IN THE SUPREME COURT OF FLORIDA

CASE NO. SC00-724

DOUGLAS ISOM,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

* *

ON DISCRETIONARY REVIEW
FROM THE THIRD DISTRICT COURT OF APPEAL

* *

RESPONDENT'S BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

MICHAEL J. NEIMAND
Sr. Assistant Attorney General
Florida Bar No. 0239437

DOUGLAS J. GLAID
Florida Bar No. 0249475
Asst. Attorney General
Department of Legal Affairs
110 S.E. 6th Street, 10th Floor
Ft. Lauderdale, Florida 33301
(954) 712-4600

Counsel for Respondent

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INTRODUCTION

The Respondent, the State of Florida, was the appellee in the Third District Court of Appeal and the prosecution in the trial court of the Eleventh Judicial Circuit, in and for Dade County. The Petitioner was the appellant and the defendant, respectively in the lower courts. In this brief, the parties will be referred to as they appear before this Honorable Court.

The symbol "R" refers to the record on appeal previously forwarded to this Court by the clerk of the Third District Court of Appeal. The symbol “A” refers to the Appendix attached to this brief containing Petitioner’s amended initial brief filed in his appeal of his resentence to the Third District Court of Appeal in case number 95-1453. Unless otherwise indicated, all emphasis has been supplied by Respondent.

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's Statement of the Case and Facts appearing on pages 1 through 2 of his Initial Brief on the Merits to the extent that it is accurate and nonargumentative, but sets forth the following additional facts for purposes of clarification:

Petitioner was convicted of trafficking, and conspiracy to traffic, in cocaine and sentenced as a habitual offender to life imprisonment. On direct appeal, Petitioner's convictions were affirmed but the habitual offender sentence was reversed and the cause remanded for resentencing. *Isom v. State*, 619 So. 2d 369 (Fla. 3d DCA 1993). On remand, the successor judge reimposed a life sentence on Petitioner as a habitual offender, and entered a written departure order. (R 31-35). On appeal, the district court of appeal affirmed without written opinion. *See Isom v. State,* 690 So. 2d 613 (Fla. 1997).

Petitioner thereafter filed motions for postconviction relief under Florida Rules of Criminal Procedure 3.800(a) and 3.850, the denial of which was appealed to the Third District. The district court held on rehearing that: (1) any scoresheet error in calculating the recommended sentencing guidelines range was harmless, where Petitioner received a life sentence as a habitual offender at two sentencing hearings and committed ten prior felonies during an escalating pattern of criminal conduct, and (2)

Petitioner's sentence was the law of the case barring the argument that the trial court failed to find that a sentence as an habitual offender was necessary to protect the public. *Isom v. State*, 750 So. 2d 734 (Fla. 3d DCA 2000); (R 315-320). Thereafter, Petitioner filed a motion for rehearing and/or clarification and a suggestion of a certification of conflict to this Court, both of which were denied.

Upon the filing of a notice to invoke the discretionary jurisdiction of this Court, this Court accepted jurisdiction.

SUMMARY OF THE ARGUMENT

POINT I

The trial court did not impose an "illegal sentence" on resentencing based on impermissible criteria to support a departure sentence. Since it is undisputable that valid reasons existed for Petitioner's departure sentence, to-wit: habitual offender status and escalating pattern of criminal conduct, Petitioner's sentence was not illegal and does not need to be reversed due to any scoresheet errors. Indeed, any scoresheet error was harmless at worst.

POINT II

Petitioner's claim that the trial court erred in failing to find that a habitual offender sentence was necessary for the protection of the public was procedurally barred since this claim could have been raised on direct appeal of Petitioner's resentence.

POINT III

No ex post facto violation was committed by the trial court in resentencing Petitioner, since Petitioner's ex post facto claim is precisely the same argument he made to the Third District Court of Appeal in his appeal following his resentencing. Thus, this claim is barred by the law of the case doctrine.

ARGUMENT

POINT I

THE TRIAL COURT DID NOT IMPOSE AN "ILLEGAL SENTENCE" ON RESENTENCING BASED ON IMPERMISSIBLE CRITERIA TO SUPPORT A DEPARTURE SENTENCE.

Petitioner contends that the trial court made two scoresheet errors in that it improperly scored points for legal constraint and improperly scored one of his prior convictions as a third-degree felony as opposed to a first-degree felony, thereby rendering his departure sentence based on his habitual offender status and escalating pattern of criminal conduct an "illegal sentence." For the following reasons, the State strongly disagrees.

First, Petitioner's argument that an escalating pattern of criminal conduct was an invalid reason for the trial court's departure sentence is foreclosed by the law of the case doctrine. Indeed, Petitioner's instant claim overlooks the fact that, in his direct appeal of his resentence to the Third District, Petitioner specifically challenged the trial court's finding that a "pattern of escalating criminal activity" existed to justify a departure sentence. (A, pp. 12, 14). By its per curiam affirmance, the Third District necessarily considered and rejected this claim. *Isom v. State*, 690 So. 2d 613 (Fla. 3d DCA 1997). *See Greene v. Massey*, 384 So. 2d 24, 27-28 (Fla. 1980) ("All points of law which have been adjudicated become the law of the case and are, except in

exceptional circumstances, no longer open for discussion or consideration in subsequent proceedings in the case."), *citing Goodman v. Olsen,* 365 So. 2d 393, 396 (Fla. 3d DCA 1978) (when a point which was not discussed in an appellate opinion is necessarily determined by the opinion, the doctrine of the law of the case is applicable); *State Stabile,* 443 So. 2d 398, 400 (Fla. 4th DCA 1984) (law of the case precludes relitigation of all issues necessarily ruled upon by the court; per curiam affirmance does establish the law of the case); *accord Gaskins v. State,* 502 So. 2d 1344, 1346 (Fla. 2d DCA 1987)(defendant, who had previously challenged habitual offender sentence on direct appeal of conviction, was precluded by law of the case from relitigating habitual offender issue on appeal from order on motion to correct sentence; per curiam affirmance establishes law of the case); *Williams v. State,* 686 So. 2d 615, 616 (Fla. 2d DCA 1996); *White v. State,* 651 So. 2d 726 (Fla. 5th DCA 1995), *approved*, 666 So. 2d 895 (Fla. 1996); *Smith v. State*, 669 So. 2d 1133, 1134 (Fla. 3d DCA 1996); *see also Glasco v. State*, 656 So. 2d 523, 524 (Fla. 5th DCA 1995) (issue that victim injury points were improperly scored was foreclosed and settled by law of the case, where direct appeal was affirmed without opinion, but court records indicated postconviction defendant argued in direct appeal that victim injury points should not have been scored). Hence, since it is undisputable that valid reasons existed for Petitioner's departure sentence, to-wit: habitual offender status and escalating

pattern of criminal conduct, it necessarily follows that Petitioner's sentence need not be reversed due to any scoresheet errors. *See Raley v. State*, 675 So. 2d 170, 174-75 (Fla. 5th DCA 1996) (Defendant's sentence need not be reversed on claim of scoresheet error where valid departure sentence was imposed), *citing Russell v. State*, 656 So. 2d 203 (Fla. 5th DCA 1995).

Indeed, since Petitioner did not receive a *guidelines* sentence, but rather a valid *departure* sentence, his sentence clearly was not an "illegal sentence" within the meaning of rule 3.800(a). *See Davis v. State*, 661 So. 2d 1193, 1196 (Fla. 1995) ("[A]n illegal sentence is one that exceeds the maximum period set forth by law for a particular offense without regard to the guidelines."); *State v. Mancino*, 714 So. 2d 429, 433 (Fla. 1998) ("A sentence that patently fails to comport with statutory or constitutional limitations is by definition "illegal"."). Surely, the effect of the alleged scoresheet errors here was not the imposition of a sentence greater than the maximum sentence authorized by law.

Moreover, any scoresheet error was harmless at worst. In *State v. Mackey*, 719 So. 2d 284, 285 (Fla. 1998), this Court disapproved a rule of per se reversal in cases involving scoresheet errors. The *Mackey* court approved the Second District's decision in *Hines v. State*, 587 So. 2d 620 (Fla. 2d DCA 1991), which affirmed a departure sentence imposed on the basis of an improperly calculated

scoresheet, finding that the trial court would have imposed the same sentence despite the scoresheet error.

Likewise, here, the Third District perceptively concluded that even assuming Petitioner's claims of scoresheet error are correct, Petitioner would still receive the same sentence if a new sentencing proceeding was ordered. To be sure, as the Third District noted in its opinion, the record shows that Petitioner was sentenced at his original sentencing proceeding and at his resentencing proceeding to a term of life imprisonment as a habitual offender. Even though the resentencing court was instructed that it had the discretion to not impose a life sentence, the resentencing judge nevertheless did so after finding an escalating pattern of criminal conduct on Petitioner's part and that Petitioner qualified as a habitual offender. Thus, the Third District reasonably concluded that any scoresheet error would not have altered Petitioner's departure sentence and, as such, was harmless error. *See Rubin v. State*, 734 So. 2d 1089 (Fla. 3d DCA 1999) [on remand from *State v. Rubin*, 721 So. 2d 716 (Fla. 1998)].

POINT II

PETITIONER'S CLAIM THAT THE TRIAL COURT ERRED IN FAILING TO FIND THAT A HABITUAL OFFENDER SENTENCE WAS NECESSARY FOR THE PROTECTION OF THE PUBLIC WAS PROCEDURALLY BARRED SINCE THIS CLAIM COULD HAVE BEEN RAISED ON DIRECT APPEAL OF PETITIONER'S RESENTENCE. (Restated).

Petitioner claims that the trial court, in resentencing him as a habitual offender, fundamentally erred by failing to specifically find that habitualization was necessary for the protection of the public. However, as the trial court properly found (R 99), this claim could very well have been presented in Petitioner's direct appeal of his sentence after remand by the Third District. Indeed, in his postconviction motion, Petitioner conceded that he had not previously raised this issue, *inter alia*, on direct appeal and did not offer sufficient justification for his failure to do so.R 62). Thus, Petitioner's claim in this regard was procedurally barred. *See Straight v. State,* 488 So. 2d 530 So. 2d (Fla. 1986) (issues which could have been remedied by objection at trial and argument on appeal could not be raised in postconviction relief proceeding); *Byrd v. State,* 597 So. 2d 252 (Fla. 1992) (issues which either were or could have been raised in direct appeal were procedurally barred in post-conviction proceedings); *Christopher v. State,* 489 So. 2d 22, 24 (Fla. 1986).

In any event, the resentencing court's alleged failure to announce that Petitioner's sentence was necessary for the protection

of the public is without merit. Indeed, in its written order and over no objection, the resentencing court specifically found that, "the Petitioner is a habitual felony offender *within the statutory criteria* for same *in effect prior to October 1, 1988.*" (R 33). Obviously, one statutory criterion was that the sentence was necessary for the protection of the public. *See* §775.084(3), (4)(a), (c), Fla. Stat. (1987). In accord with this Court's decision in *Eutsey v. State,* 383 So. 2d 219, 226 (Fla. 1980), it is clear that no "magic words" are necessary regarding the finding as to the protection of the public. As such, the State submits that the trial court sufficiently complied with the statutory requirement. Nevertheless, given the existence of an independent basis for Petitioner's upward departure sentence, to-wit: Petitioner's escalating pattern of criminal conduct, any error with regard to the trial court's findings as to habitualization was harmless at worst. *Cf. State v. Mackey*, 719 So. 2d 284 (Fla. 1998); *State v. Rubin*, 721 So. 2d 716 (Fla. 1998).

Additionally, as the Third District Court of Appeal held, Petitioner's claim was barred by the law of the case doctrine. After his resentencing, Defendant appealed his sentence to the Third District Court of Appeal, which *per curiam* affirmed Defendant's sentence. *Isom v. State*, 690 So. 2d 613 (Fla. 3d DCA 1997). In this appeal, Defendant obviously could have raised the improper habitualization claim he raised in his second rule 3.850 motion for

postconviction relief, but did not do so. Since the law of the case was established by virtue of the Third District's affirmance of Defendant's sentence, Defendant was properly precluded from obtaining relief on this claim. *See White v. State,* 651 So. 2d 726 (Fla. 5th DCA 1995) (a per curiam decision even without opinion establishes the law of the case on the same issues and facts which were raised *or which could have been raised*), *approved,* 666 So. 2d 895 (Fla. 1996), *citing State v. Stabile,* 443 So. 2d 398, 400 (Fla. 4th DCA 1984) (law of the case precludes relitigation of all issues necessarily ruled upon by the court, *as well as* all issues upon which appeal *could* have been taken, but which were not appealed; per curiam affirmance does establish the law of the case); *Gaskins v. State,* 502 So. 2d 1344, 1346 (Fla. 2d DCA 1987); *accord Williams v. State,* 686 So. 2d 615, 616 (Fla. 2d DCA 1996).

POINT III

NO EX POST FACTO VIOLATION WAS COMMITTED BY THE TRIAL COURT IN RESENTENCING PETITIONER, SINCE PETITIONER'S EX POST FACTO CLAIM IS PRECISELY THE SAME ARGUMENT PETITIONER MADE TO THE THIRD DISTRICT COURT OF APPEAL IN HIS APPEAL FOLLOWING HIS RESENTENCING. (Restated).

Petitioner lastly contends that the trial court violated the ex post facto clause of Article I, Sections 9 and 10 of the United States Constitution when it applied the criteria of "increasingly serious criminal activity" to Petitioner's record to depart from the sentencing guidelines in the resentencing order. However, Petitioner's ex post facto claim is precisely the same argument Petitioner made to the Third District Court of Appeal in his appeal following his resentencing. Indeed, this argument was raised in point II of Petitioner's amended initial brief filed in the district court. (A, pp. 12-13). Since the Third District obviously rejected this claim by virtue of its per curiam affirmance of Petitioner's sentence in this appeal in *Isom v. State,* 690 So. 2d 613 (Fla. 3d DCA 1997), the law of the case doctrine properly precludes relitigation of this issue. *See Stabile,* 443 So. 2d at 400 (law of the case precludes relitigation of all issues necessarily ruled upon by the court; per curiam affirmance does establish the law of the case); *Gaskins,* 502 So. 2d at 1346 (defendant, who had previously challenged habitual offender sentence on direct appeal of conviction, was precluded by law of the case from relitigating

habitual offender issue on appeal from order on motion to correct sentence; per curiam affirmance establishes law of the case); *Williams,* 686 So. 2d at 616; *White,* 651 So. 2d at 726, *approved*, 666 So. 2d 895 (Fla. 1996); *Smith v. State*, 669 So. 2d 1133, 1134 (Fla. 3d DCA 1996); *see also Glasco v. State*, 656 So. 2d 523, 524 (Fla. 5th DCA 1995) (issue that victim injury points were improperly scored was foreclosed and settled by law of the case, where direct appeal was affirmed without opinion, but court records indicated postconviction defendant argued in direct appeal that victim injury points should not have been scored).

Moreover, similar to the claim raised in point II, *supra*, Petitioner's ex post facto claim in his motion for postconviction relief (R 44-69) was clearly procedurally barred since Petitioner raised this issue in his direct appeal of his resentence. *Byrd*, 597 So. 2d at 254 (issues which were raised in direct appeal are procedurally barred in post-conviction proceedings).

CONCLUSION

Wherefore, based upon the foregoing argument and authorities cited herein, Respondent respectfully requests that this Honorable Court to approve of the decision of the Third District Court of Appeal in this cause.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General

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MICHAEL J. NEIMAND
Sr. Assistant Attorney General

_____

DOUGLAS J. GLAID
Florida Bar No. 0249475
Assistant Attorney General
Department of Legal Affairs
110 S.E. 6th Street, 10th Fl.
Ft. Lauderdale, Florida 33301
(954) 712-4600

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Brief on the Merits was furnished by U.S. Mail to Mary E. Adkins, Esquire, Counsel for Petitioner, 303 State Road 26, P.O. Box 511, Melrose, FL 32666, on this ____ day of December, 2000.

_____

DOUGLAS J. GLAID
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

Counsel for the Respondent, the State of Florida, hereby certifies that 12 point Courier New is used in this brief.

_____

DOUGLAS J. GLAID
Assistant Attorney General

APPENDIX