IN THE SUPREME COURT OF FLORIDA

MICHAEL A. McEACHERN,

Petitioner,

v. CASE NO. 89,859

STATE OF FLORIDA,

Respondent.

ON DISCRETIONARY REVIEW FROM THE
FIFTH DISTRICT COURT OF APPEAL

MERITS BRIEF OF RESPONDENT

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SUMMARY OF ARGUMENT

A conditional suspended sentence is not authorized by Poore v. State, infra, and is not a statutorily provided for sentencing scheme. Neither does this type of sentence qualify as a "true split" sentence. It is an unauthorized sentence which is appealable by the State. The Fifth District Court of Appeal's opinion was correct.

ARGUMENT

IT WAS NOT ERROR FOR THE DISTRICT COURT OF APPEAL TO REVERSE THE SENTENCE IMPOSED BY THE TRIAL COURT,

upon entering a plea involving three cases, Petitioner, Michael McEachern (McEachern), received a guidelines scoresheet total of 63.4 points. The sentence computation provided for a state prison sentencing range of 26.55 to 44.25 months. (R 76-77). Pursuant to the court's agreement with McEachern, the trial judge sentenced McEachern to the maximum sentence of 44.25 months in the Department of Corrections, and suspended the entire sentence upon the condition that McEachern successfully complete two years community control followed by three years of supervised probation. (R 2-15) . The trial court did not orally state a reason for departure, nor is any written reason for departure attached to this scoresheet.[1]

The State appealed McEachern's sentence as a conditional suspended sentence which was not authorized under Poore v. State,

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[1]McEachern was simultaneously being sentenced for violation of probation in another case in which he also received a downward departure sentence. In that case, the court checked the box stating that the defendant required specialized treatment for addiction, mental disorder, or physical disability and that the defendant was amenable to treatment in support of its departure sentence. No evidence supporting this reasoning appears in the record,

531 so. 2d 161 (Fla. 1988), nor was the sentence a statutorily recognized sentencing scheme. The Fifth District Court of Appeal agreed with the State and reversed McEachern's sentence, but certified the following question as one of great public importance:

> IS A SENTENCE, ENTIRELY SUSPENDED ON THE CONDITION THAT THE DEFENDANT SUCCESSFULLY COMPLETE COMMUNITY CONTROL, AN ILLEGAL SENTENCE AS CONSTITUTING AN UNAUTHORIZED SENTENCING ALTERNATIVE WHICH MAY BE APPEALED BY THE STATE AND VACATED ON DIRECT APPEAL?

Because it is not one of the sentencing alternatives set out in Poore v. State, 531 So. 2d 161 (Fla. 1988), McEachern's sentence is an 'illegal" sentence in that it is unauthorized. Respondent does not contend that Poore represents a finite list of sentencing alternatives. Instead, at the time it was written in 1988, Poore was a codification of the statutory sentencing alternatives available to the courts at that time. See §§ 921.187 & 948.01, Fla. Stat. (1987). In 1991, the legislature added another sentencing alternative - the backend split sentence. See §948.01(11), Fla. Stat. (1991); Disbrow v. State, 642 So. 2d 740 (Fla. 1994). Conditional suspended sentences, like McEachern's, are not provided for by Poore or by statute.

Additionally, it is not the place of the trial courts to fashion new sentencing alternatives. Such a task is purely a

legislative function. See State v. Coban, 520 so. 2d 40 (Fla. 1988) (plenary power of the legislature to prescribe punishment for criminal offenses cannot be abrogated by the courts in the guise of fashioning an equitable sentence outside the statutory provisions). As this Court intimated in Disbrow, supra, the legislature knows how to fashion sentencing alternatives and can do so when it wishes. Disbrow, 642 So. 2d at 741 (when the legislature wants to exempt a sentence from the guidelines, it knows how to do it).

Although the First and Second District Courts of Appeal have held otherwise, the conditional suspended sentence does not qualify as a "true split" sentence. See e.g. Helton v. State, 611 So. 2d 1323 (Fla. 1st DCA 1993); Silva v. State, 602 So. 2d 694 (Fla. 2d DCA 1992). See also Jefferson v. State, 677 So. 2d 29 (Fla. 1st DCA 1996); Lee v. State, 666 So. 2d 209 (Fla. 2d DCA 1995). Poore defined a "true split" sentence as one consisting of a total period of confinement with a portion of the confinement period suspended and the defendant placed on probation for that suspended portion. Poore, 531 So. 2d at 164.

The plain meaning of the word "portion" implies a term which is less than the whole. Webster's New World Dictionary, 2d Ed., defines 'portion" as a part or limited quantity of anything. When a court sentences a defendant to a sentence of 44.25 months of

incarceration and suspends the entire term of incarceration upon the successful completion of two years community control and two years probation, the defendant has been relieved of serving any time in prison. There is no "true split" because there has been no split at all - the sentence was suspended in its entirety.

Respondent further contends that the concerns of the Fifth District regarding the authorization of the state to appeal an unauthorized sentence have been assuaged by the commentary accompanying the most recent amendments to the Florida Rules of Appellate Procedure. See Amendments to Florida Rule of Appellate Procedure, 21 Fla. L. Weekly S507, 508 (Fla. Nov. 22, 1996); see also 21 Fla. L. Weekly Issue 48, Appendix S9 (Fla. Nov. 22, 1996). In the commentary, this court noted that Rule 9.140(c) had been amended in view of this Court's decision in Davis v. State, 661 so. 2d 1193 (Fla. 1995). The commentary provides that direct appeals may be taken from both illegal and unauthorized sentences. Id. In this respect, the Fifth District was correct in noting below that "an unauthorized or unlawful sentence qualifies as an 'illegal sentence'" for the purposes of Rule 9.140 and allows an appeal by the state.

While McEachern was sentenced prior to the new amendments, the subsequent amendment is instructive in the proper interpretation of

the type of sentences the state may appeal. The last amendment to Florida Rule of Appellate Procedure preceding the 1996 amendment occurred in 1992.[2] This Court's decision in Davis v. State, 661 So, 2d 1193 (Fla. 1995), occurred approximately two years after the rule had been amended. The most recent amendments to the Florida Rules of Appellate Procedure took place November 22, 1995, and became effective January 1, 1997.

This Court noted that it was amending this rule in light of its decision in Davis. Based upon the recent amendment, it is clear that this Court has **always** intended that the State be able to appeal illegal and unauthorized sentences. Cf. Lowry v. Parole and Probation Commission, 473 so. 2d 1248, 1250 (Fla. 1985) (where an amendment to a statute is enacted soon after controversies as to its interpretation of the original act arise, a court may consider the amendment as **a** legislative interpretation of the original law and not as a substantive change thereof). See also State v. Lanier, 464 So. 2d 1192 (Fla. 1985).

A conditional suspended sentence is not **a** valid sentencing scheme under current Florida law. The judiciary is not entitled to

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[2]The amendment took place on October 22, 1992, and became effective January 1, 1993. In re Amendment to Florida Rules of Appellate Procedure, 609 So. 2d 516 (Fla. 1992).

fashion new sentencing alternatives on their own. The Fifth District Court of Appeal properly determined that McEachern's sentence was illegal, as being an unauthorized sentence, and remanded the case to the trial court for further proceedings.

CONCLUSION

Based on the arguments and authorities presented herein, Respondent respectfully requests this honorable Court affirm the ruling of the Fifth District Court of Appeal in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Merits Brief of Respondent has been furnished by delivery to Dee Ball via the mailbox of the Office of the Public Defender at the Fifth District Court of Appeal, this 1st day of May, 1997.

Ann M. Childs
Of Counsel

6-10-96 IB

Child
96-150328 AC

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT JANUARY TERM 1997

NOT FINAL UNTIL THE TIME EXPIRES TO FILE REHEARING MOTION, AND, IF FILED, DISPOSED OF.

STATE OF FLORIDA,

Appellant,

v.

CASE NO.: 96-467
95-13118; 10517; 1295

MICHAEL ALAN McEACHERN,

Appellee.

Opinion filed January 31, 1997

Appeal from the Circuit Court
for Orange County,
Cynthia Z. Mackinnon, Judge.

Robert A. Butterworth, Attorney General, Tallahassee, and Ann M. Childs, Assistant Attorney General, Daytona Beach, for Appellant.

James B. Gibson, Public Defender, and Dee R. Ball, Assistant Public Defender, Daytona Beach, for Appellee.

ON MOTION FOR REHEARING

COBB, J.

The appellee, Michael Alan McEachern, has filed a motion for rehearing en banc and/or certification. Upon further consideration, we sua *sponte* withdraw our opinion in this case under date of November 15, 1996, and substitute therefor the following:

The trial judge, following a nolo plea by McEachern to various charges, sentenced him to 44.25 months incarceration suspended upon successful completion of two years

Community control including successful completion of a residential drug/alcohol rehabilitation program, followed by three years of supervised probation. The sentence imposed by the trial court does not conform to the sentence categories enunciated by the Florida Supreme Court in Poore v. State, 531 So. 2d 161 (Fla. 1988). We have previously held this type of pure suspended sentence to be illegal. See State v. Davis, 657 So. 2d 1224 (Fla. 5th DCA 1995); State v. Conte, 650 So. 2d 192 (Fla. 5th DCA), review denied, 659 So. 2d 270 (Fla. 1995); State v. Manning, 605 So. 2d 508 (Fla. 5th DCA 1992); Bryant v. State, 591 So. 2d 1102 (Fla. 5th DCA 1992); and Pinardi v. State, 617 So. 2d 371 (Fla. 5th DCA 1993). We recognize that the First and Second Districts have held that a sentence of imprisonment which is entirely suspended is authorized as a true split sentence under Poore. See, e.g., Helton v. State, 611 So. 2d 1323 (Fla. 'I st DCA 1993); Silva v. State, 602 So. 2d 694 (Fla. 2d DCA 1992). See also Jefferson v. State, 677 So. 2d 29 (Fla. 1st DCA 1996); Lee v. State, 666 So. 2d 209 (Fla. 2d DCA 1995).

The Florida Supreme Court has recently issued two opinions concerning the definition of the term "illegal sentence." See Davis v. State, 661 So. 2d 1193 (Fla. 1995) and State v. Callaway, 658 So. 2d 983 (Fla. 1995). Both cases dealt with Florida Rule of Criminal Procedure 3.800, the relevant portion of which provides that a court may at any time correct an illegal sentence imposed by it,

In Davis, the supreme court, in considering the type of illegal sentence remediable under Florida Rule of Criminal Procedure 3.800(a) announced as follows:

> [A]n illegal sentence is one that exceeds the maximum period set forth by law for a particular offense without regard to the guidelines.

661 So. 2d at 1196.

The court in (Callaway) recognized three types of sentencing errors: "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 proceeding. Callaway, 658 So. 2d at 987-988.

The defendant asserts that because his sentence does not exceed the maximum allowable by law, under Davis and Callaway it is not an "illegal sentence." However, under the precedent from this district, the sentence is an "unauthorized sentence" under the principles set out in Poore.

Recently, in King v. State, 681 So. 2d 1136 (Fla. 1996), the supreme court discussed the efficacy of a hybrid split sentence which consisted of incarceration without habitual offender status followed by probation as a habitual offender. While noting that such a sentence is not authorized by section 775.084, Florida Statutes, and in fact is inconsistent with the language of that statute, the supreme court, citing Davis held that such an unauthorized sentence is not an illegal sentence so long as the total sentence does not exceed the statutory maximum for the particular offense at issue.

The supreme court, noting that in the conflict case with King (Davis v. State, 623 So. 2d 547 (Fla. 2d DCA 1993)), the hybrid split sentence had apparently been agreed to as part of a negotiated plea agreement, explained as follows:

> While a trial court cannot impose an illegal sentence pursuant to a plea bargain, Williams v. State, 500 So. 2d 501, 503 (Fla. 1986), it can impose a negotiated sentence that is not specifically authorized by statute. Cf. Quarterman v. State, 527 So. 2d 1380, 1382 (Fla. 1988)(finding that defendant's violation of plea agreement condition that he appear at sentencing was clear and convincing reason for departure sentence even

> though failure to appear for sentencing in an of itself was not valid reason for departure). This distinction between an unauthorized and an illegal sentence does not change the result for King: absent a valid agreement to the contrary, the judge had no authority to impose this hybrid sentence and it must be reversed. However, we distinguish those instances where a defendant agrees to such a sentence as part of an otherwise valid plea agreement and the negotiated sentence does not exceed the statutory maximum for the particular offense involved.

There is no mention of Poore in the King decision. In any event, we find that King is inapplicable to the instant case because here the state did not agree to imposition of a pure suspended sentence.

Besides the need to harmonize Davis. Callaway and Poore, the issue of what is an "illegal sentence" requires additional supreme court attention. Given that Florida Rule of Appellate Procedure 9.140(c)(1)(I) authorizes a state appeal from an "illegal sentence," in light of Callaway and Davis, can the state only appeal a sentence which exceeds the maximum period set forth by law for the offense? If so, no appeal would lie here and dismissal of the state's appeal would be necessary. However, such an interpretation is ludicrous. Why would the state appeal an excessive sentence when it would logically be the defendant who challenges such a sentence? To limit the state's right to appeal imposition of such a sentence is not only illogical but could preclude the state from obtaining review of an erroneous or unlawful sentence. Furthermore, if an "illegal sentence" can only becorrected in a Rule 3.800 proceeding, a direct appeal by the state from an order imposing an illegal sentence would be improper.

If the sentence here is deemed an "illegal sentence," under Davis could it only be remedied in a 3.800 proceeding? The language in Davis and Callaway has caused confusion when read together with Poore. See Jefferson v. State; 677 So. 2d 29 (Fla. 1st

DCA 1996).

As a matter of logic, we hold that an unauthorized or unlawful sentence qualifies as an "illegal sentence" for purposes of Rule 9.140(c)(1)(I), thereby allowing an appeal by the state. We therefore vacate the sentence in accordance with the prior precedent from this court. Upon remand, the trial judge should affirmatively offer McEachern the right to withdraw his nolo plea. Goins v. State, 672 So. 2d 30 (Fla. 1996). If McEachern elects to withdraw his plea, the plea bargain is off in all regards and the state would be free to prosecute the charges which it agreed to dismiss as part of the plea bargain. However. in light of the intra district conflict as to whether a pure suspended sentence is authorized under Poore, as well as the recent decisions in Davis and Callaway, the following question is certified to the Florida Supreme Court as a question of great public importance:

> IS A SENTENCE, ENTIRELY SUSPENDED ON THE CONDITION THAT THE DEFENDANT SUCCESSFULLY COMPLETE COMMUNITY CONTROL, AN ILLEGAL SENTENCE AS CONSTITUTING AN UNAUTHORIZED SENTENCING ALTERNATIVE WHICH MAY BE APPEALED BY THE STATE AND VACATED ON DIRECT APPEAL?

REVERSED AND REMANDED; QUESTION CERTIFIED.

SHARP, W. and THOMPSON, JJ., concur