IN THE SUPREME COURT OF FLORIDA

THOMAS SERGIO BURGESS,	:	
Petitioner,	:	
vs.	:	Case No. SC00-1724
STATE OF FLORIDA,	:	
Respondent.	:	
	:	

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

INITIAL BRIEF OF PETITIONER ON MERITS

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STATEMENT OF TYPE USED

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STATEMENT OF THE CASE AND FACTS

On 1-22-00 Petitioner, Thomas Burgess, entered an open guilty plea to burglary of a structure, grand theft, possession of burglary tools (all third-degree felonies) and obstructing an officer without violence (a misdemeanor). Mr. Burgess was then sentenced on that same day to a total of 20 years -- 10 years on the burglary, 5 years on the grand theft, 5 years on the possession, and time served on the misdemeanor, with all the felonies habitualized and ordered to run consecutive to each other. (V1/R30, 33-46) The information set forth some facts concerning the offenses: Mr. Burgess unlawfully entered a structure which belonged to John Stevens on 9-21-89, and on that same day he took money belonging to John Stevens. Also on that same day Mr. Burgess had a tool used or intended to be used in order to commit a burglary. (V1/R33, 34) The police report with its sworn affidavit clearly sets forth the facts that demonstrate the burglary, grand theft and possession all arise from the same incident -- the breaking into of Big John's Bar-B-Q Restaurant on 9-21-89 via a bathroom window that was pried open with a screwdriver and the taking of $593.54 from an unlocked file cabinet at that time. (V1/R31, 32)

At the time Mr. Burgess was sentenced, case law allowed consecutive habitual offender sentencing for crimes occurring in a single episode. See Marshall v. State, 596 So. 2d 114, 115 (Fla. 2d DCA 1992). In 1993 this Court held that consecutive habitual offender sentences for crimes occurring in a single episode were

not authorized by law in Hale v. State, 630 So. 2d 521 (Fla. 1993); and this holding was then to be applied retroactively. State v. Callaway, 658 So. 2d 983 (Fla. 1995).

On 4-20-99, Mr. Burgess filed a motion to correct illegal sentence pursuant to Fla. R. Crim. P. 3.800(a) asking that his consecutive habitualized sentences arising from the same incident be corrected to run concurrent in accordance with Hale and Callaway. Mr. Burgess also argued that he could raise this issue in a 3.800(a) motion because the fact the crimes all occurred in one criminal episode can be proven by a review of the established record as set forth, among other things, by the police report affidavit and the information. The trial court denied the 3.800(a) motion based on Callaway requiring that a timely 3.850 motion be filed to address this error; and since Mr. Burgess did not file his motion timely, he was not entitled to relief. Although the trial court's order stated the time period for filing a 3.850 in this issue ended on 2-9-96, this Court held that the time period for filing such a motion attacking consecutive habitualized sentences arising from the same incident ended on 8-16-97. See Dixon v. State, 730 So. 2d 265 at 269, ftnt. 7 (Fla. 1999).

Mr. Burgess appealed the denial of his 3.800(a) motion, and the Second District Court of Appeal upheld the trial court's decision also based on Callaway. In so doing, however, the Court was extremely disturbed by its decision and certified the following question to this Court:

> After the holding in Callaway, can a trial court rely upon a sworn arrest report in the

> court file to determine, as a matter of law, that consecutive habitual offender sentences are illegal?

Mr. Burgess timely filed a notice to invoke this Court's jurisdiction.

SUMMARY OF THE ARGUMENT

Mr. Hale's 20-year sentence is illegal in this case, and this illegality is clear from the record. Fundamental fairness, uniformity in sentences, and the administration of justice require that a rule 3.800 be used in Hale issues clear on the face of the record. The law should not be so rigid and inflexible as to allow an obvious illegal sentence to stand. The sworn arrest report is a reliable source for determining the facts in this case. This Court should answer the certified question in the affirmative and allow Mr. Burgess to be resentenced.

ARGUMENT

ISSUE

AFTER THE HOLDING IN CALLAWAY, CAN A TRIAL COURT RELY UPON A SWORN ARREST REPORT IN THE COURT FILE TO DETERMINE, AS A MATTER OF LAW, THAT CONSECUTIVE HABITUAL OFFENDER SENTENCES ARE ILLEGAL?

When the Second District Court denied Mr. Burgess relief, it did so reluctantly. "We affirm with reluctance because we are convinced to a moral certainty by the content of the police report that the grand theft and the burglary were committed in one criminal episode." Burgess, 25 Fla. Law Weekly D1636 (Fla. 2d DCA July 7, 2000) (emphasis added). The problem the Second District Court had was this Court's opinion in Callaway that seems to rule that a Hale issue must be raised in a 3.850 motion. So the question in this case is can a Hale issue be raised in a 3.800(a) motion now that the 2-year time period for raising a Hale issue in a 3.850 motion has expired and the facts in the established record -- including the sworn affidavit in the police report and the information -- clearly establish the consecutive habitualized sentences arose from the same incident.

As the Second District Court noted in Burgess, the sworn affidavit in the police report clearly establishes the facts in this case; so why can't that affidavit be used to supply the facts needed in a Hale issue? There have been other instances where the courts and agencies have been allowed to rely on such affidavits. In Gramegna v. Parole Commission, 666 So. 2d 135 at 137 (Fla.

1996), this Court held "[c]ontrol release eligibility may be based on any reasonably reliable official document contained in the record and generated during the course of a criminal investigation or proceeding, including an arrest report." (Emphasis added.) Thus, this Court allows a release determination in a criminal case to be based solely on the arresting officer's affidavit where the information, indictment, bill of particulars and judgment do not establish a disqualifying conviction. In so holding, this Court referred to another decision it made in Dugger v. Grant, 610 So. 2d 428 (Fla. 1992), wherein it held the Department of Corrections may rely solely on the arrest report contained in the presentence investigation file in denying eligibility for provisional credits against the defendant's sentence. Also, in the case of Parker v. State, 633 So. 2d 72 (Fla. 1st DCA 1994), the First District relied on the facts contained in an arrest report to determine that the consecutive minimum mandatories in a habitualized violent offender sentence were proper (neither the factual basis for the plea nor the PSI set forth the necessary facts). If arrest report affidavits are reliable enough in these instances, they should be reliable enough in a Hale issue filed in a 3.800(a) motion.

The inference in this Court's Callaway decision was that all Hale issues are strictly matters of fact that require an evidentiary hearing, but the Second District Court's decision in their underlying Callaway case[1] was not so limiting. The Second

[1] Callaway v. State, 642 So. 2d 636 (Fla. 2d DCA 1994), opinion by Judge Altenbernd -- the same judge who wrote Mr. Burgess' opinion.

District noted that Hale issues would "usually, if not always, require an evidentiary determination." Callaway v. State, 642 So. 2d at 640 (emphasis added). While trying to decide if a Hale issue should be brought in a 3.850 motion or a 3.800 motion, the Second District pointed to several items that might provide the necessary facts as part of the established record without the need for an evidentiary hearing: recorded plea colloquy, information, arrest report, or transcript of trial. The problems the Second District had with these items was that these items might not contain the necessary facts, so it determined the 3.850 was the "appropriate method for resolution of this issue." Id. This determination that the Hale issue was more appropriately pursued in a 3.850 motion, however, does not make it the only method that can be used.

In Adams v. State, 755 So. 2d 678 (Fla. 2d DCA 1999), the Second District points out that neither Callaway decision (the Florida Supreme Court and the Second District) specifically irretrievably foreclose relief from consecutively-imposed habitual offender sentences arising from the same criminal episode by means of 3.800. It then referred to Judge Allen's dissent in Richardson v. State, 698 So. 2d 551 at 554 (Fla. 1st DCA 1997), which argues against inflexibly prohibiting the use of 3.800 to correct a Hale sentencing error:

> Because Callaway apparently adopted the **Judge** definition of "illegal sentence," it follows that sentences which are excessive under the constitution would be remediable under rule 3.800(a), so long as the unconstitutionality of the sentence is apparent from the face of the trial court record. There is

> no apparent justification for cutting off all challenges to an unconstitutional sentence filed more than two years after judgment and sentence become final. There are valid reasons for time limitations upon challenges that could only be proven through evidentiary hearings. Material witnesses die or move away, and memories fade. But where a constitutional claim may be proven by a simple review of the trial court file, these concerns are not present.

(Emphasis added.) In Adams the State "conceded that relief may be available to a movant who properly pleads in a rule 3.800 motion that the application of the rule in Hale may be determined without resort to extra-record facts...." Adams, 755 So. 2d at 680.[2]

Even though the panel in Burgess came to the conclusion that Callaway did not allow Mr. Burgess to obtain relief at this time, it noted that the Supreme Court in Callaway was not dealing with a defendant whose time had expired under a 3.850 motion and the appellate record did not contain a sworn police affidavit describing the criminal episode. Had this Court been dealing with Mr. Burgess' facts -- a clear presentation of facts on the face of the record showing one criminal episode, the question is whether this Court would allow a 3.800 motion now that the time has expired for a 3.850 motion or would it impose a rigid, inflexible rule

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[2] Adams involved the stacking of minimum mandatory sentences for the possession of a firearm where the possessions may have all arisen from the same episode. The Second District compared this issue to that of Hale and found the issues to be so similar as to require the same treatment. The Second District held the defendant can raise the consecutive sentence issue if the proper facts can be found in the record and did not depend on the development of extra record facts. Adams was affirmed because the motion did not allege the facts were clear on the face of the record. (A 3.850 motion was no longer available because the 2-year time limit had run.)

regardless of the facts in the established record? The better rule, based on fundamental fairness, uniformity in sentences, and the administration of justice, would be to allow the Hale issue to be addressed in a 3.800(a) motion once the 3.850 time limit has passed as long as the record clearly establishes the necessary facts and there is no need for an evidentiary hearing. The State cannot claim harm as long as no evidentiary hearing is needed; and as long as the facts are from a reliable state source (like a police affidavit or a prosecutor's presentation of facts at a plea hearing or the information), the State should be estopped from protesting these facts.

There is precedent for allowing alternative methods of proving a sentencing issue. The failure to properly calculate time served is an area that can be addressed either in a 3.850 or 3.800, depending on the circumstances. In State v. Mancino, 714 So. 2d 429 (Fla. 1998), this Court held that a defendant can raise a credit-for-time-served issue under 3.800 if the record reflects that the defendant has served time prior to sentencing and the sentence does not properly credit the defendant with time served. In Mancino, this Court quoted at length from Judge Altenbernd's specially concurring opinion in Chojnowski v. State, 705 So. 2d 915 at 917-919 (Fla. 2d DCA 1997). In part of that quote Judge Altenbernd notes that while rule 3.850 may provide the best procedure to resolve jail credit issues, it is not the only way. Rule 3.800, although "far from an adequate tool to review most jail credit errors," was still a tool that could deal with some jail

credit errors that can be resolved without a factual hearing based on the contents of the court file. Chojnowski, 705 So. 2d at 918; Mancino, 714 So. 2d at 431. In approving the Second District's decision in Mancino, this Court concluded its opinion with another quote from Judge Altenbernd in Chojnowski: "[S]ince a defendant is entitled to credit for time served as a matter of law, 'common fairness, if not due process, requires that the State concede its error and correct the sentence 'at any time.'' 705 So. 2d at 918 (Altenbernd, J., concurring specially)." Mancino, 714 So. 2d at 432. Also see Hopping v. State, 708 So. 2d 263 (Fla. 1998), wherein this Court held an unconstitutionally enhanced sentence that violated double jeopardy could be raised in a rule 3.800 where it can be determined on the face of the record without an evidentiary hearing.

Just as common fairness and due process allows the use of rule 3.800 to raise credit issues or enhanced sentences in violation of double jeopardy that are evident on the face of the record, so to can a rule 3.800 be used to attack improperly imposed consecutive habitual sentences based on the same criminal episode when the facts are clear on the face of the record and no evidentiary hearing is necessary. The sworn affidavit, as part of the police report, is a reliable document; and since Mr. Burgess entered an open plea to the existing charges, the State must be estopped from claiming these facts are not reliable now.[3] Although rule 3.850

[3] If anything, the State got more of a benefit to Mr. Burgess' plea than Mr. Burgess --while the State got to avoid bringing in witnesses and going to trial, Mr. Burgess was pretty

may have been the better method of resolution for the Hale issues, it should not be considered the exclusive method of resolution. As long as the Hale issue can be established on the face of the record without an evidentiary hearing, rule 3.800 can address the issue.

Mr. Hale's 20-year sentence is illegal in this case, and this illegality is clear from the record. Fundamental fairness, uniformity in sentences, and the administration of justice require that a rule 3.800 be used in Hale issues clear on the face of the record. The law should not be so rigid and inflexible as to allow an obvious illegal sentence to stand. Mr. Burgess should not be forced to spend another 10 years in prison because he had the misfortune to be sentenced at the wrong time. It was only years later that this Court determined sentences such as Mr. Burgess' were illegal, and at that point Mr. Burgess had already spent several years in jail and had no counsel from which to obtain legal advice. As Judge Altenbernd pointed out in this case, the Court affirmed "with reluctance because we are convinced to a moral certainty by the content of the police report that the grand theft and burglary were committed in one criminal episode." Burgess, 25 Fla. Law Weekly at D1636. Because of the Second District's problem with this apparent injustice, the Court certified the question of using rule 3.800 as one being of great public importance. This Court should answer that certified question in the affirmative.

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much maxed out with all the sentences habitualized and ordered to run consecutive. There was no cap or minimum sentence agreed to as part of the plea, so the State cannot claim harm in any way.

CONCLUSION

Based on the foregoing arguments and authorities, this Court should answer the Second District's certified question in the affirmative and allow Mr. Burgess to be resentenced via rule 3.800 so as to require all of his habitualized sentences be ordered to run concurrent.

APPENDIX

1.Thomas Sergio Burgess

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CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert J. Krauss, Assistant Attorney General, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on this _____ day of October, 2002.

Respectfully submitted,

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