IN THE SUPREME COURT OF FLORIDA

TRAVIS A. TROTTER,

Petitioner, S. CT. CASE NO. SC02-14

vs. DCA CASE NO. 5D01-873

STATE OF FLORIDA,

Respondent.
_____/

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT, AND THE NINTH JUDICIAL CIRCUIT IN AND FOR ORANGE COUNTY, FLORIDA

PETITIONER'S REPLY BRIEF ON THE MERITS

JAMES B. GIBSON
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SEVENTH JUDICIAL CIRCUIT

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SUMMARY OF THE ARGUMENT

The Respondent's contention is that the trial court's subsequent assessment of the 1.5 drug trafficking multiplier is not violative of substantive due process under the Fourteenth Amendment to the United States Constitution because the Petitioner did not receive an incarceration term at the "...top of the permitted range under the 1994 guidelines (80.125 months)." This litmus test for a substantive due process violation under the Fourteenth Amendment to the United States Constitution is misplaced and incorrect. Fundamental principles of fairness, which serves as the underpinning of substantive due process, are not silenced merely because a more egregious sentence was possible hypothetically. Thus, because the Petitioner did not facilitate any mistake or fraud upon the trial court, when the trial court chose not to impose the 1.5 drug trafficking multiplier at the Petitioner's initial sentencing hearing, the trial court should not later be permitted to impose the 1.5 drug trafficking multiplier at the Petitioner's resentencing hearing.

In addition, Respondent asserts that the trial court's assessment of the 1.5 drug trafficking multiplier at the Petitioner's subsequent resentencing hearing, after the trial court chose not to assess the 1.5 drug trafficking multiplier when Petitioner was originally sentenced, is not violative of double jeopardy under the Fifth Amendment to the United States Constitution. Respondent's basis for this

argument that, because the Petitioner sought the relief of a resentencing hearing under Heggs v. State, 759 So. 2d 620 (Fla. 2000), he had no expectation of finality as to the 1.5 multiplier not being assessed, is similarly misplaced. The Petitioner has a legitimate right to expect that the trial court would not revisit the trial court's previous determination not to impose the 1.5 drug trafficking multiplier, made at the Petitioner's initial sentencing hearing, and, thereby, not to be subjected to an illegal enhancement of his sentences.

Finally, the Respondent's assertion that the State may, upon remand to the trial court for resentencing, move to "withdraw" from the "plea bargain" is misplaced. This is because the prosecutor merely recommended a guidelines sentence at the original sentencing hearing, which is not a "plea agreement" for a specific sentence. Further, this issue has, under principles of res judicata, already been resolved by the Fifth District's previously issued opinion in this case, which is not presently on appeal before this Court.

ISSUE

IN REPLY TO RESPONDENT'S ASSERTION THAT THE TRIAL COURT PROPERLY RESENTENCED THE PETITIONER

Respondent first contends the Second District Court of Appeal's decision in Estrada v. State, 787 So. 2d 94 (Fla. 2d DCA 2001), is "flawed" in holding that the Fifth Amendment of the United States Constitution's guarantee against double jeopardy, pertaining to multiple punishments for the same offense, prohibits the trial court from imposing the 1.5 drug trafficking multiplier sentencing enhancement, during a subsequent sentencing rehearing, when the same 1.5 drug trafficking multiplier was not imposed by the trial court at the defendant's original sentencing hearing. In support of this proposition, the Respondent argues that, under United States v. DiFrancesco, 449 U.S. 117 (1980); Llerena v. United States, 508 F. 2d 78 (5th Cir. 1975); Monge v. California, 524 U.S. 721 (1998); and Van Buren v. State, 500 So. 2d 732 (Fla. 2d DCA 1987), because ". . . Petitioner. . .sought to be resentenced pursuant to the 1994 guidelines, . . .he did not have any expectation of finality in his original sentences imposed. . ." for purposes of double jeopardy. (Respondent's Merit Brief pgs. 5-7) Respondent additionally relies on the decisions of Pennsylvania v. Goldhammer, 474 U.S. 28 (1985); United States v. Mixon, 115 F.3d 900 (11th Cir. 1997); Green v. United States, 355 U.S. 184

(1957); United States v. Watkins, 147 F.3d 1294 (3d Cir. 1998); United States v. Murray, 144 F.3d 270 (3rd Cir. 1998), Goene v. State, 577 So.2d 1306 (Fla. 1991); and Cline v. State, 399 So.2d 1115 (Fla. 5th DCA 1981). None of these decisions, however, address the specific factual circumstances surrounding the Petitioner's original and subsequent resentencing pursuant to Heggs v. State, 759 So. 2d 620 (Fla. 2000).

Petitioner would first point out that of the aforementioned cases do not deal with the actual exercise of the trial court's discretion not to impose the 1.5 drug trafficking multiplier at a defendant's original sentencing hearing and then, subsequently, at a resentencing hearing, triggered by no fault of the defendant by way of committing a fraud upon the trial court, imposing the very same 1.5 sentencing multiplier the trial court had previously determined not to impose. Nor does the present case involve any mistaken belief on the part of the trial court that the trial court was prohibited, at the Petitioner's original sentencing hearing, from imposing the 1.5 drug trafficking multiplier or the Petitioner being resentenced after having violated his probation. In contrast, the decision of Goene, supra, does, in fact, involve the defendant's omitted prior record as a direct result of the defendant's fraudulent procurement of the trial court's original sentencing order by the defendant's direct misrepresentation to the trial court as to his identity.

Similarly, the defendant in Cline, supra, refused to accept his original sentences of one year county jail incarceration, followed by four years probation, so the trial court reimposed an entirely new sentence. Sub judice, the trial court was not imposing a new guidelines sentence, without objection, by the Petitioner. Instead, the trial court, in the case at bar, was merely asked by the Petitioner to correct his illegal original sentence to conform to the 1994 sentencing guidelines, but subject to the Petitioner's objection to the trial court imposing the 1.5 drug trafficking multiplier, which the trial court had elected not to impose when the Petitioner was originally sentenced.

As for Mixon, supra, Murray, supra, and Watkins, supra, these decisions all involved the unbundling of a "sentencing package," for multiple offenses, upon resentencing, when a specific conviction and/or sentence had been vacated on appeal. In these cases, the district trial court merely resentenced the defendants by applying a lawful Federal guidelines departure sentence or imposing an alternative Federal guidelines sentence which the district trial court was foreclosed from doing at the defendant's original sentencing hearing because the challenged offense(s)/sentence(s) on appeal still existed.

Turning next to Respondent's assertion that no due process violation, under the Fourteenth Amendment to the United States Constitution, occurred in the

Petitioner's resentencing because "[i]f vindictiveness was the motivation, the trial court obviously would have imposed the top of the permitted range under the 1994 guidelines (80-125) months." (Respondent's merit brief, pgs. 10-11) Respondent principally relies on the decisions of Laster v. State, 564 So. 2d 536 (Fla. 5th DCA 1990); Blackshear v. State, 531 So. 2d 956 (Fla. 1988); Wemett v. State, 547 So. 2d 955 (Fla. 1st DCA 1989); and Frazier v. State, 540 So. 2d 228 (Fla. 5th DCA 1989). Petitioner would submit, once again, these decisions do not directly address the specific factual circumstances at issue sub judice. In Laster, supra, for example, the defendant was resentenced according to a mandatory sentencing provision for a capital sexual battery offense. Similarly, in Blackshear, supra, and Frazier, supra, an increase in those defendants' incarceration terms, upon resentencing by the trial court, was not upheld on appeal. On appeal to this Court in Wemett v. State, 567 So. 2d 882 (Fla. 1990), this Court's majority opinion could not agree as to whether an original incarceration term of 120 years, changed by the trial court upon resentencing to life imprisonment, violated due process as a vindictive sentence. In the case at bar, 72 months incarceration is clearly an increase from a maximum permitted guidelines sentence of 41.75 months incarceration, when calculated without the 1.5 drug trafficking multiplier being assessed by the trial court. Moreover, Petitioner strongly disagrees with

Respondent's suggested litmus test for vindictiveness being whether or not the trial court could have increased the Petitioner's sentence more than the improperly increased sentence which was actually imposed. Quite simply, if the challenged increased sentence should not have been imposed, by whatever length, it qualifies as an unfairly increased resentencing subject to being attacked and labeled as being vindictive.

Finally, Respondent contends the Petitioner's reliance on Estrada, supra, is misplaced due to the fact ". . .the instant case does not involve the trial court on its own initiative resentencing Petitioner after the original sentence was imposed because of a miscalculation of the scoresheet. . ." and because the Petitioner's original guidelines scoresheet does not actually establish that the trial court chose not to impose the 1.5 drug trafficking multiplier, since it was prepared by an individual named "Lancaster". (Respondent's answer brief pgs. 13-14) Petitioner strongly disagrees with both of these assertions. The fact that the Petitioner pursued his lawful right on appeal to be resentenced under Heggs, supra, does not mean he has waived his right to challenge an unconstitutional increase in his subsequent guidelines sentence imposed by the trial court after seeking such appellate relief. Moreover, Respondent ignores the trial court's own signature on the Petitioner's original guidelines scoresheet, as well as the subsequent Heggs resentencing hearing transcript, both of which establish the prosecutor and trial

court were well aware the discretionary 1.5 drug trafficking multiplier could have been assessed by the trial court at the Petitioner's original sentencing hearing. (R 1-8, 14-16) Although Respondent attempts to rely on this Court's decision in Harris v. State, 645 So. 2d 386 (Fla. 1994), that decision is distinguishable because it involved the prosecutor initially requesting habitual felony offender sentencing, but the trial court mistakenly believing that such a sentence was not legally possible. Thus, the Petitioner did not, contrary to Respondent's argument, benefit from playing a sentencing "game" in order to benefit from a mistaken"wrong move" by the trial court. The Petitioner has merely asked to have his proper guidelines sentence to be imposed by the trial court without the drug trafficking 1.5 multiplier, being assessed, which the trial court had previously decided not to impose.

Finally, Petitioner submits that Respondent's suggested remedy of permitting the State to have the option of "withdrawing from the plea agreement..." is foreclosed by the doctrine of res judicata due to the Fifth District's earlier decision in Trotter v. State, 774 So. 2d 924 (Fla. 5th DCA 2001). Trotter (I). The Fifth District held that, in Trotter (I) because there was no plea bargain entered into between the State and the Petitioner, the State could not "withdraw" from a "straight up" plea to the trial court for the charged offense. Id., 925. The State

never appealed the decision in Trotter (I) to this Court. Accordingly, the Petitioner is entitled to be resentenced under a 1994 guidelines scoresheet, without the 1.5 drug trafficking multiplier being assessed. This Court should, therefore, quash the decision of the Fifth District in this case, Trotter (II), and remand this case to the trial court for resentencing based on a properly calculated 1994 guidelines scoresheet with a sentencing range of between 25.05 and 41.75 months incarceration.

CONCLUSION

Based upon the arguments and authorities cited herein and in Petitioner's Merit Brief, Petitioner respectfully requests this Honorable Court to quash the decision of the Fifth District in this appeal (Trotter II), vacate the Petitioner's sentence, and, remand this case for resentencing in accordance with a correct guidelines scoresheet, in conformity with Heggs v. State, 759 So. 2d 620 (Fla. 2000), without the inclusion of a 1.5 multiplier for a trafficking offense.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Boulevard, 5th Floor, Daytona Beach, Florida 32118, via his basket at the Fifth District Court of Appeal and mailed to Travis A. Trotter, DOC #190010, Gulf Correctional Institution, 500 Ike Steel Road, Wewahitichka, FL 32465, on this 11th day of March, 2002.

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SUSAN A. FAGAN
ASSISTANT PUBLIC DEFENDER

CERTIFICATE OF FONT

I HEREBY CERTIFY that the size and style of type used in the brief is 14 point proportionally spaced Times New Roman.

_____
SUSAN A. FAGAN
ASSISTANT PUBLIC DEFENDER