IN THE SUPREME COURT OF FLORIDA

ELLIS D. DOWNS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC00-2382

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

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:

Petitioner was charged by amended information with the following offenses:

Count 1: Burglary/Structure between November 8-9 1989, victim: Jim Pierce;
Count 2: Grand Theft between November 8-9 1989, victim: Jim Pierce;
Count 3: Possession of Burglary Tools between November 8-9 1989;
Count 4: Driving While License Suspended between November 8-9 1989;
Count 5: Reckless Driving between November 8-9 1989; and
Count 6: Fleeing to Elude between November 8-9 1989.

(V1/R398-402)

SUMMARY OF THE ARGUMENT

The trial court may not rely upon trial transcript testimony to determine as a matter of law under a rule 3.800(a) motion whether an alleged Hale error is entitled to correction after the two year window period established in Callaway has expired. Hale errors are not pure issues of law and must be raised by a 3.850 motion. The trial court should not be required to delve extensively into stale records to apply the Hale rule which is why this court set up the two year window period and made no exceptions for Hale errors which are apparent on the face of the record.

ARGUMENT

ISSUE

AFTER THE HOLDING IN CALLAWAY, CAN A TRIAL COURT RELY UPON TRIAL TRANSCRIPT TESTIMONY IN THE COURT FILE TO DETERMINE, AS A MATTER OF LAW, THAT CONSECUTIVE HABITUAL OFFENDER SENTENCES ARE ILLEGAL.

The trial court may not rely upon trial transcript testimony to determine, as a matter of law, that consecutive habitual felony offender sentences are illegal. As this Court stated in State v. Callaway, 658 So.2d 983, 987-988 (Fla. 1995):

> We now turn 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[1] sentencing error constitutes an "illegal" sentence within the meaning of rule 3.800(a).
>
> ....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 hearing.
>
> Whether a Hale sentencing error has

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

> 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 time, places, and circumstances of the offense," and often cannot be determined from the face of the record. *Callaway*, 642 So.2d at 639.

This Court went on to say in Callaway, *id.* that in that case resolution of the issue required an evidentiary hearing 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.

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 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* "often cannot be determined from the face of the record," which is not to say that a *Hale* 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 raise a *Hale* claim under rule 3.800(a) if the facts supporting the claim are apparent on 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 growing out of the same criminal

> episode by means of rule 3.000. *See also Richardson v. State*, 698 So.2d 551 (Fla. 1st DCA 1997) (Allen J., dissenting. As stated 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 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 - in this case the trial transcript - the trial court should not be required to delve into the record after the two year window has closed.

This Court in Callaway, *supra* at 988, determined that this issue was not a pure question of law , and, therefore, respondent would argue, cannot be raised in a 3.800(a) motion. Respondent submits that a consecutive habitual felony offender sentences are not per se illegal sentences nor do such sentences violate the violate the any constitutional limitations. As this Court stated in State v. Mancino, 714 So.2d 429, at 433 (Fla. 1998), "A sentence that patently fails to comport with statutory

or constitutional limitations is by definition 'illegal'." Whether a Hale error has occurred as stated earlier by this court is not a pure question of law but depends upon the facts of each individual case. Callaway, *supra* at 988.

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).")

Respondent submits that a rule 3.800(a) motion should not be used to conduct a general review of a trial transcript to determine a mixed questions of law and fact such as whether offenses arose during a single criminal episode after the two year Hale window has expired.

This case demonstrates the problems created by the lack of a legal definition of the term "illegal sentence". As the Third District stated in Bover v. State, 732 So.2d 1187, 1993 (Fla. 3d

DCA 1999), *rev. granted* 743 So.2d 508 Fla. 1999):

> A case-by-case approach to deciding what is an "illegal" sentence under rule 3.800(a) is undesirable. It creates uncertainty in the law and invites large numbers of postconviction motions, each filed in the hopes that the definition of "illegal" sentence will be expanded to so as to allow consideration of other-wise time-barred claims.
>
> 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 that any sentencing error which can be gleaned from the face of the record renders a sentence illegal, and may be raised at any time. "The unending debate about what is an 'illegal' sentence for purposes of Rule 3.800(a) stems from the fact that the term 'illegal' is susceptible of multiple meanings." *Hildalgo v. State*, c24 Fla. L. Weekly D776, D778 n.2, 759 So.2d 984 (Fla.3d DCA 1999) (Citations omitted).
>
> The better approach would be to decide what postconviction matters are sufficiently important that they can be raised at any time, and to amend the postconviction rules to identify those matters specifically. The term "illegal sentence" in Rule 3.800(a) should be explicitly defined, or abandoned. *See Hidalgo.*

CONCLUSION

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Deborah K. Brueckheimer, Assistant Public Defender, P.O. Box 9000)Drawer PD, Bartow, Florida 33831-9000, this 13th day of March, 2001.

CERTIFICATE OF FONT

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).

Respectfully submitted,
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