

IN THE SUPREME COURT OF FLORIDA

FILED
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DEC 28 1999

CLERK, SUPREME COURT

BY dy

ANTHONY A. STUART,
PETITIONER

VS.

CASE NO.: 96,208

DCA CASE NO.: 98-02900

STATE OF FLORIDA
RESPONDENT

ON DISCRETIONARY REVIEW FROM THE
DISTRICT COURT OF APPEALS, SECOND DISTRICT
STATE OF FLORIDA

INITIAL BRIEF OF PETITIONER

Anthony A. Stuart
Petitioner
Washington Corr. Inst.
4455 Sam Mitchell Drive
Chipley, Florida, 32428

DC# T06549 Pro Se

CERTIFICATE OF INTERESTED PERSONS

I hereby certify that the foregoing named persons have an interest in the outcome of this appeal:

All interested persons are listed in the caption of this brief.

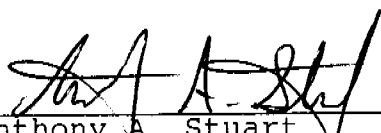
/s/ 
Anthony A. Stuart
Petitioner, Pro Se
Washington Corr. Inst.
4455 Sam Mitchell Drive
Chipley, Florida, 32428
DC# T06549 Pro Se

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INTRODUCTION

This is an appeal from a judgement of conviction and sentence before the Honorable Daniel L. Perry, Judge of Circuit Court, Criminal Division, Thirteenth Judicial Circuit. The Appellant, **ANTHONY A. STUART**, was the Defendant in the trial court, and the Appellee, State of Florida, as the prosecution. The Defendant will be referred to in this brief as Stuart, Appellant or Petitioner. The Assistant State Attorney will be referred to as the prosecutor.

The symbol "R", followed by the appropriate volume and page number, will be used to refer to the record on appeal.

STATEMENT OF THE CASE AND FACTS

On May 18, 1998, Stuart entered open pleas of guilty to five separate pending cases. (R. II 172-73). The trial court engaged in complete and proper plea colloquies. (R. II, 195-204). Before Stuart pled guilty, the trial court pointed out that he was facing a substantial prison sentence. The guidelines scoresheet provided a prison range from 267 months to 445 months. (R. II, 197). Stuart, through trial counsel, requested that the Department of Corrections conduct a pre-sentence investigation before sentencing. The trial court granted that request and set the cases for a sentencing date of June 23, 1998.

On June 23, 1998, the trial court considered several items including the prepared Department of Correction's report and statements from the deceased victim's family. The court also heard argument from counsel for Stuart as well as argument from the prosecutor. The trial court subsequently sentenced Stuart as follows:

Case 97-17927, Robbery, (home invasion less than \$300), 812.135(1): 20 years prison followed by 15 years probation. (R. I, 104-110, 169).

Case 97-20100, two counts of Vehicular Homicide, 782.071: 10 years probation on each count; each count to run concurrent with the other, but consecutive to prison time in 97-17927 and 97-2501. (R. I, 166-169). The information charging Stuart did not allege any enhancement, to wit: that he left the scene of the accident after it occurred. (R. I, 147).

Case 97-10310, three counts of Obtaining Property for Worthless Check, felony amount, 832.05(4): 5 years prison. (R. I, 68-73).

Case 97-18205, Burglary of a Conveyance, 810.02(4)(b): 5 years prison; Dealing in Stolen

Property, 812.019(1): 15 years prison, (R.I, 126-131).

Case 97-2501, Possession of Cocaine, 983.13, and three misdemeanors: 5 years prison. (R. I, 33-41).

All sentences were to run concurrently unless otherwise indicated. Each of the judgments and sentences above were signed by the trial court. Stuart filed a pro se notice of appeal on July 6, 1998, (R.I 176).

The Second District Court of Appeals dismissed the appeal for lack of jurisdiction, citing Leonard v. State, 731 So.2d 2 (Fla. 2d DCA 1998). The Leonard, decision was granted review in this Court and jurisdiction in Stuart, was subsequently granted.

This appeal follows.

SUMMARY OF ARGUMENT

ISSUE I

The trial court imposed an illegal sentence in lower case number 97-17927, Robbery (home invasion), because the period of incarceration imposed combined with the period of probation imposed, exceeds the statutory maximum provided for a first degree felony. That is, the lower court imposed 20 years prison followed by 15 years probation on a first degree felony which only allows for a maximum aggregate penalty of 30 years.

The trial court imposed an illegal sentence in lower case number 97-20100 Vehicular Homicide, because the period of probation imposed exceeds the statutory maximum for a third degree felony. That is, the trial court imposed probation on a third degree felony which only allows for a maximum penalty of 5 years. **The State of Florida agreed the sentence was illegal in their brief before the District Court.**

The District Court of Appeal had jurisdiction to reverse the illegal sentence imposed.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT IMPOSED AN ILLEGAL SENTENCE

The trial court is permitted under the sentencing guidelines to impose a combination of incarceration and probation so long as the combined terms of incarceration and probation do not exceed the statutory maximum. King v. State, 681 So.2d 1136 (Fla. 1996); Fuentes v. State, 23 Fla. L. Weekly D1213 (Fla. 2d DCA May 13, 1998); State v. Lindsey, 560 So.2d 406 (Fla. 5th DCA 1990). A sentence is "illegal" if it exceeds the statutory maximum for the particular offense at issue. King v. State, 681 So.2d 1136 (Fla. 1996). A guidelines sentence, which includes the incarcerative portion of the sentence and the probationary or community control period may not exceed the statutory maximum for that offense. Stephens v. State, 677 So.2d 1325 (Fla. 2d DCA 1996); Garcia v. State, 666 So.2d 231 (Fla. 2d DCA 1995). The Florida Supreme Court has recently allowed a prison sentence which was within the recommended scoresheet range, but which exceeded the statutory maximum. Mays v. State, 23 Fla. L. Weekly S387 (Fla. S. Ct., July, 1998).

Stuart entered a plea of guilty to Robbery, (home invasion less than \$300), 812.135(1). This offense is classified as a first degree felony punishable by imprisonment for up to 30 years. Fla. Stat. 775.082(3)(b). The court imposed a sentence of 20 years prison followed by 15 years probation. (R. I, 104-110, 169). Since the combined periods of 20 and 15 exceed the statutory maximum of 30, the trial court imposed an illegal sentence.

Stuart also entered a plea of guilty to two counts of Vehicular Homicide, 782.071. The State of Florida did not allege any enhancement under 782.071. (R. I, 147). These offenses, therefore, are classified as third degree felonies punishable by imprisonment for up to 5 years. Fla. Stat.

775.082(3)(d). The trial court imposed a sentence of 10 years probation on each count; each count to run concurrent with the other, but consecutive to prison time in 97-17927 and 97-2501. (R.I, 166-169). Since the ten year probationary period exceeds the 5 year allowable sentence, the trial court imposed an illegal sentence.

Florida Statute, Section 924.06 (1998) (amended) provides: "(1) A defendant may appeal from: . . . (d) A sentence, on the ground that it is illegal,"

The trial court, at sentencing, stated:

"The Court: He has thirty days to appeal the judgement and sentence of the Court." (R. I, 257)(T-52).

Since Florida Statute 924.051(4) did not override, section 924.06, regarding an appeal of a true illegal sentence, the District Court had jurisdiction and the Petitioner was entitled to relief, King v. State, 681 So.2d 1136 (Fla. 1996), and Davis v. State, 661 So.2d 1193 (Fla. 1995)("illegal sentence is one that can be addressed at any time." and should be "raised on direct appeal"). Id at 1197.

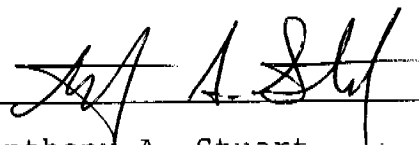
CONCLUSION

The trial court imposed an illegal sentence in lower case 97-17927, Robbery (home invasion), because the period of incarceration imposed combined with the period of probation imposed, exceeds the statutory maximum for a first degree felony. That is, the court imposed 20 years prison followed by 15 years probation on a first degree felony which only allows for maximum aggregate penalty of 30 years.

The trial court imposed an illegal sentence in lower case 97-20100, Vehicular Homicide, because the period of probation imposed, exceeds the statutory maximum for a third degree felony. That is, the court imposed 10 years probation on a third degree felony which only allows for a maximum penalty of 5 years.

For the above stated reasons, this matter should be remanded to the trial court for sentencing in accordance with statutory maximums for each indicated offense.

RESPECTFULLY SUBMITTED

/s/ 

Anthony A. Stuart,
Petitioner, Pro se
Washington Corr. Inst.
4455 Sam Mitchell Drive
Chipley, Florida 32428
DC# T06549

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that a true and correct copy of the foregoing
has been furnished by pre-paid U.S. Mail to:

Robert A. Butterworth, Attorney General
Plaza Level #01 - The Capitol, Tallahassee, Florida
32399-1050

on this 24th day of December, 1999.

/s/ Anthony Stuart

Anthony Stuart
PRO SE, DC # T06549
Washington Corr. Inst.
4455 Sam Mitchell Drive
Chipley, Florida 32428

IN THE SUPREME COURT OF FLORIDA

ANTHONY STUART,
PETITIONER

VS.

CASE NO.: 96,208

STATE OF FLORIDA,
RESPONDENT

APPENDIX

Opinion - Second District Court of Appeals

Stuart v. State,

2d DCA case no. 98-02900 (Fla. 2d DCA 1999) "A"

Pre-sentence Investigation,

Florida Department of Corrections 6/18/98 "B"

Answer Brief, State of Florida; pages 4 - 7,

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2d DCA case no. 98-02900 (Fla. 2d DCA 1999) "C"

APPENDIX "A"

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

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

ANTHONY A. STUART,)
)
 Appellant,)
)
 v.)
)
 STATE OF FLORIDA,)
)
 Appellee.)

Case No. 98-02900

Opinion filed June 2, 1999.

Appeal from the Circuit Court for
Hillsborough County; Daniel L. Perry,
Judge.

Gerald A. Perez, Tampa, for Appellant.

Robert A. Butterworth, Attorney General,
Tallahassee, and Ronald Napolitano,
Assistant Attorney General, Tampa, for
Appellee.

PER CURIAM.

Dismissed. See Leonard v. State, 23 Fla. L. Weekly D1438 (Fla. 2d DCA
1998), review granted, No. 93,332 (Fla. Feb. 22, 1999).

PATTERSON, A.C.J., and ALTENBERND, and CASANUEVA, JJ., Concur.

APPENDIX "B"

Other Recommendations: IF COMMUNITY SUPERVISION IS APPLICABLE, THE DEFENDANT STATES HE WOULD LIKE TO GET INTO A REHABILITATION PROGRAM AND QUIT USING DRUGS IN ORDER TO BE ABLE TO SEE HIS SON OR BE ABLE TO SEE HIS SON GROW UP AND GET A RELATIONSHIP WITH HIM AND A RELATIONSHIP BACK WITH HIS MOTHER. THE DEFENDANT STATES HE WOULD LIKE A NEW LIFE WITHOUT DRUGS.

ASSESSMENT & RECOMMENDATION

Recommended Disposition and Reason: BEFORE THE COURT STANDS 34 YEAR OLD ANTHONY ADRIAN STUART PLEADING GUILTY TO DKT. #97-2501, CT. 1-POSSESSION OF COCAINE, CT. 2-CARRYING A CONCEALED WEAPON, CT. 3-POSSESSION OF DRUG PARAPHERNALIA, CT. 4-ATTACHING TAG NOT ASSIGNED; DKT. #97-10310: CTS. 1, 2, AND 3-OBTAINING PROPERTY FOR WORTHLESS CHECK; DKT. #97-18205, CT. 1-BURGLARY OF A CONVEYANCE, CT. 3-DEALING IN STOLEN PROPERTY; DKT. #97-17927: ROBBERY (HOME INVASION); DKT. #97-20100: CT. 1 AND 2-VEHICULAR HOMICIDE.

PRIOR THE DEFENDANT'S ARREST FOR THE INSTANT OFFENSES, HIS CRIMINAL RECORD CONSISTED OF ONLY MISDEMEANOR OFFENSES OF CHARGES FOR PETIT THEFT. THE DEFENDANT HAD BEEN PLACED ON SALVATION ARMY PROBATION WHICH HE VIOLATED AND LATER SERVED TIME IN COUNTY JAIL. THE DEFENDANT ATTRIBUTES HIS CRIMINAL ACTIVITY TO HIS ADDICTION TO CRACK COCAINE. SINCE THE DEFENDANT'S ADDICTION, HE HAS BEEN UNABLE TO MAINTAIN STABLE RESIDENCE, KEEP GAINFUL EMPLOYMENT, TAKE CARE OF HIS SON IN THE MANNER IN WHICH HE DESERVES. THE DEFENDANT RELATED ON THE MORNING OF THE CAR ACCIDENT, HE HAD GOTTEN INTO A DISAGREEMENT WITH HIS MOTHER AND GOTTEN KICKED OUT HER RESIDENCE. THAT MORNING THE DEFENDANT STATES HE WAS ON HIS WAY TO WORK WHEN THE ACCIDENT HAPPENED. THERE IS NO EXCUSE FOR THE DEFENDANT'S CHOICE OF ACTIONS WHICH CAUSED THE FATAL ACCIDENT, KILLING TWO INNOCENT MEN. DURING THE FORM-1 INTERVIEW, THE DEFENDANT EXPRESSED TREMENDOUS REMORSE FOR HIS ACTIONS NOT ONLY FOR THOSE WHO LOST THEIR LOVED ONES, BUT FOR THE PAIN HE HAS CAUSED HIS MOTHER AND HIS SON.

PER SENTENCING GUIDELINES SCORESHEET, THE DEFENDANT SCORES OUT TO A TOTAL 116.5 STATE PRISON MONTHS, WITH THE MINIMUM BEING 87.3 MONTHS AND THE MAXIMUM BEING 145.6 MONTHS.

THIS OFFICER CAN SEE NO LEGAL REASON TO DEVIATE FROM THE SENTENCING GUIDELINES SCORESHEET, THEREFORE RECOMMENDS 12 YEARS FLORIDA STATE PRISON FOLLOWED BY 10 YEARS DRUG OFFENDER PROBATION. THIS OFFICER RECOMMENDS THAT WHILE THE DEFENDANT IS INCARCERATED, HE ENTER AND SUCCESSFULLY COMPLETE THE TIER III DRUG PROGRAM AND OBTAIN HIS GED. UPON RELEASE FROM INCARCERATION, THIS OFFICER RECOMMENDS THAT THE DEFENDANT CONTINUE DRUG TREATMENT, RANDOM URINE SCREENS, OBTAIN GED IF NOT DONE WHILE IN PRISON, OBTAIN GAINFUL EMPLOYMENT, AND COMMUNITY SERVICE HOURS AND HELPING THOSE WHO HAVE LOST A LOVED ONE DUE TO A FATAL ACCIDENT.

Restitution: NO YES (Specify amount, name, address, and how payable)

DKT. #97-10310: \$537.09 TO WALMART, 11720 MARTIN LUTHER KING JR. BLVD, SEFFNER, FL 33584.

DKT. #97-18205: \$85.00 PAYABLE TO L.N.I. DESIGN, 5330 CR 579, SEFFNER, FL 33584. ATTN: LARRY REEL.

DKT. #97-17927: RESTITUTION AMOUNT TO BE DETERMINED PAYABLE TO PATRICIA STUART, SEFFNER, FL

DKT. #97-20100: \$7000.00 PAYABLE TO TERRI NORTH OF ODESSA, FL

RESTITUTION AMOUNT TO BE DETERMINED BY VICTIM ASSISTANCE PAYABLE TO VIVIAN EVERSOLL OF 46701 TRAFFORD ROAD, HOLIDAY, FL.

Environment to Which Offender Might Return or Be Sent: THIS OFFICER RECOMMENDS THE ENVIRONMENT OF FLORIDA STATE PRISON WITH DRUG TREATMENT AND COUNSELING WHILE INCARCERATED. THIS OFFICER RECOMMENDS THAT FOLLOWING INCARCERATION, THE DEFENDANT BE SUPERVISED UNDER DRUG OFFENDER PROBATION WITH CONTINUED DRUG TREATMENT AND COUNSELING WHILE MAINTAINING GAINFUL EMPLOYMENT.

Resources Available to Assist this Particular Offender: DEPT. OF CORRECTIONS, FLORIDA STATE PRISON, GED, TIER III DRUG PROGRAM, DACCO.

Alternative Recommended Dispositions (If Any): NONE.

Date Dictated 6/15/98 MB Typed 6/18/98 LLB

I hereby certify that the above is true and correct to the best of my knowledge and belief and verified where reasonably possible.

DEPARTMENT OF CORRECTIONS

By: Michelle Benitez 6-18-98
MICHELLE BENITEZ, CPD/ Date
Probation Officer

Approved By: Willis Suddreth 6-18-98
WILLIS SUDDRETH, CPSS/ Date
Supervisor

The Presentence Investigation is not a public record and is available only to those persons as specified in Rule 3.712 of the Florida Rules of Criminal Procedure. Following sentencing, portions of the report shall constitute the basic classification and evaluation document of the Department of Corrections as specified in 921.231 Florida Statutes.

Disposition:

APPENDIX "C"

ARGUMENT

ISSUE

WHETHER THE TRIAL COURT IMPOSED AN ILLEGAL SENTENCE.

Appellant attacks the sentences imposed for the offenses of home invasion robbery (case 97-17927) and for two counts of vehicular homicide (case 97-20100).

A. Procedural bar: Appellee submits that the appellant cannot raise this issue on direct appeal because he failed to raise it at the time of sentencing or by filing a motion to correct sentencing error pursuant to Fla. R. Crim. Pro. 3.800(b) (1997) as required to preserve a sentencing error for review on direct appeal pursuant to Fla. R. App. Pro 9.140 (1997). *Leonard v. State*, 23 Fla. L. Weekly D 1438 (Fla. 2d DCA June 10, 1998). Appellant can still raise the issue by filing a motion to correct illegal sentence pursuant to Fla. R. Crim. 3.800(a).

B. Merits: If this appellate court should reach the merits of the issue raised in the instant appeal, appellee acknowledges that the trial court did error in sentencing the appellant. Appellant was sentenced to 20 years imprisonment followed by 15 probation for the offense of home invasion robbery in case 97-17927 (R 104-110, 169). He was sentenced to concurrent terms of 10 years probation for the two counts of vehicular homicide in case 97-20100 (R 1666-169). Appellee acknowledges that the statutory maximum for home invasion robbery, a felony of the first degree is 30 years

imprisonment¹. Appellant was sentenced to 10 years concurrent probation in case 97-20100 for the two counts of vehicular homicide which appellee acknowledges is a third degree felony for which the maximum penalty is 5 years imprisonment² (to run concurrent with the probation in case 97-17927 (R 166-169)).

Fla. R. Crim. 3.703(d) (30) (1997) provides in pertinent part:

If a split sentence is imposed, the incarcerative portion of the sentence must not deviate more than 25 percent from the recommended guidelines prison sentence. The total sanction (incarceration and community control or probation) shall not exceed the term provided by general law or the guidelines recommended sentence where the provisions of subsection 921.001(5) apply.

S. 921.001(5), Fla. Stat. (1997) provides in pertinent part:

If a recommended under the guidelines exceeds the maximum sentence authorized by s. 775.082, the sentence under the guidelines must be imposed, absent a departure. If a departure sentence, with written findings, is imposed, such sentence must be within any relevant maximum sentence limitations provided in s. 775.082.

When these sections are read *in para materia* it is clear that the rule means that the total sentence (incarceration and probation) cannot exceed (a) the guidelines recommended prison sentence (which includes the 25% deviation up or down) if that recommended sentence exceeds the statutory maximum authorized by s.

¹ s. 812.135, Fla. Stat. (1997) and 775.082(3)(b), Fla. Stat. (1997).

² s. 782.071 Fla. Stat. (1997) and s. 775.082(3)(d), Fla. Stat. (1997).

775.082 or (b) if a departure sentence is imposed, the total sentence (incarceration and probation) cannot exceed the maximum sentence provided for by s. 775.082.

In the instant case had the trial court chose to sentence the appellant within the guidelines it could have sentenced him to 22 years imprisonment (low end of guidelines range) followed by up to 15 years probation (total 45 years). However, since the trial court chose to go below the guidelines (depart downwards) and sentence appellant to only 20 years imprisonment the total sanction could not exceed the statutory maximum as provided for by s. 775.085. Accordingly, the sentences will have to be corrected. However, at the time of resentencing, the trial court can refashion the sentences to accomplish the same total sentence of 20 years imprisonment followed by 15 years probation. This can be accomplished by sentencing the appellant as follows:

(1) 97-17927 (Home Invasion Robbery): 20 years imprisonment followed by 10 years probation.

(2) 97-20100 (Two counts of Vehicular Homicide): 5 years concurrent probation on each count but consecutive to the 10 years probation imposed in case 97-12927.

See *Blackshear v. State*, 531 So.2d 956 (Fla. 1988) and *Herring v. State*, 411 So.2d 966 (Fla. 3d DCA 1987).

CONCLUSION

Based on the foregoing facts, argument, and citations of authority, Appellee respectfully requests that Appellant's convictions and sentences be affirmed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



RONALD NAPOLITANO

Assistant Attorney General
Florida Bar No. 175130
2002 N. Lois Ave., Ste. 700
Westwood Center
Tampa, Florida 33607-2366
(813)873-4739

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Gerald A. Perez, Esq. 609 W. Azeele Street, Tampa, Florida 33606, this 26 day of January, 1999..



COUNSEL FOR APPELLEE