Filing # 23168687 E-Filed 01/30/2015 09:45:49 AM

RECEIVED, 01/30/2015 09:48:43 AM, Clerk, Supreme Court

IN THE SUPREME COURT OF FLORIDA

MARLON FARON KELLY,

Petitioner,

v. **CASE NO. SC14-916**

STATE OF FLORIDA,

Respondent.
___________________________/

ON REVIEW FROM THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

PETITIONER'S REPLY BRIEF ON THE MERITS

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PETITIONER'S REPLY BRIEF ON THE MERITS

PRELIMINARY STATEMENT

As in the Initial Brief, Mr. Kelly will be referred to in this brief as "Petitioner," "Defendant," or by his proper name. Reference to the record on appeal will be by use of the volume number (in roman numerals) followed by the appropriate page number in parentheses. The Initial Brief will be referred to as IB, and the Answer Brief as AB.

ARGUMENT

ISSUE PRESENTED FOR REVIEW:
THE FIRST DCA ERRED AS A MATTER OF LAW IN RULING THAT SECTION 775.087(2)(B) PROVIDES AUTHORIZATION FOR A SENTENCING COURT TO IMPOSE ANY SENTENCE IT CHOOSES IN EXCESS OF THE STATUTORY MAXIMUM IN ADDITION TO THE MANDATORY MINIMUM SENTENCE IT HAS ALREADY SELECTED, ESSENTIALLY ABROGATING THE GENERAL PENALTIES PROVISION OF SECTION 775.

First, the Respondent has conceded the issue raised in this Petition. Respondent agrees that the First District Court of Appeal was incorrect in its interpretation of the statute as outlined in Petitioner's merit brief. (AB-4) Consequently, this Court need look no further to resolve this case. The most important factor in this case is that the First District Court of Appeal announced an incorrect statutory interpretation and expressly invited the circuit courts within the district to rely on this interpretation in sentencing. Conflict was created with other district courts of appeal. This erroneous and conflicting ruling must be quashed.

Respondent, contends, however, that the First District Court of Appeal was incorrect in its ruling that the trial court could not increase the legal 25 year minimum mandatory sentence when it ruled on Petitioner's Rule 3.800(b)(2) motion. Kelly v. State, at 5. However, Respondent neither filed a motion for rehearing challenging this ruling in the DCA, nor did Respondent file a petition for review in this court with regard to this particular issue. Petitioner therefore contends that this separate legal issue

has been waived for further review, and that portion of the Answer Brief that expands beyond the issue presented should be stricken.

On the merits, Petitioner contends that, contrary to Respondent's argument in the DCA and in this court, what occurred in the process of ruling on the Rule 3.800(b)(2) motion was not a mere restructuring of a sentence. On the contrary, the 40 year sentence initially imposed was illegal for reasons outlined in the 3.800(b)(2) motion and acknowledged by the trial court as well as the DCA. In essence, the trial court had illegally enhanced the degree of the offense. The case law is clear that while the court may impose a minimum mandatory of 25 years in this situation even when the basic offense is a second degree felony, it may not exceed that 25 year sentence in imposing the core sentence for a second degree felony. See, e.g., Brown v. State, 983 So. 2d 706 (Fla. 5th DCA 2008). Thus the 40 year sentence originally imposed was illegal, and restructuring to reach the same end was not an option. In its opinion, the DCA expressly and correctly recognized that this case did not involve a mere restructuring when it noted as follows:

> "Rather, the trial court upwardly modified Appellant's sentence by making the entire sentence a mandatory minimum, thus impermissibly increasing the previously imposed mandatory minimum sentence."

Kelly at 7. There can be no doubt that a 37.55 mandatory minimum sentence is more onerous than a 25 year mandatory minimum sentence.

The 25 year minimum mandatory sentence originally imposed was legal and was never challenged in the Rule 3.800(b)(2) motion or at any point by Petitioner, thus for double jeopardy reasons, the trial court could not alter that sentence once Petitioner had begun serving it. See Macias v. State, 572 So. 2d 22, 23 (Fla. 4th DCA 1990). Respondent argues that Macias, which the DCA expressly relied upon, does not apply here because, Respondent contends, there was no double jeopardy issue. (RB-9) Respondent does not appear to understand that aspect of double jeopardy that precludes increasing a legal sentence after a prisoner has begun serving that legal sentence. (AB-8) The case law, including Macias, is clear on that point. See also Thomas v. State, 921 So. 2d 657 (Fla. 2d DCA 2006)(originally imposed minimum sentence was legal and could not be modified after defendant began serving it).

Macias is exactly on point, and the DCA was correct to rely on it. The 25 year minimum mandatory sentence was legal and was never challenged as an illegal sentence, nor could it have been under the rule. Petitioner has located no other Florida case that addresses the increase of a legal minimum mandatory sentence and double jeopardy, and Respondent has not cited any. Further, none of the cases cited by Respondent for its restructuring argument involved cases with legal minimum mandatory sentences. The general sentence imposed and the mandatory minimum sentence imposed are governed by two entirely separate statutes. Any possible ambiguity concerning

the interpretation of sentencing statutes must be governed by the rule of lenity.

While Respondent discusses at length cases involving claims of vindictive sentencing upon remand after a reversal on appeal, (AB-5-7) first, the issue in the present case involves a Rule 3.800(b)(2) proceeding, not a reversal and remand with resentencing after a successful appeal; second, no claim of vindictive sentencing was made in this case at any point. In fact, claims of vindictive sentencing are not cognizable in Rule 3.800(b)(2) motions. See, e.g., Johnson v. State, 948 SO. 2d 896 (Fla. 5th DCA 2007).

Respondent has further attempted to bring an issue into this case, concerning consecutive sentencing, that has never been addressed by any party or in any court previously. (AB-10) Thus this issue was waived long ago, and cannot be raised at this point in the proceedings. See, e.g., State v. Szempruch, 935 So. 2d 66 (Fla. 2d DCA 2006)(state failed to preserve sentencing issue for appellate review when not raised previously).

For all of the reasons discussed above and in the Initial Brief, this Court must quash that part of the DCA opinion that was identified in the petition for review, and otherwise affirm the DCA ruling.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by electronic mail to Jay Kubica, Assistant Attorney General, Appeals Division, The Capitol, PL-01, Tallahassee, FL, 32399-1050, at Crimapptlh@myfloridalegal.com as agreed by the parties, and by U.S. mail to petitioner, Marlon Kelly, #125876, Santa Rosa Annex, 5850 E. Milton Rd., Milton, FL 32583, on this 30th day of January, 2014.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using Courier New 12 point font in compliance with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

Respectfully submitted,

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