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IN THE SUPREME COURT OF FLORIDA

THE STATE OF FLORIDA,

Petitioner,

v. CASE NO. 81,544

FELICE JOHN VEACH,

Respondent.

_____/

PETITIONER'S REPLY BRIEF

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

WENDY S. MORRIS
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0890537

JAMES W. ROGERS
BUREAU CHIEF
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0325791

OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(904) 488-0600

COUNSEL FOR PETITIONER

TABLE OF CONTENTS

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PRELIMINARY STATEMENT

Petitioner, the State of Florida, the prosecuting authority in the trial court and Appellee in the district court of appeal, shall be referred to herein as "the State." Respondent, FELICE JOHN VEACH, defendant in the trial court and Appellant in the district court of appeal, will be referred to herein as "Respondent." References to the record on appeal, including the transcripts of the proceedings below, will be by the use of the symbol "R" followed by the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

Petitioner relies upon the statement of the case and facts presented in its initial brief, which has been accepted by Respondent.

SUMMARY OF ARGUMENT

The First District Court of Appeal erred in reversing Respondent's sentences of incarceration imposed after revocation of community control.

ARGUMENT

ISSUE

THE FIRST DISTRICT COURT OF APPEAL ERRED IN REVERSING RESPONDENT'S SENTENCES OF INCARCERATION IMPOSED AFTER REVOCATION OF HIS ORIGINAL SENTENCES OF COMMUNITY CONTROL AND PROBATION ON THE GROUNDS THAT THE ORIGINAL SENTENCES WERE ERRONEOUS.

Appellant's reliance upon Sirmons v. State, 18 Fla. Law Weekly S356 (Fla. June 24, 1993), is misplaced. In that case, the juvenile did not enter a plea to a specific adult sentence; rather, he agreed to allow the court to consider the imposition of adult or juvenile sanctions. Id. at S356. Specifically, the juvenile pled nolo contendere in exchange for a maximum sentence of nine years' incarceration with a three-year minimum mandatory term, if he was sentenced as an adult. Id. The trial court imposed a nine-year period of incarceration as an adult without making any findings. Id. This Court held that under that plea agreement the trial court was required to state its findings and reasons for imposing an adult sentence on the record. Id. at S357. In contrast, the instant juvenile agreed to a specific adult sentence of five years' probation. If the trial court accepted the plea agreement, it was left with no discretion to impose juvenile sanctions. Clearly, Appellant waived juvenile sanctions in the instant plea agreement.

The instant case also differs from that presented in Sirmons because Respondent, unlike Sirmons, did not directly

appeal from his sentence. Instead, Respondent accepted the sentence and did not contest its validity until he violated community control. Respondent took the benefit of his sentence, therefore he waived the right to question its validity. See Preston v. State, 411 So. 2d 297 (Fla. 3d DCA 1982); Bashlor v. State, 586 So. 2d 488 (Fla. 1st DCA 1991), rev. denied, 598 So. 2d 75 (Fla. 1992). Respondent, therefore, is in a wholly different posture than was Sirmons, who directly appealed from his allegedly erroneous sentence and did not take the benefit of such sentence. Respondent's case differs from Sirmons' case for an additional reason. It appears from the Sirmons opinion that Sirmons fully contended his plea was unintelligent and involuntary. Respondent, however, did not contend in his initial brief in the district court that his plea was involuntary. Rather, he waited until his reply brief to hint that such was the case.

Appellant cannot overcome the waiver by claiming that his original sentence was an "illegal sentence," which may be corrected at any time under Florida Rule of Criminal Procedure 3.800(a). In Judge v. State, 596 So. 2d 73 (Fla. 2d DCA) (on rehearing en banc), rev. denied, 613 So. 2d 5 (Fla. 1992), the Second District observed:

> It would be difficult, if not impossible, to succinctly state the precise definition between: 1) a sentencing error that may be corrected on direct appeal, 2) a sentence imposed "in violation of" law that may be

> corrected under rule 3.850, and 3) an "illegal sentence" that must be corrected at any time under rule 3.800(a). Even though lawyers and judges sometimes loosely refer to all three categories as "illegal" sentences, it is clear that the three categories are not identical. Some errors that can be addressed on direct appeal cannot be raised in postconviction motions. Some errors that can be corrected under rule 3.850 cannot be corrected under rule 3.800(a). Rule 3.800(a) is reserved for the narrow category of cases in which the sentence can be described as truly "illegal" as a matter of law.

The Court further stated:

> Rule 3.800(a) is intended to provide relief for a narrow category of cases in which the sentence imposes a penalty that is simply not authorized by law. It is concerned primarily with whether the terms and conditions of the punishment for a particular offense are permissible as a matter of law. It is not a vehicle designed to re-examine whether the procedure employed to impose the punishment comported with statutory law and due process. Unlike a motion pursuant to rule 3.850, the motion can be filed without an oath because it is designed to test issues that should not involve significant questions of fact or require a lengthy evidentiary hearing.

Id. at 77. The Court held that Judge's contentions that his habitual felony offender sentence was illegal because he never received an habitual offender notice was not cognizable under rule 3.800(a). The Court concluded that an habitual offender sentence is "illegal" only if: 1) the terms or conditions of the sentence exceed those authorized

by the statute, or 2) a prior offense essential to categorize the defendant as an habitual felony offender does not actually exist. Id. at 78.

In so holding, the Judge Court noted that its analysis was consisted with its previous holding that an adult sentence imposed on a juvenile in the absence of specific findings of fact created an erroneous, not an illegal sentence. See Griffin v. State, 519 So. 2d 677 (Fla. 2d DCA 1988). Id at 77. Thus, even if the instant trial court should have made specific findings of fact on the record, the lack of these findings would not make the sentence illegal and therefore correctable at any time. At most, it would make the sentence erroneous and correctable only on direct appeal.

CONCLUSION

Based on the foregoing legal authorities and arguments, Respondent respectfully requests that this Honorable Court reverse the decision of the First District Court of Appeal and reinstate the sentences rendered by the trial court in this case.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

WENDY S. MORRIS
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0890537

JAMES W. ROGERS
BUREAU CHIEF
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0325791

OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(904) 488-0600

COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to P. Douglas Brinkmeyer, Assistant Public Defender, Second Judicial Circuit, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, Florida 32301, this 7th day of September, 1993.

Wendy S. Morris
Assistant Attorney General