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

REPLY BRIEF OF PETITIONER ON THE MERITS

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ARGUMENT

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?

There are two aspects to this issue: (1) can a Hale issue be raised in a 3.800 motion when the claim is apparent on the face of the record, and (2) is a sworn police report affidavit sufficient to constitute evidence that is part of the record in order to supply the necessary facts that support a Hale issue?

The recent case of Valdes v. State, 765 So. 2d 774 (Fla. 1st DCA 2000), speaks to the first aspect. The First District allowed the defendant to raise a Hale issue in a 3.800(a) motion because the facts were apparent from the face of the record. The First District noted that there was nothing in State v. Callaway, 658 So. 2d 983 (Fla. 1995), "that leads us to believe that the supreme court intended to establish an inflexible rule barring relief under rule 3.800(a) from all Hale claims...." Valdes, 765 So. 2d at 776 (emphasis added).

As for the second aspect, the State claims a sworn police affidavit is only inadmissible hearsay that cannot be used to establish the facts on the record. The State takes the interesting position that a police affidavit is unreliable and they have the right to cross-examine the officer. The State then goes further and tries to argue that the affidavit was not even in the court record until Mr. Burgess put it there approximately 10 years later.

This assumption is wrong. Undersigned counsel contacted the Hillsborough County Clerk's Office and was told that the computer progress docket reflected a sworn affidavit was filed on 9-22-89 (see attached appendix, the progress docket at R29 is mostly unreadable) -- the day after Mr. Burgess' arrest. Filed means filed in the official file in the Clerk's office. How the State can argue that being filed on 9-22-89 does not mean in the court file is incomprehensible. More importantly, however, the State argues the affidavit is inadmissible hearsay under sec. 90.803(8), Fla. Stat. (1999). The State also cites to Bolin v. State, 736 So. 2d 1160 (Fla. 1999), for the proposition that police reports are hearsay. Bolin, however, does say more. Bolin indicates that the actual police report could have been admitted under sec. 90.803(6), Fla. Stat. (1985), as a business record exception; but since only oral testimony was used, it was not admissible hearsay. The State's reliance on Bolin is misplaced because of its factual distinction. If anything, the inference in Bolin is helpful to Mr. Burgess' position.

The use of the police affidavit is not to determine guilt or innocence but a sentencing issue. As pointed out in Petitioner's Initial Brief, other cases have used such affidavits to determine sentencing issues (control release, provisional credits, consecutive minimum mandatories); a Hale sentencing issue should be no exception.

APPENDIX

PAGE NO.

1.Progress docket. A

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert 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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