047

IN THE SUPREME COURT OF FLORIDA

LESTER JOYNER,

Petitioner,

vs. Case No. 79, 565

STATE OF FLORIDA,

Respondent.
_____/

ON DISCRETIONARY REVIEW OF A
DECISION OF THE SECOND
DISTRICT OF COURT OF APPEAL

JURISDICTIONAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE AND FACTS

Respondent submits the following additions and corrections to Petitioner's Statement of the Case and Facts. In all other respects, Respondent accepts the statement as submitted by Petitioner.

Petitioner did not prosecute an appeal from the judgment or community control sentence when it was imposed in February 23, 1990. After revocation of his community control, he prosecuted an appeal in the Second District Court of Appeal. Petitioner failed to include in the record on appeal a copy of any of the trial court proceedings which occurred prior to the sentencing following the revocation of his community control. The Second District Court of Appeal ruled that "His acceptance of community control constituted a waiver of the right to attack that community control at revocation." Joyner v. State, 17 F.L.W. (D)532 (Fla. 2d DCA February 19, 1992).

SUMMARY OF ARGUMENT

It is clear from the cases that no conflict exists. Petitioner is dissatisfied with the District Court's ruling in a separate case wherein the court ruled that imposition of a sentence of community control after classification as a habitual offender does not constitute an illegal sentence. However the District Court did not rule on the legality of the same sentence in this case but ruled that the Petitioner had waived his right to challenge the sentence after revocation of community control. Since no conflict exists, this Court must decline to exercise jurisdiction.

ARGUMENT

THIS COURT LACKS JURISDICTION TO REVIEW THE DECISION OF THE DISTRICT COURT OF APPEAL SINCE THERE ARE NO FACTS ON THE FACE OF THE OPINION WHICH CONFLICT WITH A DECISION OF THIS COURT OR ANY OTHER DISTRICT COURT OF APPEAL ON THE SAME ISSUE OF LAW.

Petitioner was quite content with the sentence he received when he initially entered his plea. He avoided a possible ten year prison term in exchange for a plea of guilty. He was only sentenced to community control although he was a habitual offender. After revocation of that community control, Petitioner prosecuted an appeal. Petitioner alleged in the Second District Court of Appeal that once he was habitualized, he was no longer eligible for community control because the habitual offender statute and probation statute has mutually exclusive purposes. If that contention is correct, Petitioner has fully enjoyed the benefits of a sentence which erred in his favor since he should have been sentenced to an extended term as a habitual offender. Petitioner is in no position to complain about a lesser sentence. See generally, McCloud v. State, 335 So. 2d 257 (Fla. 1976).

Moreover, Petitioner waived his right to object after revocation of community control because he bargained for, benefitted from and accepted the original sentence. See Bashlor v. State, 586 So. 2d 488 (Fla. 1st DCA 1991); and King v. State, 373 So. 2d 78 (Fla. 3d DCA 1979). In King, the court ruled that a defendant is estopped from challenging his conditions of probation after having enjoyed the benefits of that probation.

Petitioner cannot cite to any case which conflicts with the District Court's ruling that he waived his right to complain about the sentence by failing to file an appeal from the initial sentence. The policy reasons for estopping a defendant from attacking a probation sentence after revocation of probation are applicable to this case. It discourages defendants from intentionally entering into allegedly illegal sentences and having that same sentence declared illegal after violating its terms. This court should not allow defendants to manipulate the sentencing court in such a manner. Furthermore, since Petitioner was subject to the same sentence during his initial sentencing which he received upon revocation of community control, he has not been harmed by the allegedly illegal sentence. See Wright v. State, 510 So. 2d 1159 (Fla. 3d DCA 1987)(defendant cannot be harmed by error from which he benefitted).

For purposes of determining conflict jurisdiction, the Court is limited to the facts which appear on the face of the opinion. Hardee v. State, 534 So. 2d 706 (Fla. 1988). In order to find conflict between the decisions cited by Petitioner and Joyner, infra, it would be necessary for this Court to review the record in order to resolve the disagreement in Petitioner's favor. Such action would be improper. Reaves v. State, 485 So. 2d 829 (Fla. 1986). Although the court in Joyner v. State, 17 F.L.W. (D)532 (Fla. 2d DCA February 19, 1992), could have addressed the legality of the sentence, nowhere in the four corners of the decision does the court rule on that issue. In fact, the court specifically declined to address that argument:

> we need not and do not address the defendant's argument that he should not have been sentenced to community control after having been declared a habitual offender.

Joyner, supra.

No decision by this Court or any other district court of appeal that has held that sentencing a defendant to community control after classifying the defendant as a habitual offender constitutes an illegal sentence. Moreover, in King v. State, 17 F.L.W. (D)662 (Fla. 2d DCA March 4, 1992), the court held that the imposition of community control after classifying the defendant as a habitual offender is not inherently or per se illegal. See also, Burdick v. State, 17 F.L.W. (S)88 (Fla. February 6, 1992); Williams v. State, 581 So. 2d 144 (Fla. 1991); Sheffield v. State, 580 So. 2d 790 (Fla. 1st DCA 1991)(court rejected state's appeal wherein the state argued that once a defendant is habitualized, sentencing as such is mandatory); and Fla. R. Crim. P. 3.790. Although King, 17 F.L.W. (D)662 (Fla. 2d DCA March 4, 1992), was not decided until after Joyner, supra, was issued, Petitioner cannot show that there is any decision which conflicts with King.

Furthermore, there is no law which precludes a defendant from entering into a plea agreement for a particular sentence which is less than what the trial court could impose if the defendant was found guilty of all charges. Smith v. State, 529 So. 2d 1106 (Fla. 1988)(We find no impropriety in allowing a defendant to negotiate a plea agreement that provides a

sentencing cap which is less than the statutory maximum in order to limit his exposure to jail time; once a plea agreement is negotiated which specifies the permissive sentence, the agreement is binding).

Respondent recognizes that State v. Kendricks, 17 F.L.W. (D)812 (Fla. 5th DCA March 27, 1992), was issued after Petitioner filed his jurisdictional brief. However, Kendricks does not help Petitioner in his quest to demonstrate conflict. Kendricks dealt with probation; Petitioner was not placed on probation but was sentenced to community control. The Kendricks decision hinges on the well established law that probation is not a sentence but is a sentencing alternative in lieu of a sentence. See, Kendricks, supra, at 813 (probation was not a sentence at all but was a conditional limbo-like status during a period of time between a finding of criminal guilt and the imposition of a sentence, if a sentence was ever imposed. The placing of a defendant on probation is in lieu of a sentence). See also, Poore v. State, 531 So. 2d 161 (Fla. 1988).

Conversely, there is no statute, rule, or case which holds that sentencing a defendant to community control is not a "sentence." Community control is a form of intensive, supervised "custody." § 948.001, Florida Statutes (1989). Additionally, section 948.01(10), Florida Statutes (1989), identifies the class of individuals for whom community control is impermissible. Petitioner's conviction does not fall within that class. Unless this court is prepared to conclude that community control is not a sentence, there can be no doubt that Petitioner was sentenced.

Since the court in Kendricks held that imposition of a sentence was mandated after finding a defendant to be a habitual offender and that probation is not a sentence, the rationale and holding in Kendricks are inapplicable to the facts of this case because the placing of a defendant on probation is distinctly different from sentencing a defendant to community control. Accordingly, no conflict exists on any issue of law.

Respondent agrees that an illegal sentence can be corrected at any time. Since the imposition of community control following a classification as a habitual offender is not an illegal sentence, a contemporaneous objection or timely appeal was required. See, Whitfield v. State, 487 So. 2d 1045 (Fla. 1986); Thompson v. State, 17 F.L.W. (D)164 (Fla. 2d DCA January 3, 1992). Petitioner failed to object to or file an appeal from the initial sentence.

Petitioner cannot demonstrate that the decision in Joyner conflicts with any decision of this Court or another district court of appeal on the same issue of law. Accordingly, this Court lacks jurisdiction to review this case under Art. 5§ 3(b)(3) or Fla. R. App. P. 9.030(a)(2)(A)(iv).

CONCLUSION

Based on the foregoing facts, authorities and arguments, this Court must deny the petition for discretionary review.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail to Jennifer Y. Fogle, Assistant Public Defender, Polk County Courthouse, P. O. 9000-Drawer PD, Bartow, Florida 33830 this 22nd day of May, 1992.

Elaine L. Thompson

COUNSEL FOR RESPONDENT