047

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

REPLY BRIEF OF PETITIONER ON THE MERITS

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TENTH JUDICIAL CIRCUIT

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ISSUE

WHETHER THE TRIAL COURT ERRED BY IMPOSING COMMUNITY CONTROL AS A HABITUAL FELONY OFFENDER?

In addition to the arguments presented in Petitioner's Initial Brief on the Merits, Mr. Joyner makes the following response to the Brief of Respondent on the Merits. In summary, his position in reply is that his arguments are not precluded by waiver or estoppel. On resentencing, he is entitled to a guidelines sanction.

Contrary to Respondent's assertion that the waiver issue was not argued below, it was always the Petitioner's assertion in the district court that his sentence was illegal and not authorized by law. Inherent in this position is the principle that a defendant cannot by waiver confer on a court the power to impose an illegal sentence.[1] The second district disagreed that the sentence was illegal and therefore held that the failure to object or appeal the initial sentence constituted a waiver under Wolfson v. State, 437 So.2d 174 (Fla. 2d DCA 1983). Petitioner continues to assert that

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[1]Respondent complains that the Petitioner has not provided as part of the record the original plea hearing or the hearing on revocation of community control. The present record reflects that the Petitioner entered a no contest plea on February 23, 1990; and a guilty plea to violation of community control on May 16, 1990. (R1) His initial sentence was not appealed. Because Petitioner's argument has consistently been that the sentence was impermissible as a matter of law, and constituted fundamental error, reexamination of the plea hearing would not be necessary for review. However, if this Court so desires, Petitioner can supplement the record.

the error in his case was fundamental and preserved for review. Steinhorst v. State, 412 So.2d 332 (Fla. 1982). Additionally, because the sentence was impermissible as a matter of law, relief is appropriate under Rule 3.800(a), as previously argued. See also, Judge v. State, 596 So.2d 73, 77 (Fla. 2d DCA 1992).

Respondent also erroneously contends that Petitioner is estopped from now challenging the sentence after he has enjoyed its benefits. The Respondent cites cases and states the cases involve an attempt to attack sentences (which were initially accepted) after revocation of probation or community control. In actuality, the cases cited do not deal with revocations of probation or community control and primarily involve errors the courts deemed merely improper or correctible. King v. State, 373 So.2d 78 (Fla. 3d DCA 1979), cert. denied, 383 So.2d 1197 (Fla. 1980), involved an improperly lenient but not illegal sentence. Bradley v. State, 17 F.L.W. 1697 (Fla. 3d DCA July 14, 1992), involved restitution contemplated by a plea agreement for which proper notice and hearing were given, thereby waiving any complaint. McCarthy v. State, 462 So.2d 408 (Fla. 4th DCA 1980), was a per curiam affirmance based on King, with no facts presented. Clem v. State, 462 So.2d 1134 (Fla. 4th DCA 1984), involved an order placing the defendant on probation rather than on community control which could not later be complained of because it was correctible. Pollock v. State, 450 So.2d 1183 (Fla. 2d DCA 1984), involved a condition of probation which was specifically a part of a negotiated plea agreement. Gallagher v. State, 421 So.2d 581 (Fla. 5th DCA

1982) was an attack on an improper condition of probation after revocation. McPhee v. State, 254 So.2d 406 (Fla. 1st DCA 1971), involved an improper jury instruction to the defendant's benefit, which did not rise to fundamental error.[2]

Respondent's reliance on McCloud v. State, 335 So.2d 257 (Fla. 1976) is equally misplaced. McCloud involved a jury trial where the defendant was convicted of robbery and the lesser included offense of manslaughter (rather than felony murder). Although the court thought the verdicts inconsistent, the error was in the defendant's favor so he was held unable to complain. This bears no relationship to the instant case which involves a sentencing application fashioned by a trial court which is illegal and unauthorized by statutory provisions. Additionally, as previously argued, the placement of a defendant on probation or community control when he is designated a habitual felon is completely incongruous and cannot logically be said to inure to his benefit or to have been specifically bargained for. Upon revocation of community control, as here, a defendant finds he is taken out of the guidelines, suffers a potentially double statutory maximum sentence, and receives extremely limited gain time without the benefit of court compliance with the requirements of the habitual offender statute. Whitehead v. State, 498 So.2d 863 (Fla. 1986); § 775.084, Fla. Stat. (1989).

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[2]Petitioner has previously addressed Wolfson v.State, 437 So.2d 174 (Fla. 2d DCA 1983), and Bashlor v. State, 586 So.2d 488 (Fla. 1st DCA 1991) in the Initial Brief on the Merits.

Respondent also relies on Dailey v. State, 488 So.2d 532, 533 (Fla. 1986) for the proposition that errors involving factual matters which are not apparent or determinable from the record on appeal preclude appellate reiew. In Dailey, the issue involved scoresheet calculations for legal constraint and victim injury which were not contested at the trial level. Thus, there was no ruling by the trial court supporting either the pro or con of the appellant's contentions on appeal.

However, sentencing errors involving the mandatory duty of the trial court to make affirmative findings on the record, which findings were not made, are apparent and determinable from the record and thus appealable. Walker v. State, 462 So.2d 452, 454 (Fla. 1986) (trial court has mandatory statutory duty to make specific findings of fact when sentencing a defendant as habitual felony offender and the failure to do so is appealable regardless of whether such failure is objected to at trial); State v. Rhoden, 448 So.2d 1013 (Fla. 1984)(statutory duty to make specific findings when sentencing a juvenile as an adult are mandatory and the failure to follow the mandatory sentencing requirements is reviewable on appeal). In the instant case it is clear from the record that the trial court at the revocation hearing designated the Petitioner a habitual offender without making the required findings of fact. The trial court proceeded also without meeting the statutory requirements for a pre-sentence investigation, certified copies of prior convictions, or proof of no pardon or post-conviction relief being granted. The court merely told

someone to get certified copies of two convictions in the file at some future time. These errors are readily apparent from the record and are thus reviewable on appeal based on Dailey, Walker, and Rhoden.

Petitioner also disagrees with Respondent's assertion that Williams v. State, 581 So.2d 144 (Fla. 1991), applies to the instant case. Williams deals with a guidelines departure sentence imposed upon revocation of probation, and stands for the proposition that such a departure is proper where the reasons for it were present at the time the original probation was imposed and they are properly presented at the sentencing. Williams, however, does not stand for the proposition that a habitualized sentence can be imposed upon revocation. See Steiner v. State, 591 So.2d 1070, 1074 (Fla. 2d DCA 1991) (LEHAN, J., Specially concurring): "An interpretation of Williams to the contrary would conflict with Florida Rule of Criminal Procedure 3.701(d)(14) which states: 'Sentences imposed after revocation of probation or community control must be in accordance with the guidelines.' (Emphasis added.) Rule 3.701(d)(14) appears controlling because community control itself is subject to the guidelines and is not otherwise within the purview of section 775.084. . . "

Based on the arguments presented in the Initial Brief of Petitioner on the Merits and his Reply Brief, Mr. Joyner's habitual offender designation should be deemed void and he should be resentenced within the guidelines.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Elaine L. Thompson, 4000 Hollywood Boulevard, Suite 505 South, Hollywood, Florida 33021, (305) 985-4788, on this 2d day of September, 1992.

Respectfully submitted,

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