

IN THE SUPREME COURT OF FLORIDA

COLUMBUS RICKEY ASHLEY,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. Sc00-2586

RESPONDENT'S ANSWER BRIEF

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PRELIMINARY STATEMENT

Respondent, the State of Florida, the Appellee in the District Court of Appeal (DCA) and the prosecuting authority in the trial court, will be referenced in this brief as Respondent, the prosecution, or the State. Petitioner, Columbus Rickey Ashley, the Appellant in the DCA and the defendant in the trial court, will be referenced in this brief as Petitioner or by proper name.

The symbol "I", "II", "III", "IV" will refer to the record on appeal. "IB" will designate Ashley's Initial Brief. Each symbol is followed by the appropriate page number.

All emphasis through bold lettering is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

The State agrees with Petitioner's statement of the case and facts.

SUMMARY OF ARGUMENT

The trial court did not violate double jeopardy by resentencing Ashley as a habitual violent felony offender (herein after HVFO) after originally sentence Ashley as a habitual felony offender (hereinafter HFO) because the trial court was correcting a clerical-like error and imposing the sentence originally intended. During the sentencing hearing, the State proved and the trial court found that Ashley qualified as a HVFO. The parties discussed the length of the HVFO sentence Ashley should receive. The State did not file a notice of intent to seek HFO sentencing nor did the State prove that Ashley qualified as an HFO. In fact, the possibility of an HFO sentence was never discussed. Thus, when the trial court mistakenly orally pronounced the HFO sentence instead of an HVFO, Ashley knew or should have known that the sentence was incorrect. Accordingly, Ashley had no expectation of finality in the HFO sentence, and when the judge corrected Ashley's sentence three days later, there was no double jeopardy violation.

Furthermore, the trial court did not increase Ashley's sentence. Even though the habitual violent felony sentence contains a minimum mandatory, Ashley's sentence was not effected because Ashley is required to serve 85 percent of his sentence which exceeds the minimum mandatory portion of the sentence. Because his sentence was not increased, there could be no double jeopardy violation.

ARGUMENT

ISSUE I

DID THE TRIAL COURT ERR BY RESENTENCING ASHLEY AS AN HABITUAL VIOLENT FELONY OFFENDER BECAUSE THE TRIAL COURT HAD MISSPOKE AND SENTENCED HIM AS A HABITUAL FELONY OFFENDER THREE DAYS EARLIER?
(Restated)

Ashley argues that the trial court erred by resentencing him as a habitual violent felony offender a few days after the imposition of the original sentence when the trial court had misspoke and imposed a habitual felony offender sentence. The State respectfully disagrees.

Standard of Review & Preservation

Whether or not the trial court's act of resentencing Ashley violated double jeopardy is an issue of law which is subject to de novo review.

Ashley preserved this issue by filing a Florida Rule of Criminal Procedure 3.800(b) in the trial court.

Jurisdiction

The State maintains that upon review of the operative facts, as contained within the "four corners" of the decisions in Ashley v. State, 772 So.2d 42 (Fla. 1st DCA 2000), Troupe v. Rowe, 283 So. 2d 857 (Fla. 1973), State v. Hudson, 698 So. 2d 831 (Fla. 1997), Evans v. State, 675 So. 2d 1012 (Fla. 4th DCA 1996), and Knapp v. State, 741 So. 2d 1150 (Fla. 2d DCA 1999), there is no express and direct conflict with this Court or any other District Court of Appeal. See

Reaves v. State, 485 So.2d 829, 830 (Fla. 1986); Jenkins v. State, 385 So.2d 1356, 1359 (Fla. 1980).

Argument

Ashley contends that his sentence as a habitual violent offender violates double jeopardy. During the sentencing hearing held on July 8, 1999, the prosecutor informed the court that he had filed a notice of intent to seek habitual violent felony offender sanctions, and would use his armed robbery conviction as the prior predicate offense. (I.68). Defense counsel also discussed the use of the prior robbery to habitualize him and the habitual **violent** offender sentence. (I.78-79). The July 8th hearing was continued to the next day, and the trial court sentenced Ashley to twenty-five years as a habitual felony offender. (I.97). On July 12, 1999, the trial court held a second hearing clarifying Ashley's sentence stating that it had mistakenly sentenced Ashley as a habitual felony offender when a habitual violent felony offender notice had been filed. Defense counsel had no objection to Ashley being sentenced as a habitual violent offender. (I.105). The trial court also pointed out the fact that although there was a ten year minimum mandatory, it would not make a difference because Ashley had to serve 85 percent of his sentence. (I.106).

Ashley argues that the trial court could not resentence him because it violated double jeopardy. The Fifth Amendment to the Federal Constitution provides:

nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb;

U.S. CONST. AMEND. V., CL. 2. The Florida Constitution provides:

No person shall be deprived of life, liberty or property without due process of law, or be twice put in jeopardy for the same offense, or be compelled in any criminal matter to be a witness against himself.

Art. I, § 9, FLA. CONST. The guarantee against double jeopardy "has been said to consist of three separate constitutional protections. It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." United States v. DiFrancesco, 449 U.S. 117, 101 S.Ct. 426, 433, 66 L.Ed.2d 328 (1980). The Court stated:

The constitutional prohibition against "double jeopardy" was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense.... The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Id. at 449 U.S. at 127-128, 101 S.Ct at 432, citing Green v. United States, 355 U.S. 184, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957). The primary purpose of the Double Jeopardy Clause was to preserve the finality and integrity of judgments. Id. at 449 U.S. at 128, 101 S.Ct at 432. "Historically, the pronouncement of sentence has never carried the finality that attaches to an acquittal." Id. at 449 U.S. at 133, 101 S.Ct at 435. In fact, the practice of allowing the trial court to increase a sentence as long as it was during the same term of court was once thought not to violate

double jeopardy principles. 449 U.S. at 133-134, 101 S.Ct at 435.

However, the general rule is that the trial court cannot increase a sentence once a defendant begins to serve his sentence. Troupe v. Rowe, 283 So.2d 857, 859 (Fla. 1973). Nevertheless, there are exceptions to this rule. Goene v. State, 577 So.2d 1306, 1308 (Fla. 1991). "The Constitution does not require that sentencing should be a game in which a wrong move by the judge means immunity for the prisoner." Harris v. State, 645 So.2d 386, 388 (Fla. 1994), citing United States v. DiFrancesco 449 U.S. at 135, 101 S.Ct. at 436.

In Harris v. State, the State had requested habitual offender sanctions, but the trial court imposed a guidelines sentence because Harris had "convinced the trial court that the law was such that habitual offender sanctions were not legally permissible for his convictions." Id. at 387. When Harris appealed his conviction and sentence, the State cross appealed the issue of whether the trial court had the authority to impose a habitual offender sentence. The district court affirmed Harris' convictions and held that the "trial court erred in its finding that Harris's convictions were not subject to habitualization." Id. This Court relying on United States v. DiFrancesco, stated that "we find that the Double Jeopardy Clause is not an absolute bar to the imposition of an increased sentence on remand from an authorized appellate review of an issue of law concerning the original sentence. Harris has not been deprived of any reasonable expectation of finality in

his original sentence, nor has he been subject to repeated attempts to convict." Id. at 388.

In Goene v. State, 577 So.2d 1306 (Fla. 1991), the trial court resentenced Goene once the court learned that Goene was using an alias and had several prior convictions which were not on the scoresheet. Goene argued that once a defendant has begun to serve his sentence, the judge may not recall him and resentence him to an increased term. Id. at 1308. This Court held that while that was the "general rule in Florida, it is clear that there are exceptions to the rule." Id. Thus, this Court approved of the trial court decision to resentence Goene because Goene had committed fraud upon the court which effected his sentence.

In Cheshire v. State, 568 So.2d 908, 913 (Fla. 1990), this Court held that double jeopardy did not prevent the trial court from resentencing a defendant when the original scoresheet contained mathematical errors. The court stated: "Double jeopardy does not guarantee a defendant the benefit of a judges good-faith mathematical or clerical errors." Id.

Likewise in the case at bar, Ashley had no expectation in the finality of his HFO sentence, which was the result of a clerical-like error. "It [was] undisputed that the State was seeking an HVFO sentence and that all of the sentencing proceedings dealt with the issue of Appellant's qualification as an HVFO." Ashley v. State, 772 So.2d 42, 42 (Fla. 1st DCA 2000). The State proved and the trial court found that Ashley qualified as a HVFO. Id. After the trial court found Ashley qualified as a HVFO, the parties

discussed the length of the HVFO sentence Ashley should receive. Id. **"The possibility of an HFO sentence was never discussed, nor did the State file a notice of intent to seek HFO sentencing or prove that appellant would qualify as an HFO."** Id. (Emphasis added). Thus, when the trial court mistakenly orally pronounced the HFO sentence, Ashley knew or should have known that the sentence was incorrect. Accordingly, Ashley had no expectation of finality in the HFO sentence. The trial court merely misspoke omitting the word violent from the July 9th oral pronouncement, and the judge corrected Ashley's sentence on July 12, 1999. Thus, there was no double jeopardy violation.

Ashley's reliance on Troupe v. Rowe, 283 So. 2d 857 (Fla. 1973), is misplaced. In Troupe, the parties had agreed in plea bargain to the length of Troupe's but disagreed over "(1) the defendant's desire for a 'finding' of guilt rather than the stigmatizing adjudication, and (2) the resulting benefit of allowing defendant to remain in the army after his release: whereas the state was insistent upon an adjudication of such serious crimes." Id. at 858. The trial court decided to "go with" the defendant's position, entering a "finding" over the State's objection, and the court sentenced the defendant. Id. Following a recess, a second assistant state attorney had the trial court return to Troupe's case, and he vehemently objected to the finding rather than an adjudication. After a discussion, the trial court set aside the plea. Id.

This Court concluded that in Troupe's case, "the fact reflect that a voluntary plea of guilty was entered and sentence imposed and the hearing concluded." Id. at 859. The second assistant state attorney did not interject himself into the case until after the hearing had concluded and the trial court had emphatically ruled on the adjudication verses finding issue. Thus, this Court found that "Jeopardy had attached in petitioner's case and the sentence which had been imposed could not thereafter be increased (as the second assistant state attorney's position would do) in violation of defendant's constitutional guaranty not to be twice placed in jeopardy." Id. at 860.

Troupe greatly differs from Ashley. In Ashley, the trial court corrected its mistaken imposition of a HFO sentence rather than an HVFO sentence in a situation when it was clear that a HVFO sentence was intended. The First District specifically found that it was not a discretionary ruling of the trial court. An HFO sentence was never on the table in Ashley. Whereas, in Troupe, the trial court reversed an earlier discretionary ruling and in effect set aside Troupe's plea after hearing additional argument from a second prosecutor although the trial court had already sentenced Troupe and the hearing had concluded. Furthermore, the trial court, in Troupe, had option of withholding adjudication or adjudicating Troupe guilty, and when the court decided to withhold adjudication, Troupe had expectation in the finality of that sentence. Ashley never had an expectation in the finality of a sentence which he knew or should have known was the result of a misstatement.

State v. Hudson, 698 So. 2d 831 (Fla. 1997) is also inapposite. Hudson filed a motion to correct an illegal sentence. The trial court had sentenced him to twelve years as a HVFO. However, the trial court did not impose a minimum mandatory, and there was no mention of a minimum mandatory in the written plea agreement, the colloquy, or the sentencing documents. Nevertheless, after Hudson began to serve his sentence, the Department of Corrections set up Hudson's records to show a twelve-year minimum mandatory. Hudson filed a motion to correct illegal sentence arguing that the trial court had improperly amended his sentence. The court denied the motion because the court had never imposed a minimum mandatory and therefore had not changed Hudson's sentence. Id. at 832. The Third District affirmed without prejudice to Hudson to challenge the Department of Corrections should it enforce the mandatory term, and in a footnote the Third District recognized conflict among the district courts as to whether the minimum mandatory terms under the habitual offender statute were discretionary. Id. In light of its previous decisions finding that a court has discretion as to whether or not to sentence a defendant as a habitual offender, this Court found that "the court's sentencing discretion extends to determining whether to impose a mandatory minimum term." Id. at 833. See also Knapp v. State, 741 So.2d 1150 (Fla. 2d DCA 1999) (finding that when the court originally sentenced Knapp as a HVFO without imposing a minimum mandatory sentence, the trial court, after receiving a letter from the Department of Corrections explaining that the court was statutorily required to impose the

minimum mandatory, could not resentenced Knapp as a HVFO with the minimum mandatory because Knapp's original sentence was legal").

The First District's decision in Ashley, did not question this Court's decision in Hudson or the trial court's discretion to impose a minimum mandatory. Rather, in Ashley, the trial court corrected a clerical-like error by imposing a HVFO sentence with the minimum mandatory even though it had mistakenly imposed a HFO sentence three days earlier. The Ashley court found that the trial court did not "initially impose[] a legal sentence," and that Ashley "had no expectation of finality after the trial court imposed the first sentence." Ashley at 43.

Ashley also differs from Evans v. State, 675 So.2d 1012 (Fla. 4th DCA 1996). The trial court originally sentenced Evans as a HFO to current sentences of three years of probation on the condition he complete a drug program. Id. at 1013. Evans violated his probation. At the sentencing hearing, the parties discussed Evans sentencing guidelines scoresheet range. Id. The trial court sentenced him to consecutive five and fifteen-year prison sentences, but the trial court did not state that Evans was being sentenced as a HFO. Id. at 1014. A written sentence did provided that Evans was sentenced as a HFO, although the commitment papers did not reflect a HFO sentence. Id. Two days later the State filed a motion to clarify the sentence. Id. The Fourth District stated that: "Resentencing a defendant to an habitual offender term of imprisonment subsequent to the entry of a jurisdictionally permissible term is unequivocally a violation of double jeopardy

rights which cannot be constitutionally justified.” Id. While the court recognized that the trial court’s failure to orally pronounce the HFO status may have been an oversight, the Fourth District found that clarification two days later to be in error. Id. at 1015.

Ashley differs from Evans because an HFO sentence was not an option in Ashley while the trial court could have sentence Evans as a HFO or to a guidelines sentence. Therefore, Evans’ guidelines sentence was a lawful sentence for which he had an expectation of finality. Ashley did not have an expectation of finality in his sentence which was the result of a misstatement. Furthermore, the First District found that the trial court did not “initially impose[] a legal sentence.” Ashley at 43. The State did not file a HFO notice or prove that Ashley would qualify as a HFO. The notice, discussions, and proof involved a HVFO sentence, and therefore unlike Evans, Ashley “had no expectation of finality after the trial court imposed the first sentence.” Id. Ashley knew or should have known that the HFO sentence was incorrect.

Accordingly, unlike the cases cited by Ashley, Ashley’s second sentence did not involve the discretionary judgment of the trial court to impose a different sentence, but instead, the trial court merely corrected a clerical-like error involving a simple mistake about what type of notice had been filed and proven on the previous day. Therefore, Ashley had no expectation of finality in his HFO sentence, and the HVFO sentence did not violate the principles of the double jeopardy.

Furthermore, Ashley's sentence was not increased. The trial court sentenced Ashley to twenty-five years in prison. (I.42,52). Although the trial court imposed a ten-year minimum mandatory with the habitual violent offender sentence, it should not effect Ashley's sentence because he has to serve 85 percent of his sentence, which exceeds the minimum mandatory. § 944.275, Fla. Stat. (1999). Therefore, the imposition of the habitual violent felony offender sentence had no effect on Ashley's sentence. See West v. State, 718 So.2d 908 (Fla. 1st DCA 1998). Accordingly, Ashley's sentence should be affirmed.

CONCLUSION

Based on the foregoing, the State respectfully submits the decision of the District Court of Appeal reported at 772 So. 2d 42 should be approved, and Ashley's HVFO sentence affirmed.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Paula S. Saunders, Esq., Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, by MAIL on June _____, 2001.

Respectfully submitted and served,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of Fla.
R. App. P. 9.210.

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APPENDIX

Ashley v. State, 772 So.2d 42 (Fla. 1st DCA 2000)

