

IN THE SUPREME COURT OF FLORIDA

Case No. SC20-676
Lower Tribunal Case No. 5D19-1747

MICHAEL D. SPEAR,
Appellant,
v.
STATE OF FLORIDA,
Appellee.

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

REPLY BRIEF FROM THE APPELLANT

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

Glendon George Gordon, Jr.
Assistant Public Defender
Florida Bar No. 119176
444 Seabreeze Blvd., Suite 210
Daytona Beach, Florida 32118
Phone: (386) 254-3758
Email: Gordon.Glen@pd7.org

COUNSEL FOR THE APPELLANT

RECEIVED, 12/15/2020 03:19:29 PM, Clerk, Supreme Court

TABLE OF CONTENTS

TABLE OF CONTENTS	1
TABLE OF CITATIONS	2
LEGAL ARGUMENT	3
I. <u>IN RESPONSE TO THE STATE’S ARGUMENT THAT THE DISTRICT COURT PROPERLY AFFIRMED THE TRIAL COURT’S ORDER MODIFYING PETITIONER’S JAIL CREDIT.</u>	3
CONCLUSION	7
CERTIFICATE OF COMPLIANCE	8
CERTIFICATE OF SERVICE	8

TABLE OF CITATIONS

	Page(s)
Cases:	
<u>Ashley v. State,</u> 850 So. 2d 1265 (Fla. 2003)	3, 4
<u>Evans v. State,</u> 675 So. 2d 1012 (Fla. 4th DCA 1996)	3
<u>Gallinat v. State,</u> 941 So. 2d 1237 (Fla. 5th DCA 2006)	4
<u>Hagley v. State,</u> 140 So. 3d 678 (Fla. 5th DCA 2014)	4
<u>Linton v. State,</u> 702 So. 2d 236 (Fla. 2d DCA 1997)	4
<u>Rivera v. State,</u> 257 So. 3d 1142 (Fla. 3d DCA 2018)	4

LEGAL ARGUMENT

I. IN RESPONSE TO THE STATE’S ARGUMENT THAT THE DISTRICT COURT PROPERLY AFFIRMED THE TRIAL COURT’S ORDER MODIFYING PETITIONER’S JAIL CREDIT.

In its Answer Brief, the State correctly asserted that the Petitioner did not address the certified question. (Answer Br. 7.) Admittedly, this was an oversight by the undersigned counsel. Nonetheless, the law has been fairly clear that a trial court does indeed have the inherent authority to correct a clerical error at any time. However, the question is whether credit for time served falls within this authority and whether it can do so on its own.

Inherent Authority to Correct Clerical Errors

The State cited [Ashley v. State, 850 So. 2d 1265 \(Fla. 2003\)](#), among others, to support its proposition that a miscalculation of jail credit is a clerical error for which the trial court has inherent power to correct. (Answer Br. 8.) However, this Honorable Court in [Ashley](#) actually held that it violated double jeopardy when the trial court resentenced the appellant as a habitual *violent* felony offender despite the original oral pronouncement that appellant was a habitual felony offender. This Honorable Court resolved a conflict in favor of [Evans v. State, 675 So. 2d 1012 \(Fla. 4th DCA 1996\)](#), which held that the trial court violated double jeopardy when the written order imposed a habitual felony offender status although the trial court failed to orally pronounce the appellant’s status as such.

Later in the opinion, this Honorable Court mentioned, “Generally, the oral pronouncement prevails unless **the oral pronouncement is in error due to a clerical error** such as the calculation of jail credit.” [Id. at 1268](#) (emphasis added and citation omitted). In the instant case, the trial court never orally pronounced the credit for time served.

Nonetheless, the Petitioner acknowledges that [Hagley v. State, 140 So. 3d 678, 679 \(Fla. 5th DCA 2014\)](#) does indeed support this proposition. However, it should be noted that the [Hagley](#) opinion relies upon [Gallinat v. State, 941 So. 2d 1237 \(Fla. 5th DCA 2006\)](#), which this Honorable Court should not adopt for the reasons stated in the initial brief.

The State also cited [Rivera v. State, 257 So. 3d 1142 \(Fla. 3d DCA 2018\)](#) for the proposition that an improper award of prison credit can be corrected by the trial court at any time under [Rule 3.800\(a\), Florida Rules of Criminal Procedure](#). (Answer Br. 10–11.) However, this proposition relied upon [Rule 3.800\(a\)\(1\) Florida Rules of Criminal Procedure](#), which requires that the error be “affirmatively alleged.” See also [Linton v. State, 702 So. 2d 236, 237 \(Fla. 2d DCA 1997\)](#) (“[W]e conclude that such an award is not an illegal sentence where the defendant has spent time in jail on those charges.”)

Double Jeopardy

The State agreed that a reduction in credit for time served increases the amount of time an inmate spends incarcerated, but argued that such a reduction does not “enhance” the overall length of sentence the trial court intended to impose. (Answer Br. 12.) This argument is rather paradoxical for a couple of reasons.

First, credit for time served is so integral to a sentence that it *is* essentially the sentence. Second, the ultimate aim for imposing an incarcerative sentence is to set the amount of time an inmate spends incarcerated. Time spent incarcerated is the sentence. Assume that a trial court imposes a five-year prison sentence and awards four years-worth of credit for time served. The defendant will effectively serve one year in prison. To suggest that a one-year reduction in credit for time served (to three years of credit for time served) would not increase the sentence is mistaken. This is because trial courts do not impose incarcerative sentences in a vacuum.

The State also argued that correcting a reporting error of the actual amount of time served does not defeat a defendant’s legitimate expectation. (Answer Br. 15.) The Petitioner respectfully disagrees. A defendant legitimately expects that once he begins to serve a sentence, it will not be altered and he will not be thrown back into prison if such an error is realized following his release.

For the reasons stated in the initial brief, this Honorable Court should not adopt the reasoning of Gallinat. This Honorable Court should resolve the conflict in Mr. Spear's favor, quash the Fifth District's opinion, and remand for the trial court to restore his credit for time served.

CONCLUSION

BASED ON the foregoing facts, authorities, and arguments, the Appellant respectfully requests this Honorable Court to resolve the conflict in his favor, quash the Fifth District's opinion, and remand for the trial court to restore his credit for time served.

Respectfully submitted,

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

/s/ *Glendon George Gordon, Jr.*
Glendon George Gordon, Jr.
Assistant Public Defender
Florida Bar No. 119176
444 Seabreeze Blvd., Suite 210
Daytona Beach, Florida 32118
Phone: (386) 254-3758
Email: Gordon.Glen@pd7.org

COUNSEL FOR THE APPELLANT

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the font used in this brief is 14 point, proportionally spaced Times New Roman.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 15, 2020, this document was filed electronically through The Florida Courts E-Filing Portal at <https://www.myflcourtaaccess.com> in the **Fifth District Court of Appeal**, 300 South Beach Street, Daytona Beach, Florida 32114, and served upon the following parties in the manner specified below:

Email via E-Filing Portal:

Kaylee Tatman

Assistant Attorney General

Office of the Attorney General

444 Seabreeze Boulevard, Fifth floor

Daytona Beach, Florida 32118

Crimappdab@myfloridalegal.com

Kaylee.Tatman@myfloridalegal.com

United States Postal Service:

Michael Spear

DC No. E16891

Zephyrhills Correctional Institution

2739 Gall Boulevard

Zephyrhills, Florida 33541-9701

/s/

Glendon George Gordon, Jr.

Glendon George Gordon, Jr.

Assistant Public Defender