

IN THE SUPREME COURT OF THE STATE OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

CASE NO. SC04-379

DAVID ALLEN FULLER,

Respondent.

_____ /

ON DISCRETIONARY REVIEW FROM THE
FIFTH DISTRICT COURT OF APPEAL

PETITIONER'S INITIAL BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Fuller's offenses were committed on or about July 5, 1991. (R51, FN1). On May 28, 1993, Fuller was convicted by a jury of one count of attempted armed robbery with a firearm while wearing a mask, two counts of aggravated assault with a firearm while wearing a mask, one count of aggravated battery, and one count of possession of a firearm by a convicted felon. (R45). On July 21, 1993, the trial court adjudicated Fuller guilty and sentenced Fuller as follows:

- I. Attempted armed robbery with a firearm while wearing a mask: life as an habitual felony offender
- II. Aggravated assault with a firearm while wearing a mask: 15 years incarceration
- III. Aggravated assault with a firearm while wearing a mask:
15 years incarceration
- IV. Aggravated battery with a firearm while wearing a mask:
15 years incarceration
- V. Possession of a firearm by a convicted felon: 15 years probation as an habitual offender.

The trial court ordered Fuller's sentence in count V to run consecutive to the sentences imposed in counts I-IV. (R45). On

direct appeal, Fuller's judgment and sentences were *per curiam* affirmed. See Fuller v. State, 638 So. 2d 75 (Fla. 5th DCA 1994).

In 1998, Fuller filed a motion for correction of sentence, arguing two grounds: (1) that he was illegally sentenced when the trial court imposed both an habitual offender and the mask enhancement on count I; and (2) that he was improperly sentenced to a consecutive term of 15 years probation as an habitual offender on count V. (R50). The trial court granted Fuller relief on his first claim and ordered that Fuller be resentenced on Count I. (R51-52). On Fuller's second claim, the trial court ruled that Fuller's claim was not cognizable in a Rule 3.800(a) motion. (R51-52). Fuller was subsequently resentenced to 30 years in prison as an habitual offender on Count I on January 19, 1999, without the use of mask enhancement. (R54-58). Fuller appealed and the Fifth District Court *per curiam* affirmed Fuller's sentence. See Fuller v. State, 743 So. 2d 529 (Fla. 5th DCA 1999).

After his convictions were affirmed and before the instant motion, Fuller filed several post-conviction motions which were *per curiam* affirmed by the Fifth District Court on appeal. See Fuller v. State, 688 So. 2d 932 (Fla. 5th DCA 1997); Fuller v. State, 795 So. 2d 76 (Fla. 5th DCA 2001); Fuller v. State, 812 So. 2d 429 (Fla. 5th DCA 2002).

On August 29, 2002, Fuller filed the instant motion for post-conviction relief.¹ (R12). In his motion, Fuller asserted that he was seeking to have his January 19, 1999, sentence overturned because he was improperly sentenced to consecutive habitual offender sentences. (R18). In its response to Fuller's 3.850 motion, the State urged the trial court to treat the illegal sentence claim as a motion to correct illegal sentence pursuant to Florida Rule of Criminal Procedure 3.800(a). (R28). As to that claim, the State acknowledged that pursuant to Hale,² a defendant may not be sentenced to consecutive habitual offender sentences. (R28-29). Additionally, the State argued that the court should not revisit the 1999 resentencing on count I as it was a discretionary matter whether to impose an habitual offender sentence and the claim was both procedurally and time barred. Id.

A hearing was held on March 6, 2003, at which Fuller was represented by counsel. (T1,5). Initially, the trial court summarized Fuller's arguments, i.e., that his habitual offender

¹Under Florida Rule of Appellate Procedure 9.420, also known as the "mailbox rule," a *pro se* motion is deemed filed on the date the inmate relinquished control of the document to State officials for delivery. Haag v. State, 591 So. 2d 614, 617 (Fla. 1992). In addition, the date reflected on the certificate of service is presumed to be the date on which the document is filed. Thompson v. State, 761 So. 2d 324, 326 (Fla. 2000).

²Hale v. State, 630 So. 2d 521 (Fla. 1993).

sentence, including the probationary term imposed in count V, should run concurrently with count I, and the habitual offender designation in count I should be set aside and Fuller resentenced to a guidelines sentence applying only the use of mask enhancement. (T7). Defense counsel agreed with the court's assessment and reiterated that the only remedy was to sentence Fuller in count V to an incarcerative term. Id.

In response, the State suggested the trial court remove the habitual felony offender designation in count V in order to cure the Hale problem and allow the sentence to remain consecutive to count I. Fuller complained that back in 1999, the trial court should have eliminated the habitual felony designation rather than the mask enhancement in count I. (T8-9). Fuller also argued that the only lawful remedy for the Hale violation would be to impose count V concurrently with count I. (T9).

Subsequently, the trial court issued an order amending Fuller's sentence to reflect a sentence of 15 years probation without the habitual offender classification. (R46-47). Specifically, the trial court found:

TRIAL COURT: The Court finds that it has two choices: (1) resentence Defendant, on Count V, to a term of incarceration, to run concurrent; or (2) remove the habitual offender designation from Count V. The Court does not believe that this second alternative would be a violation of Hale because a Hale error is when two offenses,

committed within the same criminal episode, are both enhanced by being classified as "habitual offender" sentences and then ordered to run consecutive. See Hale v. State, 630 So. 2d 521 (Fla. 1993). A Hale error does not exist if Defendant is sentenced to a term of habitual offender incarceration on one count and probation on another count. Id. As long as the probation is also not classified as a "habitual offender" sentence [sic]. Id. Therefore, Defendant's sentence is hereby amended to reflect a sentence of fifteen (15) years probation on Count V. The habitual offender classification shall be removed from the sentence in Count V. The Clerk of the Court shall prepare an amended probation order to reflect this ruling.

(R47). Fuller appealed and argued that: (1) the resentencing was illegal in that the only lawful remedy was the imposition of an incarcerative sentence in count V to run concurrent with count I; (2) the trial court erred by finding his second ground time barred; (3) his resentencing in 1999 was improper in that the trial court should have set aside the habitual felony offender designation rather than the use of a mask enhancement; (4) the hybrid sentence, part habitual part guidelines, was illegal; and (5) the sentence violated section 921.16, Florida Statutes, which requires sentences for offenses charged in the same information to be served concurrently. (IB 1-42).

In its answer brief, the State argued that the sentences were proper in that the trial court had the discretion to either eliminate the habitual felony offender designation or the use of

mask enhancement, and the so-called hybrid sentence was lawful. (AB 5-7). Pursuant to the order of the Fifth District Court to supplement its answer brief and address Canavan v. State, 842 So. 2d 306 (Fla. 5th DCA 2003), the State filed a supplemental brief distinguishing Canavan from Hale, where, as here, the consecutive probationary sentence was not as an habitual felony offender. (SB 2).

The Fifth District Court issued an opinion on February 6, 2004, concluding that Canavan controlled and certifying conflict with Davis v. State, 710 So. 2d 1051 (Fla. 1st DCA 1998). The district court found its Canavan opinion mandated by Hale, explaining that the purpose of Hale was to prevent consecutive sentencing arising from a single criminal episode where an appellant has been sentenced as an habitual felony offender.

The State filed a notice to invoke discretionary jurisdiction based upon the certification of conflict by the district court with Davis v. State, 710 So. 2d 1051 (Fla. 1st DCA 1998). This Court has postponed a decision on jurisdiction pursuant to an order issued on March 16, 2004.

SUMMARY OF ARGUMENT

This Court clearly has conflict jurisdiction and should quash the opinion in Fuller, infra, and affirm the sentences imposed in both Fuller, and Davis v. State, 710 So. 2d 1051 (Fla. 1st DCA 1998). Upon resentencing in 2003, Fuller received a guidelines term of fifteen years probation in count V upon his conviction for possession of a firearm by a convicted felon. Davis is in harmony with Hale, whereas the Fifth DCA's holding in Fuller goes against public policy by allowing first time offenders or non-habitualized offenders to receive longer sentences than habitualized offenders. Clearly, the legislature could not have intended such an absurd result. This Court should affirm the sentences imposed in both Fuller and Davis.

ARGUMENT

POINT ON APPEAL

THIS COURT SHOULD ACCEPT JURISDICTION AND OVERRULE FULLER, INFRA, WHEREIN THE FIFTH DISTRICT COURT OF APPEAL FOUND A HALE VIOLATION BASED ON THE IMPOSITION OF A NON-HABITUAL FELONY PROBATIONARY SENTENCE CONSECUTIVE TO AN HABITUAL OFFENDER INCARCERATIVE SENTENCE.

In Fuller v. State, 867 So. 2d 469 (Fla. 5th DCA 2004), the Fifth District Court of Appeal (DCA) concluded that based upon its opinion in Canavan v. State, 842 So. 2d 306 (Fla. 5th DCA 2003), a non-habitual felony sentence imposed consecutively to an habitual felony incarcerative sentence on one or more counts arising from a single criminal episode violates Hale v. State, 630 So. 2d 521 (Fla. 1993). Id. at 470. In its Fuller opinion, the Fifth DCA certified conflict with Davis v. State, 710 So. 2d 1051 (Fla. 1st DCA 1998).

This Court has jurisdiction under article V, section (3)(b)(3) of the Florida Constitution where a decision of a district court "expressly and directly conflicts" with a decision of this Court or another district court. This Court has repeatedly held that such conflict must be express and direct, that is, "it must appear within the four corners of the majority decision." Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986).

Here, this Court has conflict jurisdiction because in Davis, the First DCA upheld a sentence identical to the one disapproved in Fuller, i.e., a non-habitual term of probation imposed consecutively to the habitual offender incarcerative sentence in another count arising out of a single criminal episode. Id.

The facts of the underlying case are not in dispute. On May 28, 1993, Fuller was convicted by a jury of one count of attempted armed robbery with a firearm while wearing a mask, two counts of aggravated assault with a firearm while wearing a mask, one count of aggravated battery, and one count of possession of a firearm by a convicted felon. On July 21, 1993, the trial court adjudicated Fuller guilty and sentenced Fuller as follows:

- I. Attempted armed robbery with a firearm while wearing a mask: life as an habitual felony offender
- II. Aggravated assault with a firearm while wearing a mask: 15 years incarceration
- III. Aggravated assault with a firearm while wearing a mask:
15 years incarceration
- IV. Aggravated battery with a firearm while wearing a mask:
15 years incarceration

V. Possession of a firearm by a convicted felon: 15 years probation as an habitual offender.

The trial court ordered Fuller's sentence in count V to run consecutive to the sentences imposed in counts I-IV. On direct appeal, Fuller's judgment and sentences were *per curiam* affirmed. See Fuller v. State, 638 So. 2d 75 (Fla. 5th DCA 1994).

In 1998, Fuller filed a motion for correction of sentence, arguing two grounds: (1) that he was illegally sentenced when the trial court imposed both an habitual offender and the mask enhancement on count I; and (2) that he was improperly sentenced to a consecutive term of 15 years probation as an habitual offender on count V. The trial court granted Fuller relief on his first claim and ordered that Fuller be resentenced on Count I. On Fuller's second claim, the trial court ruled that Fuller's claim was not cognizable in a Rule 3.800(a) motion. Fuller was subsequently resentenced to 30 years in prison as an habitual offender on Count I on January 19, 1999. Fuller appealed and the Fifth District Court *per curiam* affirmed Fuller's sentence. See Fuller v. State, 743 So. 2d 529 (Fla. 5th DCA 1999).

On August 29, 2002, Fuller filed the instant motion for post-conviction relief. In his motion, Fuller asserted that he was seeking to have his January 19, 1999, sentence overturned because he was improperly sentenced to consecutive habitual

offender sentences. In its response to Fuller's 3.850 motion, the State urged the trial court to treat the illegal sentence claim as a motion to correct illegal sentence pursuant to Florida Rule of Criminal Procedure 3.800(a). As to that claim, the State acknowledged that pursuant to Hale, a defendant may not be sentenced to consecutive habitual offender sentences. Additionally, the State argued that the court should not revisit the 1999 resentencing on count I as it was a discretionary matter whether to impose an habitual offender sentence and the claim was both procedurally and time barred.

A hearing was held on March 6, 2003, at which Fuller was represented by counsel. Initially, the trial court summarized Fuller's arguments, i.e., that his habitual offender sentence, including the probationary term imposed in count V, should run concurrently with count I, and the habitual offender designation in count I should be set aside and Fuller resentenced to a guidelines sentence applying only the use of mask enhancement. Defense counsel agreed with the court's assessment and reiterated that the only remedy was to sentence Fuller in count V to an incarcerative term.

In response, the State suggested the trial court remove the habitual felony offender designation in count V in order to cure the Hale problem and allow the sentence to remain consecutive to

count I. Fuller complained that back in 1999, the trial court should have eliminated the habitual felony designation rather than the mask enhancement in count I. Fuller also argued that the only lawful remedy for the Hale violation would be to impose count V concurrently with count I.

Subsequently, the trial court issued an order amending Fuller's sentence to reflect a sentence of 15 years probation without the habitual offender classification. Specifically, the trial court found:

TRIAL COURT: The Court finds that it has two choices: (1) resentence Defendant, on Count V, to a term of incarceration, to run concurrent; or (2) remove the habitual offender designation from Count V. The Court does not believe that this second alternative would be a violation of Hale because a Hale error is when two offenses, committed within the same criminal episode, are both enhanced by being classified as "habitual offender" sentences and then ordered to run consecutive. See Hale v. State, 630 So. 2d 521 (Fla. 1993). A Hale error does not exist if Defendant is sentenced to a term of habitual offender incarceration on one count and probation on another count. Id. As long as the probation is also not classified as a "habitual offender" sentence [sic]. Id. Therefore, Defendant's sentence is hereby amended to reflect a sentence of fifteen (15) years probation on Count V. The habitual offender classification shall be removed from the sentence in Count V. The Clerk of the Court shall prepare an amended probation order to reflect this ruling.

(R47). Fuller appealed and argued that: (1) the resentencing was

illegal in that the only lawful remedy was the imposition of an incarcerative sentence in count V to run concurrent with count I; (2) the trial court erred by finding his second ground time barred; (3) his resentencing in 1999 was improper in that the trial court should have set aside the habitual felony offender designation rather than the use of a mask enhancement; (4) the hybrid sentence, part habitual and part guidelines, was illegal; and (5) the sentence violated section 921.16, Florida Statutes, which requires sentences for offenses charged in the same information to be served concurrently.

In its answer brief, the State argued that the sentences were proper in that the trial court had the discretion to either eliminate the habitual felony offender designation or the use of mask enhancement, and the so-called hybrid sentence was unlawful. Pursuant to the order of the Fifth District Court to supplement its answer brief and address Canavan v. State, 842 So. 2d 306 (Fla. 5th DCA 2003), the State filed a supplemental brief distinguishing Canavan from Hale, where, as here, the consecutive probationary sentence was not as an habitual felony offender.

The Fifth District Court issued its opinion on February 6, 2004, concluding that Canavan controlled and certifying conflict with Davis v. State, 710 So. 2d 1051 (Fla. 1st DCA 1998). The

district court found its Canavan opinion mandated by Hale, explaining that the purpose of Hale was to prevent consecutive sentencing arising from a single criminal episode where an appellant has been sentenced as an habitual felony offender.

However, Hale v. State, 630 So. 2d 521 (Fla. 1994), which addressed consecutive habitual offender sentences, does not mandate the result in Fuller. On the contrary, the sentences set aside in Fuller and affirmed in Davis are consistent with Hale. In Hale, this Court held:

We find nothing in the language of the habitual offender statute which suggests that the legislature also intended that, once the sentences from multiple crimes committed during a single criminal episode have been enhanced through the habitual offender statutes, the total penalty should then be further increased by ordering that the sentences run consecutively.

Id. at 524.

Both before and since Hale, this Court has held on numerous occasions that where the Legislature's sentencing statutes did not provide for the stacking of enhanced penalties for offenses arising out of a single criminal episode, a trial court may not impose the enhanced penalties consecutively. See, e.g., Palmer v. State, 438 So. 2d 1 (Fla. 1983)(firearm minimum mandatory terms cannot be imposed consecutively for a single episode); Daniels v. State, 595 So. 2d 952 (Fla. 1992)(habitual offender

minimum mandatory terms cannot be imposed consecutively for a single episode); Brooks v. State, 630 So. 2d 527 (Fla. 1993)(habitual offender maximum terms cannot be imposed consecutively for a single episode); Jackson v. State, 659 So. 2d 1060 (Fla. 1995)(minimum mandatory term for possession of a firearm by a convicted felony and habitual offender minimum mandatory sentences cannot be imposed consecutively for a single episode); State v. Hill, 660 So. 2d 1384 (Fla. 1995)(even where sentence imposed is less than guidelines range, habitual offender sentences may not be imposed consecutively for a single episode).

Moreover, the Second and Fifth District Courts of Appeal have consistently found a Hale violation where an habitual offender probationary term is imposed consecutively with an habitual offender incarcerative term. See, e.g., Green v. State, 643 So. 2d 1177 (Fla. 2d DCA 1994); Taylor v. State, 658 So. 2d 635 (Fla. 2d DCA 1995); Benjamin v. State, 667 So. 2d 437 (Fla. 2d DCA 1996); West v. State, 790 So. 2d 513 (Fla. 5th DCA 2001); Johnson v. State, 809 So. 2d 892 (Fla. 2d DCA 2002); Canavan v. State, supra. Implicitly, the Davis court agreed with the holding in these cases by comparing its holding with Benjamin, supra. Davis, 710 So. 2d at 1052. However, these cases plainly are inapposite to the circumstances of the instant case since they involve habitual offender probationary terms running

consecutive to an habitual offender incarcerative term for offenses which arise from the same criminal episode.

Recently, the First District Court issued Kiedrowski v. State, No. 1D02-2554 (Fla. 1st DCA April 28, 2004). In that case, the First District reversed a sentence similar to that imposed herein, i.e., an habitual offender incarcerative sentence followed by a non-habitual offender probationary term. Id. The First DCA distinguished its opinion in Davis by finding a critical distinction, i.e., that Davis was silent regarding whether the combined sentences exceeded the statutory maximum. Id. In Kiedrowski, because appellant's combined sentences exceeded the statutory maximum, the DCA concluded that the sentences violated the "reasoning and spirit of Hale." Id.

Either a sentence violates Hale or it does not. Hale prohibits the imposition of enhanced sentences consecutively for offenses which arise from the same criminal episode. Id. The First DCA's finding in Kiedrowski that such a sentence violates the "spirit" of Hale rather than its express holding is too great an extension of Hale. Where there is no imposition of consecutive enhanced penalties for crimes arising from a single criminal episode, there should be no Hale violation.

The habitual offender statute is a recidivism statute by which the legislature intended to increase the incarceration period for repeat offenders. Hale, 630 So. 2d at 524 (quoting

from Daniels, 595 So. 2d at 954). Fuller creates a contrary result which goes against public policy by allowing the potential for first time offenders to receive longer sentences than repeat offenders or for habitualized offenders to receive less time than non-habitualized offenders. For instance, if a non-habitualized offender had been convicted of three third-degree felonies, he could receive three consecutive five-year sentences. See §§ 921.002(1)(g) & 921.0023(2), Fla. Stat. (2003). But if an offender committed the same crimes and was sentenced as an habitual felony offender for any one of them, the preclusion of consecutive sentences means that offender could only receive three concurrent ten-year sentences. See § 775.084(4)(a)3., Fla. Stat. (2003). Clearly, the legislature could not have intended such an absurd result.

Here, upon resentencing in 2003, Fuller received a guidelines term of fifteen years probation in count V upon his conviction for possession of a firearm by a convicted felon.³ Once the trial court removed the habitual offender designation, the probationary term imposed in count V no longer constituted an enhanced sentence. Fuller's consecutive guidelines probationary term does not violate Hale or the holding in Hale,

³Possession of a firearm by a convicted felon is a second degree felony punishable up to fifteen years incarceration. See §§ 790.23(1) & (3), Fla. Stat. (1991); 775.082(3)(c), Fla. Stat. (1991).

that enhanced sentences may not be imposed consecutively where the offenses arose from a single criminal episode, since the probationary term is not an enhanced sentence. Fuller's sentence should be affirmed.

Based on the foregoing facts and authorities, this Court clearly has conflict jurisdiction and should quash the opinion in Fuller. Davis is in harmony with Hale whereas the Fifth DCA's holding in Fuller goes against public policy by allowing first time offenders or non-habitualized offenders to receive longer sentences than habitualized offenders. As such, the Court should affirm the sentences imposed in both Fuller and Davis.

CONCLUSION

Based on the arguments and authorities presented herein, Petitioner respectfully prays this Honorable Court quash Fuller, infra, and affirm the sentences imposed in both Fuller and Davis.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Merits Initial Brief has been furnished by delivery by U.S. Mail to David Allen Fuller, DOC # 091489, Q3212L, Apalachee Correctional Institution, 35 Apalachee Drive, Sneads, Florida 32460-0699, this 3rd day of May, 2004.

CERTIFICATE OF 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).

Respectfully submitted,

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