IN THE SUPREME COURT OF FLORIDA

JOHN EARL HUBBARD,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC00-2350

ON PETITION FOR REVIEW FROM
THE SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA

AMENDED ANSWER BRIEF OF RESPONDENT ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's statement of the case and facts with the following additions and corrections:

As is reflected in the opinion of the Second District Court of Appeals in its opinion in Hubbard v. State, 773 So.2d 87, at 88 (Fla. 2d DCA 2000), Appellant was convicted by a jury of Burglary of Dwelling (count 1) and Sexual Battery (count 2) and was sentenced to consecutive habitual violent felony offender sentences of 10 years as an HVFO for the Burglary/Dwelling and 30 years HVFO for the Sexual Battery.

Petitioner had filed an "Amended Motion To Correct Illegal Sentence" in the trial court in May of 1999, alleging that his consecutive habitual violent felony offender sentences were illegal because it constituted a Hale[1] error. See respondent's jurisdictional brief appendix, State Exhibit 2)[2]. On April 10, 2000, the trial court entered an order denying the 3.800 motion, reasoning that the alleged Hale must be raised in a rule 3.850 hearing because "whether a prisoner's consecutive sentences arise out of a single criminal episode is not a pure question of law," and that the petitioner's 3.800 motion could not be treated as a 3.850 motion as it was time barred. (See

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[1] Hale v. State, 630 So.2d 521 (Fla. 1993)

[2] The motion did not allege that the Hale error was apparent on the face of the record or how and where the record demonstrates an entitlement to relief.

jurisdictional brief appendix, State Exhibit 3). On April 19, 2000, the petitioner filed a motion for rehearing arguing that the "face of the record demonstrate that both offenses arose out of a single criminal episode" and that 3.800 relief is warranted because no evidentiary proceeding is necessary. (See jurisdictional brief appendix, State Exhibit 4). The trial court entered an order denying the motion for rehearing on April 28, 2000 (See jurisdictional brief appendix, State Exhibit 5). Petitioner filed his notice of appeal from the trial court's order denying the original motion to correct illegal sentence and the order denying motion for rehearing on May 13, 2000 (See appendix, State Exhibit 6).

Petitioner filed a document asking the appellate court to take judicial notice of the following appellate decisions: State v. Mancino, 714 So.2d 429 (Fla. 1998) and Valdes v. State, 765 So.2d 774 (Fla. 1st DCA 2000).

The Second District Court of Appeal in Hubbard v. State, *supra*, affirmed the reasoning of the trial court.

Petitioner filed a motion for rehearing, rehearing en banc or certification arguing that the district court overlooked or misapprehended the decisions in Mancino, *supra*, and Valdes. The Second District denied the motion.

Petitioner timely filed a notice to invoke the discretionary jurisdiction of this Court. This Court in an

order dated June 13, 2001, accepted jurisdiction and dispensed with oral argument.

SUMMARY OF THE ARGUMENT

The respondent agrees that the conflict between the Second District in Hubbard v. State, *supra*, and Valdes v. State, *supra* can be resolved by this Court's reasoning in Carter v. State, 26 Fla. L. Weekly S347 (Fla. May 24, 2001). Respondent does not agree with petitioner's conclusion that Carter mandates that a Hale error apparent on the face of the record is subject to correction under a motion to correct an illegal sentence under rule 3.800(a).

In Carter, *id.* at S349, this Court approved of Judge Farmer's definition of an "illegal sentence" as being a sentence "that imposes a kind of punishment that no judge under the entire body of sentencing statutes could possibly inflict under any set of factual circumstances". Unlike habitual offender sentences being imposed for life felonies, which could not be imposed under any factual circumstances at the time that Carter was sentenced and which this Court held in Carter v. State, *id.*, to be an illegal sentence which could be raised under a rule 3.800(a) motion at any time, consecutive habitual offender sentences are not always illegal; they may be improperly imposed if the offenses occurred during a single criminal episode but whether the offenses occurred during a single criminal episode requires an evidentiary determination. This court specifically held in State v. Callaway, 658 So.2d 983 (Fla. 1995) that such

errors cannot be raised at anytime by a 3.800(a) motion but must be raised within the time restraints required to file a 3.850 motion.

Even if this Court were to determine that Hale errors could be raised at any time under a rule 3.800(a) motion if the matters can be "gleaned from the face of the record", petitioner submits that the criminal arrest affidavit relied upon by the petitioner to establish that the offenses occurred during a single criminal episode is not competent evidence because it is hearsay. Furthermore, the trial court should not be required to "delve extensively into stale records" in order to apply the Hale rule which is why this Court in Callaway, *supra* at 987-88, required such matters to be raised within two years of the Hale decision.

ARGUMENT

ISSUE

WHETHER HALE CLAIMS APPEARING ON THE FACE OF THE RECORD MAY BE REVIEWED BY A RULE 3.800(A) MOTION.

The standard of review is de novo. Petitioner argues that the conflict between the Second District Court of Appeals in Hubbard v. State, 773 So.2d 87 (Fla. 2d DCA 2000) and the First District Court of Appeals in Valdes v. State, 765 So.2d 774 (Fla. 1st DCA 2000) has been resolved by this Court's reasoning in Carter v. State, 26 Fla. L. Weekly S347 (Fla. May 24, 2001). Respondent agrees, but unlike petitioner, submits that the reasoning in Carter supports the state's argument that Hale can only be raised pursuant to a post conviction 3.850 motion not a rule 3.800(a) motion.

This Court in Carter, *id.,* stated:

> Although we may have defined "illegal" too narrowly in *Davis*,[3] it appears that our newly formulated definition in *Mancino*[4] may be overly broad. Both the Third and Fourth Districts have expressed concern that

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[3] Davis v. State, 661 So.2d 1193 (Fla. 1995). In Carter, 26 Fla. L. Weekly at S348, this Court stated regarding Davis, "We additionally made the statement that seemingly narrowed the definition of 'illegal sentence' by stating that '[o]nly if the sentence exceeds the maximum allowed by law would the sentence be illegal".

[4] State v. Mancino, 714 So.2d 429 (Fla. 1998). In Carter, 26 Fla. L. Weekly at S348, this Court stated regarding Mancino, "We went on in Mancino to state that a 'sentence that patently fails to comport with statutory or constitutional limitations is by definition 'illegal'".

> defining an illegal sentence as one that "patently fails to comport with statutory or constitutional limitations" is too expansive because it encompasses all patent sentencing errors. *See Bover,* 732 So.2d at 1193; *Blakley v. State*, 746 So.2d 1182, 1186 (Fla. 4th DCA 1999). The Third District lamented:
>
> > Rule 3.800(a) motions now routinely rely upon the statement in *State v. Mancino*, 714 So.2d 429, 433 (Fla. 1998), that "[a] sentence that patently fails to comport with statutory or constitutional limitations is by definition 'illegal.'" Although not intended, the statement is being interpreted as saying any sentencing error which can be gleaned from the face of the record renders the sentence illegal, and may be raised at any time.
>
> *Bover*, 732 So.2d at 1193; *see Kelly v. State*, 739 So.2d 1164, 1165 (Fla. 5th DCA 1999) (observing that "[r]ule 3.800(a) motions now routinely rely on the language in *Mancino* which has been interpreted to allow review of any sentencing error discernable from the face of the record.") Despite these interpretations of *Mancino*, the Fourth District has concluded that the "supreme court did not intend to enlarge the universe of illegal sentences beyond the three kinds described in *Davis, Callaway, Hopping* and *Mancino, Blakley,* 746 So.2d at 1186.

This Court noted that Judge Farmer had attempted to formulate a more workable definition of "illegal sentence:

> ...Judge Framer has explained:
>
> To be illegal within the meaning of rule 3.800(a) *the sentence must impose a kind of punishment that no judge under the entire body of sentencing statutes could possibly inflict under any set of factual*

> *circumstances.* On the other hand, if it is possible under all the sentencing statutes - given a specific set of facts - to impose a particular sentence, then the sentence will not be illegal within rule 3.800(a) even though the judge erred in imposing it.
>
> *Blakley*, 746 So.2d 1186-87 (emphasis supplied)

This Court in Carter, *id.* at (348-49) held that imposition of a habitual offender sentence for a life felony was "illegal" because the statute at the time did not permit habitualization for life felonies because using the definition as set forth by Judge Farmer is a sentence "no judge under the entire body of sentencing statutes could possibly inflict."

Petitioner argues that the reasoning of Carter applies in the instant case and that no judge could sentence him to consecutive habitual violent felony offender sentences when the offenses arose out of the same criminal episode. Respondent submits that the petitioner had improperly interpreted Carter. Petitioner is assuming as a matter of law what must be proved as a matter of fact. Whether the offenses occurred during the same criminal episode is not a pure question of law but a mixed question of law and fact and requires an evidentiary ruling.

This Court in Carter, 26 Fla. L. Weekly S349, stated plainly:

> Moreover, we approve of Judge Farmer's definition in *Blakley* - that a sentence is "illegal" if it "imposes a kind of punishment that no judge under the entire

> body of sentencing statutes could possibly inflict **under any set of factual circumstances**" - because it comes close to formulating a workable definition of "illegal" sentence.

(Bold emphasis added)

Respondent submits that consecutive habitual violent felony sentences are punishments that **may be imposed under certain factual circumstances** unlike habitual felony offender sentences for life felonies which **may not be imposed under any factual circumstances.** Since consecutive habitual violent felony offenses **may be imposed under certain factual circumstances** the imposition of such sentences are not "illegal sentences" as a matter of law, the question then is whether such a sentence is properly imposed in the specific case under consideration based upon the facts of that case.

This Court in State v. Callaway, 658 So.2d 983 (Fla. 1995) rejected the idea that a Hale error could be raised by a 3.800(a) motion at any time. This Court stated in Callaway, *id*. at 987-988:

> We turn now to the question of whether an alleged Hale sentencing error can be raised in an unsworn motion under rule 3.800 either in lieu of a rule 3.850 or after the two-year time period for filing a rule 3.850 motion has expired. The resolution of this issue hinges on whether a Hale[5] sentencing error constitutes an "illegal" sentence within the meaning of rule 3.800(a).

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[5] Hale v. State, 630 So.2d 521 (Fla. 1993)

> ....We recently explained that an illegal sentence is one that exceeds the maximum period set forth by law for a particular offense without regard to the guidelines. *Davis v. State*, No. 84,155, --- So.2d --- [1995 WL 424172] (Fla. July 20, 1995). **A rule 3.800 motion** can be filed at any time, even decades after a sentence has been imposed, and as such, its **subject matter is limited to those sentencing issues that can be resolved as a matter of law without an evidentiary determination.**
>
> Whether a Hale sentencing error has occurred will require a determination of whether the offenses for which the defendant has been sentenced arose out of a single criminal episode. We agree with the district court that this issue is not a pure question of law. As the district court recognized, "resolution of this issue depends upon factual evidence involving the times, places, and circumstances of the offense," and often cannot be determined from the face of the record. *Callaway*, 642 So.2d at 639.

(Bold emphasis added)

This Court went on to say in Callaway, *id.* that in that case resolution of the issue required an **"evidentiary determination"** and should be dealt with under rule 3.850 which specifically provides for an evidentiary hearing and therefore answered the certified question in the negative. This Court even stated in Carter, *id.* at S448, that it had rejected the argument that a Hale error constitutes an "illegal sentence".

Respondent acknowledges the well reasoned opinion in Valdes v. State, 765 So.2d 774 (Fla. 1st DCA 2000) that:

> ...[w]e do not read the *Callaway* decision to preclude consideration of a *Hale*

> claim under rule 3.800(a) in a case in which the illegality of the sentences can be proven on the face of the record. The court observed in *Callaway*, that the facts necessary to support a *Hale* claim "often cannot be determined from the face of the record," which is not to say that a *Hale* claim can never be proven by facts appearing on the face of the record. *Callaway* at 988.
>
> The Second District Court of Appeal has recognized that a defendant may be entitled to assert a *Hale* claim under rule 3.800(a) if the facts supporting the claim are apparent from the face of the record. In *Adams v. State*, 775 So.2d 678 (Fla. 2d DCA 1999), the court acknowledged that the *Callaway* decision does not "irretrievably foreclose relief from consecutively imposed habitual offender sentences growing out of the same criminal episode by means of rule 3.800." *See also Richardson v. State*, 698 So.2d 551 (Fla. 1st DCA 1997) (Allen J., dissenting). As the state conceded in *Adams*, a defendant may properly assert a *Hale* claim in a rule 3.800(a) motion if the claim is one the court can resolve without resorting to extra-record facts.

However, respondent submits that this court made no exceptions for factual evidence of a Hale error which is apparent on the face of the record. This court was aware that Hale claims may could be proven by facts apparent on the face of the record but made no exception to the two year limit to raise the issue in the trial court. This Court set a limit of two years to raise any Hale claim so at to avoid the necessity to "delve extensively into stale **records** to apply the [Hale] rule". Callaway, *supra* at 987 (emphasis added). Accordingly, even if the records are available and establish that the offenses

occurred during the same criminal episode, the trial court should not be required to delve into the record after the two year window has closed.

This Court gave defendants two years to raise Hale errors so as to avoid the necessity to "delve extensively into stale records". Callaway, *supra* at 987. Appellant failed to raise his alleged Hale error during that window period which ended August 16, 1997. *See* Dixon v. State, 730 So.2d 265, at 269, fn.7 (Fla. 1999). *See* Johnson v. State, 557 So.2d 223 (Fla. 1990)("Although appellant styled his motion as one seeking relief under Florida Rule of Criminal Procedure 3.800(a), he is not challenging the legality of the sentences imposed, but rather is contending that the sentences were imposed in violation of the laws of the state. Such an argument is cognizable under Rule 3.850 rather than rule 3.800(a).").

Even if this Court should determine that a Hale error can be raised at any time in a 3.800(a) motion, respondent submits that the "charging complaints" which petitioner argues establishes that the offenses took place at the same time and place and involved the same victim (petitioner's brief at p.11) cannot be used to establish his claim that the offenses occurred during the same criminal episode. The documents the petitioner is referring to are actually "criminal/arrest affidavits" and cannot be considered as a matter of law or fact to determine

that the imposition of consecutive habitual offender sentences was illegal because the offenses occurred during a single criminal episode. The lower courts (both the trial court and/or the Second District Court of Appeal) would have to be considering those documents as truthful statements of fact - establishing the time, place, and circumstance of each offense - in order to establish that the offenses occurred during a single criminal episode. However, these documents cannot be considered as truthful statements of fact because there are hearsay statements.[6]

This Court in Bolin v. State, 736 So.2d 1160, at 1167 (Fla. 1999) stated that, "police reports are hearsay." The fact that the police report or the criminal report arrest affidavit may be in the court record does not make the hearsay statements contained therein admissible. The statements contained in a police report or a criminal arrest affidavit are hearsay because it "is a statement, other than one made by the declarant while testifying at trial or hearing, offered as evidence to prove the truth of the matter asserted." §90.803(1)(c), Fla. Stat.

[6] The arguments presented in this merits brief were never made at the trial level or on appeal to the Second District because the matter was handled summarily by both the trial court and the district court of appeal, and neither the state attorney at the trial level nor the attorney general on appeal was requested to respond. However, a conclusion or decision of a trial court should be affirmed, even when based on erroneous reasoning, if evidence or an alternative theory supports it. Caso v. State, 524 So.2d 422 (Fla. 1988).

(1999). Moreover, the hearsay statements in question were not subject to cross-examination, and do not fall under any recognized exception to the hearsay rule. Stoll v. State, 762 So.2d 870, at 876 (Fla. 2000).

Furthermore, neither a criminal report nor the criminal report affidavit could be considered merely because they are part of the court record. As this Court stated in Stoll, *id* at 876-877:

> Although a trial court may take judicial notice of court records, *see* §90.202(6), Fla. Stat. (1997), it does not follow that this provision permits the wholesale admission of all hearsay statements contained within those court records. We have never held that such otherwise inadmissible documents are automatically admissible just because they were included in a judicially noticed court file. *Cf. Allstate Ins. Co. v. Greyhound Rent-A-Car,* 586 So.2d 482, 483 (Fla. 4th DCA 1991) ('[T]he fact that a deposition may be judicially noticed does not render all that is in it admissible.')...To the contrary, we find that documents contained in a court file, even if that entire court file is judicially noticed, are still subject to the same rules of evidence to which all evidence must adhere.

Obviously, if the state sought to establish that the offenses occurred during a single criminal episode by seeking to introduce into evidence or to rely upon the police report or the criminal report affidavit, the defense would vehemently object on grounds of hearsay. Just as the petitioner would have the right to demand the presence of the police officer to testify as

to the factual matters pertinent to determining if the offenses occurred during a single criminal episode - the time, place, and factual circumstances of the offenses - the respondent, State of Florida, also has the right to demand the presence of the police officer to establish that the offenses did not occur during a single criminal episode. However, once the testimony of a witness is required to establish the factual basis for a legal determination, then we are dealing with matters requiring an evidentiary hearing; and this requires a 3.850 proceeding, not a 3.800 proceeding; and in the instant case, all parties agree that a 3.850 proceeding is time barred.

Petitioner argues that if the information contained in the these affidavits are insufficient to establish his argument that the offenses occurred during the same criminal episode that the case should be remanded to the trial court to allow him an opportunity to supplement the record "with already existing record evidence proving all the events emanated from a single criminal episode" (petitioner's brief at p.11).

Respondent presumes that the petitioner would be referring to the trial transcript which was probably prepared when the petitioner appealed his original convictions and sentences after his jury trial in 1990 in Hubbard v. State, 582 So.2d 824 (Fla. 2d DCA 1991). As respondent stated earlier, this Court set a limit of two years to raise any Hale claim so as to avoid the

necessity to “delve extensively into stale **records** to apply the [Hale] rule”. Callaway, *supra* at 987 (emphasis added). Accordingly, even if the trial transcripts are available the trial court should not be required to delve into the record after the two year window has closed.

CONCLUSION

Respondent respectfully requests that this Honorable Court approve the opinion of the lower court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to R. Mitchell Prugh, Esq., Middleton & Prugh, P.A., 303 State Road 26, Melrose, Florida 32666, this ____ day of August, 2001.

_____
COUNSEL FOR RESPONDENT

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

_____

COUNSEL FOR RESPONDENT