation of finality. Id. at 137. Petitioner can have no legitimate expectation of finality in his sentence where he continually lied to receive an illegal guidelines sentence.

Petitioner relies on a quotation in Troupe from United States v. Benz, 282 U.S. 304, 51 S.Ct. 113, 75 L.Ed. 354 (1931). However, Benz was severely limited, if not completely disapproved in DiFrancesco. The Benz decision

apparently contains dicta to the effect that once a defendant has begun to serve his sentence, a court cannot increase that sentence. However, the DiFrancesco Court noted that Benz had erroneously relied on Ex parte Lange, 18 Wall. 163, 85 U.S. 163, 21 L.Ed. 354 (1931) to support that dicta. The Court characterized the holding in Lange as only that "a defendant may not receive a greater sentence than the legislature has authorized." Id. at 139, 101 S.Ct. at 438. The Court concluded that the holding in Lange and the dictum in Benz, are not susceptible of general application. See also Bozza v. United States, 330 U.S. 160, 166-67, 67 S.Ct. 645, 91 L.Ed. 818, 821-22 (1947)(sentencing should not be a game where a wrong move by a judge means immunity for the defendant -- trial judge has authority to resentence defendant to a greater punishment when original sentence did not comply with statute).

In Troupe, there was no indication that the defendant presented false information or otherwise deceived the court. Therefore, he had a legitimate expectation of finality in the original sentence. Similarly, in United States v. Jones, 722 F.2d 632 (11th Cir. 1983), the Court held that since there was no indication that the defendant affirmatively misrepresented his past or deliberately withheld information, his original sentence would stand:

> For the purpose of determining the legitimatacy of a defendant's expectations, we draw a distinction between one who intentionally deceives the sentencing authority or thwarts the sentencing process and one who is forthright in every respect. Whereas the former will have purposely created any

error on the sentencer's part and thus can have no legitimate expectation regarding the sentence procured, the latter, being blameless, may legitimately expect that the sentence, once imposed and commenced, will not later be enhanced.

772 F.2d at 638. See also United States v. Bishop, 774 F.2d 771 (7th Cir. 1985) and cases cited therein (court had power to increase sentence procured by fraudulent representation of defendant -- no merit to claim that principles of double jeopardy were violated) and Hicks v. Duckworth, 708 F. Supp. 214 (N.D.Ind. 1989)(holding in Jones requiring fraud by defendant to increase sentence that had commenced was too restrictive in light of DiFrancesco).

In Bruton, the defendant received a new trial based on new evidence established by an affidavit of a purported eye witness. The trial court later granted the State's motion for rehearing because the defendant's false statements constituted a fraud on the court. The district court found that the trial court had no authority to entertain a motion for rehearing on such an order. This Court reversed, stating:

. . . The trial court's order granting the new trial in the first instance was the product of fraud practiced on the Court. . . . . It was not a case of the court changing its mind or attempting to correct an error in the usual sense. It was a plain case of producing a judicial act by fraudulent representations to the Judge. Any order so produced, as noted by the learned Judge who wrote for the District Court, may be recalled and set aside at any time. . . . . We see no reason why the cases are not equally applicable to all judicial acts.

* * *

. . . But this restriction does not apply to such

> orders, judgments, or decrees which are the product of fraud, collusion, deceit, mistake, etc. Such may be vacated, modified, opened or otherwise acted upon at any time. This is an inherent power of courts of record, and one essential to insure the true administration of the judicial process.
>
> This case is a classic example of the wisdom of such a rule. The trial court said it would not have acted as it did in granting a new trial had the truth been presented to him. Must the fact that he acted on false testimony render him helpless to remedy the wrong which has occurred and to put justice back on the track? We hold that it does not. He not only had the power to act but the clear duty to do so.

314 So.2d at 137, 138. See also Booker v. State, 503 So.2d 888, 889 (Fla. 1987)(trial court may set aside order procured by fraud at any time).

Florida Rule of Criminal Procedure 3.800(a) provides a second basis for the trial court's actions. Petitioner contends that the trial court violated Rule 3.800 (a), which states:

> A court may at any time correct an illegal sentence imposed by it or an incorrect calculation made by it in a sentencing guidelines scoresheet (emphasis supplied).

In support of his argument that Rule 3.800(a) has no applicability in this case, petitioner cites Senior v. State, 502 So.2d 1360 (Fla. 5th DCA), rev. denied, 511 So.2d 299 (Fla. 1987) which cites State v. Whitfield, 487 So.2d 1045 (Fla. 1986). Senior is distinguishable from the present case and is incorrect. In Senior, there was no indication that the defendant used an alias, thus preventing the State from investigating his past. Bruton was not discussed. In its analysis, the court in Senior talks about whether the

sentencing error was preserved for appeal. The issue in this case is not whether a sentencing error was preserved for appeal by appropriate objection. Senior relies on Dailey v. State, 488 So.2d 532 (Fla. 1986). Daily simply held that to be reviewable on appeal, defense counsel must make some objection below, otherwise there is no appropriate record for the appellate court to review. Here there is no problem with the adequacy of the record. Dailey also did not involve an intentional misrepresentation, preventing a full investigation of the defendant's background.

The present case (and Senior) involves the power of a trial court to modify a sentence procured by fraud. The sentence was illegal. The scoresheet was improperly calculated due to affirmative misrepresentations by petitioner. Consequently, petitioner did not originally receive the sentence mandated by the guidelines. His sentence constituted a downward departure without written reasons. To hold otherwise would put an intolerable burden on this State's already strained criminal justice system. It would encourage and reward a defendant's use of countless aliases. The more aliases used, the less likely a defendant would be to receive a correct sentence under the guidelines. It is unreasonable to expect the State to always be able to forage out every defendant's aliases. This is especially true where, as here, the defendant used a fictitious identity throughout the trial court proceeding.

Senior is also incorrect in holding that perjury

provides an adequate remedy in such a situation. The maximum statutory penalty for perjury is five years. See Sections 837.02 and 775.082(3)(d) Florida Statutes (1987). Petitioner's score under the guidelines increased twelve and one-half years when his true identity and past became known. Additionally, a defendant should not be entitled to a trade off in this situation. If perjury is committed, a defendant should be punished for perjury. He should also receive his true sentence under the guidelines for his other crimes.

Doe v. State, 492 So.2d 842 (Fla. 1st DCA 1986), is also distinguishable. In that case the State was aware that petitioner was proceeding under a false identity, but elected to proceed with sentencing. Additionally, it appears that Doe was decided on the ground that double jeopardy principles were violated, which, as explained above, is incorrect. Katz v. State, 335 So.2d 608 (Fla. 2d DCA 1976) is incorrect for the same reason.

It should also be noted that the trial court in this case never lost traditional jurisdiction. At the time of the second sentencing hearing no appeal had been filed (R 240) and petitioner's original motion for new trial was still pending (R 267-68)(this motion also had the effect of eliminating any expectation of finality).

CONCLUSION

Based on the preceding argument and authorities, this Court should affirm.

Respectfully submitted,

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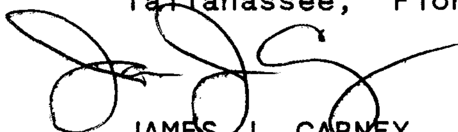

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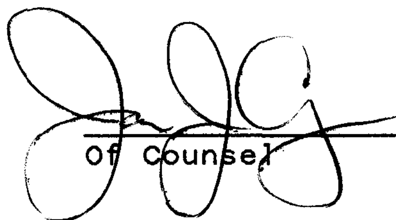
CERTIFICATE OF SERVICE

I certify that a true copy of this document has been furnished by courier to Tanja Ostapoff, Assistant Public Defender, Governmental Center, 9th Floor, 301 North Olive Avenue, West Palm Beach, Florida, 33401, this 19th day of March, 1990.



Of Counsel