

IN THE SUPREME COURT  
OF FLORIDA

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CASE NO.: 90,439

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DAVID L. TAYLOR

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

On Discretionary Review from a Decision  
of the Fifth District Court of Appeal

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INITIAL BRIEF OF PETITIONER

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I.

**THE TRIAL COURT LACKED AUTHORITY TO CHARGE  
APPELLANT WITH VIOLATION OF PROBATION OR TO  
REVOKE HIS PROBATION WHILE SERVING AN ILLEGAL  
SENTENCE.**

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PRELIMINARY STATEMENT

Petitioner, David L. Taylor, will be referred to herein by name, as "defendant" or as "petitioner". Respondent, State of Florida, will be referred to herein as the "State" or "respondent." References to the Record on Appeal will be designated by reference to the relevant volume and page set forth brackets. Example, [R.I, 1].

STATEMENT OF THE CASE AND FACTS

On June 30, 1995, David Taylor, was sentenced to 10 years probation on the charge of Driving Under the Influence Resulting in Serious Bodily Injury, a third degree felony. §316.193, Fla. Stat. 1993. [R.I, 38]. The maximum penalty for a third degree felony is five years imprisonment. §775.082 (3)(d), Fla. Stat. (1993). While on probation, Mr. Taylor violated his probation as indicated in the Violation of Probation of December 22, 1995. [R.I, 38]. On May 31, 1996, Mr. Taylor's probation was revoked and he was sentenced to incarceration for 38 months at a state facility. [R.I, 21,38,61]. On June 27, 1996, Mr. Taylor filed his notice of appeal from the sentence and judgment. [R.I, 39]. Mr. Taylor argued on appeal that his probation could not be revoked as the 10 year sentence was illegal for exceeding the statutory maximum of 5 years for a third degree felony. §775.082(3)(d), Florida Statutes (1993).

On March 27, 1997, the Fifth District Court of Appeal rendered its decision, affirming the sentence imposed. [Opinion filed March 27, 1997, 2]. The Fifth District Court of Appeal did recognize that Mr. Taylor's original sentence was illegal and that it exceeded the maximum statutory authority. [Opinion filed March 27, 1997, 2].

On April 21, 1997, Mr. Taylor filed his Notice to Invoke Discretionary Jurisdiction. This Court entered its Order Accepting Jurisdiction and Dispensing with Oral Argument on June 20, 1997. This initial brief on the merits follows.

POINTS ON APPEAL

I.

**Sentencing court lacked authority to charge appellant with violation of his probation order or revoke his probation while serving an illegal sentence.**

SUMMARY OF THE ARGUMENT

The petitioner, David Taylor, was sentenced illegally to 10 years probation for a third degree felony which has a maximum penalty of 5 years. The trial court charged Mr. Taylor with violation of his probation and revoked his probation. The trial court lacked the authority to do either because Mr. Taylor was serving an illegal sentence. Mr. Taylor's charge of violation and revocation of probation should be reversed. Additionally, this Court has the authority to remand for a re-sentencing of the previously imposed illegal sentence.

ARGUMENT

I.

**THE TRIAL COURT LACKED AUTHORITY TO CHARGE PETITIONER WITH VIOLATION OF PROBATION OR TO REVOKE HIS PROBATION WHILE SERVING AN ILLEGAL SENTENCE.**

The Fifth District Court of Appeal affirmed the trial court's decision to violate the petitioner David L. Taylor's probation. Despite the fact that the original sentence, 10 years probation, was an illegal sentence as it exceeded the statutory maximum, the district court found that the revocation and imposition of 38 months in prison was appropriate. The district court reasoned that

because the violation of probation occurred during the first five years of the illegally imposed 10 year probationary period, the sentence would have been legal in any event. Also, the district court stated that Mr. Taylor is estopped from asserting the illegality of the sentence "after he knowingly [took] advantage of its benefits." [Opinion filed March 27, 1997, 2]. The district court concluded its reasoning by stating, "We are not here facing a violation which is alleged to have occurred during that portion of the sentence which exceeded the statutory maximum." [Opinion filed March 27, 1997, 2].

In Jackson v. State, 654 So. 2d 234 (Fla 4th DCA 1995), the Fourth District Court of Appeal held that:

Since appellant was serving an illegal sentence, the trial court could not charge appellant with a violation of the terms of his probation nor revoke his probation.

\* \* \*

We . . . hold that a defendant may not be violated on a condition of probation or community control while serving an illegal sentence.

Id. at 236. According to the Jackson Court as well as the First District Court of Appeal in Cecil v. State, 614 So. 2d 603 (Fla. 1st DCA 1993) (holding that a defendant could not be properly charged with violating his probation while serving illegal sentence nor have that probation revoked), it was irrelevant whether the revocation of probation occurred within the so-called "legal" portion of the sentence; that is, the portion of the sentence within the statutory maximum. Indeed, the Cecil Court rejected the argument that the revocation of probation should be affirmed

because the violation occurred within the "legal" portion of the sentence; that is, the violation occurred during the initial five years. See Jackson, 654 So. 2d at 236.

The district court in the instant case improperly rejected these cases and even recognized conflict with the Jackson decision, but did not give any explanation for its rejection. The appellate courts in Jackson and Cecil were certainly aware in rendering their respective decisions that there are no "legal" portions of a sentence when it exceeds the statutory maximum. For example, in Robbins v. State, 413 So. 2d 840, 841 (Fla. 3d DCA 1982), the defendant pled guilty to robbery and unlawful display of a firearm during the commission of the robbery. The defendant was sentenced to five years imprisonment for the robbery to be followed by three years probation for the unlawful display. After completing his prison term, the defendant was charged with violation of probation which was revoked. The defendant was sentenced to fifteen years imprisonment. Id. On appeal, the defendant argued that the original sentencing order placing him on probation was illegal as it violated the "single transaction rule." Id. The appellate court agreed that the probationary sentence was illegal and thus void ab initio. Id. at 841-42. The appellate court further held that "all proceedings flowing from the probation are also a nullity. Therefore, the sentence imposed for violation of the probation is an illegal sentence." Id. at 842. The appellate court reversed the lower court and remanded the case to the trial court with directions to discharge the defendant. Id.; see Eaton



v. State, 307 So. 2d 881 (Fla. 3d DCA 1975) (illegally imposed probation is a nullity and void ab initio).

In the instant case, Mr. Taylor was sentenced illegally to a probationary term of 10 years, which exceeded the statutory maximum. As such, the sentence imposed is void ab initio, or void from the beginning. "Ab initio" is defined in Black's Law Dictionary as "[f]rom the beginning; from the first act; entirely; as to all the acts done; in the inception." Black's Law Dictionary 8 (4th ed. 1968). There can be no doubt then that the probationary term imposed has no "legal" portion. Mr. Taylor's entire probationary sentence from the beginning is illegal. Accordingly, the revocation of probation and the term of imprisonment imposed are likewise null and void.

Furthermore, the district court in the instant case improperly ruled that Mr. Taylor is estopped from asserting the illegality of the sentence after he has knowingly taken advantage of its benefits. In reliance on its ruling, the district court cited Warrington v. State, 660 So. 2d 385 (Fla. 5th DCA 1995). However, the district court improperly reads Warrington. Indeed, the district court's proposition of waiver and estoppel do not apply according to the Warrington decision. In Warrington, the Fifth District Court of Appeal explained that one cannot waive an illegal sentence if it violates a statutory maximum:

Usually, a defendant cannot agree to an illegal sentence, but when the illegal alternative and conditional defects which benefited that defendant are no longer in effect, the terms of incarceration that were agreed upon are valid so long as they are not beyond the statutory

maximums for the offenses for which the defendant was convicted.

Id. (emphasis added).

Likewise, the District Court's reliance on Smith v. State, 630 So. 2d 641 (Fla. 5th DCA 1994) and Gaskins v. State, 607 So. 2d 475 (Fla. 1st DCA 1992), is misplaced as both cases are factually dissimilar to the instant case. The illegal sentences opposed in Smith and in Gaskins were not due to imposition of a sentence which exceeded the statutory maximum. Accordingly, such error was not fundamental and thus Smith and Gaskins do not offer any support for the district court's ruling as to estoppel. In fact, Warrington, decided by the Fifth District Court of Appeal expressly rejects such an argument in this case. The Warrington Court made it quite clear that the "benefit" rule does not apply to sentences that violate the statutory maximum.

The sentence [in Warrington] is "illegal" only in the sense that it is not one of the sentences that may be imposed pursuant to Poore [v. State], 531 So. 2d. 161 (Fla. 1988) and §948.01, Fla. Statutes. The sentence does not violate a statutory maximum i.e. the terms of incarceration did not violate the statutory maximums for the crimes.

Accordingly, the "benefit" rule does not apply to the instant case.

In the instant case, the original sentence of ten years probation exceeded the statutory maximum for a third degree felony (i.e., five years sentence) and is thus invalid. This constitutes a fundamental error which cannot be waived and the petitioner cannot be estopped from raising such error. See Robbins v. State, 413 So. 2d 840 (Fla. 3d DCA 1982); see also, Ortiz v. State, 22

F.L.W. D 1649 (Fla. 5th DCA July 3, 1997) (a sentence which exceeds the maximum authorized by law is illegal and can be challenged at any time); Reed v. State, 616 So. 2d 592 (Fla. 4th DCA 1993) (defendant cannot agree to be sentenced beyond the statutory maximum). Likewise just as the petitioner, cannot agree to a sentence which exceeds the statutory maximum, he cannot agree to accept the benefits, if any, of such a sentence.

Caselaw is clear that the appropriate remedy in the instant case is reversal of the probation revocation and remand for re-sentencing. See Jackson v. State, 654 So. 2d 234 (Fla. 4th DCA 1995); Cecil v. State, 614 So. 2d 603 (Fla. 1st DCA 1993); Barnes v. State, 614 So. 2d 26 (Fla. 1st DCA 1993). Additionally, the sentencing court should be directed to consider any time served by petitioner during the pendency of his appeal. See Jackson, 654 So. 2d at 237.

CONCLUSION

For the foregoing reasons, the appellant respectfully requests that his charge of violating his probation and the revocation of such probation be reversed and that his case be remanded for re-sentencing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to David A. Foxman, Esquire, Assistant Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, by United States Mail, this 15 day of July, 1997.

*Richard W. Smith*

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