IN THE SUPREME COURT OF FLORIDA

CASE NO. SC02-1695

RALPH GROSS, JR.,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

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ON DISCRETIONARY REVIEW IN THE FLORIDA SUPREME COURT

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ANSWER BRIEF ON THE MERITS

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TABLE OF CONTENTS

	Page
CERTIFICATE OF TYPE AND STYLE	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE AND FACTS	2
SUMMARY OF THE ARGUMENT	5
ARGUMENT	6
ISSUE I	6
WHETHER THE FOURTH DISTRICT PROPERLY FOUND THAT PETITIONER'S SENTENCE WAS NOT ILLEGAL? (RESTATED)?	
CONCLUSION	10
CERTIFICATE OF SERVICE	10
CERTIFICATE OF FONT	11

TABLE OF AUTHORITIES

CASES

Apprendi v. New Jersey, 530 U.S. 466 (2000) 10

Armor Packing Co. v. United States, 209 U.S. 56, 74 (1908) 7

Bailey v. Hough, 441 So. 2d 614 (Fla. 1983) 5

Cairl v. State, 833 So. 2d 312 (Fla. 2d DCA 2003) 3, 4, 7, 9

Carter v. State, 786 So. 2d 1173, 1181 (Fla. 2001) . . 6

Gross v. State, 820 So. 2d 1043, 1045 (Fla. 4th DCA 2002), rev. granted, 837 So. 2d 409 (Fla. 2003) 2

Hankin v. State, 682 So. 2d 602 (Fla. 2d DCA 1996), receded from by Cairl v. State, 833 So. 2d 312 (Fla. 2d DCA 2003) 4, 11

Hughes v. State, 826 So. 2d 1070 (Fla. 1st DCA), rev. granted, 837 So. 2d 1040 (Fla. 2003) 10

Langdon v. State, 330 So. 2d 804, 805 (Fla. 3d DCA 1976) 8

Marciniak v. State, 754 So. 2d 877 (Fla. 1st DCA 2000) . 6

McBride v. State, 524 So. 2d 1113 (Fla. 4th DCA 1988) . 6

Nolte v. State, 726 So. 2d 307, 308 (Fla. 2d DCA 1998) 8

Puffinburger v. State, 581 So. 2d 897 (Fla. 1991) 4, 5, 7, 8

State v. Cogswell, 521 So. 2d 1081, 1082 (Fla. 1986) . . 7

State v. Walker, 593 So. 2d 1049 (Fla. 1992) 5

United States v. Batchelder, 442 U.S. 114 (1979). . . . 8

United States v. De Simone, 468 F.2d 1196, 1199-1200 (2d Cir. 1972) 7, 10

United States v. Kramer, 955 F. 2d 479, 485 (1992) . . . 7

STATUTES AND RULES

Section 775.021(1) Fla. Stat. (2001) 2, 9

Fla. R. Crim. P. 3.800(a) 3, 5, 6, 9

PRELIMINARY STATEMENT

The defendant will be referred to as "Petitioner." The State will be referred to as "Respondent." References to the record will be preceded by "(R." References to the transcript will be preceded by "(TR." All emphasis is added unless otherwise noted.

STATEMENT OF THE CASE AND FACTS

Respondent agrees with Petitioner's statement of the case and facts, with the following additions, exceptions, and clarifications.

Respondent does not agree that the State successfully argued that the 1995 amendment to §775.021(1) applied retroactively. Respondent does not agree that the trial court found that the 1995 amendment to §775.021(1) applied retroactively. See Gross v. State, 820 So. 2d 1043, 1045 (Fla. 4th DCA 2002), rev. granted, 837 So. 2d 409 (Fla. 2003).

SUMMARY OF THE ARGUMENT

I

In light of a recent opinion from the Second District, this Court should reconsider its decision to accept jurisdiction, and dismiss this case.

Petitioner’s claim is not cognizable under Fla. R. Crim. P. 3.800(a) as his sentence is not illegal. Applying the guidelines in effect at the beginning of a continuing criminal episode does not violate the ex post facto clause.

The portion of Cairl v. State, 833 So. 2d 312 (Fla. 2d DCA 2003) applying the rule of lenity does not support Petitioner’s position. Cairl, unlike the present case, did not involve a true continuing criminal enterprise spanning two dates. Rather, the State alleged a broad range of dates within which two single offenses occurred.

ARGUMENT

POINT I (REPHRASED)

THE FOURTH DISTRICT PROPERLY FOUND THAT PETITIONER'S SENTENCE WAS NOT ILLEGAL.

JURISDICTION

The Fourth District's opinion in this case disagreed with the Second District's decision in Hankin v. State, 682 So. 2d 602 (Fla. 2d DCA 1996), receded from by Cairl v. State, 833 So. 2d 312 (Fla. 2d DCA 2003). The Fourth District found that the Hankin case had misconstrued this Court's holding in Puffinburger v. State, 581 So. 2d 897 (Fla. 1991) to mandate the use of the guidelines in effect at the end of a criminal enterprise. The District Court found that while Puffinburger allowed the use of the guidelines in effect at the end of the criminal enterprise, it did not mandate their use. This Court apparently accepted jurisdiction based on a conflict between Hankin and the present case. However, after the jurisdictional briefs were filed, but before this Court accepted jurisdiction, the Second District issued Cairl v. State, 833 So. 2d 312 (Fla. 2d DCA 2003). In Cairl, the Second District receded from Hankin:

> However, we know conclude that Hankin applies an overly expansive reading of Puffinberger.
>
> * * *
>
> Thus, contrary to what we stated in

> Hankin, Puffinberger does not mandate the use of the guidelines in effect at the end of a time frame such as that alleged in Cairl's information.

833 So. 2d at 313.

Contrary to Petitioner's contention, there is clearly no conflict between Puffinberger and the Fourth District's opinion in this case. As explained by the Fourth District in Gross and the Second District in Cairl, the Puffinberger opinion did not mandate the use of the guidelines at the end of a continuing criminal episode. Puffinberger merely held it was not *ex post facto* violation to apply those guidelines. In light of the Second District's opinion in Cairl, any conflict no longer exists and this Court should decline to accept jurisdiction. See State v. Walker, 593 So. 2d 1049 (Fla. 1992)(dismissal proper where later determined there was no conflict at time Florida Supreme Court accepted jurisdiction) and Bailey v. Hough, 441 So. 2d 614 (Fla. 1983)(review denied where Florida Supreme Court accepted jurisdiction based on claimed conflict which was later found to no longer exist).

MERITS

Initially, Respondent notes that this claim was properly denied as it was not cognizable under Fla. R. Crim. P. 3.800(a). That rule covers only illegal sentences, sentences

that do not award proper credit for time served, or an incorrect calculation made in the sentencing guidelines scoresheet. Petitioner's claim does not fall within the rule. His sentence is within the statutory maximum and is not illegal. See Carter v. State, 786 So. 2d 1173, 1181 (Fla. 2001)(a sentence is "illegal" if it "imposes a kind of punishment that no judge under the entire body of sentencing statutes could possibly inflict under any set of factual circumstances.").

Petitioner is also not claiming an incorrect calculation in the scoresheet. See Marciniak v. State, 754 So. 2d 877 (Fla. 1st DCA 2000)(with the exception of calculation errors in a sentencing guideline scoresheet, a motion to correct an illegal sentence may not be used to correct sentencing guideline errors). On the contrary, he is making a legal argument. Petitioner is claiming that using the scoresheet in effect when a continuing crime has been committed but is ongoing and not completed, was somehow improper. As this claim does not fall within Fla. R. Crim. P. 3.800(a), the motion was properly denied regardless of the trial court's reasoning. See McBride v. State, 524 So. 2d 1113 (Fla. 4th DCA 1988) (trial court's ruling will be upheld if right for any reason).

Assuming arguendo, that this claim is cognizable here, Petitioner's contention that it was somehow an *ex post facto* violation to apply the statute in effect at the time the crime was committed but not completed, is without merit. Interestingly, in the continuing crime context, defendants normally claim (albeit unsuccessfully) the opposite (*i.e.*, that it is an *ex post facto* violation to apply the statute in effect at the end of a continuing crime rather than the statute in effect when the crime is first committed). See, e.g., Puffinberger v. State, 581 So. 2d 897 (Fla. 1991) and United States v. Kramer, 955 F. 2d 479, 485 (1992) and cases cited therein.

Contrary to the suggestion in Petitioner's brief, Puffinberger v. State, 581 So. 2d 897 (Fla. 1991), does not stand for the proposition that the ending date of a continuing crime must be used in determining the applicable guidelines. This was acknowledged in Cairl and the Fourth District's opinion in this case. Puffinburger simply held that it was not an *ex post facto* violation to use the ending date. It did not mandate that the ending date be used.

The guidelines used were in effect at the time Petitioner committed his crimes. It was not an *ex post facto* violation or any kind of a violation to use the earlier guidelines.

See United States v. De Simone, 468 F.2d 1196, 1199-1200 (2d Cir. 1972)(the fact that a criminal extends his crime spree for an additional period should not be grounds for him to demand a more lenient sentence as a matter of right). Cf. Armor Packing Co. v. United States, 209 U.S. 56, 74 (1908)(in venue context holding that a continuing offense may be punished at the beginning, middle or end); State v. Cogswell, 521 So. 2d 1081, 1082 (Fla. 1986)(where defendant's conduct falls under more than one statute, it is within the prosecutor's discretion which violations to prosecute and hence which range of penalties to visit upon the offender); United States v. Batchelder, 442 U.S. 114 (1979)("[T]here is no appreciable difference between the discretion a prosecutor exercises when deciding whether to charge under one of two statutes with different elements and the discretion he exercises when choosing one of two statutes with identical elements."); Langdon v. State, 330 So. 2d 804, 805 (Fla. 3d DCA 1976)(trial court has discretion to impose any legal sentence even if alternative statute provides for lesser sentence).

The Fourth District correctly determined that Puffinberger did not mandate the use of the later guidelines. See also Nolte v. State, 726 So. 2d 307, 308 (Fla. 2d DCA

1998)("Disposition of a case on appeal 'should be made in accord with the law in effect at the time of the appellate court's decision rather than the law in effect at the time the judgment appealed was rendered.' Hendeles v. Sanford Auto Auction, Inc., 364 So.2d 467, 468 (Fla.1978)") and Gross v. State, 765 So. 2d 39, 47 n. 7 (Fla. 2000)(any error in trial court's failure to follow controlling law was harmless where appellate court determined controlling law was incorrect).

Rule of Lenity

Gross next claims that his sentence violates the rule of lenity. Again, his sentence was within the statutory maximum for his crimes and is not cognizable under Rule 3.800(a). Moreover, as found by the Fourth District the rule of lenity has no application here.

Petitioner's reliance on Cairl is misplaced. Cairl, unlike this case, did not involve a Rule 3.800(a) motion. Cairl, unlike this case, also did not involve true continuing crimes. In Cairl the defendant committed two single offenses alleged to have occurred at some unspecified time during a six year period. Id. at 313. Three different versions of the guidelines were in effect during that period. Neither the evidence nor the verdict pinpointed the dates of the

crimes. The Second District, citing various cases, found that under those circumstance the defendant was entitled to be sentenced under the guidelines providing the lowest score[1].

In contrast, this case involves true continuing crimes committed during the effective date of two versions of the guidelines. Petitioner acknowledges that the crimes in this case spanned the effective date of two guidelines statutes (initial brief pp. 2, 3, 5, 7). Under these circumstances neither the law, equity, or logic dictate entitlement to application of the guidelines resulting in the lowest sentence. Petitioner should not be rewarded because he chose to extend his crime spree. See United States v. De Simone, 468 F.2d 1196, 1199-1200 (2d Cir. 1972)(the fact that a criminal extends his crime spree for an additional period should not be grounds for him to demand a more lenient sentence as a matter of right).

Finally, Apprendi v. New Jersey, 530 U.S. 466 (2000) has no application in this case. Apprendi is inapplicable unless a sentence exceeds the statutory maximum. Id. at 490. It

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[1]Respondent does not agree that the rule of lenity is applicable in cases such as Cairl. The rule of lenity involves statutory construction when a statute is found to be ambiguous. See Section 775.021(1) Fla. Stat. (2001). The statutes involved in Cairl were not found to be ambiguous.

also does not apply retroactively. See Hughes v. State, 826 So. 2d 1070 (Fla. 1st DCA), rev. granted, 837 So. 2d 1040 (Fla. 2003). Additionally, the dates spanning the two crimes were charged in the information (R 1-24) and Petitioner was found guilty of those offenses. Furthermore, this argument was not made below. In fact, Petitioner acknowledges that the continuing crimes in question were committed over a period encompassing two versions of the guidelines (initial brief p. 19).

CONCLUSION

Given the Second District's opinion receding from Hankin, this Court should decline to accept jurisdiction. If this Court accepts jurisdiction, it should affirm the decision of the Fourth District.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that a true copy of this document has been sent by mail to: Samuel R. Halpern, 2856 E. Oakland Park Blvd., Fort Lauderdale, FL 33306, this ____ day of March 2003.

____

Of Counsel

CERTIFICATE OF TYPE AND STYLE

I certify that Respondent's answer brief conforms to the Administrative Order dated July 13, 1998. This brief is typed using 12 point Courier New type, a font that is not spaced proportionately.