IN THE SUPREME COURT OF FLORIDA

WILMANN RENAUD

Petitioner,

vs.

CASE NO. SC05-1005
L.T. CASE NO. 4D05-1527

STATE OF FLORIDA,

Respondent.
_____/

PETITIONER=S INITIAL BRIEF ON THE MERITS

On review from the Fourth District Court of Appeal

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PRELIMINARY STATEMENT

Petitioner was the defendant and Respondent the prosecution in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, In and For Broward County, Florida. In this brief the parties will be referred to as they appear before the Court. The record on appeal consists of a single volume that is not paginated. Accordingly, Petitioner cannot cite to the record on appeal with specificity.

STATEMENT OF THE CASE AND FACTS

Petitioner Wilmann Renaud seeks review of the District Court=s decision summarily affirming his appeal of the circuit court=s denial of his Florida Rule of Criminal Procedure 3.850 motion. See Renaud v. State, 901 So.2d 1032 (Fla. 4th DCA 2005). That motion challenged the inclusion of a ten-year minimum mandatory provision on his written sentence where no minimum mandatory provision was announced at Petitioner=s sentencing hearing.

The minimum mandatory provision was challenged in Petitioner=s second Rule 3.850 motion. That motion was filed pro se. However, the Office of the Public Defender for the Seventeenth Judicial Circuit was subsequently appointed to represent Petitioner. Through counsel, he requested that the motion be regarded as if it were filed pursuant to Florida Rule of Criminal Procedure 3.800(a).

The circuit court entered a written order adopting the State=s position that the discrepancy between the oral pronouncement of sentence and written order is not cognizable in a Rule 3.800(a) motion. The Fourth District summarily affirmed, citing its own opinion in Covell v. State, 891 So.2d 1132 (Fla. 4th DCA 2005), and certifying 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).

Petitioner was convicted in the Circuit Court of the Seventeenth Judicial Circuit of

one count of robbery with a firearm, one count of armed kidnaping, one count of car jacking with a firearm, and one count of aggravated battery. On August 30, 2000 Petitioner was sentenced to three concurrent terms of life imprisonment for the robbery, kidnaping, and car jacking offenses and to thirty years for the aggravated battery offense.

The Fourth District affirmed Petitioner=s conviction and sentences on direct appeal. (See P.1 of State=s Response to Defendant=s Successive Motion For Post Conviction Relief).

After having previously filed a pro se motion pursuant to Florida Rule of Criminal Procedure Rule 3.850, Petitioner filed a second, pro se, post conviction motion dated September 29th, 2004. Although the motion was styled as a AMotion For Post Conviction Relief@, Petitioner raised three issues relating exclusively to the legality of the sentences imposed in this submission. On October 11th, 2004, the trial court entered a written order directing the State to respond.

The State filed its initial response on November 8th, 2004. In its initial response, the State argued that most of Petitioner=s claims were procedurally barred because they were not raised in his initial Rule 3.850 motion. However, the State also conceded that one of Petitioner=s points could be raised as a Rule 3.800(a) motion, and was well taken. Accordingly, Petitioner was entitled to be resentenced for the aggravated battery offense.

Petitioner was resentenced on January 19th, 2005. (See P.3, State=s Supplemental Response To Defendant=s Successive Motion For Post Conviction Relief, filed on

February 18th, 2005). The record on appeal contains an order re-sentencing Petitioner to fifteen years on Count I.[1]

According to the State=s supplemental response, the circuit court asked the State to clarify its position regarding Petitioner=s claim that the trial court=s oral pronouncement of sentence did not include the minimum mandatory provisions in the written order. The State argued the trial court could not consider the issue because it was raised in a successive Rule 3.850 motion. The State also argued that claims of this nature cannot be raised on a Rule 3.800(a) motion. In support of that proposition, the State relied on the Fourth District=s prior holdings in Campbell v. State, 718 So.2d 886 (Fla. 4th DCA 1998), Rinderer v. State, 857 So.2d 955 (Fla. 4th DCA 2003), and Covell v. State, 891 So.2d 1132, (Fla. 4th DCA 2005). (See p. 3-4 State=s Supplemental Response To Defendant=s Successive Motion For Post Conviction Relief.). However, the State also conceded that, but for this procedural bar, Petitioner would otherwise be entitled to the relief requested. (See p.4 State=s Supplemental Response To Defendant=s Successive Motion For Post Conviction Relief).

Through counsel, Petitioner filed a response to the State=s submission noting that the Fourth District in Covell v. State, 891 So.2d 1132, certified that the authorities the

[1]It appears that this is a scrivener=s error, and it was intended that his order refer to count IV.

State cited in its submissions are in conflict with the opinions of the First and Fifth Districts. The circuit court entered a written order adopting the argument in the State=s supplemental response on March 4th, 2005. The Fourth District released its published opinion denying relief and certifying conflict with Fitzpatrick and Berthiaume on May 25th, 2005.

Petitioner filed a timely notice invoking discretionary jurisdiction in this Court. This Court has postponed deciding the issue of jurisdiction and ordered briefing on the merits.

SUMMARY OF THE ARGUMENT

The Fourth District erred when it held that a discrepancy between the oral pronouncement of sentence and the written order that subjects a defendant to a greater term of imprisonment cannot be raised on a motion filed pursuant to Florida Rule of Criminal Procedure 3.800(a). When the written sentence order imposes more onerous terms than those announced at the sentencing hearing, such a sentence violates double jeopardy principles and is therefore an illegal sentence.

ARGUMENT

THE MINIMUM MANDATORY PROVISION IN PETITIONER=S SENTENCE WAS NOT ANNOUNCED WHEN HE WAS SENTENCED. THEREFORE, PETITIONER=S SENTENCE IS ILLEGAL. ACCORDINGLY, PETITIONER CAN NOT BE PROCEDURALLY BARRED FROM PURSING RELIEF THROUGH FLORIDA RULE OF CRIMINAL PROCEDURE 3.800(a).

A. JURISDICTION

Both Fitzpatrick and Berthiaume hold that a discrepancy between the oral pronouncement of sentence and the written sentencing order render a sentence illegal, and that a defendant may seek relief from such a sentence through a Florida Rule of Criminal Procedure Rule 3.800(a) motion. Accordingly the Fourth District certified conflict those cases in its opinion in the case at bar. Although not addressed in the Fourth District=s opinion in the case at bar, the Fourth District=s holding in this case also conflicts with the Second District=s holding in Cote v. State, 841 So.2d 488 (Fla. 2d DCA 2003). In Cote, the Second District held that a discrepancy between an oral pronouncement of sentence and written sentencing order rendered the sentence illegal and subject to correction on appeal when the error was not preserved.

Because the Fourth District in Covell, certified conflict with Fitzpatrick and Berthiaume, this Court has jurisdiction to resolve the conflict pursuant to Article V, Section 3(b)(4) of the Florida Constitution. In addition, the Fourth District=s decision in

the case at bar expressly and directly conflicts with the Second District=s decision in Cote, accordingly this Court also has jurisdiction over the instant case pursuant to Article V Section 3(b)(3) of the Florida Constitution.

At the present time, a prisoner who was sentenced by a circuit court located in the First, Second, or Fifth District, but who was otherwise in the same status as Petitioner, would be entitled to raise this issue in a rule 3.800(a) motion. However, Petitioner, and all other similarly situated prisoners in the Fourth District, cannot. Accordingly, this Court should accept jurisdiction and establish a uniform rule for the entire state. For the reasons described below, the conflict should be resolved in favor of Fitzpatrick, Berthiaume, and Cote.

B. MERITS

An illegal sentence is one that imposes a punishment that Ano judge under the entire body of sentencing statutes could possibly inflict under any set of factual circumstances.@ Carter v. State, 786 So.2d 1173, 1178 (Fla. 2001). The Fourth District=s holding in the case at bar rests on the conclusion that Petitioner, having previously filed a Rule 3.850 motion, is procedurally barred from raising the discrepancy between the oral and written sentence orders in a successive Rule 3.850 motion. Furthermore, the Fourth District=s holding also rests on its conclusion that this discrepancy does not render the sentence illegal and therefore the issue is not cognizable in a Rule 3.800(a) motion. The existence of a procedural bar is subject to de novo review on appeal. See West v. State, 790 So.2d

513 (Fla. 5th DCA 2001). The legality of a sentence is a question of law, subject to de novo review on appeal. See Flowers v. State, 899 So.2d 1257, 1258 (Fla. 4th DCA 2005).

Petitioner=s motion filed in the circuit court includes an appendix containing the transcript of his sentencing hearing. This transcript does not include any oral pronouncement relating to a minimum mandatory sentence. As the State expressly acknowledged, but for the asserted procedural bar, Petitioner would be entitled to relief on this claim. (See p.4 State=s Supplemental Response To Defendant=s Successive Motion For Post Conviction Relief).

In summarily affirming Petitioner=s appeal, the Fourth District expressly relied on its earlier per curiam opinion in Covell v. State, 891 So.2d 1132 (Fla. 4th DCA 2005). Covell relies on the Fourth District=s earlier opinion in Campbell v. State, 718 So.2d 886 (Fla. 4th DCA 1998). That opinion states that a discrepancy between the oral pronouncement of sentence and the written sentence is a violation of Florida Rules of Criminal Procedure, but not a violation of Florida Statutes or the state and federal constitutions. Accordingly, the Campbell Court held that such a violation did not render such sentence illegal for purposes of a Rule. 3.800(a) motion.

However, as the First District acknowledged in Fitzpatrick v. State, 863 So.2d at 463 (one of the cases certified to be in conflict with the Fourth District=s decision in the case at bar), this Court has held that the type of error presented here violates double

jeopardy principles. See Ashley v. State, 850 So.2d 1265, 1268-1269 (Fla. 2003). Accordingly, the Fourth District=s analysis in Campbell and Covell is incorrect in light of Ashley. While the Florida Rules of Criminal Procedure do require the oral pronouncement of sentencing to match the written sentence order, this rule is based on constitutional double jeopardy principles. Accordingly, a violation of this rule rises to constitutional magnitude and renders the sentence imposed in the case at bar illegal.

As current Chief Justice Pariente pointed out in her concurring opinion in Ashley v. State, 850 So.2d at 1269 (Pariente, J. concurring). Athe law is clear that Ashley began serving his sentence upon the conclusion of the hearing in which the court made its oral pronouncement.@ *Citing* Troupe v. Rowe, 283 So.2d 857 (Fla. 1973). As the current Chief Justice also noted, a written sentence is often entered days or weeks after the original sentencing hearing. Ashley v. State, 850 So.2d at 1270 (Pariente, J. concurring).

Of course, a defendant and his counsel are frequently not present when the written sentence is entered. Accordingly, the defendant is frequently unable to object to the discrepancy when it occurs. Furthermore, defendants who pursue Rule 3.850 motions are generally unrepresented and are in custody. Accordingly, they are at a great disadvantage when they pursue post conviction relief.

The procedural bar erected by the Fourth District=s holding in the case at bar and its underpinnings will give effect to similar mistakes in the future. In contrast, the elimination of the procedural bar preventing these errors being raised in a Rule 3.800(a) motion is

consistent with the established principle, recognized in Ashley v State, 850 So.2d 1268, that the oral pronouncement of sentencing controls.

CONCLUSION

Based upon the foregoing argument and the authorities cited therein, Petitioner respectfully requests that this Honorable Court quash the Fourth District=s decision in the case at bar and approve the First District=s opinion in Fitzpatrick, the Fifth District=s opinion in Berthiaume, and the Second District=s opinion in Cote, and remand the case at bar for further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Celia Terenzio, Assistant Attorney General, 1515 North Flagler Drive, Ninth Floor, West Palm Beach, Florida 33401-3432, this _____ day July 2005.

_____
Jeffrey Golant
Assistant Public Defender

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared in compliance with the font standards required by Florida Fla. R. App. P. 9.210. The font is Times New Roman, 14 point.

_____
Jeffrey Golant
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