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IN THE SUPREME COURT OF FLORIDA

LESTER JOYNER,

Petitioner,

vs. Case No. 79,565

STATE OF FLORIDA,

Respondent.
_____/

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

BRIEF OF RESPONDENT ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Respondent makes this addition to the facts as submitted by petitioner: After petitioner was placed on community control on February 23, 1990, petitioner did not prosecute an appeal of the judgment or sentence.[1]

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[1] Petitioner has not included as part of the record any of the transcripts of the hearings wherein he entered his pleas (January 30, 1989; July 31, 1989; February 23, 1990) nor the transcript of hearing on this violation of Community Control wherein he pled guilty.

SUMMARY OF THE ARGUMENT

The procedures utilized by the trial court in sentencing petitioner were proper. By placing petitioner on community control without declaring that it was not necessary to protect the public, the sentence was improper. However, that improper sentence erred to petitioner's benefit and he has no right to complain. With the issuance of King v. State, 597 So. 2d 309 (Fla. 2d DCA 1992), the problems in sentencing under the habitual offender statute should be resolved. King is a correct application of that statute.

Even if the sentence was improper when imposed, by failing to object or filing an appeal, petitioner cannot be heard to complain after revocation of that sentence. Factual findings which are not disputed in the trial court should not be subject to review on appeal, unless error is demonstrated on the face of the record.

Most importantly, since petitioner did not present any of his claims to the trial court and raised a new one in this Court, those issues are not properly preserved for appellate review. This Court should affirm the ruling of the district court.

ARGUMENT

THE ARGUMENTS PRESENTED ARE NOT PROPER FOR REVIEW SINCE THEY WERE NOT RAISED IN THE TRIAL COURT. MOREOVER, SINCE PETITIONER SHOULD HAVE BEEN SENTENCED TO A HARSHER SENTENCE ORIGINALLY, HE CANNOT BE HEARD TO COMPLAIN ABOUT A SENTENCE WHICH ERRED IN HIS FAVOR.

Petitioner attacks his conviction and sentence on three grounds. First, he alleges that his initial sentence of community control as a habitual offender was illegal. Petitioner then asserts that since the initial sentence was illegal, he may challenge that sentence after having accepted the allegedly illegal sentence. Finally, petitioner challenges the procedure by which the trial court initially found him to be a habitual offender. None of the arguments raised in the district court were presented to the trial court, and one of the arguments raised in this court was not argued in the district court.[2] Unless this Court finds that the error was fundamental, the issues are not properly preserved for review. Steinhorst v. State, 412 So. 2d 332 (Fla. 1982).

In the district court, petitioner alleged that his sentence of "habitualized community control" consitututed an illegal application of section 775.084 and chapter 948. (App. Brief at 3, 4-5). In this Court, petitioner alleges that his original sentence of habitualized community control was illegal. (Petitioner's brief at 5). Unless petitioner's initial sentence

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[2] Although the state's answer brief in the district court primarily raised a waiver defense, petitioner did not file a reply brief. By not filing a reply brief, petitioner failed to address the issue of whether he waived his right to object to the initial sentence.

was illegal, petitioner has no grounds to complain. Petitioner's entire argument concerning the alleged illegality of his initial sentence has no statutory support. Instead, petitioner argues that the probation statute and habitual offender statute are mutually exclusive. In Ch. 88-131, Laws of Florida, the legislature amended section 775.084(4)(e), Florida Statutes. That amendment removed the habitual offender sentence from the sentencing guidelines provision; it removed habitual offenders from consideration for parole; and it removed them from consideration for gain time. It had no effect on section 775.084(4)(c), but extended the possible prison terms that may be imposed while making sure that defendants would serve more time in prison by reducing the possibility of early release.

The defendant in Williams v. State, 581 So. 2d 144 (Fla. 1991), argued that the trial court could not depart from the sentencing guidelines after revocation of probation because by placing him on probation, the court necessarily had to find that he was not likely again to engage in a criminal course of conduct. This Court rejected that argument based on the possible deterrent effect on probation. Id. at 146.

Petitioner's argument is essentially the same as Williams' argument. Petitioner asserts that by placing a defendant on probation or community control, the court necessarily found that he was not likely to engage in criminal conduct and therefore, habitual offender sentencing was inappropriate. Based on petitioner's argument, if a defendant meets the criteria for habitualization under section 775.084,

Florida Statutes, neither probation or community control is a proper disposition. That interpretation is inconsistent with section 775.084(4)(c), Florida Statutes. Section 775.084(4)(c), Florida Statutes (1989), gives the trial court discretion to determine whether to sentence a defendant as a habitual offender. Petitioner's argument would completely negate that section since he claims that defendants found to be habitual offenders must be sentenced to a "term of years" under section 775.084(4)(a). In construing statutes, court must, to the extent possible, give effect to all parts of a statute. Kepner v. State, 571 So. 2d 576 (Fla. 1991). To give effect to subsection 4(c), the trial courts must have the discretion not to impose a habitual offender sentence, otherwise, that subsection would be meaningless.

The analysis employed in King v. State, 597 So. 2d 309 (Fla. 2d DCA 1992), most accurately reflects the options available to a trial court where a defendant is found to be a habitual offender. In King, the court emphasized the fact that section 775.084(4)(c), Florida Statutes, clearly gives a judge the discretion as to whether to sentence a defendant as a habitual offender. Id. at 314. Although petitioner points out that the legislature provided that the most severe sanction should be pursued by the prosectution (petitioner's brief at 6), that does not mandate that the court impose the most severe sanction possible. Otherwise, subsection 4(c) is meaningless.

In Burdick v. State, 594 So. 2d 267 (Fla. 1992), the defendant argued that the trial court is not required to impose the maximum penalty provided in the statute, but rather can

sentence the defendant anywhere up to the maximum sanction. The Court held sentencing under section 775.084 (4)(a), Florida Statutes (1989), is permissive, not mandatory. The Court noted that the trial judge regains all the discretion the guidelines were intended to reduce by simply classifying a defendant as a habitual offender. Id. at 270. Therefore, persons found to be habitual felony offenders may be sentenced as habitual felony offenders under subsections 775.084(4)(a)(1),(2), or (3), Fla. Statutes. King, supra, at 316. If the court decides that sentencing as a habitual offender is not necessary for the protection of the public, the defendant is to be sentenced under the guidelines. Id.; section 775.084(4)(c), Fla. Stat. (1989).

Section 948.06(1), Florida Statutes (1989), provides that upon revocation of probation or community control, the court may impose any sentence that it might have originally imposed before placing the defendant on probation or community control. In Williams, this Court upheld a departure sentence imposed after revocation of probation. This Court recognized that trial courts might be less willing to give defendant's another chance by putting them on probation if the court was forbidden from exercising its authority under section 948.06(1), in the event probation was violated. The Court approved the trial court's application of section 948.06(1) to defendants after revocation of probation and permitted the trial courts to impose a departure sentence based on conditions which the trial court could have provided at the initial sentencing. Based on section 948.06(1), after revocation of community control petitioner was subject to

ten years imprisonment as a habitual offender. That is the sentence that was imposed upon revocation of his community control. Therefore, petitioner has no grounds to complain.

Petitioner's dissatisfaction is with the time period within which the trial court may impose a sentence as a habitual offender. The state believes that the procedure employed here, and that employed in Snead v. State, 598 So. 2d 316 (Fla. 5th DCA 1992), are proper methods for imposing habitual offenders sentences. In both cases, the defendants were initially spared from a harsh prison sentence. After revocation of probation and community control, the trial courts exercised their authority to impose any sentence which they might have imposed originally. This procedure is consistent with the policy of giving the defendant another chance. See, Williams, supra.

In State v. Kendricks, 17 F.L.W. 812 (Fla. 5th DCA March 27, 1992), the trial court determined that imposition of a habitual offender sentence was necessary for the protection of the public. Therefore, under King, the defendant should have been sentenced pursuant to section 775.084(4)(a)(2), Florida Statutes (1989). The sanction imposed in Kendricks by the trial court was not within the terms of the statute. Accordingly, the sentence was improper. By placing the defendant on probation, the trial court withheld sentencing. If the court had found that it was not necessary for the protection of the public that the defendant be sentenced as a habitual offender, then the defendant would be required to be sentenced under the guidelines. King, supra, at 315. In Kendricks, the sentencing guidelines indicated

a permissible range of 2 ½ to 5 ½ years incarceration. By imposing probation, the court imposed a downward departure without providing written reasons. Therefore the sentence was improper. The analysis utilized in Kendricks is consistent with the court's ruling in King, supra.

Assuming arguendo that the original sentence constituted an illegal application of section 775.084, petitioner is estopped from challenging the sentence after he has enjoyed its benefits. All five of the district courts of appeal have applied estoppel policy when defendants tried to attack sentences (which they initially accepted) after revocation of probation or community control. See King v. State, 373 So. 2d 78 (Fla. 3d DCA 1979); Bradley v. State, 17 F.L.W. 1697 (Fla. 3d DCA July 14, 1992); McCarthy v. State, 382 So. 2d 408 (Fla. 4th DCA 1980); Clem v. State, 462 So. 2d 1136 (Fla. 4th DCA 1984); Pollock v. State, 450 So. 2d 1183 (Fla. 2d DCA 1984); Wolfson v. State, 437 So. 2d 174 (Fla. 2d DCA 1983); Gallagher v. State, 421 So. 2d 581 (Fla. 5th DCA 1982); Bashlor v. State, 586 So. 2d 488 (Fla. 1st DCA 1991); and McPhee v. State, 254 So. 2d 406 (Fla. 1st DCA 1971). The rationale for preventing defendants from attacking the legality of a sentence is based on fairness. No defendant should be able to enjoy the benefits of a probation sentence which is allegedly illegal, and after revocation of probation, attack the original probation. Since petitioner had the right to challenge the sentence when it was originally imposed but failed to do so, his inaction results in a waiver of the improper sentence.

Absent some jurisdictional flaw, Florida courts have repeatedly held that sentences imposed in violation of statutory requirements may not be challenged after the defendant has accepted the benefits but failed to carry out the conditions imposed on him. Bashlor, supra, at 489. Once the defendant has entered a guilty plea, the state may not keep in touch with its witness nor maintain the evidence, especially in cases involving narcotics. If the defendant is allowed to challenge his original sentence, which was the basis for the bargain, the state is at a severe disadvantage. In recognition of the very real danger of prejudice to the state, the district courts have not permitted defendants to attack sentences which they bargained for and benefitted from, in the absence of a jurisdictional flaw. This Court should uphold this policy. To do otherwise diminishes the incentive for the state or trial court to enter negotiated pleas. In this case, there is no dispute that the circuit court had jurisdiction to sentence petitioner. Therefore, petitioner should not be heard to complain about a sentence from which he benefitted.

In McCloud v. State, 335 So. 2d 257 (Fla. 1976), this Court ruled that a defendant is not in a position to complain about a lesser sentence. Petitioner was not sentenced as a habitual offender even though the trial court did not find that imposition of sentence as a habitual offender was not necessary. This was error. See King, 597 So. 2d 309 (Fla. 2d DCA 1992). Had the trial court made such a finding, petitioner was then subject to sentencing under the guidelines. Id. Therefore, the

sentence initially imposed was a lesser sentence than that which was required by law. Petitioner, like Kendricks, received an improper, lenient sentence. However, the state, not petitioner, was disadvantaged because at the time of petitioner's original sentence, the state was not allowed to appeal the "habitual probation" or "habitual community control" sentences. See State v. Davis, 559 So. 2d 1279 (Fla. 2d DCA 1990), receded from King v. State, 597 So. 2d at 317. Therefore, petitioner has benefitted from the improper sentence with resulting prejudice to the state. Accordingly, he has no grounds to complain. McCloud, supra.

Clark v. State, 579 So. 2d 109 (Fla. 1991), does not help petitioner's case. In Clark, the trial court lacked jurisdiction to change the conditions of probation because no formal charges had been filed under section 948.06. The defendant in Larson v. State, 572 So. 2d 1368 (Fla. 1991), filed a direct appeal challenging the original order of probation. Both Clark and Larson are consistent with the districts courts policy of allowing challenges to sentences imposed in violation of statutory requirements only if there is a jurisdictional flaw, after revocation of probation or community control. If a defendant enters into a plea bargain for a specific sentence and he later challenges the sentence, the state will not receive its benefit from the bargain and therefore, the state should be allowed to vacate the plea. That way, all parties are back to square one and either a new plea bargain can be reached or the matter may be set for trial. A plea bargain is essentially a

contract by which both parties are bound. Neither party has the right to excise one portion of the deal and force the remaining party to be stuck with what's left. That is essentially what a defendant does when they enter into a plea agreement and later challenge the terms of the plea after they have violated the conditions of probation. The state, like the defendant, is entitled to justice.

Finally, petitioner challenges the procedure employed to sentence him as a habitual offender. First and foremost, petitioner should not be heard to complain about the procedures used to habitualize him. Petitioner has not made a part of the record on appeal any transcript of the hearing wherein he was found to be a habitual offender. The findings and judgment of the trial court comes to the appellate court with a presumption of correctness. Boylan v. Boylan, 571 So. 2d 580 (Fla. 4th DCA 1990). Petitioner has the burden of bringing before the appellate court an adequate record to support his appeal. He has failed to do so.

Petitioner alleges that the trial court failed to make a record at the revocation proceedings of any evidence to support his habitual offender findings. Petitioner was not found to be a habitual offender at his revocation hearing. The record on appeal shows that petitioner was found to be a habitual offender at his original sentencing hearing on February 23, 1990. (R1,15) The judgment for petitioner's conviction was entered on February 23, 1990, and it contains the habitual offender notation. (R15) Petitioner did not make the transcript of the February 23, 1990,

hearing a part of the record on appeal. Petitioner did not direct the clerk to include a copy of that hearing, nor did he direct the court reporter to transcribe the hearing. (R50-54) Even after respondent informed the district court that the February 23, 1990, hearing was not part of the record, petitioner did not seek to make it available. Since petitioner has the burden of bringing before the appellate court an adequate record to support his appeal, his failure to include the transcript of February 23, 1990, hearing prohibits this court from reviewing his claim regarding the factual findings required under Section 775.084(1)(a)(1-4), Florida Statute (1989).[3]

Respondent asserts that even if the transcript had been provided, petitioner's failure to raise any challenge to the factual findings on direct appeal from his original sentence or in the trial court precludes relief. Since the issue could have been raised on direct appeal from the original sentence and was not presented to the trial court at either the original sentencing hearing nor the revocation hearing, petitioner has waived his right to review. Johnson v. State, 541 So. 2d 661 (Fla. 1st DCA 1989); Eutzy v. State, 541 So. 2d 1143 (Fla. 1989). The findings required by section 775.084 (1)(a) (1-4), Florida Statute (1989), are all factual matters to be resolved by the trial court. In the absence of any objection in the trial,

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[3] Although petitioner was noticed on the same day he was sentenced, since there is no proof that petitioner was prejudiced or that he objected, his failure to raise the timeliness issue on direct appeal constitutes a waiver. See Ashley v. State, 590 So. 2d 27 (Fla. 5th DCA 1991); Chalk v. State, 17 F.L.W. 1751 (Fla. 4th DCA July 22, 1992); and Judge v. State, 596 So. 2d 73 (Fla. 2d DCA 1991).

errors that are not apparent and determinable from the record which involved factual matters are precluded appellate review. Dailey v. State, 488 So. 2d 532 (Fla. 1986). Since there is no evidence that shows that petitioner objected to or disputed the trial court's findings of fact, he cannot be heard to complain.

CONCLUSION

Respondent requests that this Court rule that the procedures outlined in King v. State, 597 So. 2d 309 (Fla. 2d DCA 1992), and utilized in this case, and Snead v. State, 598 So. 2d 316 (Fla. 5th DCA 1992), are proper methods for sentencing under section 775.084. Additionally, this Court should rule that defendants are prohibited from attacking their probation and community control sentences after revocation of the probation or community control. Finally, this Court should rule that the failure to object to the trial court's findings under section 775.084 (1)(a)(1-4), Florida Statutes, precludes relief unless the record clearly demonstrates error. Petitioner's conviction and sentence must be affirmed.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that a true and correct copy of the foregoing has been sent by U.S. Mail to Jennifer Y. Fogle, Assistant Public Defender, Counsel for Petitioner, Polk County Courthouse, P.O. Box 9000-Drawer PD, Bartow, FL 33830 on this 18th day of August, 1992.

COUNSEL FOR RESPONDENT