IN THE SUPREME COURT OF FLORIDA

WILFRID METELLUS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.
_____/

DCA CASE No.s: 5D01-1044, 5D01-1249, 5D01-1250, 5D01-1251 5D01-1253, 5D01-1254 (Consolidated: 5D01-1044)

S. CT. CASE NO.: 5D02-1494

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

PETITIONER'S INITIAL BRIEF ON THE MERITS

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OTHER AUTHORITIES CITED:

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PRELIMINARY STATEMENT

The Petitioner was the Defendant and the Respondent was the Prosecution in the Ninth Judicial Circuit Court, in and for Orange County, Florida. In the Brief the Respondent will be called "the State" and the Defendant will be called "Petitioner."

The instant case is a consolidated appeal of six cases, CR99-43, CR99-699, CR99-736, CR99-1254, CR99-1907, CR98-14790. The record of CR 99-699 will serve as the record on appeal, as it is the most complete record. In the brief the following symbols will be used:

"R"- Volume two of the Record on Appeal, Case CR99-699,

"T" - Transcript of hearing on the motion to vacate and the transcript of the resentencing, Volume one of the Record on Appeal, Case CR99-699.

"S" - the Supplemental Record, Volume one.

“R2” - Volume two of the record on appeal for Case CR99-43.

“R3” - Volume two of the record on appeal for Case CR99-736.

“R4” - Volume two of the record on appeal for Case CR99-1254.

“R5” - Volume two of the record on appeal for Case CR99-1907.

“R6” - Volume two of the record on appeal for Case CR98-14790.

STATEMENT OF THE CASE

The instant case is a consolidated appeal of six cases, CR99-43, CR99-699, CR99-736, CR99-1254, CR99-1907, CR98-14790. The record of CR 99-699 served as the record on appeal.

A. The charges against Petitioner

Petitioner was charged by information, on December 9, 1998, with two counts, Case No. CR98-14790 (R6 98;Vol.2). Count one was carrying a concealed firearm, in violation of Section 790.01(2), Florida Statutes (1998) (R6 98;Vol.2). Count two was possession of 20 grams or less of cannabis, in violation of Section 893.13(6)(b), Florida Statutes (1998) (R6 98;Vol.2).

Petitioner was charged by information, on January 27, 1999, with one count of carrying a concealed firearm, in violation of Section 790.01(2), Florida Statutes (1999), Case No. CR99-43, (R2 101;Vol.2).

Petitioner was charged by information, on February 11, 1999, with three counts, Case No. CR99-699 (R 99-100;Vol.2). Count one was home invasion robbery (with a firearm), in violation of Sections 812.15(1), 812.135(2), 775.087(1) and 775.087(2), Florida Statutes (1999) (R 99;Vol.2). Count two was kidnaping with intent to commit a felony (with a firearm), in violation of Sections 787.01(1)(a)(2), 775. 087(1) and 775. 087(2), Florida Statutes (1999) (R 100;

Vol.2). Count three was burglary of a dwelling with an assault or a battery (with a firearm), in violation of Sections 810.02(2)(a), 775.087(1), and 775.087(2), Florida Statutes (1999) (R 100;Vol.2).

Petitioner was charged by information, on February 11, 1999, with seven counts, Case No. CR99-736 (R3 101-104;Vol.2). Count one was home invasion robbery (with a firearm), in violation of Sections 812.135(1), 812.135(2), 775.087(1), and 775.087(2), Florida Statutes (1999) (R3 101;Vol.2). Count two was burglary of a dwelling with an assault or a battery (with a firearm), in violation of Sections 810.02(2)(a), 775.087(1), and 775.087(2), Florida Statutes (1999) (R3 101;Vol.2). Counts three, four, and five were each a charge of aggravated assault with a firearm (with a mask), in violation of Sections 784.021(1)(a), 775.0845 and 775.087(2), Florida Statutes (1999) (R3 102-103; Vol.2). Counts six and seven were each a count of kidnaping with intent to commit a felony (with a firearm), in violation of Sections 787.01(1)(a)(2), 775.087(1), and 775.087(2), Florida Statutes (1999) (R3 103-104;Vol.2).

Petitioner was charged by information, on February 16, 1999 with two counts, Case No. CR99-1254 (R4 99-100;Vol.2). Count one was home invasion robbery (with a firearm), in violation of Sections 812.135(1), 812.135(2), 775.087(1), and 775.087(2), Florida Statutes (1999) (R4 99;Vol.2). Count two was

aggravated assault with a firearm, in violation of Sections 784.021(1)(a) and 775.087(2), Florida Statutes (1999) (R4 100;Vol.2).

Petitioner was charged by information, on March 8, 1999, with four counts, Case No. CR99-1907 (R5 109-111;Vol.2). Count one was armed burglary of a dwelling with a firearm, in violation of Sections 810.01(2)(b) and 775.087(2) (R5 109;Vol.2). Count two and three were each a charge of aggravated assault with a firearm, in violation of Sections 784.021(1)(a) and 775.087(2), Florida Statutes (1999) (R5 110;Vol.2). Count four was possession of a firearm in commission of a felony, in violation of Section 790.07(2) (R5 111;Vol.2).

B. Petitioner's plea agreement and sentencing

On November 3, 1999, before the Honorable Stan Strickland, circuit judge, Petitioner entered into a plea agreement with the State on five of his six cases (R 34-53,136-137;Vol.2) (R2 127-128;Vol.2) (R2 127-128;Vol.2) (R3 136-137;Vol.2) (R4 134-135;Vol.2) (R5 140-141;Vol.2). Case No. CR98-14790 was omitted accidentally; on February 24, 2000 it was added to the plea agreement under the same plea conditions as with the other five cases (R 78-81;Vol.2) (R6 131-132;Vol.2). The plea agreement, in its entirety, required Petitioner to plead guilty to count one of each information, the sentences were to run concurrently, and the prison sentence would be capped at thirty years (R 35-37;Vol.2). The State agreed

to nolle prosequi the remaining counts (R 35-37;Vol.2). The State further required that Petitioner testify truthfully at the future trials of his codefendants (R 35-37;Vol.2).

Petitioner was sentenced on February 24, 2000 and he was adjudicated guilty on all counts (R 92-94;Vol.2)(R2 131-132;Vol.2) (R3 143-144;Vol.2) (R4 141-142;Vol.2) (R5 144-145;Vol.2) (R6 133-134;Vol.2). Petitioner was sentenced to four sentences of fourteen years in Department of Corrections, for case numbers CR99-699, CR99-1254, CR99-1907, CR99-736, and two sentences of five years in the Department of Corrections, for case numbers CR99-43 and CR98-14790 (R 92-94;Vol.2) (R2 136-137;Vol.2) (R3 145-146;Vol.2) (R4 146-147;Vol.2) (R5 149-150;Vol.2) (R6 138-139;Vol.2). The Court ordered that all sentences were to be served concurrently (R 94;Vol.2).

C. The trial of Tony Elozar and the resentencing of Petitioner

On August 17, 2000, Petitioner was called to the stand to testify at the trial of Tony Elozar, his former co-defendant (R 157-159;Vol.1). Petitioner's testimony on the stand was inconsistent with his prior sworn statements and he stated that his prior statements to police detectives about the case were lies (R 157-159;Vol.1).

On October 30, 2000, the State filed a motion to vacate sentence arguing that Petitioner had perpetrated a fraud upon the court (R 157-159;Vol.2).

On March 8, 2001 a hearing was held before Judge Strickland on the State's motion to vacate (T 1-33;Vol.1). The Court granted the State's motion and vacated Petitioner's 14 year sentence (T 31;Vol.1,R164;Vol.2). The Court resentenced Petitioner to four sentences of 29 years in the Department of Corrections, case numbers CR99-699, CR99-1254, CR99-1907, CR99-736. (T 28-30;Vol.1, R 161-162,164;Vol.2) (R4 154-155;Vol.2) (R5 162-163;Vol.2) (R3 156-157;Vol.2). The Court also sentenced Petitioners to a three year minimum mandatory sentence in each of these cases (T 31;Vol.1). The Court resentenced Petitioner to the same five year sentences in the Department of Corrections on the remaining two cases and ordered all sentences to be served concurrently (T 30,31;Vol.1) (R2 141-142;Vol.2) (R6 148-149;Vol.2).

D. Petitioner's appeal to the Fifth District Court of Appeal of the State of Florida

Petitioner filed six timely notices of appeal, one for each case, April 3, 2001 (R 166;Vol.2) (R2 149;Vol.2) (R3 161;Vol.2) (R4 159;Vol.2) (R5 166;Vol.2) (R6 153;Vol.2). The Office of Public Defender was appointed to represent Petitioner (R 171;Vol.2) (R2 154;Vol.2) (R3 166;Vol.2) (R4 162;Vol.2) (R5 171;Vol.2).

On June 12, 2001, the Fifth District Court of Appeal ordered that the six cases be consolidated for further proceedings in that court.

On July 3, 2001, Petitioner filed a motion to correct sentencing error, under

Rule 3.800(b)(2) (S 156-160;Vol.1). On September 10, 2001, the circuit court held a hearing on the 3.800(b)(2) motion and reserved ruling on the motion (S 161;Vol.1). The Court failed to rule on the motion before sixty days had elapsed from the date of filing, so the motion to correct sentencing was deemed denied. Kimbrough v. State, 766 So. 2d 1255 (Fla. 5th DCA 2000).

On May 31, 2002, the Fifth District Court of Appeal affirmed the trial court's vacating of Petitioner's sentence and resentencing of Petitioner to a longer sentence. Metellus v. State, 817 So. 2d 1009 (Fla. 5th DCA 2002). The Fifth District Court of Appeal also certified conflict with the decisions of the Second District Court of Appeal in Joslin v. State, 27 Fla. L. Weekly D686 (Fla. 2d DCA March 22, 2002) and Robie v. State, 807 So. 2d 781 (Fla. 2d DCA 2002). The Second District Court of Appeal held in Joslin and Robie that under Rule 3.170(g)(2)(A) the trial court did not have jurisdiction to increase a defendant's sentence when the State failed to move to vacate defendant's sentence within 60 days after defendant's noncompliance.

Petitioner filed a notice to invoke the discretionary jurisdiction of this Court on July 3, 2002. This Court issued an order, dated July 11, 2002, postponing decision on jurisdiction in this case and set a briefing schedule.

STATEMENT OF THE FACTS

A. The Plea Agreement

On November 3, 1999, Petitioner entered into a plea agreement before the Honorable Stan Strickland, circuit judge. (R 34-53;Vol.2). Among the terms of the plea agreement was a requirement that Petitioner cooperate with the State by testifying truthfully against his co-defendants (R 35-37;Vol.2). During the plea hearing the State questioned Petitioner about a statement he had previously made to Detective Duncan and had Petitioner confirm that the statement was the truth (R 43-49;Vol.2). However, the State never put on the record, as part of the plea agreement, a requirement that Petitioner testify in accordance with his previous testimony, nor did any provision of the plea agreement purport to lengthen the time given the State to move to vacate for noncompliance (R 34-53;Vol.2).

The plea agreement was intended to cover all six cases[1], however due to an oversight, Case No. CR98-14790 was omitted; it was later added to the agreement with the same conditions as the other five cases (R 78;Vol.2). In the beginning of the plea hearing, defense counsel placed the terms of the plea agreement on the record (R 35-37;Vol.2). The plea agreement, in its entirety, required Petitioner to plead guilty to count one of each of the six informations (R 35-37;Vol.2). In

[1] CR99-43, CR99-699C, CR99-736A, CR99-1254B, CR99-1907C, CR98-14790

exchange, the State agreed to nolle prosequi the remaining counts of each information and to recommend that all Petitioner's sentences were to run concurrently (R 35-37;Vol.2). The Court agreed that Petitioner's exposure to prison would be capped at 30 years (R 36;Vol.2). Additionally, the State required that Petitioner testify truthfully against his co-defendants in exchange for a reduced sentence (R 35-37;Vol.2).

Defense counsel repeatedly stated, for the record, the additional requirement of testifying against the co-defendants (R 35-37;Vol.2). Each time the requirement was only to testify and testify truthfully (R 35-37;Vol.2). Never was Petitioner required to testify in accordance with previous statements he had made (R 35-37;Vol.2). Not once did the State object to defense counsel's recitation of the plea agreement, nor did the State mention any additional requirements (R 34-53;Vol.2).

Defense counsel stated the requirement three times as he went through each case Petitioner was entering a plea on that day (R 36-37;Vol.2). Defense counsel said, "He'll also be required to testify truthfully against the co-defendant in this case, and that would be Mr. Ocer if there are any remaining trials after today and also [Elozar] trials, if Mr. Elozar proceeds forward." (R 36;Vol.2). Defense counsel also stated, "He'll be, again, set off for sentencing, and he will be required to testify truthfully against any co-defendants who proceed to trial."(R 37;Vol.2).

Finally, Defense counsel said, “The State will be nol prossing counts two, three and four, ordering PSI, and he will testify truthfully against any co-defendant who proceeds to trial”(R 37;Vol.2).

The Court then swore Petitioner in and began the plea colloquy (R 38; Vol.2). The State questioned Petitioner, after giving a factual basis for each case and before the colloquy was completed and the Court accepted the plea (R 40-44;Vol.2). The State asked Petitioner, “Mr. Metellus it is my understanding that you are willing to testify truthfully in any future trial of Mr. Ocer or Mr. Elozar, is that correct?”(R 44;Vol.2). Petitioner responded, “Yes.” (R 44;Vol.2). The State then questioned Petitioner about a statement he had made to Detective Parks Duncan (R 44-49;Vol.2). The State handed Petitioner a copy of a transcript of the statement and ascertained that he did remember giving the statement (R 44;Vol.2). The State then asked, “Is everything that you told Detective Parks Duncan in this transcript, is that the truth?” (R 45;Vol.2). Petitioner responded, “Yes.” (R 45;Vol.2). The State then questioned Petitioner about the specifics of the home invasion robbery that occurred on January 10, 1999 (R 46-47;Vol.2). Petitioner admitted that he had committed the offense, with Tony Elozar, Jonel Ocer and Mr. Coulou, and that all four men were armed with guns (R 47;Vol.2). The State then questioned Petitioner about the specifics of a robbery that occurred on January 13,

1999 (R 47-49;Vol.2). Petitioner agreed that he had committed the offense, with Tony Elozar, Jonel Ocer, and an unnamed individual (R 48-49;Vol.2). The State then showed Petitioner a picture of a man, marked state's exhibit 14 in case CR99-1254, and asked him if that was a picture of Tony Elozar (R 49;Vol.2). Petitioner said, "Yes." (R 49;Vol.2). The State then asked, "And is that the same Tony that participated in the robberies with you?" (R 49;Vol.2). Petitioner responded, "Yes, Ma'am." (R 49;Vol.2). The State then asked, "Is everything that you just told me here in court today, is that the truth?" (R 49;Vol.2). Petitioner responded, "Yes, Ma'am." (R 49;Vol.2).

The Court then concluded the colloquy, accepted Petitioner's plea of guilty, and set a date for sentencing (R 49-50;Vol.2).

B. Petitioner's original sentencing

On February 24, 2000, Petitioner was sentenced before Judge Strickland (R54-95;Vol.2). Apparently at the time of Petitioner's sentencing, Tony Elozar was not in custody, therefore Petitioner had yet to testify at the trial of this co-defendant (R 90;Vol.2). The Court sentenced Petitioner to 14 years in the Department of Corrections and stated that the sentence was based in part upon Petitioner's representation that he would testify against his co-defendant if Tony Elozar ever went to trial (R 92;Vol.2). Prior to sentencing, the State again had Petitioner

confirm that his prior statements about Tony Elozar's involvement in the home invasions were truthful (R54-95;Vol.2). But once again the State failed to require as part of the plea agreement that Petitioner testify in accordance with those statements (R 54-95;Vol.2).

Petitioner took the stand and told the Court that he was sorry for his actions (R 73-75;Vol.2). The State then questioned Petitioner about his earlier statements (R 75-77;Vol.2). The State asked Petitioner if everything he had said at the earlier plea hearing was still true (R 75-76;Vol.2). Petitioner answered, "Yes, Ma'am." (R 76;Vol.2). The State then asked, "Is everything that you told the detectives in reference to these home invasions, are they all - - was that all true?" (R 76;Vol.2). Petitioner again answered, "Yes, Ma'am." (R 76;Vol.2). The State then had Petitioner confirm that the men who committed the offenses with him were Tony Elozar and Jonel Ocer (R 76;Vol.2). The State went over the agreement that Petitioner made to testify against his co-defendants (R 76;Vol.2). The State said, "And as part of your sentence we have taken into consideration the fact that you have been cooperative and you have represented that you will be cooperative, should you be called at any trial against either of those individuals. Is that still your position?" (R 76;Vol.2). Petitioner said, "Um, My deal was that you was gonna make me testify on Tony Elozar."(R 76;Vol.2). The State replied, "If you were

called to testify against anyone would you testify truthfully?" (R 76-77;Vol.2). Petitioner answered, "Yes, Ma'am" (R 77;Vol.2). Later on in her questioning, the State again asked, "...there may be a day where you may be brought back to testify. And is it your testimony here today that you will testify truthfully?" (R 77;Vol.2). Petitioner answered, "Yes Ma'am." (R 77;Vol.2).

Before sentencing Petitioner, the Court remedied the matter of the case that had been accidentally omitted from the plea hearing, even though it was intended to be part of the plea agreement (R 78;Vol.2).

The Court then addressed the issue of Petitioner's sentence. The State said they expected him to be sentenced between 16 and 30 years in the Department of Corrections, but that the State was not recommending a sentence in the high end of that range (R 90;Vol.2). The State conceded that once Petitioner was sentenced, the Court would not be able to alter Petitioner's sentence (R 90;Vol. 2). The State said, "It's obviously a D.O.C. sentence, it's just matter of how much the Court chooses to give him. *It can't be taken away from him.* Mr. Elozar's running off -- I have to assume that Mr. Metellus would have testified truthfully or will testify truthfully in the future." (R 90;Vol.2) (emphasis added). Apparently Mr. Elozar had escaped from custody, preventing the State from proceeding to trial on him before sentencing Petitioner (R 90;Vol.2).

In cases CR99-699, CR99-1254, CR99-1907, CR99-736, the Court sentenced Petitioner to 14 years in the Department of Corrections on each case (R 92-93;Vol.2). In case CR99-43 and case CR98-14790 the Court sentenced Petitioner to five years in the Department of Corrections (R 94;Vol.2). The Court ordered that all sentences were to be served concurrently (R 94;Vol.2).

C. The Trial of Tony Elozar

On August 17, 2000, Petitioner was called to testify at the trial of Tony Elozar, his former co-defendant (R 157-159;Vol.2). Petitioner was accidentally placed in the same holding cell as Mr. Elozar (T 16-17;Vol.1). Mr. Elozar threatened Petitioner (T 17-18;Vol.1). Moments before he was to testify, Petitioner asked the State for a sentence reduction saying, "I know you need me. I want 4 instead of 14." (R 158;Vol.2). Petitioner's testimony on the stand was inconsistent with his prior sworn statements and he stated that his prior statements to police detectives about the case were lies (R 157-159;Vol.1).

At the motion to vacate hearing, Judge Strickland reviewed the testimony of Petitioner at the trial (T 25-26;Vol.1). The Court stated that on the stand Petitioner said that he had been mistaken, that Tony Elozar was not present at the home invasion (T25;Vol.1). Petitioner said that the only reason he said Tony Elozar was a participant in the crimes was because Petitioner thought he would never have to

face Tony Elozar again (T 25;Vol.1). Petitioner stated that he had lied in his previous statements (T 26;Vol.1).

D. The Motion to Vacate and Resentencing

On October 30, 2000, the State filed a Motion to Vacate (R 157-158;Vol.2). Citing Petitioner's failure to testify at trial in accordance with his previous statements, the State moved that the Court should "vacate the original sentence received by Wilfrid Metellus, who received the benefit of a bargain, but failed to comply with his terms." (R 158;Vol.2). The motion to vacate stated that "The State agreed to Nol prosse the remaining counts in each case based upon the Defendant's representation that he would cooperate and testify truthfully against his co-defendants, specifically Tony Elozar." (R 157;Vol.2). Nowhere in the motion does it state that Petitioner had been required by his plea agreement to testify in accordance with his prior testimony (R 157-158;Vol.2). Instead, the State repeats several times that it relied upon Petitioner to testify truthfully (R 157-158;Vol.2). Furthermore, the motion to vacate does not cite any procedural rule or case law which would permit the Court to vacate Petitioner's sentence (R 157-158;Vol.2).

On March 8, 2001 a hearing was held on the State's motion to vacate sentencing, before Judge Strickland (T 1-33;Vol.1). The State contended that the Court could vacate Petitioner's sentence because he had, in the State's view,

"committed a fraud on the Court during his plea" (T 7;Vol.1). In support of this contention, the State did not cite any case law or procedural rule, instead the State reviewed the history of Petitioner's plea agreement and his involvement in the prosecution of Tony Elozar, his co-defendant (T 3-8;Vol.1). The State reminded the Court that "...the State [agreed] to go ahead and to nol. pros the remaining counts based upon the defendant's representation that he would cooperate and testify truthfully against his co-defendants." (T 3;Vol.1). The State reviewed for the Court that Petitioner had represented, "...that he would cooperate and testify truthfully against his co-defendants. Specifically, Tony Elozar was included in that." (T3;Vol.1). The State pointed out that Petitioner had given Detective Duncan a statement indicating that Tony Elozar was one of the home invaders in Case CR99-699, the case that the State went to trial on against Tony Elozar (T 3-4;Vol.1). The State also reminded the Court that prior to the Court accepting the plea that Petitioner had "...confirmed on the record that everything contained in the statement was the truth." (T 5,Vol.1). The State said that, "[b]ased upon his representation that was the truth, and his willingness to cooperate and testify in the trial of Tony Elozar, the Court sentenced the defendant to the bottom of the guidelines, 14 years D.O.C." (T 5;Vol.1). The State then discussed Petitioner's testimony at Tony Elozar's trial (T 6;Vol.1). When Petitioner took the stand he

said that Tony Elozar had nothing to do with the home invasion and that Petitioner's statement to Detective Duncan was a lie (T 6;Vol.1). Subsequently, the case against Tony Elozar was dismissed (T 6;Vol.1).

The State said they believed that the Court was still bound to the 30 year sentence cap, so they asked the Court to sentence Petitioner to the maximum possible sentence of 30 years in the Department of Corrections (T 7-8;Vol.1). Defense counsel asked for leniency and informed the Court that the State had filed a perjury charge against Petitioner for his actions at Mr. Elozar's trial (T 1;Vol.1).

The Court granted the motion to vacate, stating that Petitioner's sentence was based upon him telling the truth (T 26;Vol.1). The Court resentenced Petitioner to four terms of 29 years in the Department of Corrections, case numbers CR99-699, CR99-1254, CR99-1907, CR99-736. (T 28-30;Vol.1). The Court also sentenced Petitioner to three years minimum mandatory in each of these cases (T 31;Vol.1). The Court resentenced Petitioner to the same five year terms in the Department of Corrections on the remaining two cases and ordered all sentences to be served concurrently (T 30,31;Vol.1).

SUMMARY OF ARGUMENT

The first issue presented on appeal is the trial court's improper revocation of Petitioner's sentence. The Trial Court lacked jurisdiction when the State failed to

file a motion to vacate plea and sentence within sixty days after Petitioner's alleged noncompliance with his plea agreement. The sixty day time limit in Rule 3.170(g), Fla. R. of Crim. Pro., is jurisdictional. Whether or not the trial court violated the rule is a pure question of law and therefore the standard of review also de novo. Philip J. Padovano, Florida Appellate Practice § 9.4 (2d ed.1997).

The second issue presented on appeal is the trial court's violation of the prohibition against double jeopardy, patently apparent on the face of the record, in vacating Petitioner's sentence and resentencing him to a longer sentence after he had already begun to serve his original sentence. Troupe v. Rowe, 283 So. 2d 857 (Fla. 1973). The trial court erred in vacating Petitioner's sentence because he did not violate the express terms of his plea agreement. McCoy v. State, 599 So. 2d 645 (Fla. 1992). Whether or not the resentencing of Petitioner violates constitutional prohibitions against double jeopardy is a pure question of law. If a ruling consists of a pure question of law, the ruling is subject to de novo review. Philip J. Padovano, Florida Appellate Practice § 9.4 (2d ed.1997).

ARGUMENT

ISSUE I: THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL ERRONEOUSLY AFFIRMED THE TRIAL COURT'S VACATING OF PETITIONER'S

SENTENCE AND RESENTENCING PETITIONER AND ERRONEOUSLY HELD THAT RULE 3.170(g)(2)(A), FLORIDA RULE OF CRIMINAL PROCEDURE IS NOT JURISDICTIONAL

A. The Trial Court lacked the jurisdiction to vacate Petitioner's sentence and re-sentence Petitioner

The Trial Court lacked the jurisdiction to vacate Petitioner's sentence and to resentence Petitioner. Petitioner's plea agreement required him to comply with specific terms (R34-35;Vol.2). Under Rule 3.170(g) the State may move to vacate a defendant's plea and sentence for noncompliance with specific terms of a plea agreement. However, Rule 3.170(g)(2)(A) contains a time limitation on the power of the State to move to vacate a plea agreement. The rule provides: "Unless otherwise stated at the time the plea is entered: The state may move to vacate a plea and sentence within 60 days of the defendant's noncompliance with the specific terms of a plea agreement." Fla. R. Crim. P. 3.170(g)(2)(A). At the time Petitioner's plea was entered, the Trial Court did not declare that the State would have more than 60 days to move to vacate the plea upon defendant's noncompliance (R 34-53;Vol.2). Petitioner's alleged noncompliance occurred on August 17, 2000, but the State failed to file any motions until October 30, 2000, when they filed a "Motion to Vacate Sentence" (R 157-159;Vol.2). Since the State

filed a motion past the time allotted by the rule, the Trial Court lacked the jurisdiction to vacate Petitioner's sentence.

Petitioner did not object to the Trial Court's lack of jurisdiction at his resentencing (T 1-33;Vol.1). However, this issue was preserved by the filing of a 3.800(b)(2) motion (S 156-159;Vol.1). Furthermore, a court's lack of jurisdiction is fundamental error and may be raised for the first time on appeal. Watson v. Schultz, 760 So. 2d 203 (Fla. 2d DCA 2000). The Fifth District of Appeal conceded that if Rule 3.170(g)(2)(A) is jurisdictional, then Petitioner's failure to object cannot constitute a waiver of the trial court's lack of jurisdiction. Metellus 817 So. 2d at 1014.

B. Rule 3.170(g)(2)(A) is jurisdictional, regardless that a provision allows for modification of the 60 day time limit

In its opinion in Metellus, the Fifth District Court of appeal held that Rule 3.170(g)(2)(A) is not jurisdictional. The Fifth District Court conducted a jurisdictional analysis of the rule and also examined the consequences of finding the rule to be jurisdictional. However, the Fifth District Court's analysis of rule was flawed. The Fifth District Court focused on the provision in the rule that allowed parties to modify the time limit, instead of examining the source of the rule's grant of jurisdiction, namely this Honorable Court.

The Fifth District Court began their analysis of Rule 3.170(g)(2)(A) by highlighting the portion of the rule that reads, "Unless otherwise stated at the time the plea is entered:". Metellus 817 So. 2d at 1014. The Fifth District Court said that this provision allowed parties to modify the 60 day time limit and therefore, this rule is not jurisdictional. Id. The Fifth District Court explained that "...the courts have consistently held that jurisdiction, where is does not otherwise exist, may not be conferred on the court by agreement or consent of the parties". Metellus, 817 So. 2d at 1015. The Fifth District Court reasoned that if jurisdiction cannot be conferred by the consent of parties and if Rule 3.170(g)(2)(A) is jurisdictional, then the parties cannot modify the time limit and the sixty-day time limit would have to be mandatory. Id. The Fifth District Court said that this conclusion would render meaningless the provision that allowed modification of the time limit. Id. The Court concluded that the inclusion of the provision to allow parties to modify the time limit, dictates that this rule is not jurisdictional, since the Florida Supreme Court does not purposefully include meaningless provisions in rules of procedure. Metellus, 817 So. 2d 1015-1016.

Petitioner does not dispute that jurisdiction cannot be conferred on a court by agreement or consent of the parties. But that is not the issue in the instant case. If under Rule 3.170(g)(2)(A), the parties choose to modify the time limit to vacate

the plea and sentence, then the parties are merely exercising an option conferred on them by this Honorable Court. Jurisdiction is not created by the agreement of the parties, their agreement would be meaningless, but for the jurisdiction created in the rule. It is this Honorable Court, via this rule, that confers jurisdiction. Therefore, despite the provision that allows for the modification of the time limit, Rule 3.170(g)(2)(A) is jurisdictional.

C. Time limits in rules and statutes limit jurisdiction

The Fifth District Court of Appeal recently issued an opinion, in a different case, that not only discussed the importance of time limits in ensuring finality, but also recognized the connection between time limits and jurisdiction. In State v. Anderson, 821 So. 2d 1206 (Fla. 5th DCA 2002), the State argued that the trial court lacked jurisdiction to reconsider its ruling on a 3.850 motion six months after the trial court had denied the relief. In its opinion the Fifth District Court discussed the role of time limits in relation to jurisdiction and relied upon Shelby Mutual Insurance Co. v. Pearson, 236 So. 2d 1 (Fla. 1970). The relevant portion of the opinion provides:

> The purpose underlying the time periods contained in the rules is to bring finality to litigation. A trial court does not possess the power and jurisdiction to correct its own judgments at any time. Shelby expressly recognizes that a trial court has no authority to modify,

> amend or vacate a final order except in the manner and within the time frame provided by rule or statute.
>
> * * *
>
> The language in Shelby that a trial court has no authority to modify, amend or vacate a final order except in the manner and within the time frame provided by rule or statute seems equally applicable to criminal cases. Otherwise the trial court would have the power ad infinitum to modify, amend or vacate final orders.
> State v. Anderson, 821 So. 2d 1206,1208 (Fla. 5th DCA 2002).

D. The Second District Court of Appeal has held that Rule 3.170(g)(2)(A) is jurisdictional

The Second District Court of Appeal has determined that Rule 3.170 (g)(2)(A) is jurisdictional in Joslin v. State, 27 Fla. L. Weekly D686 (Fla. 2d DCA March 22, 2002) and Robie v. State, 807 So. 2d 781 (Fla. 2d DCA 2002). In Robie, the defendant entered into a plea agreement with the condition that he report to the jail three weeks after his sentencing. Mr. Robie failed to report to the jail; he was arrested three years later. Robie , 807 So. 2d at 782. The Second District Court vacated Mr. Robie's sentence and resentenced him to a longer sentence. Id. The Second District Court pointed out that the State was aware of Mr. Robie's noncompliance three weeks after his sentencing and yet failed to take action until three years had passed. Id. The Second District Court then stated that, "At this point the court did not have the jurisdiction to increase Robie's sentence.

Consequently, Robie's sentence must be vacated and his original sentence reinstated." Robie , 807 So. 2d at 782.

The Second District Court of Appeal reiterated their position on Rule 3.170(g)(2)(A) in Joslin. Mr. Joslin entered into a plea agreement, was sentenced, allowed to delay reporting to jail for five weeks, and then failed to report to jail. Joslin v. State, 27 Fla. L. Weekly D686 (Fla. 2d DCA March 22, 2002). The State never made a motion to vacate Mr. Joslin's plea and sentence. But when Mr. Joslin was finally recaptured approximately six months later, the Trial Court resentenced Mr. Joslin to a longer term of imprisonment. In its opinion reversing the lower court, the Second District Court of Appeal held that:

> If the State had moved to set aside the plea and sentence in this case because Joslin failed to report to prison as he agreed, the court would have retained jurisdiction. Because the State took no action, however, the court lost jurisdiction to resentence Joslin. Id.

In its ruling below, the Fifth District Court of Appeal disagreed with the Second District Court of Appeal's holding in Robie and Joslin, but the Fifth District certified conflict with the Second District Court. Metellus, 817 So. 2d 1014-1016.

E. Conclusion

The Fifth District Court of Appeal appears to equate the term jurisdictional

with the concept of an absolute jurisdictional bar. The Fifth District Court opined that a rule whose time limit can be modified, by definition cannot be jurisdictional. Metellus, 817 So. 2d at 1015. But inflexibility is not the sine qua non of jurisdiction. The most basic definition of jurisdiction is power. The power of a court to take an action, such as ruling on a motion, or hearing a trial, or sentencing a defendant. Rules and statutes are jurisdictional when they pertain to the extent or limit of the court's power. Regardless of whether Rule 3.170(g)(2)(A) is an absolute time bar or one that can be extended, possibly by motion for an extension of time on the State's behalf, the fact remains that the State did nothing until after the time limit had expired. The State witnessed Petitioner's supposed noncompliance with his plea agreement, but failed to either through neglect or ignorance to take any action for more 60 days. The Fifth District Court of Appeal has stated that "We do not believe that the Florida Supreme Court purposely includes meaningless provisions in the rules of procedure it adopts." Metellus, 817 So. 2d at 1015. The Petitioner also believes this is true and urges this Honorable Court to find that Rule 3.170(g)(2)(A) is jurisdictional. For if this rule is not jurisdictional, then what would be the purpose of its existence?

ISSUE II: THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL ERRONEOUSLY AFFIRMED THE TRIAL COURT'S VACATING OF PETITIONER'S SENTENCE AND RESENTENCING PETITIONER TO A LONGER SENTENCE IN VIOLATION OF DOUBLE JEOPARDY.

Although review was granted only as to one issue, this Court, may address other issues properly raised and argued before it. Allstate Ins. Co. v. Rudnick, 761 So. 2d 289, 291 (Fla.2000).

A. Resentencing Petitioner violated Double Jeopardy

The Double Jeopardy Clause of the Fifth Amendment 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. The Supreme Court has held that this protection is enforceable against the States via the Fourteenth Amendment. Benton v. Maryland, 395 U.S. 784 (1969). The Florida Constitution also guarantees this protection, stating that "[n]o 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 oneself." Art. I, § 9, Fla. Const.

The United States Supreme Court has held that the guarantee against double jeopardy consists 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." North Carolina v. Pearce, 395 U.S. 711, 717 (1969). It is the third component, the protection against multiple punishments, which has been violated in the case of the Petitioner. This issue was preserved by 3.800(b)(2) motion (S156-159;Vol.1). Furthermore, a violation of double jeopardy is fundamental error. Grant v. State, 770 So. 2d 655 (Fla. 2000).

Florida courts have consistently held that once a defendant begins to serve a legal sentence the court may not resentence him to a longer, or more onerous, term of imprisonment. In Troupe v. Rowe, 283 So. 2d 857 (Fla. 1973), this Honorable Court held that once a defendant has begun to serve his sentence, it is a violation of the protection against double jeopardy to resentence him to a longer term of imprisonment. The Fifth District Court of Appeal has held that "[o]nce a person begins to serve a lawful sentence, he may not thereafter be resentenced for an increased term of incarceration" Ruffin v. State, 589 So. 2d 403, 404 (Fla. 5th DCA 1991) (citing Donald v. State, 562 So. 2d 792 (Fla. 1st DCA 1990) rev. denied, 576 So. 2d 291 (Fla. 1991).) The Fifth District Court of Appeal has explained this principle thus:

The double jeopardy clause of the federal constitution applies to the

> imposition of sentence as well as the determination of guilt and prohibits the imposition of a second or subsequent sentence after imposition of a valid sentence as to "the same offense." Once a defendant has commenced the service of a valid sentence the court cannot, constitutionally, again sentence him for "the same offense", or make the original sentence more onerous. Johnson v. State, 574 So. 2d 222, 224 (Fla. 5th DCA 1991).

Petitioner had begun to serve his legal sentence on February 24, 2000, almost a year before the Court resentenced him to a longer term of imprisonment. Therefore, the lower court's action violated the constitutional prohibition against double jeopardy.

B. Petitioner did not violate his conditional plea agreement and the trial court may not revoke his original sentence and resentence him to a longer term of imprisonment.

There is a narrow exception to the general rule that a defendant's sentence may not be increased once he has begun to serve the sentence. This Honorable Court has held in that if a defendant fails to comply with the terms of his plea agreement, then the State may be able to vacate the defendant's plea and sentence. McCoy v. State, 599 So. 2d 645 (Fla. 1992). However, this exception does not apply to the instant case, because Petitioner did not violate the express terms of his plea agreement.

This situation usually arises with pleas conditioned on a defendant providing assistance to the authorities in order to get a reduced sentence. For example in

Petitioner's case he agreed to testify against a co-defendant. In McCoy, the Florida Supreme Court "establish[ed] a definitive process that authorizes the trial court to vacate a plea agreement when a defendant has failed to testify as *specifically agreed* to in a plea agreement entered into with the court's express approval.". McCoy, 599 So. 2d at 646 (emphasis added). This procedure has since been codified in Rule 3.170(g)(2)(A) of the Florida Rules of Criminal Procedure. Fla. R. Crim. Pro. 3.170. Rule 3.170(g)(2)(A) provides that "[w]henever a plea agreement requires the defendant to comply with some specific terms, those terms shall be expressly made a part of the plea entered into in open court." Fla. R. of Crim. Pro. 3.170(g)(1). This Honorable Court found in McCoy that since "...the terms of the plea agreement allegedly violated were not part of the court record ... the court could not vacate the judgment and sentence" McCoy, 599 So. 2d at 650.

In the instant case, at the hearing on the motion to vacate, the State contended that the Court could vacate Petitioner's sentence because he had, "committed a fraud on the Court during his plea" (T 7;Vol.1). The Florida Supreme Court has emphatically stated that, "There can be no fraud perpetrated on the court where the terms allegedly breached are not before the court." McCoy, 599 at 649. Contrary to the State's contention, Petitioner could not have

committed a fraud, since the requirement of testifying in accordance with previous statements was never made a part of the plea agreement. The express terms of his agreement only required Petitioner to testify truthfully. Therefore, the Court did not have any basis for vacating Petitioner's sentence since, as in McCoy, the term allegedly violated was not part of the plea agreement and hence was not before the Court. Id.

It is the duty of the prosecutor to ensure that the plea agreement is complete. This prosecutorial duty is illustrated in the facts of McCoy, which are similar to the instant case. In McCoy, the defendant could not testify on the stand due to a lapse of memory. This Honorable Court held that since, the defendant was only required to testify truthfully, she could not have been held to violate her plea agreement. McCoy, 599 So. 2d at 649. The Court explained that while the Court did "not condone McCoy's conduct", "[a]ny fraud perpetrated by McCoy in this case was on the state attorney....not the court". McCoy, 599 at 649. The Court went on to say that "...when entering into a plea agreement, the State must make sure that the specific terms of the agreement are made a part of the plea agreement and the record." McCoy, 599 So. 2d at 649. The Court explained that this principle was implied in State v. Acosta, 506 So. 2d 387 (Fla. 1987), where it held that prosecutors are required to take the steps necessary to protect their interests when

negotiating plea agreements. The Court stated that in the case of McCoy, "...it would have been adequate if it had been stated, as part of the plea agreement, that McCoy would testify truthfully in any criminal action against her supplier in accordance with identified statements that she had previously given to law enforcement officials." McCoy, 599 at 694.

The Florida Supreme Court ruled on McCoy in 1991; therefore the State should have known that they must incorporate the term, in accordance with prior testimony, in the plea agreement if they wished Petitioner to be bound by it. The Court could not later alter the terms of the plea agreement.

C. Petitioner must be resentenced to his original sentence

The Florida Supreme Court has held that "[a] "Constant factor" insuring basic fairness in the plea bargaining process is requirement that "when a plea rests in any significant degree on the promise or agreement of prosecutor, so that it can be said to be part of inducement or consideration, such promise must be fulfilled." Hunt v. State, 613 So. 2d 893, 897 (Fla. 1992) (quoting Santobello v. New York, 404 U.S. 257, 262 (1971).) Petitioner did not breached the terms of his agreement, he therefore deserves to have the promise of his original sentence fulfilled.

CONCLUSION

BASED UPON the foregoing cases, authorities, and policies, the Petitioner respectfully requests this Honorable Court to quash the decision of the Fifth District Court of Appeal, vacate Petitioner's sentence, and remand this case for resentencing to with an order to reinstate Petitioner's earlier sentence of 14 years.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon The Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, via his basket at the Fifth District Court of Appeal, and mailed to: Wilfrid Metellus, DOC #X20492 H1-213L, Gulf Correctional Institution, 500 Ike Steel Road, Wewahitichka, Florida 32465, on this date of September 9, 2002.

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MEGHAN ANN COLLINS
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.

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MEGHAN ANN COLLINS
ASSISTANT PUBLIC DEFENDER