ORIGINAL

IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
MAY 30 1997
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

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

CASE NO. 89,515
1st DCA - No. 95-1344

PETITIONER'S INITIAL BRIEF ON THE MERITS

TO INVOKE JURISDICTION AND REQUEST FOR DISCRETIONARY REVIEW OF CERTIFIED QUESTION OF GREAT PUBLIC IMPORTANCE

(Pursuant to Fla. R. App. P. 9.120)

MR. DARIN S. HOPPING
D.O.C. # 116666
Holmes Cor. Inst.
Post Office Box 190
Bonifay, Florida 32425

IN PROPER PERSON

CERTIFICATE OF INTERESTED PERSONS

1. Honorable Jon S. Wheeler - Clerk
   First District Court Of Appeal

2. Honorable W. Randy Henderson - Clerk
   3rd Judicial Circuit Court

3. Honorable James Roy Bean - Judge
   3rd Judicial Circuit Court

4. Honorable Robert A. Butterworth - Attorney General

5. Darin S. Hopping - Petitioner

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OTHER AUTHORITIES

IN THE SUPREME COURT OF FLORIDA

DARIN S. HOPPING)
Petitioner,)
V.)
STATE OF FLORIDA,)
Respondent.)

CASE NO. 89,515
1st DCA-NO. 95-1344

I PRELIMINARY STATEMENT

Petitioner, Darin S. Hopping, movant below, will be referred to herein as "Petitioner" or by Surname. Respondent, the State of Florida, will be referred to herein as "the State", Symbolic reference to appendix will be "APP." with proper page number Sub-joined, and Petitioner with very limited access to the law library and materials asks this Honorable Court to Consider the liberal Construction of this brief pursuant to; Hines V. Kerner, 404 U.S. 519, 92 S. Ct. 594 (1972).

II STATEMENT OF THE CASE

On the 20th day of June, 1989, in the 3rd Judicial circuit Court, Petitioner pled guilty to the offense of burglary of a structure, a 3rd degree felony (case-88-324 CF) and was Sentenced to a term of 30 months incarceration followed by 18 months probation. (APP.-1,2)

Petitioner fulfilled the incarcerative portion of Sentence and released on probation.

On or about the 28th day of March, 1990, Petitioner was Charged with probation violation, and on the 21st day of November, 1991, in the 3rd Judicial Circuit Court, Petitioner's probation was revoked and Petitioner was sentenced to a term of 36 months incarceration with credit for 30 months and 2 days. (APP.-3,4)

On the 28th day of January, 1992, in the 3rd Judicial Circuit Court, Petitioner filed a motion for Correction of Sentence pursuant to Fla. R. Crim. P. 3.800(a).

On the 11th day of March, 1992, an order was issued from the 3rd Judicial Circuit Court, increasing Petitioner's Sentence to 60 months incarceration with 30 months and 2 days Credit. (APP. 5,6)

On the 7th day of November, 1994, in the 3rd Judicial Circuit Court, Petitioner filed a motion to Correct illegal Sentence pursuant to Fla. R. Crim. P. 3.800 (a), and on the 24th day of March, 1995, Petitioner's motion was denied.

On the 6th day of April, 1995, Petitioner appealed to the 1st DCA, and on the 23rd day of January, 1996, the 1st DCA ordered the State to respond. On the 12th day of February, 1996, the State responded, and on the 1st day of May, 1996, Petitioner filed a reply. On the 4th day of June, 1996, the 1st DCA issued an opinion Certifying a question of great public importance, and on the 20th day of June, 1996, issued a Mandate to the 3rd Judicial Circuit Court. (APP. - 7,8)

On the 2nd day of July, 1996, Petitioner filed a notice to invoke discretionary jurisdiction Pursuant to Fla. R. App. P. 9.120.

On the 9th day of July, 1996, the State filed a petition for rehearing, and on the 7th day of August, 1996, the State's petition was denied.

On the 18th day of November, 1996, Petitioner forwarded an inquiry to this Honorable Court's clerk, Concerning proceedings, and on the 21st day of November, 1996, this Court's clerk notified Petitioner that proceedings had not been invoked.

On the 9th day of December, 1996, Petitioner re-filed a Subsequent petition to seek review of Certified question in this Honorable Court, and on the 16th day of December, 1996, Petition was dismissed.

On the 22nd day of December, 1996, Petitioner filed a motion for reinstatement of certified question, and on the 27th day of January, 1997, this Honorable Court ordered the State to respond. On the 5th day of February, 1997, the State responded.

On the 20th day of February, 1997, this Honorable Court gave Petitioner until March 12th, 1997, to establish that Petitioner filed a timely notice, and offered the State a chance to respond. On the 8th day of March, 1997, Petitioner filed a Sworn affidavit, and on the 27th day of March, 1997, the State filed it's response.

On the 25th day of April, 1997, this Honorable Court granted Petitioner's motion for reinstatement and ordered this Case as reinstated.

III STATEMENT OF THE FACTS

On the 20th day of June, 1989, in the 3rd Judicial Circuit Court, Petitioner pled guilty to a third degree felony and was sentenced to a legal term of 30 months incarceration to be followed by 18 months probation. Petitioner fulfilled the 30 month incarcerative portion of the sentence and was released on probation. Thereafter, on or about the 28th day of March, 1990, Petitioner was charged with probation violation, and on the 21st day of November, 1991, in the 3rd Judicial Circuit Court, Petitioners probation was revoked and Petitioner was sentenced to a legal term of 36 months incarceration with 30 months credit from initial sentence and 2 days jail credit, which commenced Petitioner's sentence. (APP. - 1, 2, 3, 4)

On the 28th day of January, 1992, in the 3rd Judicial Circuit Court, Petitioner filed a motion for Correction of Sentence pursuant to Fla. R. Crim. P. 3.800(a). Petitioner at the direction of a state law clerk, was led to believe that the addition of the initial sentence of 30 months and the subsequent sentence of 36 months, added up to a total of 66 months (30+36=66), and therefore was an illegal sentence. Based on this assumption, Petitioner moved to have the sentence reduced.

On the 11th day of March, 1992, an order was issued from the 3rd Judicial Circuit Court, modifying Petitioner's Sentence and illegally increasing Petitioners Sentence to 60 months incarceration, but also granted the Same 30 months and 2 days Credit. Petitioner was not present at this hearing and was not advised of right to appeal. (APP.-5,6)

On the 7th day of November, 1994, in the 3rd Judicial Circuit Court, Petitioner filed a Subsequent motion to correct illegal Sentence pursuant to Fla. R. Crim. P. 3.800 (a), attacking the March 11th, 1992, resentencing as illegal because of the increase in Petitioners Sentence after the Sentence had Commenced. Furthermore, due to the increase in Petitioners sentence, Petitioner believed the resentencing violated the precepts of Fla. R. Crim. P. 3.701 because, the reasons for the increased Sentence and departure from the November 21st, 1991, guideline Scoresheet was not articulated in writing prior to the imposing of the Sentence, dilineating the reasons for departure and was not recorded on the original Scoresheet. Petitioner also argued that the increase in the November, 21st, 1991, Sentence, doubled Petitioners Sentence instead of reducing it, as the Petitioner moved the Court to do. On the 24th day of March, 1995, Petitioners motion was denied pursuant to Sentencing guidelines Commission notes, 1988 amendments (d)(12) Fla. R. Crim. P. 3.701.

On the 6th day of April, 1995, Petitioner appealed to the 1st DCA on grounds that Petitioner's offense date was prior to the date that the 1988 Sentencing guidelines Commission notes took effect, and on the 23rd day of January, 1996, the 1st DCA ordered the State to respond and to specifically address whether the 1992 resentencing resulted in an illegal sentence, and what, if any, effect the ruling in Troupe v. Rowe, 283 So. 2d 857 (Fla. 1973), has on that resentencing. On the 12th day of February, 1996, the State responded, stating; "Turning to the 1992 resentencing, the record indicates that the appellant's Sentence violates double jeopardy."... "but at the same time not be an illegal Sentence as narrowly defined by rule 3.800," that provides: "A Court may at any time correct an illegal Sentence imposed by it..." Fla. R. Crim. P. 3.800(a). because, "the Supreme Court's definition of an "illegal Sentence" does not include Sentences which are Constitutionally infirm." On the 1st day of May, 1996, Petitioner filed a Reply and expanded upon the definitions of "Sentence" and "illegal Sentence," and argued that trial Court lacked jurisdiction to increase a legal Sentence once it had Commenced, it is the duty of Sentencing Court to Correct illegal Sentence not authorized by law, Petitioner may not be resentenced subsequently to an increased term of incarceration once Sentence has been imposed, that double jeopardy prohibits trial Court from increasing legal Sentence once sentence has Commenced, that only the Sentence not the Conviction violated double jeopardy, which is a fundemental

issue which can be heard in any and every manner possible, and Petitioner's 3.800 was filed within the Fla. R. Crim. P. 3.850 time frame.

On the 4th day of June, 1996, the 1st DCA issued an opinion affirming the trial Court's decision based on Davis v. State, 661 So. 2d 1193 (Fla. 1995), "but because of the nature of the issue" Certified "a question of great public importance." The 1st DCA further explained that: "The prohibition against double jeopardy is 'fundemental'." Lippman v. State, 633 So. 2d 1061, 1064 (Fla. 1994), Citing Benton v. Maryland, 395 U.S. 784, 795-96, 89 S. Ct. 2056, 2063, 23 L. Ed. 2d 707 (1969). "'[T]he failure to timely raise a double jeopardy claim does not, in and of itself, serve as a waiver of the Claim.'" Id. Citing State v. Johnson, 483 So. 2d 420, 423 (Fla. 1986). In addition, this appears to be a Situation in which the issue Can be resolved as a matter of law without an evidentiary hearing. See State v. Callaway, 658 So. 2d 983 (Fla. 1995). Prior to Davis, this Court determined that when only the sentence, not the Conviction, is attacked as Violating double jeopardy, the Claim was Cognizable as an illegal Sentence under rule 3.800. See Jackson v. State, 650 So. 2d 1026 (Fla. 1st DCA 1995),

In Lee v. State, 667 So. 2d 253 (Fla. 1st DCA 1995), We recognized a possible distinction between the issue addressed in Davis, which involved the filing of Contemporaneous written reasons for a guidelines departure Sentence, and the particular

Sentencing Situation involved in Lee. As in Lee, we certify a question of great public importance regarding the availability of a rule 3.800 motion in the present context:

> 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?"
>
> (APP.- 7,8)

On the 20th day of June, 1996, the 1st DCA issued a Mandate to the 3rd Judicial Circuit Court, Commanding that further proceedings be had in accordance with the June 4th, 1996, opinion, the rules of the Court and the laws of the State of Florida.

On the 2nd day of July, 1996, Petitioner placed a notice pursuant to Fla. R. App. P. 9.120, in the institutional mail in order to invoke this Court's Jurisdiction on the Certified question.

On or about the 9th day of July, 1996, the State filed a petition for rehearing of the 1st DCA's opinion issued on the 4th day of June, 1996, and on the 7th day of August, 1996, the First DCA denied the State's petition.

On the 18th day of November, 1996, Petitioner made inquiries to determine the status of the proceedings and thereafter, was notified by this Honorable Court's Clerk that the July 2nd, 1996, notice was not filed in the Court, although it was placed in the law library mail box on July 2nd, 1996. On the 9th day of December, 1996, Petitioner re-filed a subsequent petition to seek review of certified question in this Honorable Court, and on the 16th day of December, 1996, Petitioner's notice was dismissed on grounds that notice was not timely filed, but was "Subject to reinstatement if timeliness is established on proper motion filed within fifteen days from the date of this order. See Fla. R. App. P. 9.120." On the 22nd day of December, 1996, Petitioner filed a motion for reinstatement of certified question in order to establish that Petitioner's rule 9.120 notice was timely filed, and on the 27th day of January, 1997, this Honorable Court ordered the state to respond. On the 5th day of February, 1997, the State responded, but stated; "The State is not in a position to deny or support the truth of Appellant's allegations."

On the 20th day of February, 1997, this Honorable Court gave Petitioner until the 12th day of March, 1997, to establish that Petitioner had filed a timely notice, and offered the State a chance to respond. On the 8th day of March, 1997, Petitioner filed a sworn affidavit to establish

the fact, that Petitioner had placed a timely notice in the institutional mail on July 2nd, 1996, and on the 27th day of March, 1997, the State filed a response, Stating; "The State is not in a position to deny or support the Truth of appellant's allegations.

On the 25th day of April, 1997 this Honorable Court granted Petitioner's motion for reinstatement and ordered this case as reinstated. (Petitioner brings to the Court's attention that Petitioner does not have a copy of the record and has filed this brief from a Confinement Cell, and therefore Seeks instruction from the this Honorable Court to help Cure the manifest injustice of this issue.)

IV SUMMARY OF ARGUMENTS

Petitioner will argue that the June 20th, 1989, and November 21st, 1991, Sentences were legal and the Trial Court Judge lacked jurisdiction to increase Petitioner's Sentence once it had been imposed and Commenced; by modifying Petitioner's Sentence a fundemental Violation of Petitioner's Constitutional Rights, prohibiting double jeopardy occurred, which Can be heard in any and every legal manner possible, therefore, it is the duty of the Sentencing Court to Correct the illegal Sentence imposed on the 11th day of March, 1992, and the trial Court Should not be prohibited by the narrow definition of an "illegal sentence" within the Davis v. State, opinion.

V ARGUMENT

ISSUE ONE

THE TRIAL COURT ERRORED BY INCREASING PETITIONER'S LEGAL SENTENCE WITHOUT JURISDICTION CAUSING A FUNDE - MENTAL VIOLATION OF PETITIONER'S UNITED STATES CONSTITUTIONAL RIGHTS WHICH SHOULD BE COGNIZABLE UNDER FLA. R. CRIM. P. 3.800 (a)

Petitioner was legally sentenced on the 20th day of June, 1989, to a term of incarceration of 30 months and 18 months probation, Completed the incarceration and released on probation. Petitioner violated probation and on the 21st day of November, 1991, was sentenced to a term of 36 months incarceration with credit for the 30 months initial incarceration and 2 days jail credit which Commenced Petitioner's sentence; a legal Sentence. (The resulting Sentence was only an additional 6 months incarceration, but due to the erroneous Counsel of the State's law Clerk, this fact was unknown to Petitioner). Therefore, the Trial Court lacked jurisdiction on March 11, 1992, to increase and modify Petitioner's legal sentence; Chaney v. State, 452 SO. 2d 1148 (Fla. 5th DCA 1984). Once Petitioner began Serving the lawful Sentence which was legally

imposed on the 21st day of November, 1991, Petitioner Could not be resentenced Subsequently to an increased term of incarceration, Armstead v. State, 612 So. 2d 623 (Fla. 1st DCA 1993); Causey v. State, 623 So. 2d 617 (Fla. 4th DCA 1993) and increasing Petitioners Sentence once it had Commenced is prohibited on double jeopardy grounds, Troupe v. Rowe, 283 So. 2d 857 (Fla. 1973); Coll v. State, 629 So. 2d 1056 (Fla. 2d DCA 1993) because, the resentencing error Caused Petitioner to be restrained for time longer than allowed by law and is fundemental. "The prohibition against double jeopardy is 'fundemental.'" Lippman v. State, 633 So. 2d 1061, 1064 (Fla. 1994), Citing Benton v. Maryland, 395 U.S. 784, 795-96, 89 S. Ct. 2056, 2063, 23 L. Ed. 2d 707 (1969) Therefore, Petitioners unConstitutionally enhanced Sentence Can be heard in any and every legal manner possible, Jones v. State, 599 So. 2d 769 (Fla. 1st DCA 1992) including the adoption of a Fla. R. Crim. P. 3.800 motion as a Fla. R. Crim. P. 3.850 motion, McGowan v. State, 586 So. 2d 1311 (Fla. 5th DCA 1991) although, for narrow category of Cases in which only the Sentence is not authorized by law, a Fla. R. Crim. P. 3.800 (a) motion to Correct illegal Sentence is reserved, Wyche v. State, 624 So. 2d 830 (Fla. 1st DCA 1993) and since the Court lacked jurisdiction to modify Petitioner's Sentence on the 11th day of March, 1992, modified Sentence is illegal and

Subject to correction at any time State v. Martin, 577 So. 2d 689 (Fla. 1st DCA 1991) and it is the duty of Sentencing Court to correct the illegal Sentence. U.S. v. Mesa, 641 F. Supp. 796 (S.D. Fla. 1986)

Petitioner further argues that the modification and Subsequent increase of Petitioners November 21st, 1991, legal sentence is illegal, not authorized by law, un-Constitutionally enhanced once Petitioner began serving it, and since only the sentence violated double jeopardy, Petitioner is entitled to relief under Fla. R. Crim. P. 3.800(a) that provides: "A Court may at any time Correct an illegal Sentence imposed by it...." and the opinion in Davis v. State, 661 So. 2d 1193 (Fla. 1995) should not, in Petitioner's opinion also, be read so narrowly. If a Sentence "has been unconstitutionally enhanced, See Justice v. State, 21 Fla. L. Weekly S219 (Fla. May 23, 1996); Lippman v. State, 633 So. 2d 1061 (Fla. 1994); Troupe v. Rowe, 283 So. 2d 857 (Fla. 1973); Merriman v. State, 671 So. 2d 879 (Fla. 3d DCA 1996); Hinton v. State, 446 So. 2d 712, 713 (Fla. 2d DCA 1984); Royal v. State, 389 So. 2d 696 (Fla. 2d DCA 1980); Reckom v. State, 227 So. 2d 232, 233 (Fla. 2d DCA 1969) (citing Smith v. Brown, 135 Fla. 830, 832, 185 So. 732, 733 (Fla. 1938), [it] is "an illegal Sentence... [in] that [it]

exceeds the maximum period set forth by law for a particular offense without regard to the guidelines." Davis, 661 So. 2d at 1196." (quoting Benton, J. dissenting on 1st DCA opinion, June 4th, 1996) (APP.- 7,8) and therefore, Davis, should not be read so narrowly that it excludes unconstitutionally enhanced sentences as illegal, when "all laws which are repugnant to the Constitution are null and void." Marberry v. Madison, 5 U.S. (1cranch) 137, 174, 176 (1803) and, "Where rights secured by the Constitution are involved, there can be no rule making or legislation which would abrogate them". Miranda v. Arizona, 384 U.S. 436 at 491.

VI CONCLUSION

Wherefore, Petitioner prays, based on the foregoing facts, arguments, authorities, principles of law, and in view of the fact that the original November 21st, 1991, 36 month Sentence was a legal Sentence, this most Honorable Court being humbly urged Should:

1) Set aside the narrow definition of Davis, and expand the definition of an "illegal Sentence" to include Sentences which have been unconstitutionally enhanced as being Cognizable under Fla. R. Crim. P. 3.800 (a),

2) With proper instructions to set aside the March 11th, 1992, 60 month illegal Sentence and to reinstate the original November 21st, 1991, 36 month Sentence with proper and total Credit for time served,

3) and any other relief this Honorable Court deems just and proper.

Most Respectfully Submitted,

Darin S. Hopping

PETITIONER IN PROPER PERSON

MR. Darin S. Hopping #116666
Holmes C.I. P.O. Box 190
Bonifay, Fl. 32425

VII VERIFICATION

UNDER PENALTIES OF PERJURY, I declare that I have read the foregoing brief and that the facts in it are true.

Darin S. Hopping

DARIN S. HOPPING Prose
D.O.C. #116666
Holmes Cor. Inst.
P.O. Box 190
Bonifay, Florida 32425

VIII CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that a true and complete copy of the foregoing initial brief and attached appendix has been furnished to the office of the Attorney General, The Capitol, Tallahassee, Florida 32399-1050 on this 19th day of May, 1997.

Darin S Hopping

Darin S. Hopping Pro se
Holmes C.I. P.O. Box 190
DOC # 116666
Bonifay, Florida 32425

IX APPENDIX INDEX

CONTENTS PAGE

Defendant Darin Hippins

Case Number 88324-CF

SENTENCE

(As to Count #1)

The Defendant, being personally before this Court, accompanied by his attorney, Wm. R. Slaughter, _____, and having been adjudicated guilty herein, and the Court having given the Defendant an opportunity to be heard and to offer matters in mitigation of sentence, and to show cause why he should not be sentenced as provided by law, and no cause being shown,

☐ and the Court having on _____ (date) deferred imposition of sentence until this date.

(Check either provision if applicable)

☐ and the Court having placed the Defendant on probation and having subsequently revoked the Defendant's probation by separate order entered herein,

IT IS THE SENTENCE OF THE LAW that:

☐ The Defendant pay a fine of $_____, plus $_____ as the 5% surcharge required by F.S. 960.25.

☒ The Defendant is hereby committed to the custody of the Department of Corrections

☐ The Defendant is hereby committed to the custody of the Sheriff* of _____ County, Florida

(Name of local corrections authority to be inserted at printing, if other than Sheriff)

To be imprisoned (check one; unmarked sections are inapplicable)

☐ For a term of Natural Life

☒ For a term of 30 months

☐ For an indeterminate period of 6 months to _____ years.

☒ Followed by a period of 18 months on probation under the supervision of the Department of Corrections according to the terms and conditions of probation set forth in a separate order entered herein.

If "split" sentence complete either of these two paragraphs

☐ However, after serving a period of _____ imprisonment in _____ the balance of such sentence shall be suspended and the Defendant shall be placed on probation for a period of _____ under supervision of the Department of Corrections according to the terms and conditions of probation set forth in a separate order entered herein.

SPECIAL PROVISIONS

By appropriate notation, the following provisions apply to the sentence imposed in this section:

Firearm — 3 year mandatory minimum

☐ It is further ordered that the 3 year minimum provisions of F.S. 775.087(2) are hereby imposed for the sentence specified in this count, as the Defendant possessed a firearm.

Drug Trafficking — mandatory minimum

☐ It is further ordered that the _____ year minimum provisions of F.S. 893.135(1)( )( ) are hereby imposed for the sentence specified in this count.

Retention of Jurisdiction

☐ The Court pursuant to F.S. 947.16(3) retains jurisdiction over the defendant for review of any Parole Commission release order for the period of _____. The requisite findings by the Court are set forth in a separate order or stated on the record in open court.

Habitual Offender

☐ The Defendant is adjudged a habitual offender and has been sentenced to an extended term in this sentence in accordance with the provisions of F.S. 775.084(4)(a). The requisite findings by the court are set forth in a separate order or stated on the record in open court.

Jail Credit

☒ It is further ordered that the Defendant shall be allowed a total of *123 days credit for such time as he has been incarcerated prior to imposition of this sentence. Such credit reflects the following periods of incarceration (optional):

per agrmt of Court & Counsel

Consecutive/Concurrent

It is further ordered that the sentence imposed for this count shall run ☐ consecutive to ☐ concurrent with (check one) the sentence set forth in count _____ above.

Defendant Darin Hopping

Case Number 88-324-CF

Consecutive/Concurrent (As to other convictions)

It is further ordered that the composite term of all sentences imposed for the counts specified in this order shall run ☐ consecutive to ☐ concurrent with (check one) the following:

☐ Any active sentence being served.

☐ Specific sentences: _____

In the event the above sentence is to the Department of Corrections, the Sheriff of SUWANNEE County, Florida is hereby ordered and directed to deliver the Defendant to the Department of Corrections together with a copy of this Judgment and Sentence.

The Defendant in Open Court was advised of his right to appeal from this Sentence by filing notice of appeal within thirty days from this date with the Clerk of this Court, and the Defendant's right to the assistance of counsel in taking said appeal at the expense of the State upon showing of indigency.

In imposing the above sentence, the Court further recommends _____

DONE AND ORDERED in Open Court at Suwannee County, Florida, this 20th day of June A.D., 19 89.

Luther Lawrence Jr

JUDGE

VOLUME APP. - 2

Defendant Dana Hopping

Case Number 88-324-CF

SENTENCE

(As to Count _____)

The Defendant, being personally before this Court, accompanied by his attorney, Waived Counsel

_____, and having been adjudicated guilty herein, and the Court having given the Defendant an opportunity to be heard and to offer matters in mitigation of sentence, and to show cause why he should not be sentenced as provided by law, and no cause being shown,

☐ and the Court having on _____ (date) deferred imposition of sentence until this date.

(Check either provision if applicable)

☒ and the Court having placed the Defendant on probation and having subsequently revoked the Defendant's probation by separate order entered herein,

IT IS THE SENTENCE OF THE LAW that:

☐ The Defendant pay a fine of $_____, plus $_____ as the 5% surcharge required by F.S. 960.25.

☒ The Defendant is hereby committed to the custody of the Department of Corrections

☐ The Defendant is hereby committed to the custody of the Sheriff of _____ County, Florida

(Name of local corrections authority to be inserted at printing, if other than Sheriff)

To be imprisoned (check one; unmarked sections are inapplicable)

☐ For a term of Natural Life

☒ For a term of 36 months

☐ For an indeterminate period of 6 months to _____ years.

If "split" sentence complete either of these two paragraphs

☐ Followed by a period of _____ on probation under the supervision of the Department of Corrections according to the terms and conditions of probation set forth in a separate order entered herein.

☐ However, after serving a period of _____ imprisonment in _____ the balance of such sentence shall be suspended and the Defendant shall be placed on probation for a period of _____ under supervision of the Department of Corrections according to the terms and conditions of probation set forth in a separate order entered herein.

SPECIAL PROVISIONS

By appropriate notation, the following provisions apply to the sentence imposed in this section:

Firearm — 3 year mandatory minimum ☐ It is further ordered that the 3 year minimum provisions of F.S. 775.087(2) are hereby imposed for the sentence specified in this count, as the Defendant possessed a firearm.

Drug Trafficking — mandatory minimum ☐ It is further ordered that the _____ year minimum provisions of F.S. 893.135(1)( )( ) are hereby imposed for the sentence specified in this count.

Retention of Jurisdiction ☐ The Court pursuant to F.S. 947.16(3) retains jurisdiction over the defendant for review of any Parole Commission release order for the period of _____. The requisite findings by the Court are set forth in a separate order or stated on the record in open court.

Habitual Offender ☐ The Defendant is adjudged a habitual offender and has been sentenced to an extended term in this sentence in accordance with the provisions of F.S. 775.084(4)(a). The requisite findings by the court are set forth in a separate order or stated on the record in open court.

Jail Credit ☒ It is further ordered that the Defendant shall be allowed a total of 2 days credit for such time as he has been incarcerated prior to imposition of this sentence. Such credit reflects the following periods of incarceration (optional):

credit for 30 mths in DOC

Consecutive/Concurrent It is further ordered that the sentence imposed for this count shall run ☐ consecutive to ☐ concurrent with (check one) the sentence set forth in count _____ above.

VOLUME = APP.-3

Defendant David Hopping

Case Number 88-324-CF

Consecutive/Concurrent (As to other convictions)

It is further ordered that the composite term of all sentences imposed for the counts specified in this order shall run ☒ consecutive to ☐ concurrent with (check one) the following:

☒ Any active sentence being served.

☐ Specific sentences: _____

In the event the above sentence is to the Department of Corrections, the Sheriff of Suwannee County, Florida is hereby ordered and directed to deliver the Defendant to the Department of Corrections together with a copy of this Judgment and Sentence.

The Defendant in Open Court was advised of his right to appeal from this Sentence by filing notice of appeal within thirty days from this date with the Clerk of this Court, and the Defendant's right to the assistance of counsel in taking said appeal at the expense of the State upon showing of indigency.

In imposing the above sentence, the Court further recommends _____

DONE AND ORDERED in Open Court at Suwannee County, Florida, this 21st day of Nov A.D., 19 91.

JUDGE

APP. - 4

VOLUME

IN THE CIRCUIT COURT, THIRD JUDICIAL CIRCUIT, IN AND FOR SUWANNEE COUNTY, FLORIDA.

CASE NO. 88-324-CF

MAR 1 1 92

STATE OF FLORIDA

-vs-

DARIN HOPPING,

Defendant.

ORDER CORRECTING AND MODIFYING JUDGMENT AND SENTENCE

This cause came on to be heard upon the Motion For Correction Of Sentence, filed by the Defendant, on or about January 28, 1992, requesting that his sentence be reduced to a maximum of five years with credit for time already served. The Court file reflects that a sentence was imposed upon the Defendant for a third degree felony, the maximum term for which is five years. Accordingly, it is

ORDERED AND ADJUDGED that the Judgment and Sentence entered in this cause on or about November 21, 1991, is hereby corrected and modified as follows:

1. The sentence imposed originally is vacated and in lieu thereof a sentence of sixty (60) months is imposed.

2. Those provisions of the Judgment and Sentence granting credit for time served is vacated, and in lieu thereof the following is substituted: "credit for 123 days jail time served prior to the original sentence entered on June 20, 1989, and credit for time served since his arrest as a probation violator, to-wit: 2 days; and credit for time served and unforfeited gain time earned on prior incarceration in this case."

3. In all other respects, the Judgment and Sentence shall remain unchanged and in full force and effect.

DONE AND ORDERED in Chambers at Live Oak, Suwannee County, Florida, this 11th day of March, 1992.

APP. -5

CIRCUIT JUDGE

COPY TO:

Office of State Attorney
Post Office Drawer 1546
Live Oak, Florida 32060

Darin Hopping
#116666 K-11
Union Correctional Institution
3-11-92 Post Office Box 221
ECB Raiford, Florida 32083

Department of Corrections
2601 Blair Stone Blvd.
Tallahassee, Florida

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

DARIN S. HOPPING,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

/

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

CASE NO. 95-1344

CORRECTED p 3

MAILED 7/3/96

BY AM

Opinion filed June 4, 1996.

An appeal from the Circuit Court for Suwannee County. James Roy Bean, Judge.

Darin S. Hopping, Appellant, Pro Se.

Robert A. Butterworth, Attorney General and Thomas Crapps, Assistant Attorney General, Tallahassee, for Appellee.

JOANOS, J.

This is an appeal from the denial of appellant's rule 3.800 motion for post-conviction relief. One of the issues raised in the motion was whether appellant's 1992 resentencing, which increased his sentence in response to his 1992 rule 3.800 motion for post-conviction relief, but did not exceed the statutory maximum, is an illegal sentence. We requested a response from the State on this issue, specifically on the effect of Troupe v. Rowe, 283 So. 2d 857

(Fla. 1973)(prohibiting increasing a legal sentence once it has commenced on double jeopardy grounds).

Citing the narrow definition of an illegal sentence in Davis v. State, 661 So. 2d 1193 (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"), the State explained in its response that while the resentencing violated double jeopardy, it did not result in an illegal sentence cognizable under rule 3.800. The state further asserted that appellant's remedies were either a direct appeal of the 1992 order which resulted in resentencing, or a timely 3.850 motion. Our records indicate that appellant's direct appeal following the 1992 resentencing was dismissed, and the two year bar for filing a 3.850 motion now applies. We affirm based on Davis, but because of the nature of the issue, certify a question of great public importance.

"The prohibition against double jeopardy is 'fundamental.'" Lippman v. State, 633 So. 2d 1061, 1064 (Fla. 1994), citing Benton v. Maryland, 395 U.S. 784, 795-96, 89 S.Ct. 2056, 2063, 23 L.Ed.2d 707 (1969). "'[T]he failure to timely raise a double jeopardy claim does not, in and of itself, serve as a waiver of the claim.'" Id. citing State v. Johnson, 483 So.2d 420, 423 (Fla.1986). In addition, this appears to be a situation in which the issue can be resolved as a matter of law without an evidentiary hearing. See State v. Callaway, 658 So. 2d 983 (Fla. 1995). Prior to Davis, this court determined that when only the sentence, not the conviction,

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is attacked as violating double jeopardy, the claim was cognizable as an illegal sentence under rule 3.800. See Jackson v. State, 650 So. 2d 1026 (Fla. 1st DCA 1995)

In Lee v. State, 667 So. 2d 253 (Fla. 1st DCA 1995), we recognized a possible distinction between the issue addressed in Davis, which involved the filing of contemporaneous written reasons for a guidelines departure sentence, and the particular sentencing situation involved in Lee. As in Lee, we certify a question of great public importance regarding the availability of a rule 3.800 motion in the present context:

> 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 ~~APPELLATE~~ CRIMINAL PROCEDURE?

BOOTH, J., CONCURS. BENTON, J., DISSENTS WITH OPINION.

BENTON, J., dissenting.

The court today decides that appellant's claim that his sentence was unconstitutionally lengthened, after he had begun serving it, cannot be considered under a rule that provides: "A court may at any time correct an illegal sentence imposed by it . . . ." Fla. R. Crim. P. 3.800(a). The opinion in Davis v. State, 661 So. 2d 1193 (Fla. 1995) should not, in my opinion, be read so narrowly. A sentence that has been unconstitutionally enhanced, see Justice v. State, 21 Fla. L. Weekly S219 (Fla. May 23, 1996); Lippman v. State, 633 So. 2d 1061 (Fla. 1994); Troupe v. Rowe, 283 So. 2d 857 (Fla. 1973); Merriman v. State, 671 So. 2d 879 (Fla. 3d DCA 1996); Hinton v. State, 446 So. 2d 712, 713 (Fla. 2d DCA 1984); Royal v. State, 389 So. 2d 696 (Fla. 2d DCA 1980); Beckom v. State, 227 So. 2d 232, 233 (Fla. 2d DCA 1969)(citing Smith v. Brown, 135 Fla. 830, 832, 185 So. 732, 733 (Fla. 1938)), is "an illegal sentence . . . [in] that [it] exceeds the maximum period set forth by law for a particular offense without regard to the guidelines." Davis, 661 So. 2d at 1196.

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Honorable Clerk,

5-19-97

Please file this brief, which was served on the 19th, day of 1997, by being placed in Holmes Correctional Institution's MailBox. THANKYOU!

FILED
SID J. WHITE
MAY 28 1997
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

Sincerely,
Darin Hopping

*ENCLOSED - 1 original ~~Copy~~
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