Supreme Court of Florida

CASE No. SC05-2141

Lower Tribunal Case No. 4D05-115

ROY McDONALD,

Defendant-Appellant,

v.

STATE OF FLORIDA,

Plaintiff-Appellee.

ON APPEAL FROM THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, FOURTH DISTRICT

INITIAL BRIEF FOR THE DEFENDANT-APPELLANT

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STATEMENT OF THE CASE

The appellant was the defendant in the circuit court and will be referred to as the Defendant or by name. The appellee is State of Florida and will be referred to as "the State." References to the record will be as follows:

"RR." for Case No. 99-3968CF10A;

"R." for Case No. 01-4353CF10A; and

"Tr." for the trial transcripts.

(i) Proceedings in the Circuit Court:

The Defendant filed a single motion to correct judgment covering both Case No. 99-3968CF10A and Case No. 01-4353CF10A. Under Case No. No. 99-3968CF10A the State confessed error and the circuit court obliged vacating the sentence in that case but denying relief with respect to the earlier case.

This case commenced with information filed March 20, 2001 and by which Defendant was charged for offenses committed on January 21, 2001 as follows:

Count I	-	Carjacking with a firearm in violation of Fla.Stats.812.133(1) and (2)(a);
Counts II & III	-	Robbery with a firearm in violation of

Fla.Stats.812.13(2)(a) and 775.087(2);

Count IV - Aggravated fleeing and eluding in violation of Fla.Stats.316.1935(3); and

Count V - Grand Theft (Motor Vehicle) in violation of Fla.Stats.812.014(1)(a) & (b) and 812.014(2)(c)6.

R. 5-7.

The Defendant pleaded not guilty and after a jury trial was found guilty as charged. On appeal the district court affirmed.

By motion to vacate, set aside or correct sentence pursuant to Fla. R. Crim. P. 3.800 the Defendant attacked his sentence and the circuit court denied the motion. The Fourth DCA affirmed and certified conflict with the Second DCA as that court ruled in Hall v. State, 837 So.2d 1179 (Fla. 2nd DCA 2003) and with the 3rd DCA in Frazier v. State, 877 So.2d 838 (Fla. 3rd DCA 2004). The Fourth DCA also receded from its prior decisions in several of its decisions beginning with Smith v. State, 813 So.2d 1002 (Fla. 4th DCA 2002) and ending with Malcolm v. State, 873 so.2d 378 (Fla. 4th DCA 2004).

This Court recognized jurisdiction.

(ii) Statement of the Facts:

At the trial the State filed a notice of its intention to seek imposition of the mandatory sentence under Fla.Stats. 775.082(9)(A)3 because it determined that the Defendant qualified as a "Prison Release Re-offender" ("PRR") under Fla.Stats. 775.082(9)(a)1; and by the same notice the State also sought the imposition of a mandatory sentence under Fla. Stats. 775.082(9)(A)3. R. 10. The State also filed a notice of its intention to seek that the court's declare the Defendant an habitual felony offender, an habitual violent felony offender, a three-time violent felony offender and/or a violent career criminal because the State determined that the Defendant had two or more qualifying convictions. R. 11-12.

After a jury trial the Defendant was found guilty on all counts (R. 29-33; Tr. 458-61) and on October 19, 2001 he was sentenced to concurrent life sentences on each of counts I, II and III because the court determined that he was a "prison release re-offender." R. 45-53; Tr. 479-481. He was also sentenced to 15 years concurrent on count IV (R. 54-56; Tr. 481) and 5 years concurrent on count V. R. 57-59; Tr. 481. That sentence was subsequently corrected to include a sentence of 10 years mandatory minimum. R. 67-69; Tr. 482-483. The court also made a finding that that the 10-20-Life statute applied and that it had complied with Fla. Stats. 775.087 in that the sentence

imposed as to Counts I, II and III exceeded the ten-year minimum term which that statute requires. Tr. 483. Further, the court ordered that the sentences under the subsequent case are to run consecutively to the probation violation case. Tr. 484. The sentence in that case has been since vacated.

(iii) Statement of the Standard of Review:

A circuit court's summary denial of a motion to correct sentence under Florida Rule of Criminal Procedure 3.800 is reviewed *de novo*.

SUMMARY OF ARGUMENT

The Fourth DCA impermissibly receded from its prior decisions in violation of the due process provision of the Fourteenth Amendment and should be brought back in line. Rogers v. Tennessee, ___ U.S. ___, 14 Fla. L. Weekly Fed S229, S230 (U.S. May 14, 2001); Bouie v. City of Columbia, 378 U.S. 347 (1964). Even if the change is appropriate there is no constitutional way for it to be applied against this Defendant.

By applying the new interpretation against this Defendant while applying the prior interpretation adopted by other district courts even years after the Defendant's offense, the Fourth DCA violates the equal protection provision of the Fourteenth Amendment by treating defendants similarly situated in a different manner.

If the Fourth DCA's recession from its prior decisions is to stand it would severely damage the hierarchical judicial system created by the constitution since it would give the intermediate appellate court the authority to change the interpretation of a law passed upon by this Court and embraced by other district court relying upon such endorsement. The Fourth DCA therefore acted without authority and its decision must be reversed.

Because the Third DCA in Frazier v. State, ___ So.2d ___, 29 Fla. L. Weekly D1587 (Fla. 3rd DCA July 7, 2004) applied the proper reasoning of this court that decision is the proper one to adhere to and apply against this Defendant even if this Court is minded to change its opinion for the future. In no event should any change be applied adversely against this Defendant.

The Fourth DCA overlooked the significance of a sentence that has been modified by the substitution of a new and different sentence. The former sentence no longer exists and it is the new sentence that must be applied. Accordingly, where Defendant's sentence of incarceration was modified by a replacement sentence of probation the prior sentence of incarceration is of no moment and cannot be used as a predicate for PRR classification because Defendant was never released from incarceration since there was no sentence of incarceration.

Although defendant in a proper and timely manner identified numerous errors on the scoresheet the Fourth DCA improperly ignored those errors resulting in an inaccurate scoresheet being used to sentence the Defendant. The decision should be reversed for an accurate scoresheet.

ARGUMENT

I. THE FOURTH DCA MAY NOT RECEDE FROM ITS PRIOR DECISIONS IN A MANNER PREJUDICIAL TO DEFENDANT WITHOUT VIOLATING THE DUE PROCESS PROVISION OF THE FOURTEENTH AMENDMENT

Inherent in the notion of due process under the Fourteenth Amendment is the prohibition of *ex post factor* judicial decisionmaking. Rogers v. Tennessee, ___ U.S. ___, 14 Fla. L. Weekly Fed S229, S230 (U.S. May 14, 2001). In Bouie v. City of Columbia, 378 U.S. 347 (1964) the Supreme Court addressed the question of the extent to which a state court might change the interpretation of its own laws without violating the due process provision of the Fourteenth Amendment and concluded that it might not do so beyond what a fair reading permits. Similarly, in NAACP v. Alabama, 357 U.S. 449 (1958), reaffirmed in Bouie, where the state court

had a consistent line of cases interpreting its own laws in a particular way but on the occasion of the case in issue the state court suddenly departed from that consistent line of interpretation and adopted a new and different interpretation, the Supreme Court observed that such conduct violated the due process provision of the Fourteenth Amendment because justifiable reliance on prior decisions of the state court cannot be defeated by novelty in procedural requirements. At 457. The Court there observed that reliance was justified because the state court itself had set out the "established rule" of the court and that was consistent with the prior decisions. At 458. Relying on these principles the Bouie Court concluded that,

> If a judicial construction of a criminal statute is 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue,' [the construction] must not be given retroactive effect.

At 354 quoting Hall, General Principles of Criminal Law (2d ed. 1960) at 61.

In Rogers the Court observed that the Bouie decision "rested on core due process concepts of notice, foreseeability, and, in particular, the right to fair warning . . . " At S231. *See, also,* United States v. Lanier, 520 U.S. 259, 266 (1997) ("[D]ue process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope"); Marks v.

United States, 430 U.S. 188, 191-192 (1997) (Due process protects against judicial infringement of the "right to fair warning" that certain conduct will give rise to criminal penalties), cited in Rogers at S231.

Applying the foregoing principles to the instant case it is clear that the Fourth DCA violated the due process provision of the Fourteenth Amendment when it suddenly departed from the long established interpretation of the statute. That court candidly admitted that its prior decisions had consistently interpreted the law to preclude the imposition of mandatory minimum sentences under the 10-20-LIFE statute concurrently with the mandatory minimum sentences under the PRR statute. McDonald v. State, ___ So.2d ___, 30 Fla. L. Weekly D2310, D2311 (Fla. 4th DCA September 28, 2005). Indeed the court cited some of those cases that were reported without saying whether there were others, and if so how many, were unreported. Additionally, at least one of the reported cases was taken to this Court and review was denied. *Id*. citing Hill v. State, 869 So.2d 10, 11 (Fla. 4th DCA), *rev. denied,* 871 So.2d 874 (Fla. 2004). Alarmingly, even years after the date of the commission of the offense (January 21, 2001) the law applied by the 4th DCA excluded the concurrent imposition of sentences under both the 10-20-LIFE statute and the PRR statute. Not only has this Court denied review of the state court's decisions but other circuits

have also adopted the ruling as recently as the year 2005. *See, e.g.*, Helms v. State, 890 So.2d 1256 (Fla. 2nd DCA 2005) cited in McDonald at D2311. With such a clear and unambiguous line of cases the Fourth DCA cannot deny Defendant the benefit of the law as interpreted at the time the offense was committed without violating the due process under the Fourteenth Amendment.

The 4th DCA therefor erred when it receded from its prior decisions and applied the new rule to increase the Defendant's sentence.

II. THE FOURTH DCA VIOLATED THE EQUAL PROTECTION PROVISION OF THE FOURTEENTH AMENDMENT BY TREATING DEFENDANT DIFFERENTLY FROM OTHERS SIMILARLY SITUATED

The Fourth DCA by its own candid admission disclosed that between the years 2002 and 2004 persons similarly situated as Defendant were treated differently by not being sentenced under the PRR and also the 10-20-LIFE statute concurrently. *See,* cases cited in McDonald at D2311. The differential treatment is constitutionally impermissible because the court has singled out Defendant for a much more onerous treatment than others.

III. THE FOURTH DCA LACKS JURISDICITON TO MODIFY THE LAW AFTER THE ISSUE HAS BEEN PRESENTED TO AND PASSED UPON BY THIS COURT

In a hierarchical judicial system as obtains in Florida, the intermediate appellate court may not recede from its own prior decisions without concern for whether or not those decisions have been embraced by the highest court in the state. It is respectfully submitted that once the highest court in the state has passed upon the decisions of the intermediate court those decisions become the law of the state and cannot be changed by the intermediate court but must await changes either from a higher court or from the legislature. Any other rule would create a judicial anomaly whereby the intermediate appellate court could override the highest court in the state system contrary to the very purpose of the judicial hierarchical system authorized by the constitution.

Accordingly the Fourth DCA has no jurisdiction to modify an interpretation of the state's laws once the Florida Supreme Court has passed on it.

IV. THE FOURTH DCA ERRED IN CONSTRUING THIS COURT'S DECISIONS AFFECTING THE PRISON RELEASE REOFFENDER ACT

The Fourth DCA misconstrued the prior decisions of this court and so created a conflict with the Third DCA in Frazier v. State, ___ So.2d ___, 29 Fla. L. Weekly D1587 (Fla. 3rd DCA July 7, 2004). It is respectfully submitted that the decision in Frazier is the better decision and failure t abide by it would result in serious constitutional violations as pointed out above.

The sentences imposed under counts I, II and III violate the PRR statute itself because the trial court sentenced the Defendant as a PRR to concurrent life sentences under each count (Tr. 480-481) and also under the 10-20-Life statute. Tr. 483. This is in violation of applicable law because it is now well settled that the PRR may not be applied to sentence a defendant in conjunction with other statutes unless the other statute imposes a sentence greater than that imposed under the PRR. Bromell v. State, 777 So.2d 438 (Fla. 4th DCA 2001) cited with approval in Frazier v. State, ___ So.2d ___, 29 Fla. L. Weekly D1587 (Fla. 3rd DCA July 7, 2004) relying on Grant v. State, 770 So.2d 655, 25 Fla. L. Weekly S990 (Fla. November 2, 2000). The Frazier court stated,

> The trial court's imposition of concurrent life sentences for the two counts of carjacking was error because the sentence for each carjacking conviction under the PRR Act and the Violent Career Criminal Act is life. As the State properly concedes, pursuant to section 775.082, a court may impose a concurrent sentence under section 775.084 ***only*** if it is a greater sentence. Since these sentences are equal, the appellant must be resentenced on these counts. (Citations omitted) (emphasis in original).

At D1587. *See also,* Smith v. State, 813 So.2d 1002, 1003, 27 Fla. L. Weekly D656 (Fla. 4th DCA March 20, 2002) (same), Hill v. State, ___ So.2d ___, 29 Fla. L. Weekly D255 (Fla. 4th DCA January21, 2004) (same).

In the instant case the trial court made the same error as did the sentencing court in Frazier and so the Defendant was erroneously sentenced to concurrent life sentences and a 10-year mandatory under the 10-20-Life statute. The Fourth DCA now embraces that error and should be brought in line with the other district courts which have complied with the Frazier rationale. Additionally, the concurrent life sentences for robbery with a firearm (counts II and III) are also erroneous because they violate the PRR since those offenses are first degree felonies the punishment for which under the PRR is 30 years and not life. Frazier v. State, ___ So.2d ___, 29 Fla. L. Weekly D1587 (Fla. 3rd DCA July 7, 2004) relying on Grant v. State, 770 So.2d 655, 25 Fla. L. Weekly S990 (Fla. November 2, 2000) citing with approval in Smith v. State, 754 So.2d 100 (Fla. 1st DCA 2000). The Frazier

court noted that pursuant to the PRR provision § 775.082(8)(a)2.b Fla.Stats. (1997) [now § 775.082(9)(a)3.b Fla.Stats. (2004)] the appropriate punishment for a first degree felony is 30 years and not life. That court therefore reversed a similar life sentence under the PRR.

It is respectfully submitted a similar treatment is warrant in the instant case.

V. THE FOURTH DCA ERRED IN CLASSIFYING DEFENDANT AS A PRISON RELEASE REOFFENDER

The district court erroneously determined that the Defendant was a prison release re-offender (PRR) when there was no proper predicate for such a qualification and where in doing so the court erroneously relied upon the Defendant's prior sentence as a youthful offender which was modified from one of incarceration to one of probation. In sentencing the Defendant the court reasoned that because the Defendant was released from a state correctional facility on November 15, 2000 and committed the qualifying offenses on January 21, 2001 then the 3-year predicate was satisfied. Tr. 480. The Defendant was never "released from a state correctional facility following incarceration" within the meaning of the act because his sentence of

incarceration was modified to one of probation so there was in fact no incarceration in a correctional facility. *See, e.g.,* Garner v. State, ___ So.2d ___, 28 Fla. L. Weekly D757 (Fla. 4DCA March 19, 2003) (Jimmy Ryce facility was not a correctional facility).

Pursuant to the Prison Release Reoffender Act, Fla.Stats. 775.082(9)(A)3, (PRR) a defendant is subject to an enhanced sentence under the Act ***only*** if he is a person who has been convicted of a nominate offense "within 3 years after being released from a State Correctional Facility operated by the Department of Corrections . . . *following incarceration for an offense for which the sentence is punishable* [sic.] *by more than 1 year . . .*" (Emphasis added).

In order for the Defendant to be sentenced under the PRR the State had to show that he committed the instant offenses within three years of being "released from a state correctional facility operated by the Department of Corrections or a private vendor following incarceration. § 775.082(9)(a)1." *Id*. Accordingly in Garner, *supra*, the 4th DCA reversed a PRR sentence because there the defendant was sentenced to a Jimmy Ryce facility operated by the Department of Children and Families and since such a facility was not a qualifying facility PRR status was inappropriately applied. The 4th DCA further noted that by the Florida Correctional Code a "State correctional

institution" is defined as "any prison, road camp, prison industry, prison forestry camp, or any prison camp or prison farm or other correctional facility, temporary or permanent, in which ***prisoners*** are housed, worked, or maintained, under the custody and jurisdiction of the department." *Id*. at D758 quoting § 944.02(6), Fla. Stat. (1999). (Emphasis in original). It is obvious from the foregoing that the Legislature intended to differentiate between release from "probation" as provided in 958.045(5)(c) and "release following incarceration." As the defendant in Garner, the Defendant in the case at bar was not a "prisoner" housed in any of the nominate facilities and therefore does not qualify for PRR status.

The indisputable facts are that on October 29, 1999 under Case No. 99-3968CF10A the Defendant in the instant case was convicted and sentenced as a youthful offender under a judgment of conviction entered in the Circuit Court for the Seventeenth Judicial Circuit in and for Broward County. RR. 10-19. On November 14, 2000 the same court modified the sentence to four years probation pursuant to Fla. Stat.958.045. RR. 24-25, 27-28. The order of modification under Case No. 99-3968CF10A read in pertinent part as follows:

ORDER OF MODIFICATION OF SENTENCE
PLACING THE DEFENDANT ON PROBATION

. . . it is hereby ORDERED AND ADJUDGED:

> The previous order of commitment of 4 yr f/b 2 yr prob. for the offenses of …[IS MODIFIED] as follows:
>
> Defendant's sentence is hereby modified pursuant to Section 958.045(5)(C) Florida Statutes and the defendant is hereby released from the custody of the Department of Corrections and is placed on probation for a period of four (4) years . . .

Order of Modification at p.1. This modification clearly operated to revoke the sentence of incarceration and substitute in its place a sentence of probation. It was not an order which added onto the time served a sentence of probation but instead it operated with retroactive effect to make the sentence a sentence of probation and not a sentence of incarceration. Such an interpretation is consistent with the scheme of the youthful offender statute which *inter alia* is to provide the court with sentencing alternatives to incarceration and which the sentencing court duly applied.

The State's response to the Defendant's motion to correct sentence upon which the court relied in its denial overlooks the cited case as well as the obvious principle. On the facts of the instant case the Defendant was never "released following incarceration" because his sentence was one of probation only and not one of incarceration or any type of placement.

It is respectfully submitted that this is a different situation from one in which a defendant is incarcerated and then released on probation after serving his term of incarceration. In those circumstances the statute applies

for offenders who committed the relevant offense within the 3-year limit but where, as in the instant case, the original judgment of sentence itself was modified to make it a sentence of probation and not one of incarceration there is no "prison release re-offender" predicate to warrant a sentence under the recidivist statute. Accordingly the circuit court erred in sentencing the Defendant as a prison release re-offender.

VI. THE FOURTH DCA ERRONEOUSLY DISREGARDED THE SCORESHEET ERRORS IDENTIFIED BY DEFEDANT

The Defendant was sentenced for armed robbery with a firearm without a special verdict form to determine whether the firearm used in the offenses was possessed by this Defendant or whether the possession was only constructive because it was possessed by another assailant in violation of Apprendi v. New Jersey, 530 U.S. ___, 147 L.Ed.2d 435, 120 S.Ct. 2348 (2000) and Blakely v. Washington, ___ U.S. ___, 17 Fla. L. Weekly Fed. S430 (S.C. June 24, 2004).

The scoresheet erroneously classified as "prior record" (and therefore double-counted) the offenses for which the Defendant was on probation at the time of the commission of the offenses in the instant case (R. 60-61) and

also as legal status violation points. *See,* Fla.Crim.P.Rule 3.701(d)(6); *and see,* Florida Rules of Criminal Procedure Re: Sentencing Guidelines (Rules 3.701 and 3.988), 576 So.2d 1307, 1309 (Fla. 1991), Fla.Crim.P.Rule 3.701(d)(6).

The scoresheet erroneously re-classified the armed carjacking and armed robbery counts as first degree felonies punishable by life pursuant to Fla.Stats.812.13(2)(a) and 775.087(2) (R. 60-61) although there was no specific finding by the jury that the Defendant *used a firearm*. *See,* Thompson v. State, ___ So.2d ___, 29 Fla. L. Weekly D270 (Fla. 2nd DCA January 21, 2004) relying *inter alia* on State v. Tripp, 642 So.2d 728, 730 (Fla. 1994); State v. Overfelt, 457 So.2d 1385 (Fla. 1984).

The scoresheet recorded that the Defendant was a prison release reoffender, an habitual felony offender and an habitual violent felony offender (R.61) while the only finding made by the sentencing court was that the defendant was a prison release reoffender and not the others. Tr. 480-481. The oral pronouncement should prevail. Trapp v. State, 760 So.2d 924 n. 1 (Fla. 2000) citing State v. Williams, 712 So.2d 762 (Fla. 1998) in turn citing Justice v. State, 674 So.2d 123, 125 (Fla. 1996).

The sentencing court was in error because concurrent life sentences for robbery with a firearm (counts II and III) violated the PRR since those

offenses are first degree felonies the punishment for which under the PRR is 30 years and not life. Frazier v. State, ___ So.2d ___, 29 Fla. L. Weekly D1587 (Fla. 3rd DCA July 9, 2004) relying on Grant v. State, 770 So.2d 655, 25 Fla. L. Weekly S990 (Fla. November 2, 2000) citing with approval in Smith v. State, 754 So.2d 100 (Fla. 1st DCA 2000).

CONCLUSION

For all the foregoing reasons the decision of the Fourth DCA should be reversed and the decisions of the Second and Third DCA should be accepted as the proper interpretation of the law. Even if the law should be changed the Fourth DCA is without jurisdiction to effect that change and similarly it may not disregard its obligation to correct the scoresheet errors identified by Defendant. This court should therefore reverse with instructions to the Fourth DCA to correct the scoresheet errors.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was forwarded by U.S. mail to State Attorney's Office, 201 S.E. 6th Street, Fort Lauderdale, FL 33301on April 10, 2006.

_____

ABE BAILEY, ESQ.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief complies with the font requirement of Fla.R.App.P. 9.210(a)(2) in that the Respondent uses Times New Roman 14-point font throughout.

_____

ABE BAILEY, ESQ.