IN THE SUPREME COURT OF FLORIDA

MICHAEL D. SPEAR,

Petitioner,

v. CASE NO. SC20-0676

STATE OF FLORIDA,

Respondent.

_____ /

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Respondent generally accepts Petitioner's statement of the case and facts, but would note the following facts in support of its answer brief.

In case number 2016-CF-39801 ("VOP case"), Petitioner entered a plea of guilty to three counts of forgery and three counts of uttering a forged instrument, and was sentenced to 24 months of community control, followed by 36 months of probation. (R. 59-60, 67-69.) An affidavit of violation of community control was filed, alleging that Petitioner violated by committing two new law offenses: false imprisonment and battery (domestic violence.) (R. 106.) These two new law offenses were separately charged under case number 2016-CF-47845 ("New law case"). (R. 321.)

Petitioner admitted to violating his probation, and also entered a plea in the new law case. (R. 118, 123, 341-42.) He was released on a Quarterman's Release with the understanding that if he violated the conditions of release, he agreed to be sentenced to the maximum sentence. (R. 118, 121-22, 340.) Petitioner failed to appear for sentencing, and the trial court found him in violation of his Quarterman's Release. (R. 134, 148, 159, 346, 357, 362.)

On May 30, 2017, in the VOP case, Petitioner was sentenced to five years in the Department of Corrections ("DOC"), with credit for 163 days' time served on count I, and five years in the DOC with no credit for time served on counts II, III,

IV, V, and VI, with all counts to run consecutively, for a total of thirty years. (R. 148-53, 163-67.) In the new law case, Petitioner was sentenced to five years in the DOC, with credit for 139 days' time served, to be served consecutively to the VOP case, on count I, and time served on count II. (R. 271-72.)

Petitioner filed a direct appeal, and the Fifth DCA reversed the sentences, and remanded for an evidentiary hearing and a factual determination as to whether Petitioner's failure to comply with the Quarterman's Release was willful. (R. 171-72, 376-77.) See Spear v. State, 244 So. 3d 421 (Fla. 5th DCA 2018).

At the resentencing hearing on October 4, 2018, in the VOP case, the trial court orally pronounced that Petitioner would receive credit for time served on count I, but did not orally address jail credit for the remaining counts. (R. 224.)

The clerk noted that Petitioner was originally given 163 days of credit in the VOP case, and 139 days in the new law case, and asked whether the court was "now adding the additional 493 days from the date of sentencing to today as his credit." (R. 228.) The trial court answered, "Well, he's been in custody, yes." (R. 228.) The trial court asked what the total was, and the clerk responded, "Hold on. I'm like her, I don't know math in my head." (R. 228.) The clerk calculated the time served in the VOP case as 686 days, and in the new law case as 932 days. (R. 229.)

In the written sentencing order, Petitioner was sentenced to five years in the DOC, with credit for 686 days' time served, on each count, with the first five counts

running consecutively to each other, and count VI running concurrently with count V, for a total of twenty-five years. (R. 198-203.) In the new law case, Petitioner was sentenced to five years on count I, to be served concurrently with any other active sentence. (R. 225, 389-90.) The resentencing was *per curiam* affirmed on appeal. See Spear v. State, 267 So. 3d 1029 (Table) (Fla. 5th DCA 2019).

Thereafter, the DOC sent a letter to the trial court, requesting clarification of the sentencing order. (R. 219-20.) Specifically, the DOC asked whether it was the court's intention to award credit for time served on the consecutive counts in the VOP case, which allowed Petitioner to receive a repeated benefit, and whether the credit calculation in the new law case was correct. (R. 219.)

The trial court entered an Order Correcting Judgment and Directing the Clerk to Prepare an Amended Judgment. (R. 216.) As to the VOP case, the court found that the written judgment and sentence improperly provided Petitioner with credit for time served as to each count that was to be served consecutively, which the trial court did not orally pronounce. (R. 217.) The court further found that Petitioner was not entitled to a "pyramiding" of jail credit. (R. 217.) The court also amended the improper calculation of 686 days of credit to 656 days. (R. 267, 279.) As to the new law case, the court found that the clerk erroneously stated that Petitioner was entitled to 932 days of credit, when the correct amount of credit was 632 days, and found that the court had the inherent power to correct clerical errors, such as the

calculation of jail credit. (R. 217.) An amended judgment and sentence, *nunc pro tunc* to October 4, 2018, was filed in both cases, reflecting the changes.[1] (R. 277-82, 436-39.)

An appeal followed, in which Petitioner raised two issues: (1) the trial court erred in *sua sponte* ordering a reduction in jail credit; and (2) the reduction of jail credit increased Petitioner's punishment in violation of double jeopardy. The Fifth DCA held that the trial court could *sua sponte* modify Petitioner's jail credit based on its inherent power to correct clerical errors, and that the reduction of jail credit was not in violation of double jeopardy. Spear v. State, 294 So. 3d 995 (Fla. 5th DCA 2020). However, the Fifth DCA certified a question of great public importance:

> ONCE A JUDGMENT AND SENTENCE IS FINAL, DOES A TRIAL COURT HAVE THE INHERENT AUTHORITY AT ANY TIME TO *SUA SPONTE* CORRECT SENTENCING DOCUMENTS THAT OVERREPORT THE AMOUNT OF JAIL TIME SERVED BY A DEFENDANT PRIOR TO SENTENCING OR THE AMOUNT OF JAIL TIME AND PRISON TIME SERVED BY A DEFENDANT PRIOR TO RESENTENCING?

Id. at 1003. The Fifth DCA also certified conflict with Cummings v. State, 279 So. 3d 818 (Fla. 1st DCA 2019); Washington v. State, 199 So. 3d 1110 (Fla. 1st DCA

[1] Petitioner has never argued that the jail credit awarded in the amended judgment and sentence is incorrect.

2016); King v. State, 913 So. 2d 758 (Fla. 2d DCA 2005); Wheeler v. State, 880 So. 2d 1260 (Fla. 1st DCA 2004); Lebron v. State, 870 So. 2d 165 (Fla. 2d DCA 2004); Platt v. State, 827 So. 2d 1064 (Fla. 2d DCA 2002); Keene v. State, 826 So. 2d 327 (Fla. 2d DCA 2002); Linton v. State, 702 So. 2d 236 (Fla. 2d DCA 1997); and Gilmore v. State, 523 So. 2d 1244 (Fla. 2d DCA 1988). Id.

SUMMARY OF THE ARGUMENT

The Fifth District Court of Appeal properly affirmed the trial court's order modifying Petitioner's jail credit, and its decision should be approved. The trial court had the inherent authority to *sua sponte* correct the sentencing documents to correct the clerical errors. Further, double jeopardy was not violated because the correction of jail credit to the proper amount to which Petitioner is entitled does not unconstitutionally increase Petitioner's sentence.

ARGUMENT

THE DISTRICT COURT PROPERLY AFFIRMED THE TRIAL COURT'S ORDER MODIFYING PETITIONER'S JAIL CREDIT, AND ITS DECISION SHOULD BE APPROVED.

The Fifth District Court of Appeal's decision should be approved. The trial court had the inherent authority to *sua sponte* correct the sentencing documents to correct the clerical errors. Further, double jeopardy was not violated because the correction of jail credit to the proper amount to which Petitioner is entitled does not unconstitutionally increase Petitioner's sentence.

Inherent Authority to Correct Clerical Errors

The Fifth DCA certified the following question of great public importance:

> ONCE A JUDGMENT AND SENTENCE IS FINAL, DOES A TRIAL COURT HAVE THE INHERENT AUTHORITY AT ANY TIME TO *SUA SPONTE* CORRECT SENTENCING DOCUMENTS THAT OVERREPORT THE AMOUNT OF JAIL TIME SERVED BY A DEFENDANT PRIOR TO SENTENCING OR THE AMOUNT OF JAIL TIME AND PRISON TIME SERVED BY A DEFENDANT PRIOR TO RESENTENCING?

This question should be answered in the affirmative.[2]

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[2] Other than a conclusory sentence in the summary of the argument section, Petitioner does not address this issue in his initial brief, and has therefore abandoned it. Duest v. Dugger, 555 So. 2d 849, 852 (Fla. 1990) ("The purpose of an appellate brief is to present arguments in support of the points on appeal. Merely making

Florida has long recognized a trial court's inherent power to correct its clerical errors. See Drumwright v. State, 572 So. 2d 1029, 1030–31 (Fla. 5th DCA 1991) ("It is axiomatic that oral pronouncements control over clerical errors. The court has the authority to correct its judgment. An order is rendered, valid and binding, when orally given. It may be corrected at any time to reflect what the court had, in fact, done. Florida has long recognized a court's inherent power to correct clerical errors.") (citations omitted); Luhrs v. State, 394 So. 2d 137, 138 (Fla. 5th DCA 1981) ("The judgment of a court may be corrected at any time to reflect what was, in fact, done by the court."). A miscalculation of jail credit is a clerical error, of which the trial court has the inherent power to correct. See Ashley v. State, 850 So. 2d 1265, 1268 (Fla. 2003) ("Generally, the oral pronouncement prevails unless the oral pronouncement is in error due to a clerical error such as the calculation of jail credit."); Hagley v. State, 140 So. 3d 678, 679 (Fla. 5th DCA 2014) (finding that "Florida has long recognized a court's inherent power to correct clerical errors such as calculation of jail credit," and holding that the court was allowed to correct the jail time credit if the amount of credit reflected in the sentencing orders was erroneous where the oral pronouncement was simply that the defendant would

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reference to arguments below without further elucidation does not suffice to preserve issues, and these claims are deemed to have been waived."); Ward v. State, 19 So. 3d 1060, 1061 (Fla. 5th DCA 2009) ("Appellant abandoned these issues by not addressing them in his brief.").

receive credit without mentioning a specific amount); Luke v. State, 672 So. 2d 654, 655 (Fla. 4th DCA 1996) ("[T]he court's recitation of the number of days' credit for time served is merely a ministerial act requiring no personal judgment or discretion in its performance. . . . [N]either the appellant nor the State should receive the benefit of any miscalculation or misstatement by the court."); Carson v. State, 489 So. 2d 1236, 1237–38 (Fla. 2d DCA 1986) (holding that the trial court properly modified the defendant's sentence where he received 546 days of credit when he should have received 173 days because a court may correct clerical mistakes in its own judgment and records, even after the term of court has expired).

In Boggs v. Wainwright, 223 So. 2d 316, 317 (Fla. 1969), this Court noted that it was well settled that a court of record may, even after the term had expired, correct clerical mistakes in its own judgments and records, *nunc pro tunc*, and that such corrections generally relate back and take effect as of the date of the judgment. In finding this, this Court effectively adopted Florida Rule of Civil Procedure 1.540 into criminal cases. Howard v. State, 139 So. 3d 975, 976 (Fla. 4th DCA 2014). This rule states that "[c]lerical mistakes in judgments, decrees, or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time on its own initiative." Fla. R. Civ. P. 1.540(a). A scrivener's error in this context is a clerical or ministerial error in a criminal case that occurs in the written sentence; it refers to a mistake in the written sentence that does not conform

with the oral pronouncement of sentence, but not those errors that are the result of a judicial determination or error. Amendments to Fla. Rules of Criminal Procedure 3.111(e) & 3.800 & Fla. Rules of Appellate Procedure 9.020(h), 9.140, & 9.600, 761 So. 2d 1015, 1023 (Fla. 1999), as corrected on reh'g (Nov. 13, 2002).

Here, the trial court, on its own motion, simply corrected the clerical errors in the resentencing documents. During the resentencing hearing, the clerk noted that Petitioner was originally given 163 days of credit in the VOP case, and 139 days in the new law case, and asked whether the court was "now adding the additional 493 days from the date of sentencing to today as his credit." (R. 228.) The trial court answered, "Well, he's been in custody, yes." (R. 228.) The trial court asked what the total was, and the clerk responded, "Hold on. I'm like her, I don't know math in my head." (R. 228.) The clerk erroneously calculated the time served in the VOP case as 686 days, and in the new law case as 932 days, when the appropriate calculation was 656 days for the VOP case (163+493) and 632 days in the new law case (139+493). Clearly, the trial court only had the intent to award Petitioner the time he actually served, and not an additional 30 and 300 days, respectively.

Also, Petitioner's case did not just involve jail credit, but rather, mathematical errors were made in calculating the combined jail credit and prison credit. An improper award of prison credit can be corrected by the trial court at any time under Florida Rule of Criminal Procedure 3.800(a). Rivera v. State, 257 So. 3d 1142, 1144

(Fla. 3d DCA 2018) (holding that a court at any time may correct an error in a defendant's pre-sentence prison credit).

Further, section 921.161 provides that a defendant is entitled to receive credit for all time spent in the county jail before sentencing. § 921.161, Fla. Stat. (2019). However, jail time credit need not be applied to all consecutive sentences, and such an award results in an improper multiple award of credit. Gillespie v. State, 910 So. 2d 322, 324 (Fla. 5th DCA 2005). In the VOP case, during the resentencing hearing, the trial court orally pronounced that Petitioner would receive credit for time served on count I, but did not orally address jail credit for the remaining counts. Counts I through V were to be served consecutively, and count VI was to run concurrently with count V. However, in the written sentencing order, Petitioner was erroneously given jail credit for all six counts, which resulted in him receiving an improper multiple award of credit. Therefore, the trial court had the inherent authority to correct this scrivener's error, to make the written sentence consistent with the oral pronouncement.

The modification of Petitioner's sentencing documents simply corrected these clerical errors of the miscalculation of jail credit in both cases, and to conform the written order to the oral pronouncement as to jail credit on counts II-VI of the VOP case. The certified question should be answered in the affirmative and the Fifth DCA's decision should be approved.

Double Jeopardy

The correction of the clerical errors in Petitioner's sentencing documents did not violate double jeopardy because it did not improperly enhance the sentence.

"A double jeopardy claim based upon undisputed facts presents a pure question of law and is reviewed *de novo*." State v. Akins, 69 So. 3d 261, 268 (Fla. 2011) (quoting Pizzo v. State, 945 So. 2d 1203, 1206 (Fla. 2006)). The Double Jeopardy Clause protects against multiple punishments for the same offense, including increasing a legally imposed sentence after the defendant has begun serving the sentence. Gallinat v. State, 941 So. 2d 1237, 1240 (Fla. 5th DCA 2006).

Here, admittedly, a reduction in jail credit naturally increases the amount of time an inmate spends in jail, but correcting an erroneous jail credit does not enhance the sentence imposed because correcting a miscalculation does not affect the overall length of the sentence that the trial court intended to impose. For example, when a judge sentences a defendant to five years of imprisonment, with credit for time served, absent any gain time rules, the judge intends and expects the defendant to serve a total of five years. In other words, what the judge intends is that when the time already spent in jail is combined with the time served in prison after sentencing, the total amount is five years. But suppose, hypothetically, the clerk miscalculated the time the defendant actually spent in jail and instead of six months of jail time, the clerk calculated it as one year. Now, due to the clerk's error, instead of spending

five years total incarcerated, as the judge intended, the defendant would only spend four and a half years total incarcerated, because the six months he spent in jail combined with four years of prison (because he was given one year of jail credit) totals only four and a half years, rather than five. By correcting the miscalculation to impose the sentence the judge originally intended, the court has not "enhanced" the sentence in violation of double jeopardy, because the defendant was never actually sentenced to four and a half years, but was sentenced to five years. In other words, "where the only understanding is that the defendant will serve the entire imposed sentence, and will be given credit for whatever time he or she is legally entitled, we do not believe that a later correction to the time served calculation reflected in the sentencing documents increases the sentence for double jeopardy purposes." Id. at 1241.

The Fifth DCA, in Gallinat, reached this conclusion for four reasons. Id. at 1241-42. First, the time served calculation is simply reported by the judge, and not a result of judicial decision-making. Id. at 1241. As explained by the court, "if the judge imposes a three-year sentence, and reports one year of time served because the clerk read the time served calculation from the wrong file, the judicially determined sentence is still three years in prison." Id. If the defendant served only two days in jail prior to sentencing, correcting the time served to properly reflect that historical fact will not result in imprisonment for more than three years, and does not "increase

the sentence," but rather ensures that the defendant serves the judicially-imposed sentence. Id.

Second, the principle against double jeopardy should not be used to turn sentencing into a game in which the wrong move by the judge means immunity for the prisoner, which would happen if this Court were to hold that a judge may never correct a time-served miscalculation in this type of case. Id. (citing Bozza v. United States, 330 U.S. 160, 166–67 (1947) ("The Constitution does not require that sentencing should be a game in which a wrong move by the judge means immunity for the prisoner.")).

Third, the Gallinat court acknowledged that in addressing double jeopardy claims in the sentencing context, the United States Supreme Court focused on the legitimate expectations of the defendant. Id. In United States v. DiFrancesco, 449 U.S. 117, 137 (1980), the U.S. Supreme Court considered whether an increase in a sentence after an appeal violated the principles of double jeopardy. The Court noted that the pronouncement of sentence has never carried the finality that attaches to an acquittal, that a greater sentence may be imposed after a retrial, that a defendant has no expectation of finality in his sentence until the appeal has concluded, and that the Double Jeopardy Clause does not provide the defendant with the right to know at any specific moment what the exact limit of his punishment will be. Id. at 133-37. The Court likened the revocation of probation and subsequent imposition of

imprisonment to the increase of a final sentence after appeal, and found that the "Double Jeopardy Clause does not require that a sentence be given a degree of finality that prevents its later increase." Id. at 137.

Petitioner argues that the reduction of jail credit upset his legitimate expectation of finality because he had already begun serving his sentence and the mandate had already been issued on the affirmance of his sentence when the trial court modified his sentence. However, as explained by the Gallinat opinion, the court found that in this type of case, where the jail credit was incorrectly calculated, a defendant's only legitimate expectation is that he will serve the full sentence, and no more. Gallinat, 941 So. 2d at 1242. Consequently, a defendant has the right to expect that he will be given credit for the actual amount of time actually served prior to sentencing. Id. Therefore, correcting a reporting error of the actual amount of time served does not defeat a defendant's legitimate expectations. Id.

Lastly, the Gallinat opinion reasoned that it is also appropriate to consider the legitimate expectations of the victim and of society in general. Id. Both should be able to legitimately expect that the crime will be punished, which includes a right to expect that a lawfully imposed sentence will be fully served. Id. The court acknowledged the legislatively-created methods for reducing the time served on a sentence, but found that "a judicially-created rule that shortens a lawfully-imposed sentence by barring anyone from correcting a mistake that credits the defendant with

time against his sentence that he or she has never actually served clearly thwarts society's interest in extracting a full and just punishment for crime." Id.

Petitioner argues that:

> The Gallinat opinion reasoned that a miscalculation of credit for time served does not amount to a sentence increase, but claimed that society's interest would be thwarted if the judiciary created a rule that shortened a lawfully-imposed sentence. Yet, if an increase in credit for time served did not produce a decrease in incarceration, there would be no concern of society's interest being thwarted.

(IB. pg. 14). Petitioner's argument is misplaced because he is misconstruing the court's argument. The Gallinat opinion does not contradict itself. The Fifth DCA did not hold that the rescission of jail credit does not, in practice, increase the sentence. What the court held was that the correction of a miscalculation of jail credit that rescinds jail credit did not increase the sentence "for double jeopardy purposes." Id. at 1241.

In Gallinat, the Fifth DCA considered the same line of cases from the First and Second DCA to which it now, again, certifies conflict. Each of these cases rely on the same line of reasoning that began with Linton and Gilmore. See Cummings v. State, 279 So. 3d 818 (Fla. 1st DCA 2019) (cites Wheeler, Lebron, and Linton); Washington v. State, 199 So. 3d 1110 (Fla. 1st DCA 2016) (cites Session, which cites Wheeler); King v. State, 913 So. 2d 758 (Fla. 2d DCA 2005) (cites Platt and Bailey, which cites Linton); Wheeler v. State, 880 So. 2d 1260 (Fla. 1st DCA 2004)

(cites Lebron and Linton); Lebron v. State, 870 So. 2d 165 (Fla. 2d DCA 2004) (cites Platt, Bailey, and Linton); Platt v. State, 827 So. 2d 1064 (Fla. 2d DCA 2002) (cites Bailey, which cites Linton); Keene v. State, 826 So. 2d 327 (Fla. 2d DCA 2002) (cites Bailey, which cites Linton).

In Linton, the Second District Court of Appeal found that the trial court had no authority to rescind jail credit under Rule 3.800(c), but did not discuss or consider whether a trial court has the inherent power to correct clerical errors. Linton, 702 So. 2d at 236-37. In making this finding, Linton relied on Gilmore. In Gilmore, the defendant was sentenced to 18 months in prison with credit for time served. Gilmore, 523 So. 2d at 1244. Once the trial court discovered that the credit for time served was more than the 18-month sentence, the trial court modified the sentence to give the defendant less jail credit. Id. The Second DCA found that this modification was a sentence enhancement for which there was no provision in the rules. Id. at 1245. Gilmore does not mention or discuss double jeopardy. The scenario in Gilmore, where a trial court modifies a sentence with the intention to increase it, is vastly different than a trial court correcting a miscalculation by the clerk in reciting jail credit. Linton further found that a rescission of jail credit was a sentence enhancement that violated double jeopardy. Id. at 236. In making this finding, Linton relied on Lippman v. State, 633 So. 2d 1061 (Fla. 1994). In Lippman, this Court examined whether a modification of probation to add an

additional condition constituted an additional punishment for double jeopardy purposes. Lippman, 633 So. 2d at 1062. Lippman did not discuss the modification of jail credit where the clerk miscalculated the proper amount.

The line of cases from the First and Second District Courts of Appeal do not provide an explanation of how the correction of a clerical mistake in calculating the appropriate amount of jail credit enhances a sentence for purposes of double jeopardy. The comprehensive explanation and reasoning given in Gallinat as to why the correction of a jail credit error does not violate the principles of double jeopardy is well-reasoned. This Court should adopt the reasoning of Gallinat and affirm the Fifth DCA's decision in the instant case.

CONCLUSION

Based on the arguments and authorities presented herein, Respondent respectfully requests this Honorable Court affirm Petitioner's judgment and sentence in all respects.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Answer Brief of Respondent has been furnished via the Florida Courts E-Filing Portal to counsel for Petitioner – Assistant Public Defender Glendon George Gordon, Jr. (444 Seabreeze Blvd, Suite 210, Daytona Beach, Florida 32118) at gordon.glen@pd7.org and appellate.efile@pd7.org, on October 19, 2020.

DESIGNATION OF E-MAIL ADDRESS

I HEREBY DESIGNATE crimappdab@myfloridalegal.com as my primary e-mail address and kaylee.tatman@myfloridalegal.com as my secondary address, pursuant to Rule 2.516, in this proceeding.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 14-point Times New Roman, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,
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