IN THE SUPREME COURT OF THE STATE OF FLORIDA

EDWIN GOENE,

Petitioner,

vs. CASE NO. 75,218

STATE OF FLORIDA,

Respondent.
_____/

PETITIONER'S INITIAL BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the appellant in the Fourth District Court of Appeal and the defendant in the trial court and Respondent, the State of Florida, was the appellee in the Fourth District Court of Appeal and the prosecution in the trial court. In the brief, the parties will be referred to as they appear before this Court.

The record on appeal is consecutively numbered. All references to the record will be by the symbol "R" followed by the appropriate page number in parentheses.

STATEMENT OF THE CASE AND FACTS

Petitioner was charged by information with armed robbery (Count I), aggravated assault (Count II), false imprisonment (Count III), and a misdemeanor, carrying a concealed weapon (Count IV) (R272). Following trial by jury (R275), Petitioner was found guilty on all counts (R273). The trial court below dismissed Count II, a lesser included offense of Count I (R274). Judgment was entered in accordance with the jury verdicts on Counts I, III, and IV on March 9, 1988 (R274).

On April 5, 1988, Petitioner appeared for sentencing. Prior to imposition of sentence, the State and the trial court both had the opportunity to read the presentence investigation report which had been prepared, and in response to which the trial judge observed:

> THE COURT: We have a kind of a mystery. A man from Alabama nobody knows about, nobody knows anything about him. He's from nowhere. I'm reading over the PSI. He says he's from Prattville, Alabama.
>
> THE DEFENDANT: Prattville. Prattville is where I went to school, and Prattville is just -- It's just a little town, Your Honor. There ain't a hundred people that live there, if that.
>
> THE PROBATION OFFICER: I have a letter from Prattville Elementary School indicating that there is no such school as the name of the school that he told me he went to.
>
> THE DEFENDANT: It's at Toe Creek (phonetic).
>
> THE PROBATION OFFICER: They've indicated that there is no such school in existence out there and that they have no educational records fort Mr. Goene at all. And I also contacted Mobile County Bureau of Vital Statistics, and they indicated that there were no records [of]

birth for Mr. Goene. There is also no records of birth or -- for either of his parents.

THE COURT: What did you have to say about that, sir?

THE DEFENDANT: I don't know, Your Honor.

THE COURT: Are you like the immaculate conception or what?

THE DEFENDANT: No. No, I'm not.

THE COURT: What's your real name?

THE DEFENDANT: That's my name, Your Honor.

THE COURT: Well, here in Mobile County, Mobile -- No, Mobile, Mobile County and they have no record of the birth or death of either him or his parents. October '87, he claims he resided in the home of the Rodriguez family in Davie, Florida for one month and refuses to divulge the street name or the first name of anyone in the Rodriguez family.
You weren't able to locate any Rodriguez family?

THE PROBATION OFFICER: There are many Rodriguez families in Davie.

(R231-232).

Despite the obvious confusion as to Petitioner's true antecedents, the trial judge proceeded, without objection from the State, to sentence Petitioner within the guidelines to concurrent terms of four and a half years in prison on Counts I and III, with credit for time served (R277, 278). Petitioner was sentenced to time served on Count IV (R234, 276).

On May 24, 1988, the State filed a motion to vacate the sentences on the grounds that Petitioner had given a false name and had misrepresented his criminal history, resulting in an inaccurate guidelines score at sentencing (R280-281). Petitioner's scoresheet

was amended to reflect his prior convictions, which placed him within the twelve to seventeen year sentencing range (R283). He was resentenced on June 1, 1988 to concurrent terms of seventeen years on Count, I and five years on Count III (R283, 284-285).

Credit was given for time served and no costs were imposed. The Fourth District Court of Appeal, in a decision rendered on November 22, 1989, affirmed these sentences against Petitioner's challenge on direct appeal. The district court of appeal certified the following question in this cause:

> ARE THE HOLDINGS IN SENIOR V. STATE, 502 SO. 2D 1360 (FLA. 5TH DCA), REV. DENIED, 511 SO.2D 299 (FLA. 1987); KATZ V. STATE, 335 SO.2D 608 (FLA. 2D DCA 1976); AND DOE V. STATE, 492 SO.2D 842 (FLA. 1ST DCA 1986), VALID, IN LIGHT OF THE ENACTMENT OF THE SENTENCING GUIDELINES, FOR THE REASON THAT A COMPLETE AND ACCURATE PRIOR CRIMINAL RECORD OF A DEFENDANT IS ESSENTIAL TO A PROPER COMPUTATION OF A SENTENCE UNDER SAID GUIDELINES?

By notice filed December 15, 1989, Petitioner invoked this Court's discretionary review to determine the answer to the certified question posited by the Fourth District Court of Appeal.

SUMMARY OF ARGUMENT

The double jeopardy clause of the United States and Florida Constitutions prohibits increasing a defendant's sentence after his has commenced serving it. Moreover, Fla. R.Cr.P. 3.800 (a) authorizes correction of an illegal sentence at any time, but a sentence is illegal only if its illegality is apparent on its face. Where Petitioner was sentenced to a term within the guidelines range as computed on an evidently accurate scoresheet, his sentence was not illegal and could not be increased after he had begun to serve it.

ARGUMENT

THE TRIAL COURT ERRED IN VACATING PETITIONER'S ORIGINAL SENTENCES AND RESENTENCING HIM TO INCREASED TERMS OF IMPRISONMENT.

During all phases of his prosecution below, Petitioner maintained that his true name was Edwin Goene and that he had no prior criminal history. But at the time of his original sentencing, it became clear that his account of his personal history was at best questionable, since the probation officer who prepared his presentence investigation report was unable to locate any records pertaining to him or his purported family in the small town in which he claimed to have grown up (R231-232). Nevertheless, the State made no attempt to delay sentencing so that Petitioner's antecedents could be further investigated and his true identity discovered. Instead, the trial court proceeded to sentence him on April 5, 1988 without objection by the State, to the top of the three and a half to four and a half year guideline term.

On May 24, 1988, the State moved to vacate Petitioner's legally imposed sentence after discovering through an FBI fingerprint comparison that Petitioner had used a false name and that he did indeed have prior convictions (R280, 281).[1] At the hearing on the State's motion, the trial judge resentenced Petitioner over his objection to substantially greater terms of seventeen years and five years imprisonment, respectively, on Counts I and III, based on the recommendation of a newly computed

[1] There is no indication in the record that this information was not readily available to the State or could not have become so at the time of Petitioner's original sentencing.

guidelines scoresheet which took into account the previously undiscovered convictions (R283, 284, 285).

When asked by defense counsel whether the court was vacating the original sentences or modifying them, the trial judge stated:

> I'm couching my ruling in the alternative. You have raised several points which I consider to be valid points, but I am couching my ruling in the alternative. Number one, I'm allowed to vacate the sentence under State versus Burton.
>
> Number two, I'm saying that because there was a fraudulent misrepresentation to the Court, as was indicated in State versus Burton, I'm also saying that an alternative basis, if, in fact, I considered this sentence to be an illegal sentence that under 3.800 (a) I can correct an illegal sentence at any time.
>
> I'm saying, number three, that in the event the sentence is not considered to be an illegal sentence but rather a legal sentence, then under 3.800(b) I have the authority to modify that sentence within 60 days. That's my ruling. Okay.

(R248, 249).

The trial court, and apparently, the district court of appeal,[2] believed that State v. Burton, 314 So.2d 136 (Fla. 1975) authorizes an increase in a defendant's sentence if the original sentence was the result of fraud or deception. In Burton, this Court upheld the vacation of an order granting a new trial when it was later discovered to have been based on fraud. However, in Troup v. Rowe, 283 So.2d 857, 859 (Fla. 1973), this Court said the following with respect to sentencing orders, which it found to be quite different from other orders entered during and after trial:

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[2] The opinion of the district court of appeal in the present case is rather short on analysis, but the above-stated rationale appears to follow from the court's citation to Burton.

> "The distinction that the court during the same term may amend a sentence so as to mitigate punishment, but not so as to increase it, is not based upon the ground that the court has lost control of the judgment in the latter case, but upon the ground that to increase the penalty is to subject the defendant to double punishment for the same offense in violation of the Fifth Amendment to the Constitution, which provides that no person 'shall be subject for the same offence to be twice put in jeopardy of life or limb.'"

Citing United States v. Benz, 282 U.S. 304, 307 (1931). Thus, it has been uniformly held that a sentence may not be increased once the defendant has begun serving it, even if the sentence was imposed because of some mistake by the trial judge. E.g., Gilmore v. State, 523 So.2d 1244 (Fla. 2nd DCA 1988); Harrison v. Wainwright, 408 So.2d 800 (Fla. 5th DCA 1982); Andrew v. State, 357 So.2d 489 (Fla. 1st DCA 1978) [trial judge's discovery after imposing sentence that defendant is entitled to credit for additional jail time cannot justify increase in original, legal sentence]. See also, Brown v. State, 521 So.2d 111 (Fla. 1988) [trial judge ruled that defendant who aided and abetted killing could not be sentenced to death nd imposed life sentence; double jeopardy barred resentencing defendant to death even though trial court's ruling was clearly erroneous]; Royal v. State, 389 So.2d 696 (Fla. 2nd DCA 1980) [trial court announcement on day after sentencing defendant that it was misunderstood or mistaken when five year prison sentence was imposed was invalid ground to increase lawful sentence defendant had begun serving to fifteen years in prison].

The same prohibition has been applied where it is the defendant's error which resulted in imposition of the original,

more lenient sentence. Thus, in Hinton v. State, 446 So.2d 712 (Fla. 2nd DCA 1984), the defense attorney erroneously represented that the codefendant was sentenced to ten years, and the trial court sentenced the defendant accordingly. The State later notified the trial court that the codefendant's sentence was different, arguing that the defendant's plea bargain was invalid because it was made under false pretenses. The appellate court held the resentencing the defendant after he had begun to serve a legal sentence violated the prohibition against double jeopardy.

Likewise, in Scott v. State, 419 So.2d 1178 (Fla. 3rd DCA 1982), the trial court imposed judgment and sentence, but stayed the sentence until a later date. When the defendant did not appear on that date, the court vacated the original sentence and imposed a greater one. This violated the defendant's double jeopardy rights, even assuming that the violation of the plea condition to appear was not involuntary. See also, Katz v. State, 335 So.2d 608 (Fla. 2nd DCA 1976) [no authority to resentence defendant once he began serving original sentence which was based on false information that he gave].

United States v. DiFrancesco, 449 U.S. 117 (1980), cited by the Fourth District Court of Appeal in its brief decision in support of its disposition below, does not alter this result. In DiFrancesco, the Supreme Court held in a five to four decision that a provision of the Organized Crime Control Act which permitted the government to appeal a sentence imposed against a "dangerous special offender" did not violate the double jeopardy clause of the United States Constitution. Apparently, the Fourth Distrait

Court of Appeal accepted the State's contention that DiFrancesco means that an increase in any sentence imposed against a defendant is now insulated against challenge because the double jeopardy clause is no longer applicable to resentencings.

This is much too broad a reading of DiFrancesco, however. That case dealt only with the propriety of a statute authorizing an appeal from a sentence. Vital to the Court's consideration of that issue was its recognition that a defendant sentenced under a statute which expressly authorized an appeal of the sentence had no expectation in the finality of the sentence, since the statute itself provided him notice of its appealability, and thus its lack of finality until after the appeal was filed and disposed of.

> The defendant, of course, is charged with knowledge of the statute and its appeal provisions, and has no expectation of finality in his sentence until the appeal is concluded or the time for appeal has expired. To be sure, the appeal may prolong the period of anxiety that may exist, but it does so only for the finite period provided by the statute.

United States v. DiFrancesco, supra, 449 U.S. at 136.

In the present case, however, the legislature has provided no statute which allows the State to appeal from a sentence which is within the guidelines. The only permissible state appeal is one taken from a guidelines departure sentence. But since Petitioner was originally sentenced to precisely the term recommended by his guidelines score, the sentence imposed was not a departure from the guidelines, and hence, it was not appealable. As a result, the comfort taken by the DiFrancesco Court from the notice provided to the defendant by way of the statute is simply unjustifiable sub judice. The holding of DiFrancesco that the double jeopardy clause

does not prohibit the state from providing for the appeal of certain kinds of sentence is thus not applicable to the instant case, where no statute exists to authorize an appeal from a regularly imposed guidelines sentence or to otherwise suggest that it is not a final sentence which may not be increased once it is imposed.

Even should this Court extend DiFrancesco beyond its holding,[3] the Fourth District Court of Appeal arrived at the incorrect result in the instant case. For the inquiry required by the issue raised in this case does not end with the double jeopardy clause. In DiFrancesco, the propriety of the defendant's sentence was brought before the appellate court by way of an appeal which was authorized by statute. In the present case, as has already been established, no appeal from Petitioner's sentence by the State can lie. Instead, the State sought to obtain an alteration in Petitioner's sentence by way of a motion to "correct" and "illegal" sentence under R.Cr.P. 3.800 (a), which provides:

> A court may at any time correct an illegal sentence imposed by it or an incorrect

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[3] See, United States v. Bishop, 774 So.2d 771 (7th Cir. 1985), which contains dicta supporting this conclusion. But in Bishop, the circuit court of appeals was addressing a situation where the defendant obtained the modification of his original, lawfully-imposed sentence by means of fraudulent allegations. He had, by his own actions, therefore, defeated whatever expectation he had in the finality of that original sentence, since he himself moved to have it altered. In the present case, of course, it is Petitioner's original sentence which the State sought to alter without Petitioner's concurrence. Petitioner's expectation of finality in his original sentence was thus not defeated by his own action in moving to have it modified. Consequently, the Court's decision in Bishop, which merely gave the original sentence effect after the fraudulent attempt to alter it was exposed, cannot justify the trial court's actions in the instant.

calculation made by it in a sentencing guidelines scoresheet.

In State v. Whitfield, 487 So.2d 1045 (Fla. 1986) this Court made clear just what is permitted by this rule. The defendant in that case was convicted of an aggravated assault as a lesser included offense of aggravated battery. Victim injury points were erroneously factored into his guidelines scoresheet. This Court held that Whitfield's sentence was illegal because the incorrect scoring of the guidelines point was "readily apparent on the face of the record." Consequently, since the sentence exceeded the correctly computed guidelines sentence, its propriety could be challenged for the first time on appeal even absent objection below. However, computational errors which are not apparent on the corners of the initial sentencing documents do not result in an "illegal" sentence, the illegality of which may be raised at any time. Instead, any such errors must be preserved for appeal by a contemporaneous objection.

Thus, so long as a sentence is legal on its face, it may not be subsequently "corrected" by being increased. Only if a sentence is illegal on its face is it subject to subsequent correction, regardless of whether the defendant has begun serving the sentence or not. A guidelines sentence imposed pursuant to an incorrect scoresheet is not an "illegal" sentence, the propriety of which may be challenged at any time, unless the error in scoring is evident from an examination of the sentencing documents themselves, without regard to other, extrarecord information.

In Senior v. State, 502 So.2d 1360 (Fla. 5th DCA 1987), the Fifth District Court of Appeal applied Whitfield to facts just like

those in the instant case. The defendant in Senior was sentenced within the guidelines after denying that he had any criminal record other than that reflected in the presentence investigation report. After Senior began serving his sentence, the State moved to correct the sentence under R.Cr.P. 3.800(a). on the grounds that Senior's scoresheet did not reflect a felony conviction from another state and also did not reflect the fact that Senior had been on probation in that state at the time he was sentenced. A new sentencing scoresheet was prepared which included the additional information and placed Senior in a higher sentencing range. The trial court granted the State's motion and resentenced Senior to a lengthier term of imprisonment within the new guidelines range.

The Fifth District Court of Appeal reversed, on the grounds that the scoring error was not apparent from the four corners of the record of the initial sentencing, which on its face revealed a perfectly valid, apparently correctly computed guidelines sentence. Because the scoring error was one which could be readily noted from an inspection of the scoresheet itself, the original sentence was not one which was illegal on its face as defined in Whitfield. Thus, absent a motion for continuance by the State in order to prepare a more accurate scoresheet or further investigate the defendant's criminal record, any error in computing the defendant's sentence could not be attacked on appeal. The district court of appeal noted that the State was not without remedy to punish the defendant's deceitfulness, since it could prosecute him for perjury or contempt of court. See also, Doe v. State, 492 So.2d 842 (Fla. 1st DCA 1986).

The present case is on all fours with Senior and Doe, which conform cases arising from subsequently discovered extrarecord scoresheet errors with this Court's own decision in Whitfield. Consequently, the same result is required in the present case, namely, that Petitioner's original, legally imposed sentence be re-instated, without prejudice to the State to institute proceedings against him for contempt and/or perjury.

CONCLUSION

Based on the foregoing arguments and the authorities cited therein, Petitioner respectfully requests this Court to reverse the decision of the Fourth District Court of Appeal and remand this cause with directions that Petitioner's original sentence be re-instated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier to James J. Carney, Assistant Attorney General, Elisha Newton Dimick Building, Room 204, 111 Georgia Avenue, West Palm Beach, Florida 33401, this 29th day of JANUARY, 1990, by mail.

Of Counsel.