IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. SC05-1527

WILMANN RENAUD,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

RESPONDENTS'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the Defendant and Respondent was the prosecution in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida. Petitioner was the Appellant and Respondent was the Appellee in the Fourth District Court of Appeal. In this brief, the parties shall be referred to as they appear before this Honorable Court except that Petitioner may also be referred to as the State.

In this brief, the symbol "A" will be used to denote the appendix attached hereto.

All emphasis in this brief is supplied by Petitioner unless otherwise indicated.

STATMENT OF THE CASE AND FACTS

Below, on or about October 16, 2003 petitioner filed his first 3.850 motion for post conviction relief. On September 29, 2004 petitioner filed a second 3.850 motion, alleging in claim III that there was a discrepancy between the oral and written pronouncements of sentence. The state filed a response arguing that petitioner's claim was procedurally barred as successive because it could have been raised in his first 3.850 motion and that such a claim could not be construed as a rule 3.800(a) claim, because such a claim is not cognizable in motions under 3.800(a). On March 4, 2005, the trial court issued an order finding that claim III of petitioner's 3.850 motion was procedurally barred as it should have been raised in the first 3.850 motion and is not cognizable as a 3.800(a) claim.(3.850 Record on Appeal). On May 25, 2005 the Fourth District Court of Appeal summarily affirmed the trial court's denial of petitioner's successive 3.850 motion (Appendix). This appeal follows.

SUMMARY OF THE ARGUMENT

The Fourth District Court of Appeal properly affirmed the trial court's order summarily denying petitioner's successive 3.850 motion. Moreover, the court properly affirmed the trial court's finding that the motion could not be construed as a 3.800(a) motion as petitioner's claim that the written sentence did not comport with the oral pronouncement is not cognizable under 3.800(a).

ARGUMENT

THE FOURTH DISTRICT COURT OF APPEAL PROPERLY AFFIRMED THE TRIAL COURT ORDER SUMMARILY DENYING RELIEF AS PETITIONER'S CLAIM WAS PROCEDURALLY BARRED (RESTATED).

Petitioner claims that he is entitled to post-conviction relief because there is a discrepancy between the oral and written sentences as to the ten (10) year minimum mandatory. Such a claim is procedurally barred as it was raised in a successive 3.850 motion. Moreover, the claim cannot be reached by construing petitioner's successive 3.850 motion as a 3.800(a) motion because claims of this nature are not cognizable under Rule 3.800(a).

On or about October 16, 2003 petitioner filed his first 3.850 motion for post conviction relief. On September 29, 2004 petitioner filed a second 3.850 motion, alleging in claim III that there was a discrepancy between the oral and written pronouncements of sentence. The state filed a response arguing that petitioner's claim was procedurally barred as successive because it could have been raised in his first 3.850 motion and that such a claim could not be construed as a rule 3.800(a) claim, because such is not an illegal sentence. See Campbell v.

State, 718 So. 2d 886 (Fla. 4th DCA 1998); Rinderer v. State, 857 so. 2d 955 (Fla. 4th DCA 2003); Covell v. State, 891 So. 2d 1132 (Fla. 4th DCA 2005). On March 4, 2005 the trial court entered an order denying relief. On May 25, 2005 this court summarily affirmed the trial court order denying relief.

This court has jurisdiction pursuant to Fla. R. 9.030(a)(2)(A)(vi), to review petitioner's claim that ground III of his post conviction motion is a cognizable claim under rule 3.800(a), as the Fourth District Court of Appeal certified conflict with Fitzpatrick v. State, 863 So. 2d 462 (Fla. 1st DCA 2004), and Berthiaume v. State, 864 So. 2d 1257 (Fla. 5th DCA 2004), as it did in Covell v. State, 891 So. 2d 1132 (Fla. 4th DCA 2005). Each of these cases address whether the claim that there is a discrepancy between the oral pronouncement and written pronouncement of a sentence is cognizable in a 3.800(a) motion.

However, this court should decline to review petitioner's claim that the Fourth District's procedural bar of his claim as successive puts a pro se defendant at a disadvantage, such a claim is beyond the scope of the certified conflict, and this Court should decline to address the merits of that claim. (Merits Brief p. 10), See White v. State, 714 So.2d 440, at 441 (Fla. 1998). Additionally, it is well settled by this Court that

issues which were raised or could have been raised in a prior motion for postconviction relief cannot be litigated in a second 3.850 motion. Marek v. Singletarv, 626 So. 2d 160 (Fla. 1993) Bolender v. State, 658 So. 2d 82 (Fla. 1995). Barring successive motions insures finality and avoids piecemeal litigation. Jones v. State, 591 So. 2d 911 (Fla. 1991).

Turning to the merits, Petitioner's claim that a written sentence is illegal because it does not conform with the oral pronouncement is simply wrong. In Davis v. State, 661 So. 2d 1193 (Fla. 1995), this Court defined an illegal sentence as a sentence that exceeds the statutory maximum. Furthermore, in State v. Mancino, 714 So. 2d 429 (Fla. 1998), this Court expanded the definition of an illegal sentence and found that an illegal sentence is one that patently fails to comport with statutory or constitutional limitations. In Campbell v. State, 718 So. 2d 886 (Fla 4th DCA 1998), the Fourth District Court of Appeal interpreted this Court's definition as set out in Mancino and found the following:

> In Mancino, the Supreme Court explained that "A sentence that patently fails to comport with statutory or constitutional limitations is by definition 'illegal'." Id. at S303. The rule the oral pronouncement of the sentence that controls in the event of a discrepancy between the oral pronouncement and the written sentence is found in the Florida Rules of Criminal Procedure, not the Florida Statutes or the state or federal

> constitutions. Fla. R. Crim. Pro. 3.700(1). If there was an error in Campbell's sentence, it was caused by noncompliance with a procedural rule, and therefore does not result in an "illegal sentence" under the Mancino definition.

Additionally, a sentence is illegal if it imposes a kind of punishment that no judge under the entire body of sentencing statutes could possible inflict under any set of factual circumstances. See Carter v. State, 786 So. 2d 1173 (Fla. 2001). In Carter, 786 So. 2d at 1178, this Court stated as follows:

> 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. Attempting to formulate a more workable definition of "illegal sentence," Judge Farmer has explained:
>
> > To be illegal within the meaning of rule 3.800(a) the sentence must impose a kind of punishment that no judge under the entire body of sentencing statutes could possibly inflict under any set of factual circumstances. On the other hand, if it is possible under all the sentencing statutes--given a specific set of facts--to impose a particular sentence, then the sentence will not be illegal within rule 3.800(a) even though the judge erred in imposing it

Blakley v. State, 746 So. 2d 1182, 1186-87 (Fla. 4th DCA 1999).

This Court went on to approve of Judge Farmer's definition that 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"--because it comes close to formulating a workable definition of "illegal" sentence. Carter, 786 So. 2d at 1181. In Carter, 786 So. 2d at 1173-1181, this Court held that a habitual offender sentence for a life felony, imposed when the habitual offender statute did not authorize it, was illegal.

In the instant case, petitioner was sentenced to a ten (10) year minimum mandatory term on all counts pursuant to F.S. § 775.087, because he actually possessed a firearm when he committed the crimes. When a statute mandates a minimum sentence, the sentencing court must specify it on the sentencing order. D'Alessandro v. Shearer, 360 So. 2d 774, 775 (Fla. 1978) (issuing mandamus requiring trial court to recite that five-year sentences were subject to three-year minimum mandatory provisions because without such a recitation the authorities would not be on notice that the case calls for a minimum of three years service in prison, and even if authorities received notice by other means, without a judicial order, it would be questionable whether minimum service was required); see also

State v. Johnson, 627 So. 2d 98 (Fla. 4th DCA 1993) (en banc) (*receding from* State v. Moran, 561 So. 2d 685 (Fla. 4th DCA 1990)); State v. McKenzie, 574 So. 2d 1176 (Fla. 5th DCA 1991) (en banc) (*receding from* State v. Hall, 538 So. 2d 468 (Fla. 5th DCA 1989)). In this case, such a sentence is legal and must be imposed in the sentencing order where it has been established and found that petitioner possessed a firearm during the commission of the crimes. Simply because the trial court made a procedural error and failed to orally announce this condition of sentencing does not render the sentence illegal. Petitioner could have properly raised this claim in his first 3.850 motion, yet failed to do so and then improperly raised the claim in a successive 3.850 motion.

Appellant cites this Court's decision in Ashley v. State, 850 So. 2d 1265 (Fla. 2003), and states that while the Florida Rules of Criminal Procedure do require the oral pronouncement to match the written order, this rule is based upon double jeopardy principles (Petitioner's Merits Brief p. 10). Petitioner further argues that a violation of this rule rises to constitutional magnitude and renders the sentence illegal. Id. However, this Court's decision in Ashley is factually and legally distinguishable from the instant case. This Court reviewed Ashley v. State, 772 So. 2d 42 (Fla. 1st DCA 2000),

which expressly and directly conflicted with Evans v. State, 675 So. 2d 1012 (Fla. 4th DCA 1996) and stated that the issues concerned whether a trial court can bring a defendant back to court, vacate the sentence imposed, and resentence him to what amounts to a more onerous sentence after he has already begun serving the original sentence. Ashley, 850 So. 2d at 1266. This Court agreed with the Fourth District Court of Appeal decision in Evans, and held that once a sentence has been imposed and the person begins to serve the sentence, the sentence may not be increased with out running afoul of double jeopardy principles. Id.

In this case, where the trial court imposed an invalid sentence orally by failing to impose the minimum mandatory yet at the same hearing properly imposed the minimum mandatory in the written pronouncement, double jeopardy principles do not apply. Petitioner's sentence was not increased after it was imposed. Here, the trial court did not orally pronounce the sentence, bring the petitioner back to court to correct an error, vacate the sentence imposed, and resentence him to what amounts to a more onerous sentence. Rather the records reflect that the oral and written pronouncement occurred at the same time and the written pronouncement amounts to a legal sentence. Hence, petitioner's reliance on Ashley is misplaced.

Here, it is clear that the Fourth District Court of Appeals properly found that Petitioner is not entitled to post-conviction relief where there is a discrepancy between the oral and written sentences as to the ten (10) year minimum mandatory. Such a claim is procedurally barred as it was raised in a successive 3.850 motion. Moreover, the claim cannot be reached by construing petitioner's successive 3.850 motion as a 3.800(a) motion because claims of this nature are not cognizable under Rule 3.800(a). This Court must affirm the decision of the Fourth District Court of Appeal and disapprove the decisions of the First District Court of Appeal in Fitzpatrick and the Fifth District in Berthiaume.

CONCLUSION

WHEREFORE, based on the foregoing arguments and the authorities cited therein, Respondent respectfully requests this Court affirm the decision of the Fourth District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to: Jeffrey Golant, Esq., Assistant Public Defender, Criminal Justice Building, 421 3rd Street, 6th Floor, West Palm Beach, Florida, 33401 this____ day of _____, 2005

_____
MELANIE DALE SURBER

CERTIFICATE OF TYPE SIZE AND STYLE

In accordance with Fla. R. App. P. 9.210, the undersigned hereby certifies that the instant brief has been prepared with 12 point Courier New Type.

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MELANIE DALE SURBER