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SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

HAMPTON ALONZO CORRY,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.
_____/

SUPREME COURT CASE NO: 80-173
5TH DCA CASE NO: 91-0086
L.T. CASE NO: 88-9227

APPEAL FROM THE FIFTH DISTRICT COURT OF APPEALS
IN AND FOR VOLUSIA COUNTY, FLORIDA

****

INITIAL BRIEF OF APPELLANT

****

HAMPTON ALONZO CORRY, PRO SE
SUMTER CORRECTIONAL INSTITUTION
POST OFFICE BOX 667
BUSHNELL, FLORIDA 33513-0667

TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER AUTHORITIES

PRELIMINARY STATEMENT

1. The Appellant, Hampton A. Corry, will be referred to as the Appellant or Defendant.

2. The State of Florida will be referred to as the Appellee.

3. The symbol "R" will refer to the record on appeal, following the page number.

STATEMENT OF THE CASE AND FACTS

1. On December 30, 1988, the Appellant: was charged by information with five counts of unlawful sale of a controlled substance and unlawful possession of a controlled substance.

2. On April 11, 1989, the Appellant entered a plea of nolo contendre *to* counts 1 and 3 of the information. (R. 23-24).

3. On April 11, 1989, the Court sentenced the Appellant to 5½ years on count 1 and 3 following with two years of probation.

4. On May 13, 1990, the Appellant completed the 5½ year term of that sentence and was released from the Department of Corrections , then started the probation portion of that sentence of two (2) years.

5. On September 6, 1990, the Appellant was violated for a violation of probation.

6. On December 12, 1991, Appellant's probation was revoked and Appellant was re-sentenced to (15) fifteen years in the Department of Corrections as a Habitual Felony Offender on Count I and (10) ten years as a Habitual Felony Offender on Count III to run consecutively. (R. 60, 61).

7. On January 9, 1992, the appellant: filed a timely notice of appeal.

8. On June 12, 1992, opinion filed by the 5th D.C.A., 1992, Case No. #92-86, per curiam.

9. The appellant filed a timely Notice of Appeal to the Florida Supreme Court for Jurisdiction Review. On November 19, 1992, this Court accepted Jurisdiction of the Appellant's case, case no. #80-173.

SUMMARY OF THE ARGUMENT

Whether the habitual offender statue can be applied to a defendant who was originally subjected to the statue but was instead placed on probation, whose probation was later revoked for a technical violation.

Lets keep in mind that the Appellant was sentenced to the Department of Corrections and completed the first part of his split sentence, which was 5½ years. The case that the Fifth District Court of Appeals cited that it affirmed the Appellant's case upon. **Snead** never was sentenced to D.O.C. Snead started his sentence on **probation.** Therefore, according to case and statutory law, the re-sentencing of the Appellant to (15) years is completely illegal and void where the Appellant had indeed completed that portion of his sentence.

One of the questions this Court must address, is whether it was permissible to utilize the habitual offender statute to enhance the Appellant's sentence for violating probation without a new committed charge.

ARGUMENT

THE TRIAL COURT ERRED BY SENTENCING THE APPELLANT AS A HABITUAL OFFENDER AFTER REVOKING THE APPELLANT'S PROBATION.

The Appellant entered a plea of nolo contendre on April 11, 1989, to the information of unlawful sale of a controlled substance and unlawful possession of a controlled substance - Counts I and 111. (R. 23 and *24).* On that same date of April 11, 1989, the Appellant was sentenced to five and one-half (5½) years imprisonment followed by a period of two (2) years probation on each count, to run concurrently. (R. *23-24).* The Appellant served the 5½ years portion of that sentence in the Florida Department of Corrections. However, afterward the Appellant: was released from prison and began to serve his two years of probation.

On the 6th day of September, 1990, Appellant's probation Officer filed a affidavit of violation of probation. (R. 31, 32, and 33).

On December 12th, 1991, the Circuit Court revoked the Appellant's probation on both Counts, and sentenced the Appellant *to* fifteen (15) years with the Department of Corrections as a habitual felony offender for Count I, and ten (10) years with the Department of Corrections as a habitual offender as to Count III, *to* run consecutively. (R. 51 - 59).

The questions here at bar are:

1. Whether or not the trial court could sentence the Appellant as a habitual offender without a newly committed offense.

2. Whether or not the trial court can re-sentence the Appellant on the portion of the sentence that he had served in the Department of Corrections.

3. Whether or not the trial court can re-sentence the Appellant to a consecutive sentence, when in fact, the first sentences pronounciation was to run concurrently.

4. Whether it was permissible to utilize the habitual offender statute to enhance the Appellant's sentence for violating probation with a technical violation.

According to West F.S.A. Const. Art. I, F.S. 9; U.S.C.A. Constitu Amend. 5, in every since the lower tribunal sentenced the Appellant in violations of all fourt above questions. See Macias vs. State, **572 So. 2d. 22, 23 (Fla. 4th DCA 1990).** Berry vs. State, *547* **So. 2d. 1273, 1274 (Fla. 1st DCA 1989).** Where these courts established that an increase of a lawful sentence is expressly prohibited by case law and constitutes double jeopardy. See Gonzalez vs. **State, 17 F.L.W. D575 (Fla. 3rd DCA) Feb. 21, 1992, Case No. #91-1861.** Madrigal vs. State, 547 **So. 2d. 392, 395 (Fla. 3rd DCA 1989).** Controlling these cases are **State vs. Wager, 495 So. 2d. 238 (Fla. 2nd DCA 1986); Hinton vs. State,** *446* **So. 2d. 712 (Fla. 2nd DCA 1984).** Once a Defendant commences service of his sentence he may not be re-sentenced to a greater term of imprisonment. Re-sentencing the Appellant to a greater term of imprisonment once he has commenced service of his sentence would constitute double jeopardy. Pursuant to **U.S.C.A. Const. Amend. *5*.**

The Fifth District Court of Appeals affirmed the Appellant upon **Snead** vs. **State**, **(5th D.C.A. 1992), opinion filed May 22, 1992, Case No. #91-2293.** The Appellant contends here that **Snead** never commenced his sentence in the Deparment of Corrections nor did Snead complete neither part of his sentence in the Department of Corrections. **Snead** was sentenced to probation and community control program and violated those terms. Thus, therefore **Snead** cannot hold against Appellant Corry's case here. The fruits from the **Snead** courts are totally contrary from the fruits of Appellant Corry's case.

Therefore, once Appellant Corry begins to serve his sentence, the court had no authority to re-sentence the Appellant to a longer tern, according to **Wager, Hinton,** Gonzalez, **Macias, and Madrigal**. **Also** according **to** West **F.S.A. Const. Art. I, F.S. 9, U.S.C.A. Const. Amend. 5,** which prohibit the lower tribunal by law, which constitutes double jeopardy in every since in Appellant **Corry's** case here.

Secondly, the trial court erred when using the violation of *a* technical violation for reasoning for departure. In **Lambert vs. State**, ***545*** **So. 2d. 838 (Fla. 1989); Davenport vs. State, 17 F.L.W. D595 Feb. 26, 1992, Case No. #92-01036,** where the Florida Supreme Court have found that "factors related to violation of probation or community control cannot be used as grounds for a departure". **Id at** 842. The Florida Supreme Court reversal in Davenport, where it has been recently established that a trial court may not impose a departure sentence for such reasons. Once again, the trial court produced fruits of a bad tree in ever sense of the authority of the law.

Therefore, the trial court erred by sentencing the Appellant as a habitual offender after revoking the Appellant's probation.

In **Franklin vs.** State, ***545*** **So. 2d. 851 (Fla. 1989);** **William vs. State, 581 So. 2d. 144 (Fla. 1991),** the Supreme Court found that "upon the violation of probation, however, the judge then may sentence the defendant *to* any period of incarceration permitted by the guidelines up to the maximum provided by the one cell upward increase, with credit for time served." **Id. at 853.** Actually, this reasoning concurs with the **Snead** court where once a defendant violates his or her terms of probation or community control, the trial court has the authority to start from "square one" and sentence the Defendant according to the original sentence as permitted.

Needless to say, **Gonzalez vs. State, 17 P.L.W. D575 (Feb. 21, 1992);** **Macias vs. State, 572 So. 2d. 22, 23 (Fla. *4th* DCA 1990);** **Berry vs. State, *547* So. 2d. 1273-1274 (Fla. 1st DCA 1989);** **Madrigal vs. State, *547 So.* 2d. 392, 395 (Fla. 3rd DCA 1989).** **Citing West's F.S.A. Const. Art. I, P.S. 9, U.S.C.A. Coast. Amend. 5 has** nullified the affirmation of the **Snead** court here. Holding to Florida Case and Constitutional law that has prohibited the trial court from re-sentencing a defendant "such as the Appellant", to a greater sentence once a defendant has commenced service of his sentence, he may not be re-sentenced to a greater term of imprisonment. Such a sentence of greater inheirant constitutes double jeopardy.

Therefore, this Florida Supreme Court must reverse Appellant Corry's case according *to* Florida case and Constitutional Law. This court must also find the fruits of **Snead**, case should not identify the Appellant

as an applicant concurrent with Snead. The Appellant can be identified by Wager, Hinton, Gonzalez, Macias, and Madrigal. Pursuant to West P.S.A. Const. Art. I, F.S. 9, U.S.C.A. Const. Amend. 5.

The Appellant rests upon Steiner vs. State, 591 So. 2d. 1070 (Fla. 2nd DCA 1991), where an increasement of the Appellant's sentence by any means has been prohibited by case law and constitutes double jeopardy, accordingly to U.S.C.A. Const. Amend. 5.

CONCLUSION

The trial court had no authority to re-sentence the **Appellant** to a longer term sentence – where Appellant had commenced service of his sentence and completed the portion of the sentence of Count I - five and one half years (5½) upon being released from prison started the probation portion of it on Count III. The Florida Case Law constitutes that the Appellant may not be re-sentenced to a greater term of imprisonment. Furthermore, the trial court is prohibited from starting from square one once the Appellant's sentence was commenced and Appellant: served his sentence in the Department of Corrections. The increase of a lawful sentence is expressly prohibited by case law which constitutes double jeopardy – once the Appellant commenced servicing his sentence in the department of correction The tral court was prohibited from increasing the Appellant's sentence in ever since of the law.

Furthermore, the Fifth District Court of Appeals erred when affirming the Appellant's judgement and sentence, citing Snead, where **Snead** never commenced his sentence in the Department of Corrections.

Chief Justice Thurman – "Many a winning touch down have been scored and called back, and nullified because *a* player on the team had violated an infraction of the rules in which the game must be played."

Therefore, in conclusion, the **Appellant** asks the Florida Supreme Court to nullify the decision of the Fifth District Court of Appeal and remand this case back to the trial court for re-sentencing the Appellant: to the original sentence without applying the habitual offender felony statutes.

RELIEF SOUGHT

The **Appellant** prays and **asks** this Florida Supreme Court to remand the lower tribunal trial court from increasing the **Appellant's** sentence and remand this sentence with the following instructions.

A. Exempt the Appellant from the habitual felony offender statute.

B. Exempt the Appellant: from the sentencing of a consecutive sentence.

C. Exempt the Appellant from any increasement on Count I, where the Appellant served 5½ years in the Department of Corrections in it's entirety. Therefoxe, the fifteen (15) years pronouncement of that: sentence constitutes double jeopardy.

Respectfully Submitted,

Hampton A. Corry

HAMPTON A. CORRY, PRO SE
D.O.C. #068209
SUMTER CORRECTIONAL INSTITUTION
POST OFFICE BOX 667
BUSHNELL, FLORIDA 33513-0667

NOTARY CERTIFICATE

STATE OF FLORIDA
COUNTY OF SUMTER

The foregoing instrument was acknowledged before me this 7 day of December, 1992, by Hampton A. Corry, who **has** produced Inmate identification and who did take an oath.

Cynthea D. Gibson

NOTARY PUBLIC

My Commission expires:

CYNTHEA D. GIBSON
MY COMMISSION # CC 173619
EXPIRES: February 23, 1996
Bonded Thru Notary Public Underwriters

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Appellant's Initial Brief has been forwarded by U.S. nail to the office of the Attorney General, Myra J. Fried, 210 N. Palmetto Avenue, Suite 447, Daytona Beach, Florida 32114, on this 7th day of December, 1992.

Hampton A. Corry

HAMPTON A. CORRY, PRO SE