047

IN THE SUPREME COURT OF FLORIDA

JASON TYRONE SPEIGHTS,

Petitioner,

v.

CASE NO. 93,207

STATE OF FLORIDA,

Respondent.
_____/

MERIT BRIEF OF PETITIONER

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PRELIMINARY STATEMENT

Petitioner was the appellant at the district court level and the defendant at the trial court level. Petitioner will be referred to as "Mr. Speights" in this brief. Respondent was the appellee at the district court level and the state at the trial court level. Respondent will be referred to as such in this brief.

The record on appeal will be referred to as "R" followed by a colon, volume number I, and the corresponding page number all within parentheses. The transcript of court proceedings will be referred to as "T" followed by a colon, volume numbers II-III, and the corresponding page number all within parentheses.

Appearing in Mr. Speights' defense at the trial level was Ronald D. Trow, Esquire. Appearing for the State at the trial level was Clemente J. Inclan, Esquire. The Honorable Brad

Stetson presided over the trial court.

Mr. Speights was tried by a jury and convicted as charged of Aggravated Battery. The trial court sentenced him as a Habitual Violent Felony Offender to 22 years Department of Corrections with the first 10 years mandatory minimum.

The First District Court of Appeals affirmed Mr. Speights' sentence.

STATEMENT OF THE FACTS AND CASE

A jury found Jason Speights guilty as charged of Aggravated Battery. (R:Vol I, 40)(T:Vol III, 353-354). The evidence brought forth during trial is contained in volumes II and III of the transcript but is not pertinent to this appeal and so will not be discussed.

Prior to sentencing[1], the State prepared a scoresheet which contained only one prior offense of Attempted Carjacking with Deadly Weapon.[2] The guidelines scoresheet called for a sentence between 45 and 75 months in prison. (R:Vol I, 58-59).

During the first sentencing phase the following exchange took place:

> THE COURT: Would the State please announce all of its priors its (sic) relying on in seeking habitualization in the case?
>
> MR. INCLAN [STATE]: Your Honor, the State is relying on a conviction out of Tampa dated --
>
> THE COURT: First of all give me the crime, please. Just the crime.
>
> MR. INCLAN: Yes, sir. Attempted carjacking with a deadly weapon.
>
> THE COURT: What degree

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[1]Sentencing occurred on July 14, 1997.

[2]*See also* Mr. Speights' prior record listed within his PreSentence Investigation Report.

felony is that, by the way?

MR. INCLAN: Your Honor, it's a second degree felony.

THE COURT: What was the date of that conviction?

MR. INCLAN: Your Honor, the date is July 4th, 1995.

THE COURT: And the case number?

MR. INCLAN: Case number is 95-04747.

THE COURT: 04747?

MR. INCLAN: Yes, sir. 04747.

THE COURT: Is there a -- is that Duval County?

MR. INCLAN: No, Your Honor, it is Hillsborough County.

THE COURT: Does the State know of any set aside on appeal or any gubernatorial pardon or any other matter that would affect the validity of that sentence?

MR. INCLAN: No, sir.

THE COURT: Does the defense know of any such matter?

MR. ANDUX [DEFENSE]: No, sir.

THE COURT: Does the defense stipulate, for purposes of identification, that, in fact, that is the defendant's prior judgment and sentence? Do you want to have him take a look at that?

MR. ANDUX: I already have, Judge.

(R:Vol I, 73-74).

After this colloquy, the prior judgment and sentence were entered into evidence as a sentencing exhibit. (R:Vol I, 41-46).

During the second sentencing phase, the State argued that the trial court should habitualize Mr. Speights. To this, defense counsel argued for the trial court to show him leniency by giving him only the 10 year mandatory minimum. (R:Vol I, 86-87). The trial court adjudicated Mr. Speights and sentenced him to 22 years Department of Corrections as a Habitual Violent Felony Offender with the first 10 years mandatory minimum. (R:Vol I, 50-57, 87).

On July 17, 1997, Mr. Speights filed a timely Notice of Appeal. (R:Vol I, 65).

On November 5, 1997, Mr. Speights filed a Motion to Relinquish Jurisdiction with the First District Court of Appeal. Mr. Speights argued that a sentencing error had occurred that could best be corrected by sending the case directly back to the trial court. Mr. Speights explained that this was the only viable issue for appeal in his case.

On November 17, 1997, Respondent filed a motion opposing Mr. Speights' motion. Respondent argued that the case must run the appellate course.

On November 25, 1997, the First District denied Mr. Speights' Motion to Relinquish Jurisdiction.

The issue presented to the First District Court of Appeal (on direct appeal) was whether the trial court had erred in illegally sentencing Mr. Speights as a Habitual Violent Felony Offender where the predicate offense relied on (Attempted Carjacking) was not enumerated in the habitual offender statute.

The First District affirmed Mr. Speights' sentence holding that such a sentence was not illegal, that it was not properly objected to, and therefore that it was not cognizable on direct appeal. *Speights v. State*, 23 Fla. Law Weekly D1220, 1221 (Fla. 1st DCA May 13, 1998). The First District certified the following question as one of great public importance:

> WHEN A HABITUAL VIOLENT FELONY OFFENDER SENTENCE IS IMPOSED WITHOUT RECORD EVIDENCE OF A PRIOR CONVICTION OF AN ENUMERATED PREDICATE FELONY, BUT WITHOUT OBJECTION BY THE DEFENDANT TO THE IMPOSITION OF SUCH A SENTENCE, AND THE RESULTING SENTENCE IS ABOVE THE STATUTORY MAXIMUM WITHOUT HABITUALIZATION BUT BELOW THE STATUTORY MAXIMUM PERIOD OF INCARCERATION AFTER HABITUALIZATION, IS THE SENTENCING ERROR ONE THAT MAY BE RAISED ON APPEAL FOR THE FIRST TIME, AND CORRECTED DESPITE THE LACK OF ANY MOTION IN THE TRIAL COURT TO CORRECT THE SENTENCE PURSUANT TO FLA.R.CRIM.P. 3.800(b)?

Id.

A copy of the First District's opinion is attached as Appendix A.

SUMMARY OF THE ARGUMENT

The trial court reversibly erred when it sentenced Mr. Speights as a Habitual Violent Felony Offender relying on the improper predicate offense of Attempted Carjacking.

Although there was no objection at the trial level, this issue should be viable on direct appeal.

Sentencing a defendant to an unauthorized mandatory minimum sentence is fundamental error. In as much as Mr. Speights' sentence includes a ten year mandatory minimum, the trial court committed fundamental error that can still be raised on appeal in accordance with the Criminal Appeals Reform Act. *See* §924.051(3), Fla. Stat. (1997).

Alternatively, the sentence is illegal. It is illegal because it does not comport with statutory limitations. It is illegal because without the habitualization it exceeds the statutory maximum. It is illegal because Florida courts have found improper habitualizations to be patently illegal. Finally, it is illegal because it is a sentence that can be corrected as a matter of law.

There is no question that Attempted Carjacking is not listed as a proper predicate within the habitualization statute. §775.084(1)(b)1., Fla. Stat. (1997). Florida courts have interpreted this list to be exclusive. Prior to the Reform Act, Florida courts found reliance on unlisted predicates to be errors that created illegal sentences.

Therefore, Mr. Speights' respectfully requests this Court grant him a new sentencing hearing.

ARGUMENT

ISSUE

WHETHER SENTENCING MR. SPEIGHTS AS A HABITUAL VIOLENT FELONY OFFENDER WITHOUT A PROPER PREDICATE OFFENSE IS FUNDAMENTAL ERROR THAT CAN BE ADDRESSED FOR THE FIRST TIME ON APPEAL, OR ALTERNATIVELY, CONSTITUTES AN ILLEGAL SENTENCE THAT CAN BE ADDRESSED FOR THE FIRST TIME ON APPEAL

A. FACTS

In determining that Mr. Speights qualified for sentencing as a Habitual Violent Felony Offender, the trial court relied exclusively on his prior conviction for Attempted Carjacking with Deadly Weapon. (R:Vol I, 56-57, 73-74, 87).

Mr. Speights' guidelines scoresheet showed that with his prior record his maximum exposure was 75 months (a little over six years) Department of Corrections. Still, because the trial court found Mr. Speights to be a Habitual Violent Felony Offender, he was sentenced to 22 years with a guarantee that the first ten years would be day-for-day. (R:Vol I, 50-57, 87).

The difference is approximately 16 years of a man's life.

B. PRESERVATION

Mr. Speights did not object when the trial court sentenced him as a Habitual Violent Felony Offender. In fact, he stipulated to the judgement and sentence entered on the Attempted Carjacking. (R:Vol I, 73-74). Further, when arguing

for a specific sentence, Mr. Speights argued that only the 10 years mandatory minimum should be imposed. In other words, Mr. Speights never argued for a guidelines sentence nor took exception to being classified as a Habitual Violent Felony Offender. (R:Vol I, 86-87).

Still, Mr. Speights urges that he should be allowed to address this egregious error on direct appeal. *See generally Denson v. State*, 23 Fla.L.Weekly D1216, 1217 (Fla. 2d DCA May 13, 1998)("If a goal of criminal reform is efficiency ... little is gained if the appellate courts require prisoners to file, and trial courts to process, more post conviction motions to correct errors that can be safely identified on direct appeal ... [e]fficiency aside, appellate judges take an oath to uphold the law and constitution of this state. The citizens of this state properly expect these judges to protect their rights.").

The Criminal Appeals Reform Act (hereinafter "Act") sets forth:

> An appeal may not be taken from a judgment or order of a trial court unless prejudicial error is alleged and is properly preserved <u>or if not properly preserved, would constitute fundamental error</u>. A judgment or sentence may be reversed on appeal only when an appellate court determines after a review of the complete record that prejudicial error occurred and was properly preserved in the trial court <u>or, if not properly</u>

> preserved, would constitute fundamental error.

§924.051(3), Fla. Stat. (1997)(emphasis added).

Although the Act has become a catalyst for sweeping changes at the appellate level, it appears that the legislature did not do away with fundamental error. *But cf. Maddox v. State*, 708 So.2d 617, 619 (Fla. 5th DCA 1998)(stating in dicta that the Act takes away the right to appeal any sentencing error that is not properly preserved).

According to the plain language of the statute, fundamental error is still fundamental error. Therefore, relying on Florida precedents, Mr. Speights argues that in as much as his sentence included a mandatory minimum sentence it is fundamental error. Acknowledging the ever present Criminal Appeals Reform Act, the Fourth District still held that:

> While appellant failed to preserve this error by contemporaneous objection, we hold that the improper imposition of a mandatory minimum sentence in the written sentence constitutes fundamental error, and thus, is properly before this court for review.

Louisgeste v. State, 706 So.2d 29, 31 (Fla. 4th DCA 1998).

This holding evolves from the rational that fundamental error occurs when a person is forced into incarceration for a longer period of time than he would have otherwise served, but for the error in the trial court. *Whitehead v. State*, 446 So.2d 194, 197 (Fla. 4th DCA 1984); *Reynolds v. State*, 429

So.2d 1331, 1333 (Fla. 5th DCA 1983). As discussed *supra*, but for the trial court's error in sentencing Mr. Speights as a Habitual Violent Felony Offender, he would have received a sentence at least 16 years less. Following the rationale in *Louisgeste, Whitehead, and Reynolds*, the error in Mr. Speights' case was fundamental. *See also Vause v. State*, 502 So.2d 511, 512 (Fla. 1st DCA 1987); *Walker v. State*, 474 So.2d 319, 320 (Fla. 3rd DCA 1985); *Cisnero v. State*, 458 So.2d 377, 378 (Fla. 2d DCA 1984).

If this Court is inclined to reject Mr. Speights' argument that his sentencing is fundamental error, the issue is still meritorious. This Court should find that Mr. Speights' sentence is illegal.[3]

Mr. Speights urges this Court to end the speculation among district courts that the only illegal sentence is one that exceeds the statutory maximum. *Davis v. State*, 661 So.2d 1193 (Fla. 1995). In *Davis* the sentence challenged was a guidelines departure. In that type of a sentencing error this Court found, "Only if the sentence exceeds the maximum allowed by law would the sentence be illegal." *Id.* at 1196. Mr. Speights argues that this sweeping statement should not be applied to habitual offender sentencing errors.

Support for Mr. Speights' argument comes from this Court's

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[3]A defendant may still appeal a sentence that is illegal. *Amendments to the Florida Rules of Appellate Procedure*, 685 So.2d 773, 775 (Fla. 1996). *See* Fla. R. App. P. 9.140(b)(1)(D).

recent holding in *State v. Mancino:*

> As is evident from our recent holding in *Hopping*, we have rejected the contention that our holding in *Davis* [*supra*] mandates that only those sentences that facially exceed the statutory maximums may be challenged under rule 3.850(a) as illegal.

State v. Mancino, 23 Fla.L.Weekly S301, 302 (Fla. June 11, 1998)(emphasis in original).

Mr. Speights' sentence is illegal because it does not comport with statutory limitations. In the absence of fundamental error, a sentence that does not comply with "statutory or constitutional limitations is by definition 'illegal'." *Id.* *See also McCant v. State*, 23 Fla.L.Weekly D1555 (Fla. 2d DCA June 26, 1998)(state conceding error where there was no statutory authority to habitualize a defendant upon possession of cocaine conviction, citing *Miller v. State*, 696 So.2d 913 (Fla. 2d DCA 1997)); *Denson v. State*, 23 Fla.L.Weekly D1216, 1217 (Fla. 2d DCA May 13, 1998)(improper habitualization is a patently illegal sentence).[4]

Even if this Court were to apply the *Davis, supra,* "definition" of an illegal sentence to Mr. Speights' case, his sentence should still be considered illegal because it does exceed the statutory maximum.

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[4]Prior to the Act it was well settled that without the proper predicates, a habitual offender sentence was an illegal sentence. *Washington v. State*, 653 So.2d 362, 367 (Fla. 1994), *Pet. cert. denied*, 133 L.Ed.2d 309 (1995); *Gahley v. State*, 605 So.2d 1309, 1310 (Fla. 1st DCA 1992).

Aggravated Battery, the crime to which Mr. Speights was found guilty, is a second degree felony. § 784.045, Fla. Stat. (1997). A second degree felony is punishable by law up to 15 years incarceration. § 775.082(3)(c), Fla. Stat. (1997).

Without reference to the habitual statute, the maximum period of incarceration for the second degree felony Mr. Speights was found guilty of is 15 years. Yet, he was sentenced to 22 years incarceration. Therefore, his sentence exceeds the statutory maximum by seven years.

Mr. Speights further argues that his sentence is illegal as an improper habitualization. Seemingly contrary to its holding in Mr. Speights' case, the First District has recently found that when considering whether the sentence is illegal, one must consider the maximum sentence that could be imposed absent habitualization. *Copeland v. State,* 23 Fla.L.Weekly D1224 (Fla. 1st DCA May 12, 1998)(Kahn, J., writing with Miner and Allen, JJ., concurring); *Stanford v. State,* 706 So.2d 900 (Fla. 1st DCA 1998)(Kahn, J., writing with Barfield and Benton, JJ., concurring); *Middleton v. State,* 689 So.2d 304 (Fla. 1st DCA 1997)(habitualization on possession of cocaine not preserved and not illegal because defendant received a sentence within the maximum allowable for a third degree felony - 48 months prison followed by one year probation). *But see Speights v. State,* 23 Fla.L.Weekly D1220 (Fla. 1st DCA May 13, 1998)(Davis, J., writing with Mickle and Lawrence, JJ.,

concurring).

Mr. Speights further argues that his sentence is by definition illegal as it is error that may be resolved as a matter of law. *State v. Mancino* at S302, *supra* (citing *State v. Callaway,* 658 So.2d 983 (Fla. 1995)). The record clearly indicates that the Attempted Carjacking was Mr. Speights' only prior offense.

C. MERITS

Florida Statutes section 775.084(1)(b)1. specifically states that a defendant may be considered a violent felony offender if:

> 1. The defendant has previously been convicted of a felony or an attempt or conspiracy to commit a felony and one or more of such convictions was for:
>
> a. Arson;
>
> b. Sexual battery;
>
> c. Robbery;
>
> d. Kidnapping;
>
> e. Aggravated child abuse;
>
> f. Aggravated abuse of an elderly person or disabled adult;
>
> g. Aggravated assault;
>
> h. Murder;
>
> i. Manslaughter;
>
> j. Aggravated manslaughter of an elderly person or disabled adult;

k. Aggravated manslaughter of a child;

l. Unlawful throwing, placing, or discharging of a destructive device or bomb;

m. Armed burglary;

n. Aggravated battery; or

o. Aggravated stalking.

§ 775.084(1)(b)1., Fla. Stat. (1997).

Carjacking is clearly not included within this list.

Section 775.084(1)(b)1. is an exclusive list. Therefore, if a crime is not listed within it, that crime can not be used as a predicate offense. *See, e.g.'s, Washington v. State,* 653 So.2d 362, 367 (Fla. 1994)(prior offenses for burglary could not be used to habitualize defendant as a violent felony offender where those offenses were not enumerated in the 1989 version of the statute), *cert. den'd,* 133 L.Ed.2d 309 (1995); *Watkins v. State,* 622 So.2d 1148 (Fla. 1st DCA 1993)(standing for the proposition that an offense must be specifically listed within the statute to be used as the predicate prior), *disapproved on other grounds, White v. State,* 666 So.2d 895 (Fla. 1996).

Florida Statutes section 775.084(1)(b)1. specifically defines who may be considered a Habitual Violent Felony Offender. As Mr. Speights does not meet all of the criteria, he can not be considered as such. *See Alston v. State,* 667 So.2d 1000 (Fla. 3rd DCA 1996)(finding that the statutory

language is specific, therefore, a defendant either meets the criteria or he does not).

Penal statutes must be strictly construed, and if the legislature has set forth specific terms, the courts are without authority to revise or modify those terms. *Watkins* at 1150. § 775.021(1), Fla. Stat. (1997)(rule of lenity).

The statute is clear and the case law is clear. Mr. Speights' prior Attempted Carjacking was not a proper predicate offense for a finding that he was a Habitual Violent Felony Offender. Therefore, using only this predicate the trial court erred in finding him to be a Habitual Violent Felony Offender.

CONCLUSION

In light of the foregoing, and on the strength of authority cited, Mr. Speights respectfully requests this Court remand his case for resentencing.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to James W. Rogers, Assistant Attorney General, by delivery to The Capitol, Plaza Level, Tallahassee, FL; and a copy has been mailed to appellant, Jason Speights, DOC# 548943, Holmes Corr. Institution, 3142 Thomas Drive, Bonifay, FL 32425, on this date, July 14, 1998.

Respectfully submitted,

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