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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. Case No. 90,358

GARY SWYCK,

Respondent. /

ON PETITION FOR REVIEW FROM
THE SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA

PETITIONER'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Gary Swyck, hereinafter referred to as the respondent, was charged with the offense of Armed Robbery which occurred on October 5, 1981, by criminal information in case 81-10820. (See Amended information for Armed Robbery attached to the trial court's order denying the respondent's motion for post-conviction relief under Fla. R. Crim. Pro. 3.800.). Respondent was sentenced to 30 years probation for this offense on December 29, 1981. (See Judgement of Guilt and Order of Probation attached to the same previously cited order of the trial court.) Respondent apparently violated his probation on two prior occasions and was reinstated on probation for the same period of time - 30 years. (See the trial court order denying the respondent's motion for post-conviction relief at paragraph 1.) On his third violation of probation, respondent was sentenced to 15 years imprisonment with credit for time served in the county jail of 282 days. (See Judgment and Sentence of March 19, 1991, attached to the same previously cited order of the trial court).

On August 1, 1996, respondent filed a Motion To Correct Sentence pursuant to Fla. R. Crim. Pro 3.800(a). (See record on appeal "Motion To Correct Sentence"). Respondent claimed that he was entitled to credit for time against this 15 year sentence for:

(a) the 4 year prison sentence he received in a companion case (81-1081) for burglary of a conveyance and (b) that he was entitled to credit for 12 days he spent in jail from May 8, 1991 until he was sentenced on March 19, 1991 on his violation of probation. The State of Florida, hereinafter referred to as the petitioner, filed a response to the motion . (See "State's Response to Defendant's 3.900 Motion To Correct Illegal Sentence" in record on appeal).

The trial court entered an "Order" denying the respondent's motion for relief. (See "Order" in record on appeal). Respondent took a direct appeal to the Second District Court of Appeals.

The Second District Court of Appeals rendered a written in the case in Swyck v. State, 22 Fla. L. Weekly D797 (Fla. 2d DCA March 26, 1997). (A copy of said opinion is attached to this brief). The appellate court rejected respondent's argument that he was entitled to credit Tripp credit (Tripp v. State, 622 So. 2d 941 (Fla. 1993) for the previous prison sentence of 4 years entered in a separate case since both offenses occurred before effective date of the guidelines. *Id.*

The Second District Court of Appeals did, however, reverse and remand the case to the trial court because the court's order failed to refute respondent's assertion that the trial court failed to give him proper credit for the 12 days served in the county jail

between his arrest for violation of probation in and the sentence of 15 years which followed. *Id.*

The Second District Court of Appeals reasoned, "This court has consistently afforded relief to those complaining that the failure of the trial court to award credit for jail time served rendered their sentences illegal, and was hence subject to correction in a proceeding pursuant to Florida Rule of Criminal Procedure 3.800(a)." *Id.*

The Second District Court of Appeals noted,"This, however, is not the majority view in this state.." and that:

> We acknowledge conflict with the First[1], Fourth[2], and Fifth[3] District Courts of Appeal which adopt the view that *Davis v. State*, 661 So. 2d 1193 (Fla. 1995), prohibits relief from the denial of jail credit by means of a motion to correct an illegal sentence without regard to the impact that failure may have had in "creating" a sentence which exceeds the statutory maximum allowable sanction.

Petitioner filed a timely notice invoking the discretionary jurisdiction of the Florida Supreme Court based upon certified conflict. Petitioner also filed a Motion To Stay the Mandate with

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[1]Berry v. State, 684 So. 2d 239 (Fla. 1st DCA 1996).

[2]Sullivan v. State, 674 So. 2d 214 (Fla. 4th DCA 1996).

[3]Chaney v. State, 678 So. 2d 880 (Fla. 5th DCA 1996).

the Second District Court of Appeals. This motion was denied. Petitioner then filed a Motion to Stay or Recall the Mandate of the Second District Court of Appeals which is presently pending before this Court at the time of the submission of the instant brief.

SUMMARY OF THE ARGUMENT

This Court should resolve the conflict of opinions by upholding the decisions of the First, Fourth and Fifth District Courts of Appeal which have held that the failure to give proper credit for jail served cannot be raised in a post-conviction action pursuant to Fla. R. Crim. 3.800(a) unless the defendant alleges that the denial of such credit will result in him serving a sentence which exceeds the statutory maximum for the offense.

ARGUMENT

ISSUE I

DOES THE DEFINITION OF AN "ILLEGAL SENTENCE" IN DAVIS V. STATE, 661 SO. 2D 1193, 1196 (FLA. 1995) AND STATE V. CALLAWAY, 658 SO. 2D 983, 988 (FLA. 1995) APPLY TO MOTIONS FOR FILED UNDER RULE 3.800 REQUESTING JAIL CREDIT SO THAT SUCH MOTIONS MAY NOT BE RAISED WHERE THE SENTENCE WOULD NOT EXCEED THE MAXIMUM SENTENCE ALLOWED BY LAW?.

The First district Court of Appeals in Berry v. State, 684 So. 2d 239 (Fla. 1st DCA 1996), The Fourth District Court of Appeals in Sullivan v. State, 674 So. 2d 214 (Fla. 4th DCA 1996) and the Fifth District Court of Appeals in Chaney v. State, 678 So. 2d 880 (Fla. 5th DCA 1996) have ruled that the failure of the trial court to award proper credit for time served in jail cannot be raised in a motion filed pursuant to Fla. R. Crim. Pro. 3.800(a) **unless the defendant alleges that the denial of such credit causes him to be sentenced to period in excess of the statutory maximum for his offense**. [It should be noted that the Second District Court of Appeals erroneously stated in its opinion that the First, Fourth and Fifth District Courts of Appeal prohibits such relief being granted pursuant rule 3.800 "without regard to the impact that failure may have had in "creating" a sentence *which exceeds the*

statutory maximum allowable sanction.(Emphasis added)" Swyck v. State, *Id.*] These appellate courts have relied upon this Court's statements in 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.") and State v. Callaway, 658 So. 2d 983 (Fla. 1995) ("We recently explained that an illegal sentence is one that exceeds the maximum period set forth by law for a particular offense without regard to the guidelines." in reaching their legal conclusion.

The Second District Court of Appeals in the instant case and the Third District Court of Appeals in Gonzalez v. State, 678 So. 2d 433 (Fla. 3d DCA 1996) have ruled that such requests for credit for time served can be made under rule 3.800(a). Contrary to the reasoning of the First, Fourth and Fifth Districts, the Second and Third District have held that such relief pursuant to rule 3.800(a) would be available even if the failure to give such credit does not result in the defendant being sentenced to a period in excess of the statutory maximum for the offense.

Petitioner submits that this Court should resolve this conflict in favor of the legal analysis set forth by the First, Fourth and Fifth District Courts of appeal.

Respondent was convicted of armed robbery in case 82-1082. That offense was punishable by a statutory maximum sentence of life imprisonment. *See* s. 812.13(2)(a) Fla. Stat (1981) (if a defendant carried a deadly weapon the robbery is a felony of the first degree punishable by imprisonment for a term of years not exceeding life imprisonment.). In the instant case respondent received a sentence of 15 years imprisonment upon his third revocation of probation. The failure of the trial court to give the appellant credit for 12 days spent in the county jail after his arrest for violation of probation and before his sentence was imposed will not result in the respondent serving a greater sentence then the statutory maximum of life imprisonment authorized by law.

As this Court reasoned in Callaway, *supra*. at 987-988:

> In *Judge v. State*, 596 So. 2d 73 (Fla. 2d DCA 1991) *review denied*, 613 So. 2d 5 (Fla. 1992), the court 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 proceeding. *Id.* at 76, 77 & n. 1. We explained recently that an illegal sentence is one that exceeds the maximum period set forth by law for a particular offense without regard to the guidelines. *Davis v. State*...

Petitioner submits that although the respondent is entitled to

credit for time served in county toward his prison sentence pursuant to s. 921.161(1), Fla. Stat (1981)[4], the proper procedure was to raise this issue on direct appeal (no direct appeal was taken) or to raise it in post-conviction action under Fla. R. Crim. Pro 3.850 (which he could not do since the 2 year period of limitation had lapsed). *See* Mientzer v. State, 399 So. 2d 133 (Fla. 5th DCA 1981).

In the instant case the trial court did give the respondent credit for 282 county jail credit when the 15 year sentence was imposed. (See page 4 of the Judgment and Sentence imposed on March 19, 1991 included in the record on appeal.). Therefore, the alleged error (failure to give credit for 12 days spent in county jail) is not apparent on the face of the record nor did the respondent argue in his motion for post-conviction relief that the credit give by the trial court did not include the 12 days in question. It could very be that 282 days credit included time previously spent jail for his original arrest on the armed robbery charge as well as periods of time his spent in county jail during

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[4]921.161(1): A sentence of imprisonment shall not begin to run before the date it is imposed, but the court imposing a sentence shall allow the defendant credit for the time he spent in county jail before sentencing. The credit must be for a specified period of time and shall be provided for in the sentence.

his prior arrests for violating his probation as well as the time he spent in county jail after his present arrest for violation of probation on March 8, 1991. This is why a 3.50 motion would have been the proper remedy. As the Fifth District Court of Appeals appropriately reasoned in Meintzer v. State, 399 So. 2d at 135:

> Section 921.161(1), Florida Statutes (1979), specifies that "the credit must be for a specified period of time and shall be provided for in the sentence. In order for an appellate court to determine, when the issue is raised, that a defendant has been allowed credit as required by this statute it is necessary that the sentence show on its face the specified period of time credited. ... ***Another problem is that the determination of credit requires a fact finding as to the actual confinement time in the county jail on the particular charge subject to the sentence. For this reason applications for correction of sentences to show credit for previous jail time served should be initiated under Florida Rule of Criminal Procedure 3.850 SO that the court can make the necessary factual determination and sentence correction without the necessity of appeal.***

It should be noted that the Fourth District in Sullivan v. State, 674 So. 2d at 215 note 1 stated that although not entitled to relief under rule 3.800, relief would be available under Fla. R. Crim. Pro. 3.850 and that if the defendant is beyond the time period for rule 3.850 relief [which is the factual scenario in the

instant case because the sentence of 15 years imprisonment was imposed in March of 1991 and the 2 two year limitation of action proscribed by 3.850 has expired] and the sentence has been served but for the improper jail credit time, a petition for writ of habeas corpus would offer relief.

Petitioner submits that respondent's proper remedy is to seek habeas corpus relief as stated by the Fourth District Court of Appeals in Sullivan v. State, *Id.*

CONCLUSION

Based on the foregoing facts, argument, and citations of authority, petitioner respectfully requests that this Court resolve the certified conflict of decisions by affirming the opinion s of the First, Fourth and Fifth District Court of Appeals and reverse the decision of the Second District Court of Appeals in the instant case. Respondent's proper remedy, under the specific factual circumstances of the instant case, is to seek relief through a petition for writ of habeas corpus.

Respectfully submitted,

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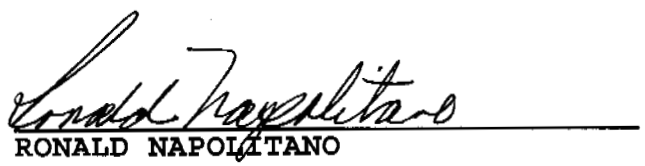

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Gary Swyck, DOC #909823, Hendry Correcetional Work Camp, 12551 Wainwright Drive, Immokalee, Florida 34142, this 16th day of May, 1997.

Ronald Napolitano

COUNSEL FOR PETITIONER

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

GARY L. SWYCK,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. 96-04736

Opinion filed March 26, 1997.

Appeal pursuant to Fla. R. App. P. 9.140(g) from the Circuit Court for Lee County; William J. Nelson, Judge.

PER CURIAM.

Gary L. Swyck challenges the trial court's denial of his motion to correct sentence filed pursuant to Florida Rule of Criminal Procedure 3.800. We reverse because the trial court failed to address and refute his claim that he was not properly credited with time spent in jail prior to the imposition of his sentence.

In 1981 Swyck was sentenced to prison to be followed by probation on a separate case. During this later period of supervision, he violated his probation and was again sentenced to prison. He claimed in his motion an entitlement to credit for the earlier time served in prison relying on Tripp v. State, 622 So. 2d 941 (Fla. 1993). As the imposition of his first sentence predated the sentencing guidelines which were effective on October 1, 1983, the dangers in sentencing which Tripp eliminated did not inhere in his circumstances. As the prison sentence in the second case was not factored into any guideline calculation initially, Tripp does not apply. Slater v. State, 639 So. 2d 80 (Fla. 2d DCA 1994). See also Duncan v. State, 22 Fla. L. Weekly D107 (Fla. 2d DCA Dec. 27, 1996).

Swyck's second complaint is that he was not properly credited with twelve days spent in the county jail between his arrest for violation of probation and the sentence which followed. This court has consistently afforded relief to those complaining that the failure of the trial court to award credit for jail time served rendered their sentences illegal, and was hence subject to correction in a proceeding pursuant to Florida Rule of Criminal Procedure 3.800(a). This, however, is not the majority view in this state, and two district courts have

certified this question to the Florida Supreme Court for consideration. Berry v. State, 684 So. 2d 239 (Fla. 1st DCA 1996); Sullivan v. State, 674 So. 2d 214 (Fla. 4th DCA 1996).[1]

We acknowledge conflict with the decisions of the First, Fourth, and Fifth District Courts of Appeal which adopt the view that Davis v. State, 661 So. 2d 1193 (Fla. 1995), prohibits relief from the denial of jail credit by means of a motion to correct an illegal sentence without regard to the impact that failure may have had in "creating" a sentence which exceeds the statutory maximum allowable sanction. In so doing we confirm the decisions of this court which have required trial courts to entertain motions seeking jail time credit brought pursuant to Florida Rule of Criminal Procedure 3.800(a). See, e.g., McDowell v. State, 684 So. 2d 250 (Fla. 2d DCA 1996).

We reverse the order denying the motion because it fails to refute Swyck's assertion that the trial court neglected to award him twelve days' county jail credit prior to the imposition of the sentence he is currently serving. In so doing, we certify that this decision is in direct conflict with Berry,

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[1] The Fifth District is aligned with those courts which have certified the question to the Supreme Court of Florida. Chaney v. State, 678 So. 2d 880 (Fla. 5th DCA 1996). The Third District continues to grant the requested relief as has this court. Gonzalez v. State, 678 So. 2d 433 (Fla. 3d DCA 1996).

Sullivan, and Chaney v. State, 678 So. 2d 880 (Fla. 5th DCA 1996).

Affirmed in part, reversed in part, and remanded.

CAMPBELL, A.C.J., and PATTERSON and BLUE, JJ., Concur.