IN THE SUPREME COURT OF FLORIDA

GEORGE I. WRIGHT,

PETITIONER,

v. **CASE NO.:SC04-137**
DCA CASE No.:2D03-3165

STATE OF FLORIDA,

RESPONDENT.

_____/

ON PETITION FOR REVIEW FROM
THE SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA

RESPONDENT'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

In 1979, Petitioner pleaded guilty to armed robbery counts in two separate cases (L.T. Case Numbers 79-4802 and 79-4803). (R. 11-22). The offenses occurred in 1979. (R. 17-21). In each case, the trial court sentences Petitioner to 75 years incarceration. (R. 8-9). The sentences were to run concurrent, and in each case the trial court retained jurisdiction over one-third of the sentence. It is unclear based upon the existing record what, if any, reasons were given for the trial court's retention of jurisdiction.

On May 30, 2002, Petitioner filed a *pro se* Florida Rule of Criminal Procedure 3.800(a) motion to correct his alleged illegal sentences. (R. 2-7). In his motion, Petitioner raised two issues: 1) The one-third jurisdiction retention should have only been applied to one of the 75 year sentences in accordance with section 947.16(3), Florida Statutes (Supp. 1978). Erroneously, it was applied to both cases; and 2) Because the record fails to show the court stated the reasons for retention of jurisdiction via Order of Particularity, nor orally on the record, the sentence is illegal pursuant to section 947.16(3)(a), Florida Statutes (Supp. 1978). (R. 4-5).

On June 6, 2002, through two orders, the trial court granted Petitioner's 3.800(a) motion in part and denied it in

part. (R. 30-34). As to Petitioner's first claim, the trial court granted Petitioner relief and relinquished jurisdiction over case number 79-4803. (R. 31). As to Petitioner's second claim, the trial court stated it was unclear from the record what reasons were given for the court's retention of jurisdiction, and that a hearing would probably be necessary in order to determine this. (R. 30). In any case, the trial court stated Petitioner's second claim was procedurally barred because the Second District Court of Appeal in King v. State, 805 So.2d 966 (Fla. 2d DCA 2001), and Mobley v. State, 590 So.2d 1023 (Fla. 2d DCA 1991), has held that this type of claim should have been brought on direct appeal and not in a motion to correct illegal sentence. (R. 30).

Thereafter, Petitioner appealed the trial court's June 6, 2002, orders in case number 2D03-3165. (R. 64-79). In his initial *pro se* brief, Petitioner raised the following two claims:

> 1). WHETHER TRIAL COURT ERRED IN FAILING TO REVIEW APPELLANT'S COMPLETE COURT FILE AND DEEM HIS PLEA AS INVALID AS HIS PLEA WAS THE PRODUCT OF AN ILLEGAL SENTENCE WHEN GRANTING HIS FLA. R. CRIM. P. 3.800(a) MOTION.
>
> 2). WHETHER TRIAL COURT ERRED IN RULING THAT APPELLANT'S CLAIM CONCERNING TRIAL COURT'S RETENTION OF JURISDICTION WITHOUT A PARTICULARITY ORDER IS PROCEDURALLY BARRED.

(R. 65).

On December 31, 2003, in an en banc decision, the Second

District affirmed the trial court's granting of relief on Petitioner's first 3.800(a) motion claim without discussion in Wright v. State, 864 So.2d 1153 (Fla. 2d DCA 2003)(en banc). The court in Wright likewise affirmed the trial court's denial of Petitioner's second claim holding Petitioner's challenge to the trial court's failure to provide reasons for retaining jurisdiction over sentencing was not a cognizable claim by way of motion to correct illegal sentence. Id. In so holding, the Second District receded from its opinion in King v. State, 835 So.2d 1224 (Fla. 2d DCA 2003), and certified conflict with decisions of the First, Third, and Fourth Districts which hold a defendant may raise, pursuant to a motion to correct illegal sentence, the legal sufficiency of sentencing orders retaining jurisdiction over one-third of a sentence.

Thereafter, Petitioner petitioned this Court to review the Second District's en banc decision. This Court has postponed its decision on jurisdiction, ordered a briefing schedule, and appointed opposing counsel to represent Petitioner. Respondent's brief is filed pursuant to this Court's July 12, 2004, Order.

SUMMARY OF THE ARGUMENT

ISSUE I: Petitioner argues the trial court's alleged failure to comply with the statutory justification requirement which permits a court to retain jurisdiction over one-third of a defendant's sentence results in an illegal sentence that can be corrected at any time under Florida Rule of Criminal Procedure 3.800(a).

Based upon this Court's holdings in Davis v. State, 661 So.2d 1193, 1196 (Fla. 1995), and Maddox v. State, 760 So.2d 89, 107-08 (Fla. 2000), Respondent submits the Second District Court of Appeal correctly determined a trial court's failure to provide reasons for retaining jurisdiction over sentencing does not result in an illegal sentence. Thus, relief via a 3.800(a) motion to correct an illegal sentence is unavailable.

ISSUE II: Petitioner challenges the constitutionality of section 947.16(3), Florida Statutes (Supp. 1978). Respondent notes this issue was never raised in the trial court nor was the issue raised for the first time on direct appeal to the appellate court below as a matter of fundamental error. Consequently, this issue is not properly before this Court. Furthermore, this Court should adhere to the doctrine of stare decisis and affirm the statute's constitutionality as

determined in Borden v. State, 402 So.2d 1176 (Fla. 1981).

ARGUMENT

ISSUE I

WHETHER A RULE 3.800(a) MOTION TO CORRECT ILLEGAL SENTENCE IS A PROPER VEHICLE TO CHALLENGE THE LEGAL SUFFICIENCY OF AN ORDER RETAINING JURISDICTION OVER ONE-THIRD OF A DEFENDANT'S SENTENCE.

(As restated by Respondent)

Petitioner argues the trial court's alleged failure to comply with the statutory justification requirement which permits a court to retain jurisdiction over one-third of a defendant's sentence results in an illegal sentence that can be corrected at any time under Florida Rule of Criminal Procedure 3.800(a). According to Petitioner, such an error is patent and identifiable without an evidentiary hearing; under no set of facts would the retention of jurisdiction be proper; and the erroneous reservation of jurisdiction creates an ongoing violation of the separation of powers provision set forth in article II, section 3, of the Florida Constitution. (Petitioner's Initial Brief at 8-21).

Based upon this Court's holdings in Davis v. State, 661 So.2d 1193, 1196 (Fla. 1995), and Maddox v. State, 760 So.2d 89, 107-08 (Fla. 2000), Respondent contends the Second District Court of Appeal properly held that a challenge to a trial court's failure to provide reasons for retaining jurisdiction over sentencing is not a cognizable claim by way

of Florida Rule of Criminal Procedure 3.800(a) motion to correct an illegal sentence. The standard of review involving pure questions of law is de novo. See e.g., Armstrong v. Harris, 773 So.2d 7, 11 (Fla. 2000).

In 1979, Petitioner pleaded guilty to armed robbery counts in two separate cases. In each case, the trial court sentenced Petitioner to 75 years incarceration. The sentences were to run concurrent, and in each case the trial court retained jurisdiction over one-third of the sentence. On May 30, 2002, Petitioner filed a Rule 3.800(a) motion to correct illegal sentence. Petitioner's second claim argued his sentence was illegal because the trial court retained jurisdiction over one-third of Petitioner's sentence without stating sufficient reasons for doing so as required pursuant to section 947.16(3)(a), Florida Statutes (Supp. 1978).

In its order denying Petitioner relief, the trial court below acknowledged that in Macias v. State, 614 So.2d 1216 (Fla. 3rd DCA 1993), and Hampton v. State, 764 So.2d 829 (Fla. 1st DCA 2000), sister appellate courts in Florida have held a claim challenging the legal sufficiency of an order retaining jurisdiction over one-third of a sentence may be raised in a rule 3.800(a) motion. (R. 30). However, the court below noted those cases were distinguishable from the instant case because the reasons given for retention of jurisdiction were readily

available in court files. In Petitioner's case by contrast, it was unclear from the record what, if any, reasons were given for the court's retention of jurisdiction, and that a hearing would probably be necessary in order to determine this.

Notwithstanding this fact, the trial court further concluded Petitioner's claim was procedurally barred because the Second District Court of Appeal in King v. State, 805 So.2d 966 (Fla. 2d DCA 2001), and Mobley v. State, 590 So.2d 1023 (Fla. 2d DCA 1991), held that this type of claim should be brought on direct appeal and not in a motion to correct illegal sentence.

Thereafter, on December 31, 2003, in an en banc decision, the Second District affirmed the trial court's decision to deny Petitioner relief based upon the instant claim. In Wright v. State, 864 So.2d 1153 (Fla. 2d DCA 2003)(en banc), the appellate court held Petitioner's challenge to the trial court's failure to provide reasons for retaining jurisdiction over sentencing was not a cognizable claim by way of motion to correct illegal sentence. In so holding, the Second District receded from its earlier opinion in King v. State, 835 So.2d 1224 (Fla. 2d DCA 2003), and certified conflict with decisions of the First, Third, and Fourth Districts which hold a defendant may raise, pursuant to a motion to correct illegal

sentence, the legal sufficiency of sentencing orders retaining jurisdiction over one-third of a sentence. See Kirtsey v. State, 855 So.2d 177 (Fla. 1st DCA 2003); Hernandez v. State, 825 So.2d 513 (Fla. 4th DCA 2002); Hampton v. State, 764 So.2d 829 (Fla. 1st DCA 2000); Macias v. State, 614 So.2d 1216 (Fla. 3d DCA 1993).

In King, supra, the Second District held that a rule 3.800(a) motion is a proper vehicle to challenge the trial court's reservation of jurisdiction over a sentence. The same court, however, receded from its previous holding concluding the decision in King is inconsistent with the Florida Supreme Court's continually refined definition of an illegal sentence. Wright, at 1154. In so ruling, the Second District took note that in Davis v. State, 661 So.2d 1193, 1196 (Fla. 1995), receded from in part on other grounds, and Mack v. State, 823 So.2d 746, 748 (Fla. 2002), this Court held that an illegal sentence is one that exceeds the maximum period set forth by law for a particular offense without regard to the guidelines. Pursuant to this language, the Davis Court held that failure to file written findings for a departure sentence does not constitute an illegal sentence, thus, is not subject to challenge under rule 3.800(a). Davis, supra, at 1196-97.

In the instant case, the district court below did recognize that in State v. Mancio, 714 So.2d 429, 433 (Fla.

1998), this Court expanded the definition of an illegal sentence to include a sentence that patently fails to comport with statutory or constitutional limitations. For example, the failure to credit a defendant with jail time served constituted an "illegal" sentence that should be corrected pursuant to rule 3.800(a). Even so, the district court below, following Davis, supra, continued to hold that a challenge to departure reasons is not cognizable in a rule 3.800(a) motion. See e.g. Williams v. State, 734 So.2d 1113 (Fla. 2d DCA 1999).

In Maddox v. State, 760 So.2d 89, 107-08 (Fla. 2000), this Court again addressed the issue of what constitutes an "illegal sentence." To this end, the Maddox court held the failure to file written departure reasons is a fundamental error for purposes of direct appeal. Importantly, however, as the district court below noted, the Maddox court did not recede from its previous holding in Davis that failure to file written reasons for a departure sentence does not constitute an illegal sentence. Wright, at 1155. By analogy, the Second District in the instant case concluded a challenge to the sufficiency of the reasons for a trial court's retention of jurisdiction is comparable to a challenge to a trial court's failure to provide departure reasons for a sentence.

Recent cases by this Court support the Second District's conclusion in the instant case. For example, it appears this

Court has retreated from its definition of illegal sentence as formulated in Mancio, supra. In Carter v. State, 786 So.2d 1173 (Fla. 2001), this court observed the Mancio definition, "patently fails to comport with statutory or constitutional limitations" may be overly broad because it encompasses all patent sentencing errors. Carter, at 1178. As this Court in Carter stated:

> We continue to refine our definition of "illegal sentence" in an attempt to strike the proper balance between concerns for finality and concerns for fundamental fairness in sentencing. In this endeavor, we have been assisted ably by the appellate courts, which continue to be confronted daily with the question of what sentences are "illegal" and correctable "at any time" and what sentences, although failing to comply with the law, are not subject to correction.

Carter, at 1178. (emphasis added).

Moreover, in Bover v. State, 797 So.2d 1246, 1251 (Fla. 2001), this Court expressly approved the Second District's decision in Judge v. State, 596 So.2d 73 (Fla. 2d DCA 1992). In that case, the Second District noted:

> Rule 3.800(a) is intended to provide relief for a narrow category of cases in which the sentence imposes a penalty that is simply not authorized by law. It is concerned primarily with whether the terms and conditions of the punishment for a particular offense are permissible as a matter of law. It is not a vehicle designed to re-examine whether the procedure employed to impose the punishment comported with statutory law and due process. Unlike a motion pursuant to rule 3.850, the motion can be filed without an oath because it is designed to test issues that should not involve significant questions of fact or require a lengthy

evidentiary hearing.

Judge, at 77. (emphasis added).

Respondent contends the sentence received by Petitioner in the instant case was not the kind of punishment imposed that no judge under the entire body of sentencing statutes could possibly inflict under any set of factual circumstances. See Blakley v. State, 746 So.2d 1182, 1186-87 (Fla. 4th DCA 1999). Instead, like the facts in Davis, supra, Respondent submits any error by trial court in failing to set forth specific reasons for retaining jurisdiction over Petitioner's sentence was a mere defect in comporting with the statutory procedural safeguards employed as part of the court's discretionary imposition of sentence. Thus, relying on Davis, any failure by the court below to consider the procedural safeguards under section 947.16(3)(a), Florida Statutes (Supp. 1978), does not make Petitioner's sentence "illegal." Compare Lee v. State, 679 So.2d 1158 (Fla. 1996)(Court's erroneous failure to consider whether defendant qualified for discretionary youthful offender sentencing did not render sentence illegal for purposes of Rule 3.800).

Finally, Respondent contends Petitioner's claim, "an erroneous reservation of jurisdiction creates an ongoing violation of the separation of powers provision set forth in article II, section 3, of the Florida Constitution," is

without merit. In Borden v. State, 402 So.2d 1176 (Fla. 1981), this Court recognized the authority of the legislature to set conditions under which parole may be granted. Id. at 1177. Consequently, this Court expressly held the statute permitting a review of parole decisions in certain instances and for a certain period of time is not unconstitutional. Id.

For these reasons, the decision of the Second District Court of Appeal in Wright v. State, 864 So.2d 1153 (Fla. 2d DCA 2003), should be affirmed, and the positions held by the First, Third, and Fourth Districts quashed by this Court.

ISSUE II

PETITIONER'S SENTENCE WAS NOT ILLEGAL BECAUSE THE STATUTE PERMITTING RETENTION OF JURISDICTION OVER PETITIONER'S SENTENCE IS CONSTITUTIONAL.
(As restated by Respondent).

Petitioner argues this Court should recede from its decision in Borden v. State, 402 So.2d 1176 (Fla. 1981), where this Court expressly held the statute permitting a review of parole decisions in certain instances and for a certain period of time is not unconstitutional. (Petitioner's Initial Brief at 21-34).

Respondent notes Petitioner's facial constitutional challenge to section 947.16(3), Florida Statutes (Supp. 1978), was never raised in the trial court nor was the issue raised for the first time on direct appeal to the appellate court below within the context of fundamental error. Compare State v. Johnson, 616 So.2d 1 (Fla. 1993); Heggs v. State, 759 So.2d

620 (Fla. 2000). Consequently, this issue not properly before this Court.

Instead, any constitutional challenge to this statute by Petitioner should follow usual procedures, with the initial challenge proceeding in the proper circuit court. See Memorial Hospital-West Volusia, Inc., v. News-Journal Corporation, 729 So.2d 373, 384 (Fla. 1999). Similarly, despite Petitioner's suggestion his challenge is, in essence, a challenge to the trial court's continuing jurisdiction over the instant case, Respondent submits this Court should not treat the instant proceeding as a petition for writ of prohibition. See e.g. Sparkman v. McClure, 498 So.2d 892 (Fla. 1986)(Supreme Court should not entertain a petition for writ of prohibition filed in place of an appeal or any other appellate remedy).

As previously noted in Issue I of this brief, the Florida Supreme Court has expressly held the statute permitting judicial review of parol decisions in certain instances and for a certain period of time is constitutional. See Borden v. State, 402 So.2d 1176 (Fla. 1981). In the construction of statutes, the rule is almost invariably to adhere to the doctrine of stare decisis, since it is of the utmost importance the statutory law be of certain meaning and fixed interpretation. See Old Plantation Corp. V. Maule Industries, Inc., 68 So.2d 180 (Fla. 1953). It follows, Petitioner has

failed to clearly show how this Court's legal analysis in holding the instant statute constitutional was so clearly erroneous as to require this Court to retreat from twenty-three years of precedence. See also Harmon v. State, 438 So.2d 369 (Fla. 1983); Springfield v. State, 443 So.2d 484 (Fla. 1984).

Accordingly, the decision of the Second District should be affirmed, and the positions held by the First, Third, and Fourth Districts quashed by this Court.

CONCLUSION

Based on the foregoing discussions, the State respectfully requests this Honorable Court approve the opinion of the district court below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Matthew J. Conigliaro, Hunter W. Carroll, Carlton Fields, P.A., Post Office Box 2861, St. Petersburg, Florida 33731-2861; and George Wright, DC# 071922, C2-2040L, Martin Correctional Institution, 1150 S.W. Allapattah Road, Indiantown, Florida 34956, this ____ day of October, 2004.

_____
COUNSEL FOR RESPONDENT

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

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COUNSEL FOR RESPONDENT