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SID J. WHITE
SEP 16 1993
CLERK, SUPREME COURT
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IN THE SUPREME COURT OF FLORIDA

CASE NO. 81,896

DCA CASE NO. 92-2609

MICHAEL BEDFORD,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Respondent's Brief on Jurisdiction

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PRELIMINARY STATEMENT

Petitioner was the appellant in the Fourth District Court of Appeal and the defendant in the trial court. Respondent was the appellee and the prosecution, respectively, in those courts. In this brief, the parties will be referred to as they appear before this Honorable Court.

STATEMENT OF THE CASE AND FACTS

Petitioner is claiming conflict jurisdiction (see petitioner's amended brief pp. 1 ,2). Respondent does not agree with the statement of the case and facts in petitioner's brief. See Reaves v. State, 485 So.2d 829, 830 (Fla. 1986) ("Conflict between decisions must be express and direct, i.e., it must appear within the four corners of the majority's decision. Neither a dissenting opinion nor the record itself can be used to establish jurisdiction.").

Petitioner's death sentence for first degree murder was vacated. Upon remand he was resentenced on the murder count and separate kidnapping count. Petitioner filed a Rule 3.800 motion claiming the kidnapping sentence was illegal because it was without the possibility of parole for twenty-five years.

Petitioner was originally sentenced to life without the possibility of parole on the kidnapping conviction. This Court specifically affirmed that sentence. Bedford v. State, 589 So. 2d 245 (Fla. 1991), cert. denied, ___ U.S. ___, 112 S.Ct. 1773, 118 L.Ed.2d 432 (1992). The Fourth District Court of appeal affirmed the kidnapping sentence, noting that the provision "without possibility of parole for twenty-five years," (vs. without possibility of any parole) benefitted rather than harmed appellant.

SUMMARY OF THE ARGUMENT

The decision of the Fourth District Court of Appeal in this case does not directly and expressly conflict with a decision of this Court.

ARGUMENT

THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL DOES NOT DIRECTLY AND EXPRESSLY CONFLICT WITH ANY DECISIONS OF OTHER DISTRICT COURTS OR THIS COURT.

For two court decisions to be in express and direct conflict for the purpose of invoking this Court's discretionary jurisdiction under Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv), the decisions should speak to the same point of law, in factual contexts of sufficient similarity to permit the inference that the result in each case would have been different had the deciding court employed the reasoning of the other court. See generally Mancini v. State, 312 So.2d 732 (Fla. 1975).

In Jenkins v. State, 385 So.2d 1356, 1359 (Fla. 1980), this Court defined the limited parameters of its conflict review as follows:

> This Court may only review a decision of a district court of appeal that expressly and directly conflicts with a decision of another district court of appeal or the Supreme Court on the same question of law. The dictionary definition of the terms 'express' include: 'to represent in words'; to give expression to.' 'Expressly' is defined: 'in an express manner.' Webster's Third New International Dictionary (1961 ed. unabr.)

See generally Ansin v. Thurston, 101 So.2d 808 (Fla. 1958); Withlacoochee River Electric Co-op v. Tampa Electric Company, 158 So.2d 136 (Fla. 1963), cert. denied, 377 U.S. 952, 84 S.Ct. 1628, 12 L.Ed.2d 497 (1964); and England and Williams, Florida Appellate Reform One Year Later, 9 F.S.U. L. Rev. 221 (1981). See also Mystan Marine, Inc. v. Harrington, 339

So.2d 200, 210 (Fla. 1976) (This Court's discretionary jurisdiction is directed to a concern with decisions as precedents, not adjudications of the rights of particular litigants).

This Court has routinely affirmed life sentences in kidnapping cases. See, e.g., Bunney v. State, 603 So. 2d 1270 (Fla. 1992) and Maharaj v. State, 597 So. 2d 786 (Fla. 1992). In fact, as noted by the Fourth District, this Court has already affirmed petitioner's life sentence without parole.

The fact that the trial court changed the sentence, benefits, rather than harms petitioner. Petitioner has not shown that the decision conflicts without any ruling of this Court or any district court.

CONCLUSION

Based on the preceding argument and authorities, this Court should decline to accept jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true copy of this document has been furnished by courier to Michael Bedford, #028348, Florida State Prison, P.O. Box 747, Starke, FL 32091, this 14 day of September 1993.

Of Counsel

ized experience and training of the officers, the cigarette itself and the defendant's actions indicated that he was smoking crack cocaine. The trial court also recalled the testimony incorrectly, concluding that one of the officers walked up to the defendant and ripped the cigarette out of his mouth. In fact, the record shows that the defendant, upon seeing the officers approach, broke the cigarette in two pieces and separated his hands as if to throw the pieces away; and as Officer Uraro grabbed the front piece of the cigarette that was in the defendant's hand, the defendant shoved the officer away then knocked the front piece of the cigarette from the officer's hand.

This court, in discussing probable cause, has stated:

> Probable cause exists if a reasonable man, having the specialized training of a police officer, in reviewing the facts known to him, would consider that a felony is being or has been committed by the person under suspicion. In dealing with probable cause as the very name implies, *the process does not deal with certainties but with probabilities.* These are not technical niceties. They are factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians act.

Schmitt v. State, 563 So.2d 1095, 1098 (Fla. 4th DCA1990) (emphasis original) (citations omitted), *quashed in part on other grounds*, 590 So.2d 404 (Fla.1991), *cert. denied*, — U.S. —, 112 S.Ct. 1572, 118 L.Ed.2d 216 (1992). *See also State v. Flonory*, 566 So.2d 310 (Fla. 5th DCA1990), *rev. denied*, 576 So.2d 286 (Fla.1991); *State v. McCormack*, 517 So.2d 73 (Fla. 3d DCA1987); *Thornton v. State*, 559 So.2d 438 (Fla. 1st DCA1990). Additionally, in *P.L.R. v. State*, 455 So.2d 363 (Fla.1984), *cert. denied*, 469 U.S. 1220, 105 S.Ct. 1206, 84 L.Ed.2d 349 (1985), the Supreme Court held that an officer's observation, in a high narcotics trafficking area, of a manila envelope of a type often used to hold marijuana, in the shirt pocket of the defendant, provided probable cause to arrest the defendant and seize the envelope.

GLICKSTEIN, C.J., LETTS, J., and WALDEN, JAMES H., Senior Judge, concur.

Michael BEDFORD, Appellant,

v.

STATE of Florida, Appellee.

No. 92–2609.

District Court of Appeal of Florida, Fourth District.

May 12, 1993.

After defendant's death sentence for first-degree murder was vacated, 589 So.2d 245, he was resentenced on remand on murder count and separate kidnapping count. Defendant moved to correct illegal sentence. The Circuit Court, Broward County, Mel Grossman, J., denied motion, and defendant appealed. The District Court of Appeal, Owen, William C., Jr., Associate Judge, held that doctrine of law of the case precluded defendant from challenging sentence of life without possibility of parole for 25 years imposed on kidnapping count.

Affirmed.

Anstead, J., filed dissenting opinion.

Criminal Law ⇐1180

Doctrine of law of the case precluded review of sentence of life without possibility of parole for 25 years imposed on kidnapping count on appeal from denial of motion to correct illegal sentence brought by defendant convicted of murder and kidnapping; on direct appeal, Supreme Court had approved life sentence without possibility of parole on kidnapping count. West's F.S.A. RCrP Rule 3.800.

Michael Bedford, pro se.

Cit

Robert A. Butterworth, Att
hassee, and James J. Carney
Gen., West Palm Beach, for

OWEN, WILLIAM C., Jr., Judge.

Appellant's death sentence
gree murder was vacated,
State, 589 So.2d 245 (Fla.199
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as it did in resentencing on
conviction, imposed a senten
possibility of parole for twenty
We affirm under the doctrine
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Upon conviction appellant w
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kidnapping count approved by
court was for a consecutive l
without possibility of parole,
sentence ultimately imposed
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tive life sentence without poss
role *for twenty-five years*, the
is one which benefits rather
appellant.

Affirmed.

Robert A. Butterworth, Atty. Gen., Tallahassee, and James J. Carney, Asst. Atty. Gen., West Palm Beach, for appellee.

OWEN, WILLIAM C., Jr., Associate Judge.

Appellant's death sentence for first degree murder was vacated, *Bedford v. State*, 589 So.2d 245 (Fla.1991), *cert. denied*, — U.S. —, 112 S.Ct. 1773, 118 L.Ed.2d 432 (1992), and upon remand he was resentenced on the murder count and on the separate kidnapping count. He asserts here, on appeal from denial of a motion under 3.800, Rules of Criminal Procedure, that the consecutive life sentence which he received on the separate count of kidnapping was illegal because the court, as it did in resentencing on the murder conviction, imposed a sentence "without possibility of parole for twenty-five years". We affirm under the doctrine of law of the case.

Upon conviction appellant was sentenced to death on the murder count and sentenced to a consecutive life sentence "without possibility of parole" on the kidnapping count. The supreme court affirmed the convictions on both counts as well as the sentence for kidnapping. *Bedford v. State*, 589 So.2d 245 (Fla.1991), *cert. denied*. The court explicitly recognized that the sentence imposed upon appellant for the kidnapping count was a consecutive life sentence without possibility of parole. *Id.* 249. Because the validity of the sentence which appellant received on the kidnapping count has been approved by the supreme court we are not at liberty to disturb it.

While it is true that the sentence on the kidnapping count approved by the supreme court was for a consecutive life sentence without possibility of parole, whereas the sentence ultimately imposed by the trial court upon resentencing was for a consecutive life sentence without possibility of parole *for twenty-five years*, the modification is one which benefits rather than harms appellant.

Affirmed.

HERSEY, J., concurs.

ANSTEAD, J., dissents with opinion.

ANSTEAD, Judge, dissenting.

Because our criminal justice system does not permit a defendant to serve a sentence that exceeds the maximum penalty permissible under our laws, appellant's Rule 3.800 motion should have been granted and his sentence corrected. As Judge Cowart of the fifth district has recognized:

> All persons in prison under a sentence for the commission of a crime are there because the judicial system declared they did not follow and obey the law but, to the contrary, they did an illegal act. Certainly in imposing the sanctions of the law upon a defendant for illegal conduct the judicial system itself must follow and obey the law and not impose an illegal sentence, and, when one is discovered, the system should willingly remedy it. The purpose of all criminal justice rules, practices and procedures is to secure the just determination of every case in accordance with the substantive law. While imperfect, our criminal justice system must provide a remedy to one in confinement under an illegal sentence. There is no better objective than to seek to do justice to an imprisoned person.

Hayes v. State, 598 So.2d 135, 138 (Fla. 5th DCA1992).

In addition to the traditional remedy of habeas corpus, this state has provided a specific rule of criminal procedure, Rule 3.800, which permits a defendant to seek relief from an illegal sentence. This rule affords a defendant who receives a sentence that exceeds the maximum provided by law the fundamental right to request *at any time* a sentence that fits within the confines of the law. *See Judge v. State*, 596 So.2d 73, 77 (Fla. 2d DCA1991) (en banc) (discussing purpose of rule), *rev. denied*, 613 So.2d 5 (Fla.1992). Thus, an attack on an illegal sentence can be raised for the first time in a Rule 3.800 motion, even after an affirmance of the judgment and sentence on direct appeal. *See id.; Anderson v. State*, 584 So.2d 1127 (Fla. 4th

DCA1991); *Pinellas v. State*, 599 So.2d 272 (Fla. 5th DCA1992).

Here, appellant did not challenge any of the mandatory provisions of his kidnapping sentence in the supreme court. Moreover, and perhaps more importantly, there is simply no legal basis for the provision of appellant's kidnapping sentence that it be served "without possibility of parole for twenty-five years." Hence, the supreme court's affirmance of appellant's life sentence could not have rested on this ground, nor can it be viewed as an approval of that aspect of the sentence. Since illegal sentences can be corrected at any time, even after an affirmance of the judgment and sentence on direct appeal, the doctrine of law of the case is inapplicable. Yet, the effect of our holding here is that no relief is available under Rule 3.800 where there has been a prior appeal resulting in an affirmance of a sentence, even though the sentence, or the alleged illegal aspect thereof, was not challenged on appeal. This holding emasculates the purpose and usefulness of Rule 3.800.

Dennis KNOWLES, Appellant,

v.

STATE of Florida, Appellee.

No. 92–1693.

District Court of Appeal of Florida, Fourth District.

May 12, 1993.

Defendant was convicted of three counts of sale of cocaine within 1,000 feet of school, in the Circuit Court, Martin County, Robert Makemson, J., and defendant appealed. The District Court of Appeal held that denial of due process did not occur when defendant received greater sentence after conviction than sentence imposed following earlier plea of no contest, which was vacated upon defendant's allegation that plea was not voluntary.

Affirmed.

Criminal Law ⇐986.2(6)

Presumption of vindictiveness was inapplicable, and, thus, due process violation did not occur when defendant received greater sentence after conviction than sentence received under earlier plea of no contest, which was vacated upon defendant's allegation that plea was not voluntary; judge who imposed first sentence was not the judge who tried case and imposed second sentence, and presentence investigation after trial revealed unfavorable information defendant which was unknown to judge imposing first sentence. U.S.C.A. Const.Amends. 5, 14.

Richard L. Jorandby, Public Defender, and Cherry Grant, Asst. Public Defender, West Palm Beach, for appellant.

Robert A. Butterworth, Atty. Gen., Tallahassee, and Melynda L. Melear, Asst. Atty. Gen., West Palm Beach, for appellee.

PER CURIAM.

Defendant was convicted of three counts of sale of cocaine within 1,000 feet of a school and received a greater sentence than he had received under an earlier plea of no contest, which was vacated when he alleged it was not voluntary. Defendant argues that under *North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), it was a denial of due process for him to have been given a greater sentence after being convicted, than the earlier sentence which was vacated. We affirm.

In *Pearce* the United States Supreme Court held that where a defendant obtained an appellate reversal of his first conviction, and was retried and convicted again, a harsher sentence than the one the same judge had imposed for the first conviction created a "presumption of vindictiveness" which could be overcome by information in the record which would warrant a higher

Cite

sentence. After *Pearce*, h
Court whittled down the circ
which the presumption of v
would exist, which have bee
summarized by the Florida Su
in *Wemett v. State*, 567 So.
1990).

There are several reasons w
sumption of vindictiveness do
in the present case. First, th
imposed the first sentence b
plea was not the judge who tr
and imposed the sentence whic
ject of this appeal. Second, th
did not obtain a reversal by a
court of the earlier conviction
got a plea vacated by motion
court. Third, a presentence i
after the trial revealed unfav
mation about the defendant, w
known to the judge imposing t
tence. *Wemett*, 567 So.2d at

Affirmed.

GLICKSTEIN, C.J., KLEIN,
WALDEN, JAMES H., Senior
concur.

In the Interest of A.J
a child, Appellant,

v.

STATE of Florida, App

No. 92–3932.

District Court of Appeal of
First District.

May 13, 1993.

Juvenile appealed from o
Circuit Court, Jefferson Cou
Johnston, Jr., J., which denie
suppress cocaine. The Distri
Appeal, Wolf, J., held that:
officer did not have reasonabl