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IN THE SUPREME COURT OF FLORIDA

DARIN S. HOPPING,
Petitioner,
v.
STATE OF FLORIDA,
Respondent.

CASE NO. 89,515

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent, the State of Florida, the Appellee in the District Court of Appeal (DCA) and the prosecuting authority in the trial court, will be referenced in this brief as Respondent, the prosecution, or the State. Petitioner, DARIN S. HOPPING, the Appellant in the DCA and the defendant in the trial court, will be referenced in this brief as Petitioner or by proper name.

The record on appeal consists of one volume and will be referred to herein by the symbol "R" followed by any appropriate page number. References to the opinion of the First District Court of Appeal, found in the appendix of this brief, will be noted by its Southern 2d citation.

STATEMENT OF THE CASE AND FACTS

The state rejects petitioner's statement of the case and facts and submits the following.

On November 7, 1994, petitioner filed a Florida Rule of Criminal Procedure 3.800(a) motion challenging his sentence as illegal. (R 1-5). Petitioner alleged that on June 20, 1989, the trial court sentenced him to 30 months incarceration followed by 18 months of probation for a third-degree felony. Petitioner asserted this sentence was illegal because the eighteen months probation exceeded the sentencing guidelines term of thirty months imprisonment. (R 1). Petitioner further alleged that on November 21, 1991, after he

violated his probation, the trial court revoked his probation and sentenced him to 36 months imprisonment with credit for 30 months time served. (R 2). According to petitioner, this constituted a sentence of sixty-six months imprisonment and he filed a rule 3.800 motion on January 28, 1992 which challenged his sentence following the revocation of his probation. (R 2). On March 11, 1992, apparently accepting petitioner's allegations of sixty-six months imprisonment at face value, the circuit court granted petitioner's rule 3.800 motion, and imposed a sentence of 60 months incarceration with credit for time served which addressed and remedied his concerns. (R 2).

In his rule 3.800 motion filed on November 7, 1994, petitioner alleged that his sentence was illegal because it was a departure sentence unsupported by written reasons. (R 1-5).

On March 27, 1995, the circuit court entered an order denying petitioner's motion. (R 12).

Petitioner appealed to the First District Court of Appeal. Although petitioner had not submitted an initial brief and had not raised any question of double jeopardy in either the trial or district court, the district court sua sponte ordered the state to file a response to the non-existent pleading of petitioner addressing the effect of Troupe v. Rowe, 283 So. 2d 857 (Fla. 1973), which held that double jeopardy principles prohibited increasing a legal sentence once it had commenced. See, Hopping v. State, 674 So. 2d 905 (Fla. 1st DCA 1996).

Relying on Davis v. State, 661 So. 2d 1193 (Fla. 1995), the State responded that appellant's sentence of sixty months incarceration was not illegal for purposes of rule 3.800(a) because it did not exceed the statutory maximum for a third-degree felony.

On June 4, 1996, the First District affirmed the circuit court's order denying petitioner's motion but certified the following question to this Court:

WHETHER A SENTENCE WHICH VIOLATES DOUBLE JEOPARDY PRINCIPLES ACCORDING TO TROUPE v. ROWE, 283 So. 2d 857 (Fla. 1973), IS AN ILLEGAL SENTENCE COGNIZABLE UNDER RULE 3.800 (a) FLORIDA RULES OF CRIMINAL PROCEDURE?

Hossina v. State, 674 So. 2d 905, 906 (Fla. 1st DCA 1996).

SUMMARY OF ARGUMENT

The certified question must be answered in the negative. This Court and the Florida Legislature have both defined "illegal sentence" as one which exceeds the statutory maximum. The initial sentence of thirty months imprisonment, the violation of probation sentence of thirty-six months imprisonment with credit for thirty months service, and the final sentence of sixty months with credit for thirty months imprisonment, which was imposed upon motion of petitioner, are all within the statutory maximum of sixty months imprisonment for a third degree felony. None of these sentences are illegal.

Assuming, arguendo, that there was a double jeopardy issue in the second resentencing of sixty months imprisonment with credit

for thirty months, as the district court hypothetically postulated in its question to the state, petitioner's proper remedy was to raise the double jeopardy issue on direct appeal or, perhaps, in a motion pursuant to Florida Rule of Criminal Procedure 3.850. It is not an issue which is cognizable under rule 3.800. The answer to the certified question should be no.

ARGUMENT

CERTIFIED QUESTION PRESENTED

WHETHER A SENTENCE WHICH VIOLATES DOUBLE JEOPARDY PRINCIPLES ACCORDING TO TROUPE v. ROME, **283** So. 2d **857** (Fla. 1973), IS AN ILLEGAL SENTENCE COGNIZABLE UNDER RULE 3.800(a) FLORIDA RULES OF CRIMINAL PROCEDURE?

The certified question must be answered in the negative. For purposes of rule 3.800(a), an illegal sentence is one which "exceeds the statutory maximum for the particular offense at issue." King v. State, 681 So. 2d 1136, 1140 (Fla. 1996). See also, Davis v. State, 661 So. 2d 1193, 1196 (Fla. 1995) ("an illegal sentence is one that exceeds the maximum period set forth by law for a particular offense without regard to the guidelines."); Lee v. State, 679 So. 2d 1158 (Fla. 1996) (sentence which did not exceed statutory maximum not illegal merely because trial court refused to consider defendant for youthful offender sentencing). Furthermore, the legislature subsequently codified the definition of an illegal sentence in section 924.06(6)(c), Florida Statute (Supp. 1996), which defines an illegal sentence as one which "exceed[s] the maximum or [falls] below the minimum authorized by statute for the criminal offense at issue." This legislative codification of the definition of an illegal sentence does not include sentences which are constitutionally infirm as long as they are within statutory limits. Accordingly, although the legislation was not in place at the time the issue first arose here, the issue is no longer a question to be judicially resolved. Rule 3.800 cannot be used to challenge a sentence on the basis that it violates double jeopardy

principles. There is a ready remedy for such challenges, however. They must be raised either on direct appeal or in a timely motion for postconviction relief filed pursuant to Florida Rule of Criminal Procedure 3.850.

Applying the definition of an illegal sentence as set forth in section 924.06(6)(c) and in Davis, King, and Lee, to petitioner's sentence, it is clear that none of petitioner's sentences exceeded the statutory maximum and thus none were illegal. The statutory maximum penalty for a third-degree felony is 5 years. Section 775.082(3)(d), Fla. Stat. (1989). Thus, the sentence of sixty months incarceration with credit for time served does not exceed the statutory maximum and is not an illegal sentence for purposes of rule 3.800(a) regardless of whether it violates double jeopardy principles.

For purposes of attempting to answer the district court's *sua sponte*, hypothetical question, the state did not challenge the district court's assumption that there was a double jeopardy question. It is by no means clear that this is the *case* and, given the inapplicability of rule 3.800 to develop the necessary facts, it is not possible to say for certain whether petitioner's resentence to sixty months imprisonment was an increase to the original resentence. There is an obvious distinction between the resentencing in the trial court here and that in Trouse v. Rowe. Troupe holds that it violates double jeopardy principles for a trial court to increase a legal sentence which has commenced. However, in Trouse and other cases finding a violation of double

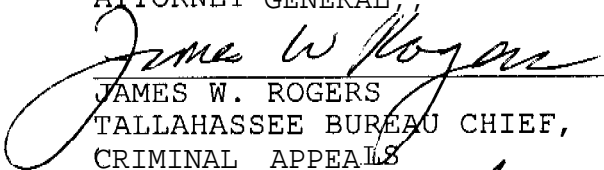
jeopardy, the defendant's sentence was modified either upon the court's own motion or the State's motion. In the instant **case**, petitioner requested that his sentence be corrected because he believed that his sentence of thirty-six months with credit for time served resulted in a total sentence of sixty-six months when added to the original sentence of thirty months incarceration followed by 18 months probation. (R 2) This was obviously an incorrect factual and legal assumption by petitioner. The trial court granted his rule 3.800 motion and resentenced him in a manner which it felt would eliminate his confused claim that he had been sentenced to a total of sixty-six months imprisonment. That sentence, which was never imposed, would have exceeded the statutory maximum for a third degree felony. Assuming that petitioner found the resentencing to sixty months under rule 3.850 objectionable, his remedy was to raise the issue on direct appeal or, perhaps, under rule 3.850 where fact finding may be done and the confused status of the sentencing and resentencings cleared up. He did not timely do so and it was error for the district court to raise on his behalf a double jeopardy issue in a rule 3.800 proceeding where the sentence was within the statutory maximum.

CONCLUSION

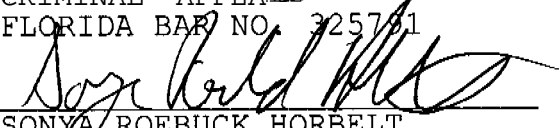
Based on the foregoing, the State respectfully submits the certified question should be answered in the negative, the decision of the District Court of Appeal reported at 674 So. 2d 905 should be approved, and the order entered in the trial court should be affirmed.

Respectfully submitted,

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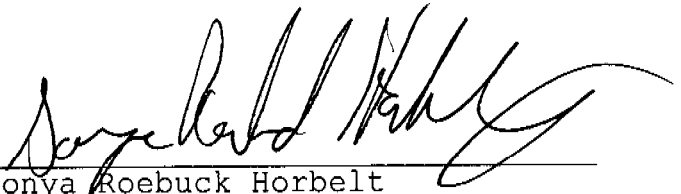
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONDENT'S BRIEF ON THE MERITS has been furnished by U.S. Mail to Darin S. Hopping, DOC# 1116666, Holmes Correctional Institution, Post Office Box 190, Bonifay, Florida 32425, this 7th day of July, 1997.



Sonya Roebuck Hörbelt
Attorney for the State of Florida

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