

IN THE SUPRME COURT OF FLORIDA

COLUMBUS RICKEY ASHLEY,

Petitioner,

v.

CASE NO. SC00-2586

DCA CASE NO. 1D99-2736

STATE OF FLORIDA,

Respondent.

\_\_\_\_\_ /

PETITIONER'S BRIEF ON THE MERITS

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**PETITIONER'S BRIEF ON THE MERITS**

**I PRELIMINARY STATEMENT**

This is an appeal from a conviction and habitual violent felony offender sentence for possession of a firearm by a convicted felon. Petitioner, COLUMBUS ASHLEY, was the defendant in the trial court and appellant in the First District Court of Appeal. Respondent, the State of Florida, was the prosecuting authority and appellee in the courts below. The parties will be referred to as Ashley and the State, respectively.

The record on appeal consists of one volume of pleadings, three volumes of transcript of the proceedings in the circuit court and a one volume supplemental record with Petitioner's Motion to Correct Sentencing Error. The four volumes of the primary record will be referred to as "R" followed by the appropriate volume and page number in parenthesis. The supplemental record will be referred to as "SRI" followed by the page number. A copy of the

District Court's opinion in Ashley v. State, 772 So.2d 42 (Fla. 1<sup>st</sup> DCA 2000), is attached as an appendix to this brief. The appendix will be referred to as "A."

## II STATEMENT OF THE CASE AND FACTS

By information filed March 26, 1999, Columbus Ashley was charged with armed robbery of a pouch and/or car keys from Glenn Williams (Count I) and aggravated assault of Glenn Williams with a handgun (Count II). The offenses allegedly occurred between 9:00 and 11:55 p.m. on January 17, 1999, in the vicinity of 11th Street East, Jacksonville, Florida (RI, 8-9, 13). An amended information filed June 3, 1999, added a third count of possession of a firearm by a convicted felony (RI, 23-24). Count III was severed for purposes of trial, and Ashley was tried solely on that count.<sup>1</sup>

Ashley was tried by jury on June 15-16, 1999.

Glenn Williams gave his friend, Kenneth Watts, Watts' brother, and a third man a ride on the night of January 17, 1999 (RIII, 199, 201-203). When Williams stopped at the corner of a dirt road, the third man hit Williams with a gun and told him "to give it up" (RIII, 209-212). Williams grabbed the gun and the two men struggled over it (RIII, 212-214). The struggle continued in to the street (RIII, 215). When Williams lost his grip on the gun, he got back in his car, and the assailant fired three times, striking Williams' Honda Civic (RIII, 203, 216, 228, 321). Watts' brother grabbed the keys from the ignition, and Watts' took Williams' pouch, and the three men fled (RIII, 216-217). Williams positively

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<sup>1</sup>After the trial, the state nol prossed Counts I and II of the amended information (RI, 99, 107).

identified Columbus Ashley in a photo lineup and at trial as the third man who assaulted him with the gun that night (RIIII, 218, 222-225, 333-335).

Ashley was interviewed following his arrest on March 5, 1999, and denied any involvement in the robbery and aggravated assault. He said he wasn't there, but Kenneth Watts told him about it (RIV, 360, 364-365).

Following the testimony, the trial court instructed the jury, per stipulation of the parties, that Mr. Ashley was convicted of a felony on January 16, 1998; that the state did not need to introduce further proof of the nature of the prior felony conviction, and that the state still had the burden of proving beyond a reasonable doubt that appellant knowingly owned or had in his care, custody or possession a firearm (RIV, 378-379).

Ashley presented three alibi witnesses at trial: his mother, Sharon Brown (RIV, 380-387); his girlfriend, Alforia Nelson (RIV, 399-401), and his stepbrother, Joseph Brown (RIV, 416-417). The jury rejected his alibi defense and found him guilty of possession of a firearm by a convicted felon as charged in Count III of the information (RI, 33; RIV, 540-541).

Prior to trial, the state filed a notice of intent to classify Ashley as an habitual violent felony offender based on Ashley's conviction for robbery on January 16, 1998 (RI, 17). At the first phase of the sentencing hearing on July 8, 1999, the state



introduced the January 16, 1998, judgment of conviction for armed robbery in Duval County Case No. 96-11439-CFA (RI, 34-35, 68-69). In response to the court's inquiry, the state proffered that the conviction was valid and had not been set aside on appeal (RI, 69).

Defense counsel noted that Ashley was 20 years old, had two prior juvenile adjudications and two prior felony convictions, "one of which is the robbery, which they're habitualizing him with, the other is possession of cocaine . . ." (RI, 78). Counsel argued that the court had broad discretion in terms of the sentencing range, from the minimum mandatory ten year term to a maximum of 30 years (RI, 78-79). "I understand that even HVO status is discretionary with the court. The court does not have to impose the HVO sentence" (RI, 78). Counsel urged the court to impose a sentence at the lower end of the range (RI, 80).

The state had "no specific recommendation for this court, but I do ask the court to take into consideration all of the circumstances in sentencing this particular defendant; that includes what he did in this case, the crime he was convicted of, and his prior record of crimes" (RI, 84).

Ashley was sentenced on July 9, 1999. The court found that this case was "certainly aggravating more than the normal case of possession of a firearm by a convicted felon" by virtue of the facts that there was a struggle over the firearm and the gun was discharged (RI, 95). The court also noted that Ashley's prior

record for aggravated assault as a juvenile, auto theft, armed robbery and possession of crack cocaine is "extremely aggravating" (RI, 96). The court nonetheless recognized Ashley's remorse as a mitigating factor and also noted that his record, "even though it's very serious, is not as lengthy as some records that I've reviewed" (RI, 97).

The trial court then adjudicated Ashley guilty and orally sentenced him as an *habitual felony offender* to 25 years in prison with credit for 127 days (RI, 39-44, 97). However, the habitual violent felony offender designation was checked on the written judgment and sentence (RI, 43). There was no minimum term noted on the written sentencing form. A handwritten notation on the judgment and sentence form indicated that the "sentence of 7-9-99 set aside & vacated. See new sentence of 7/12/99" (RI, 39).

On July 12, 1999, Ashley appeared before the court for resentencing. The trial judge advised Ashley that

We brought you back today because I made a mistake in the sentencing in that I sentenced you just as an habitual felony offender and there was no such notice filed. However, there was an habitual violent felony offender notice filed. Therefore, let's go back and I'll set aside that earlier sentence and resentence the defendant at this time.

(RI, 105). Defense counsel did not object to the resentencing (RI, 105). The court then sentenced Ashley to 25 years as an habitual violent felony offender and for the first time imposed a ten year minimum mandatory term (RI, 49-54, 105). The court entered a

separate written order providing its findings in support of the habitual violent felony offender designation (RI, 55-56).

Notice of appeal was timely filed on July 15, 1999 (RI, 58). After the notice was filed but before filing the initial brief, Ashley filed a motion to correct sentencing error, pursuant to Fla. R. Crim. P. 3.800(b)(2), alleging that the resentencing on July 12, 1999, constituted a double jeopardy violation (SRI, 1-5). The trial court did not rule on the motion, and it was therefore deemed denied.

Ashley raised the double jeopardy claim on direct appeal. The District Court rejected the claim, finding that the trial court's initial imposition of a habitual felony offender sentence "was the result of a simple mistake about what had been noticed and then proven the day before. It was not a discretionary judgment based on the facts to impose a lighter sentence." (A, 1-2).

On December 14, 2000, Ashley filed a notice to invoke this Court's discretionary jurisdiction. The Court accepted jurisdiction by order dated May 10, 2001. This brief follows.

### III SUMMARY OF THE ARGUMENT

Ashley received a lawful sentence as an habitual felony offender. However, three days after he was sentenced, Ashley was resentenced as an habitual violent felony offender, and the trial court imposed a ten year minimum mandatory term.

Case law is clear that once a lawful sentence is imposed, the trial court cannot thereafter increase the sentence, on either the state's or the court's own motion. Ashley began serving his habitual offender sentence on July 9, 1999, and the trial court's imposition of a habitual violent felony offender sentence with a ten year mandatory term on July 12, 1999, violated the constitutional prohibition against multiple punishments for the same offense. This Court must, therefore, vacate the habitual violent felony offender sentence and ten year mandatory term and remand to the trial court with directions to reinstate the original sentence.

## IV ARGUMENT

### ISSUE II

#### **THE TRIAL COURT ERRED IN RESENTENCING PETITIONER AS AN HABITUAL VIOLENT FELONY OFFENDER THREE DAYS AFTER IT HAD IMPOSED A LAWFUL HABITUAL OFFENDER SENTENCE.**

The Fifth Amendment to the United States Constitution provides that "No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb." Similarly, Article I Section 9 of the Florida Constitution provides that "No person shall be . . . twice put in jeopardy for the same offense." The double jeopardy prohibition of multiple prosecutions for the same offense limits a court's ability to alter or increase sentences once a lawful sentence has been imposed. See Ex parte Lange, 18 U.S. (Wall) 163, 21 L.Ed. 872 (1874) (defendant cannot be subjected to another sentence after suffering fully one punishment for the same offense). This principle was applied in the seminal case of Troupe v. Rowe, 283 So.2d 857 (Fla. 1973), wherein this Court held that once a final, conclusive judgment and sentence is pronounced, jeopardy attaches, and the sentence imposed may not thereafter be increased.

The imposition of a new habitual violent felony sentence and ten year mandatory term on July 12, 1999, three days after Mr. Ashley was first sentenced, violated the constitutional prohibition against double jeopardy and is squarely at odds with the principles of Troupe v. Rowe and its progeny. The issue here involves a

question of law and is subject to de novo review.

As noted in the District Court's opinion, it was undisputed that the State was seeking an habitual violent felony offender sentence and that all of the sentencing proceedings dealt with the issue of Mr. Ashley's qualification as an habitual violent felony offender (A 1). The State filed a pretrial notice of intent to classify Ashley as a habitual violent felony offender. The notice, filed pursuant to Section 775.084(3)(a), Fla. Stat., alleged one prior conviction for a violent felony (robbery) on January 16, 1998, and stated that the State would seek a sentence of life imprisonment without eligibility for release for fifteen (15) years.<sup>2</sup> At the hearing on July 8, 1999, the state proved the requisite prior violent felony conviction, and Ashley admittedly qualified for sentencing as a habitual violent felony offender. However, the record indicates that Ashley also had a prior adult conviction for possession of cocaine and qualified as a habitual felony offender (RI, 23, 46).

On July 9, 1999, the trial court sentenced Ashley to 25 years in prison as an habitual felony offender, without a minimum

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<sup>2</sup>The notice was filed on April 1, 1999, two months before the state filed its amended information charging Ashley with possession of a firearm by a convicted felon (RI, 17, 23-24). Possession of a firearm by a convicted felon is a second degree felony, which carries a maximum penalty of 15 years in prison and an enhanced penalty as a habitual violent felony offender of 30 years in prison with a ten year mandatory minimum term. Sections 775.082(3)(c), 775.084(4)(b)2., 790.23(3), Fla. Stat.

mandatory term. Although the oral pronouncement designated Ashley as an habitual offender, the written judgment and sentence noted that he was sentenced as an habitual *violent* felony offender.

On July 12, 1999, the court set aside and vacated the July 9, 1999, written judgment and sentence and resentenced Ashley to 25 years in prison as an habitual violent felony offender with a minimum mandatory term of 10 years. The court stated at the time of resentencing:

We brought you back today because I made a mistake in the sentencing in that I sentenced you just as an habitual felony offender and there was no such notice filed. However, there was an habitual violent felony offender notice filed. Therefore, let's go back and I'll set aside that earlier sentence and resentence the defendant at this time.

(RI, 105).

In Troupe v. Rowe, this Court affirmed that once a lawful sentence is imposed, jeopardy attaches, and the defendant cannot thereafter be resentenced to a greater term of imprisonment. See also, Harris v. State, 734 So.2d 1154 (Fla. 2d DCA 1999); Navarrete v. State, 707 So.2d 803 (Fla. 1st DCA 1998); Berry v. State, 547 So.2d 1273 (Fla. 1st DCA 1989). This rule applies whenever a lawful sentence is imposed even though the court intended to impose a different sentence, Evans v. State, 675 So.2d 1012 (Fla. 4th DCA 1996), or relied upon an erroneously calculated scoresheet. Gonzalez v. State, 596 So.2d 711 (Fla. 3d DCA 1992). The only exception to this rule is where a defendant intentionally deceives the sentencing court or thwarts the sentencing process and thus is

deemed to have no legitimate expectation regarding the finality of the sentence. Goene v. State, 577 So.2d 1306 (Fla. 1991).

In Goene, the Court found that the defendant committed a fraud upon the court by using an alias which affected his guidelines sentences. The Court recognized a limited exception to the double jeopardy prohibition against increasing a lawful sentence after it has been imposed when a fraud is perpetrated upon the court. The Court first noted that the purpose of the double jeopardy prohibition is to avoid subjecting the defendant to repeated embarrassment, expense, anxiety, and insecurity. "In short, the defendant at some point must be entitled to rely on the finality of the court's actions." 577 So.2d at 1307. Quoting United States v. Jones, 722 F.2d 632 (11<sup>th</sup> Cir. 1983), the Court explained:

For the purpose of determining the legitimacy of a defendant's expectations [as to the length of his sentence], we draw a distinction between one who intentionally deceives the sentencing authority or thwarts the sentencing process and one who is forthright in every respect. Whereas the former will have purposely created any error on the sentencer's part and thus can have no legitimate expectation regarding the sentence thereby procured, the latter, being blameless, may legitimately expect that the sentence, once imposed and commenced, will not later be enhanced.

The Court concluded that because Goene intentionally committed a fraud upon the court, he had no legitimate expectation of finality in the sentence originally imposed and there was no impediment to the reimposition of a correct sentence.

There is no suggestion here that Ashley committed a fraud or was in any way responsible for the trial court's failure to declare



him a habitual violent felony offender and impose a ten year mandatory sentence. Ashley did not use an alias or misrepresent his prior record or otherwise mislead the court. The judge inadvertently made a mistake (through no fault of the defense), but the after-the-fact correction of a mistake on the part of the judge nonetheless violates double jeopardy. Evans v. State. The narrow exception recognized in Goene simply does not apply in this context.

Evans v. State is on point. There, the defendant was sentenced following a violation of probation to prison terms of five and fifteen years. The trial court did not orally state that the sentence for the violation of probation was as an habitual offender, although the written sentence explicitly stated that the defendant was sentenced as an habitual offender. Two days later, the state filed a motion to clarify the sentence. At the hearing on the motion to clarify, the court sentenced the defendant as an habitual offender. On appeal, the District Court held that while the trial court's failure to orally state that it was sentencing the defendant as an habitual felony offender may have merely been an oversight, the court's clarification of the sentence two days later violated double jeopardy. The District Court reversed the sentence and remand for resentencing deleting the defendant's habitual offender status.

Here, although the court may have intended to sentence Ashley as an habitual violent felony offender, it did not do so when it initially sentenced him on July 9. The court below affirmed

Ashley's sentence finding that the trial court's initial imposition of an habitual felony offender sentence was "the result of a simple mistake about what had been noticed and then proven the day before" (A 2). Whether the original sentence is deemed a "simple mistake" or a "mere oversight," the same double jeopardy principles apply. Jeopardy attached once Ashley began serving his 25 year habitual offender sentence, and the court could not thereafter resentence him as an habitual violent felony offender with a ten year mandatory term without violating double jeopardy.

It does not matter for purposes of double jeopardy whether the mistake was due to judicial oversight or neglect on the part of the state, which also had a duty to assure that the sentencing was error-free. See, e.g., Speed v. State, 749 So.2d 545 (Fla. 4<sup>th</sup> DCA 2000)(where court originally sentenced defendant to time served under mistaken belief that offense was a misdemeanor and not a felony, court could not thereafter resentence defendant since sentence had already been served); Young v. State, 734 So.2d 490 (Fla. 2d DCA 1999)(once defendant had begun serving his guidelines sentence, court could not resentence him as a habitual offender at the request of the state which had intended to seek a habitual offender sentence); Nelson v. State, 724 So.2d 1202 (Fla. 2d DCA 1998)(double jeopardy barred resentencing defendant to increased sentence as a result of state's discovery of prior convictions overlooked in initial scoring of guidelines scoresheet). The bottom line is that Mr. Ashley, being blameless, had a legitimate expectation that his sentence, once imposed and commenced, would

not later be increased.

It likewise does not matter here that the written judgment failed to conform to the oral pronouncement. Although the written judgment entered on July 9, 1999, reflected that Ashley was sentenced as an habitual violent felony offender, the court could not orally amend the sentence at a later date to conform to the written judgment. See Justice v. State, 674 So.2d 123, 125 (Fla. 1996) (when the written order conflicts with the oral pronouncement, the oral pronouncement prevails). This was simply not a clerical error which was subject to correction; rather, the July 12 proceeding resulted in an alteration and increase of Ashley's sentence. Cf., Navarrete v. State, 707 So.2d 803 (Fla. 1<sup>st</sup> DCA 1998).

In Navarrete, the trial court orally imposed a three year minimum mandatory term, but did not include it in the written order. Two weeks after the original sentence was imposed, the court vacated the sentence because of a scoresheet error and the omission of the minimum mandatory term and imposed a longer term of incarceration. On appeal, the First District reversed the increased sentence because it violated double jeopardy, but affirmed the imposition of the three year minimum mandatory portion of the sentence, finding that its omission from the written sentence was merely a scrivener's error. Here, unlike in Navarrete, the trial judge did not orally impose a habitual violent offender sentence and ten year mandatory term; hence, its subsequent imposition was not a correction of a scrivener's error

but a new, increased sentence.

It is true that Ashley at all times understood the state was seeking a habitual violent felony offender sentence, and he did not dispute that he qualified for sentencing as a habitual violent felon. Even if the court could lawfully designate him as a habitual violent felony offender, it nonetheless could not belatedly impose the 10 year minimum mandatory term. The double jeopardy prohibition still applies where a sentence is subsequently modified to include a minimum mandatory term when a defendant is sentenced is as an habitual violent felony offender. Knapp v. State, 741 So.2d 1150 (Fla. 2d DCA 1999)(double jeopardy barred imposition of minimum mandatory term seven months after defendant was sentenced as an habitual violent felony offender); see also, Macais v. State, 572 So.2d 22 (Fla. 4th DCA 1990). In State v. Hudson, 698 So.2d 831 (Fla. 1997), this Court held that sentencing a defendant as an habitual felony offender or habitual violent felony offender, including the imposition of a mandatory minimum term, is permissive, not mandatory. See also, Burdick v. State, 594 So.2d 267 (Fla. 1992)(sentencing under habitual felony offender and habitual violent felony offender statutes is permissive, not mandatory). Consequently, the failure to impose a minimum mandatory term when sentencing a defendant as a habitual violent felony offender does not render a sentence illegal.

Appellant's original sentence as an habitual felony offender was a lawful sentence. In the information, the state alleged that Ashley had previously been convicted of possession of cocaine (RI,

23). Ashley stipulated to the prior felony conviction at trial. At sentencing, the state proved Ashley's prior felony conviction for armed robbery (RI, 34-35). Both convictions were scored on the Criminal Punishment Code scoresheet (RI, 46). Thus, Ashley had the requisite two prior felony convictions for purposes of qualifying as a habitual felony offender, and his sentence as such was lawful. Section 775.084(1)(a), Fla. Stat. Once it imposed the lawful sentence, the court could not thereafter increase that sentence, on the state's or the court's own motion, since Ashley had already begun serving it. Young v. State.

This Court must, therefore, vacate Ashley's habitual violent felony offender sentence and remand with directions to reinstate the original sentence.

#### V CONCLUSION

The second sentence imposed in this case violated the constitutional prohibition against double jeopardy as set forth in Troupe v. Rowe and subsequent cases. Ashley's sentence must be vacated and the cause remand to the trial court with directions to reinstate the original sentence imposed.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

Undersigned counsel certifies that this brief has been prepared using 12 point Courier New, a font that is not proportionately spaced.

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a copy of the foregoing has been furnished by delivery to James W. Rogers, Assistant Attorney General, Criminal Appeals Division, The Capitol, Plaza Level, Tallahassee, Florida, 32301, and by U. S. Mail to appellant, Columbus R. Ashley, #J03267, N.F.R.C., P.O. Box 628, Lake Butler, Florida, 32054, on this \_\_\_\_\_ day of May, 2001.

\_\_\_\_\_  
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