

IN THE SUPREME COURT OF FLORIDA

FILED

SID J. WHITE

JUL 17 1997

DARIN S. HOPPING,)

Petitioner,)

v.)

STATE OF FLORIDA,)

Respondent.)

CLERK, SUPREME COURT

By CASE NO. 89,515

Chief Deputy Clerk

1ST DCA, 95-1344

LOWER TRIBUNAL, 88-324

PETITIONER'S
REPLY BRIEF
ON THE MERITS

PRO-SE: MR. DARIN S. HOPPING
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ARGUMENT

The certified question must be answered in the affirmative and Hopping v. State, must expand the definition of Davis, to include Constitutionally infirm sentences.

The trial Court Judge lacked authority under the rules of Criminal procedure to enhance Petitioner's legal sentence. "Florida Rule of Criminal Procedure 3.800 provides, (a) that a Court may at any time correct an illegal sentence, and (b) that a Court may reduce a legal sentence within certain time limits. There is no provision in the rules of Criminal procedure for the subsequent enhancement of a legal sentence." Royal v. State, 389 So. 2d 696 (Fla. 2d DCA 1980)

"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." (quoting Justice Benton First DCA opinion, filed June 4, 1996)

The enhancement of Petitioner's sentence is unauthorized by law, because the trial court judge had no authority to resentence Petitioner to a longer term of imprisonment and therefore Petitioner's current sentence is an unauthorized sentence. "The fifth amendment to the United States Constitution and article I, section 9, of the Florida Constitution both provide that no person shall be put in jeopardy more than once for the same criminal offense. This court has previously held that resentencing on the same charge is a violation of double jeopardy. Katz v.

State, 335 So. 2d 608 (Fla. 2d DCA 1976); see also United States v. Benz, 282 U.S. 304, 51 S. Ct. 113, 75 L. Ed. 354 (1931); Troupe v. Rowe, 283 So. 2d 857 (Fla. 1973). Once a defendant begins to serve his Sentence, the Court has no authority to resentence him to a longer term of imprisonment. Beckom v. State, 227 So. 2d 232 (Fla. 2d DCA 1969). (Hinton v. State, 446 So. 2d 712, 713. (Fla. 2d DCA 1984))."

The Subsequent enhancement of Petitioner's Sentence, is an illegal - unauthorized Sentence and it is unquestionably revealed by the face of the record. "Davis and Callaway, and Judge v. State, 596 So. 2d 73 (Fla. 2d DCA 1991), which was discussed in Callaway, indicate that an "illegal Sentence" remediable under rule 3.800 (a) is a Sentence not authorized by law, without regard to the sentencing guidelines or mere procedural irregularities, which is determinable simply from an examination of the Court's records concerning the adjudicated offense and

the resulting sentence. In Callaway the Supreme Court essentially adopted the discussion from Judge which recognized that there are three types of sentencing errors: (1) an "erroneous sentence" which is correctable on direct appeal; (2) an "unlawful sentence" which is correctable only after an evidentiary hearing under rule 3.850, and (3) an "illegal sentence" in which the error must be corrected as a matter of law in a rule 3.800(a) proceeding. Judge explained that an "illegal sentence" correctable under rule 3.800(a) exists where a penalty has been imposed "that is simply not authorized by law". I further pointed out that a sentence is not "illegal" merely because the procedure employed to impose the punishment might have failed to comport with statutory law and due process. And finally, it explained that a sentence will be illegal only if its illegality can be determined without a lengthy evidentiary hearing. I find myself simply unable to conceive any fair and reasonable justification for cutting off all challenges to unconstitutional sentences filed

more than two years after judgement and Sentence become final But where a Claim may be proven by a simple review of the trial Court file, . . . I would ask then, Why should a defendant be required to serve out a sentence which is unquestionably revealed by the trial Court record to be excessive under the State and federal Constitutions?" Jefferson v. State, 677 So. 2d 29 (Fla. App. 1 Dist. 1996) (quoting Justice Allen)

The subsequent codification of the definition of an illegal sentence in Section 924.06 (6) (c), Florida Statute (Supp. 1996) shouldn't apply to Petitioner's issue. Petitioner's issue should be decided pursuant to case law applicable at the time of Petitioner's resentencing and filing of 3.800 motion. Jackson v. State, 650 So. 2d 1026 (Fla. App. 1 Dist. 1995)

Prior to Davis, rule 3.800 (a) was the proper vehicle for Petitioner to raise a double jeopardy claim. The First DCA also 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. Jackson v. State, 650 So. 2d 1026 (Fla. App. 1 Dist. 1995)

Davis, is in error, being so restrictively determined, that it leaves no remedy for Constitutionally infirm, unauthorized, illegal sentences. Davis, must be expanded so rule 3.800 can be used to resolve illegal sentences, which determined from the face of the record, can be corrected as a matter of law without an evidentiary hearing. State v. Callaway, 658 So. 2d 983 (Fla. 1995)

The unauthorized - illegal sentence the Petitioner is now under can be proven from the factual basis of the trial court record. It is clear also from the record, that a double jeopardy violation occurred by the enhancing of Petitioner's legal sentence. Troupe v. Rowe, 283 So. 2d 857 (Fla. 1973)

The First DCA could not ignore such a blatant violation of Petitioner's rights, when

Petitioner was Complaining that His Sentence was doubled. Seeing the factual basis from the face of the trial Court record Caused the First DCA to uphold the Oath of Justice, by Certifying a question of great public importance, the First DCA was only doing what any just Court would do - uphold Justice.

Prior to the illegal Sentencing, in Petitioner's initial 3.800 motion, Petitioner requested that the Sentence be reduced - not increased! It was the trial Court Judge who made an unauthorized decision, based on incorrect factual and legal assumptions, the trial Court Judge enhanced a legal Sentence under a rule of Criminal procedure, where the determination to make a decision must come from the factual basis obtained from the face of the record. The trial Court Judge simply ignored that there is no provision in the rules of Criminal procedure for the subsequent enhancement of a legal sentence, Royal V. State, 389 So.2d 696 (Fla. 2d DCA 1980)

Therefore, at the time Petitioner filed the

Subsequent 3.800 motion to Correct illegal sentence, a double jeopardy issue was cognizable under rule 3.800 and by precedent case law, the proper vehicle at the time Petitioner filed the motion to Correct illegal sentence, was under rule 3.800.

A rule 3.800 motion can be filed at any time, even decades after a sentence has been imposed, and as such, its subject matter is limited to those sentencing issues that can be resolved as a matter of law without an evidentiary determination. State v. Callaway, 658 So. 2d 983 (Fla. 1995)

"Besides the need to harmonize Davis, Callaway, and Poore, the issue of what is an "illegal sentence" requires additional Supreme Court attention As a matter of logic, we hold that an unauthorized sentence qualifies as an "illegal sentence" State v. McEachern, d22 FLW (D) 324

Therefore, factual basis from the face of the trial Court record proves that the subsequent enhancement of Petitioner's 36 month sentence, which violated double jeopardy, is an unauthorized -illegal sentence.

Davis, must be expanded by Hopping, to include Constitutionally infirm sentences. Where only the sentence is illegal, and the error can be cured as a matter of law without an evidentiary hearing, Constitutionally infirm sentences should be cognizable under Florida Rule of Criminal Procedure 3.800. The Constitution must stand where rights are concerned.

"The law itself is on trial quite as much as the cause which is to be decided." (Harlan F. Stone, 12th Chief Justice U.S. Supreme Court 1941)

CONCLUSION

On the foundation of the above-stated argumentation, Petitioner prays the Certified question will be answered in the affirmative, the decision at 674 So. 2d 905 will be reversed and remanded with instructions to reinstate Petitioner's issue as Cognizable under rule 3.800, so Petitioner's sentence will be returned to the initial 36 month legal sentence and the initial sentencing order will be reissued to correct Petitioner's illegal sentence.

Respectfully Submitted,
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VERIFICATION

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

Darin S. Hopping

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that a true and complete copy of the foregoing reply brief has been furnished to the office of The Attorney General, at the Capitol, Tallahassee, Florida 32399-1050 on this 14th day of July, 1997.

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Clerk,

Please file this ~~Reply~~ Brief.
Could you please notify me of the docket date that will be set for this issue to be heard?

Thank you
Mr. Dan 

CLERK, SUPREME COURT
Chief Clerk, Clerk