IN THE SUPREME COURT OF FLORIDA

ELLIS D. DOWNS, :

Petitioner, :

vs. : Case No.SC00-2382

STATE OF FLORIDA, :

Respondent. :

_____:

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

INITIAL BRIEF OF PETITIONER ON THE MERITS

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TENTH JUDICIAL CIRCUIT

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TOPICAL INDEX TO BRIEF

TABLE OF CITATIONS

TABLE OF CITATIONS (continued)

STATEMENT OF THE CASE AND FACTS

On October 29 and 30, 1990, Petitioner Ellis D. Downs had a jury trial. (V1 & 2) On October 30, 1990, Mr. Downs was found guilty of burglary, grand theft of property over $300, possession of burglary tools, driving while license suspended, reckless driving, and fleeing to elude. (V3/R407-412) Mr. Downs was sentenced on December 5, 1990, as a habitual felony offender as follows: 10 years prison on the burglary, 10 years prison consecutive on the grand theft, 5 years probation consecutive on the burglary tools, and 1 year county jail concurrent on the 3 remaining misdemeanor charges. (V3/R414-472)

At trial Police Officer Van Brummelin testified under oath that at 12:45 a.m. on November 9, 1989, he was on patrol and saw a car backed up to the front door of Jim Pierce Quality Motors. When the officer approached the car, he saw Mr. Downs in it; and Mr. Downs sped away. (V1/T32-40) Officers Van Brummelin and Messer testified they chased Mr. Downs. When the car eventually stopped, there were tools belonging to the Jim Pierce Quality Motors business in the trunk, as testified to by Officer Messer and Mr. Pierce (V1/T40-47,90-99; V2/T238,239) The business had been broken into, and tools were missing--the tools found in the car. (V3/T101, 105-109; V2/T235-239)

On December 28, 1999, Mr. Downs mailed a Motion to Correct Illegal Sentence pursuant to Fla. R. Crim. P. 3.800(a) contesting his

two consecutive habitualized sentences for burglary and grand theft. Because these two offenses arose from the same incident, it was illegal to have these two sentences run consecutive to each other. The trial court denied the motion on January 14, 2000, as being beyond the time period for filing a 3.850, which the trial court stated was the appropriate vehicle for this claim. Mr. Downs' motion for rehearing mailed on January 27, 2000, was denied.Mr. Downs appealed this denial to the Second District Court of Appeals; and on September 1, 2000, the Court issued an opinion affirming the case based on Burgess v. State, 764 So. 2d 749 (Fla. 2d DCA 2000). The same question certified in Burgess was also certified in Mr. Downs' case:

> 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. Downs timely filed a notice to invoke this Court's jurisdiction.

SUMMARY OF THE ARGUMENT

Mr. Downs' 20-year prison 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 trial transcript clearly establishes the facts in this case. This Court should answer the modified certified question in the affirmative and allow Mr. Downs to be resentenced.

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?

When the Second District Court denied Mr. Downs relief, it did so based on its decision in Burgess; and it certified the same question it certified in Burgess. However, the certified question in Burgess is not factually the same. Burgess had only a sworn police affidavit to set forth the facts to demonstrate both offenses arose from the incident, while in Mr. Downs' case there was a trial with sworn testimony. Thus, the certified question should be modified for Mr. Downs as follows:

> 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?

At the time Mr. Downs 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 autho-

rized 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). 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).

When the Second District denied relief in Burgess, 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, 764 So. 2d at 750, 751 (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 clearly establish the consecutive habitualized sentences arose from the same incident.

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) what evidence in the record can be used 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).

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 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

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

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. Downs' 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 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

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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.)

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 trial transcript), 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. This is the second aspect to this issue--what type of evidence can be used for a 3.800 motion that is part of the established record. The Burgess case involves a sworn police affidavit that was part of the established record. Mr. Downs' case is even stronger with an entire trial transcript with sworn testimony that clearly shows on the face of the record Mr. Downs' burglary and grand theft occurred at the same time in one criminal episode. The State cannot

dispute these facts. Although rule 3.850 may have been the better method of resolution for Hale issues in general, 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. Downs' 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. Downs 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. Downs' were illegal, and at that point Mr. Downs had already spent several years in jail and had no counsel from which to obtain legal advice. As Judge Altenbernd pointed out in Burgess, 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, 764 So. 2d at 750, 751. 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 (as factually modified in Mr. Downs' case) in the affirmative.

CONCLUSION

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

APPENDIX

PAGE NO.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert Butterworth, Attorney General, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on this _____ day of February, 2001.

CERTIFICATION OF FONT SIZE

I hereby certify that this document was generated by computer using Wordperfect 5.1 format with Courier 12 Point Font. The Office of the Public Defender, Tenth Judicial Circuit, is currently in the process of converting from Wordperfect 5.1 format to Microsoft Word format in order to comply with Rule 9.210(a)(2), since Courier New 12 Point Font is not available in Wordperfect 5.1. As soon as this upgrade is completed, Courier New 12 Point Font will be the standard font size used in all documents submitted by undersigned. This document substantially complies with the technical requirements of Rule 9.210(a)(2) and complies with the intent of said rule.

Respectfully submitted,

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