IN THE SUPREME COURT OF FLORIDA
(Lower Court Case No.: 4D05-4876)

CASE NO. SC06-1266

JAMES L. BROOKS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

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RESPONDENT'S ANSWER BRIEF ON THE MERITS
On review from the
District Court of Appeal, Fourth District

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PRELIMINARY STATEMENT

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

Page references to the transcript of the sentencing hearing will be cited as (T.) and the record on appeal will be cited as (R.).

STATEMENT OF THE CASE AND FACTS

This is case is before this Court on discretionary review of an opinion issued by the Fourth District Court of Appeals in Brooks v. State, 930 So.2d 835(Fla. 4th DCA 2006), wherein the District Court affirmed and certified conflict with Wilson v. State, 913 So. 2d 1277 (Fla. 2d DCA 2005).

In case number 98-21797, Petitioner, James L. Brooks, plead nolo contendere to car jacking without a firearm on October 12, 1999 and was sentenced to four years probation (R.30-31). While on probation Petitioner was charged with attempted robbery: case no.: 00-19029 CF10 and false imprisonment: case no. 99-9072 (R. 33,41-42).

A review of the sentencing transcript reveals that Petitioner entered a negotiated plea with what his counsel called "very favorable terms" wherein he received a sentence for ten years to run concurrently with his sentences imposed for the underlying violation of probation charges (T. 4-6). The trial court noted that it could have imposed a 15 year sentence for the robbery charge alone and then imposed additional sentences for the violation of probation. Petitioner was sentenced to five years in prison on the false imprisonment charge and ten years for the attempted robbery charge to run concurrent with the ten year sentence imposed for the original car jacking charge (T. 28-33).

Petitioner successfully challenged the five year mandatory habitual felony offender portion of his sentence under 3.800(a). Brooks v. State, 837 So. 2d 1125 (Fla. 4th DCA 2003). On May 23, 2003, the trial court re-sentenced Petitioner to ten years it originally imposed (R. 52-57).

On September 5, 2005, Petitioner filed the subject Motion to Correct Sentence, under 3.800(a), alleging that his sentence was illegal as the original offense of car jacking without a firearm was improperly scored as a level 9 offense, resulting in a score 36 points higher than the lowest permissible guidelines sentence. The Motion was summarily denied by the trial court on November 9, 2005 and Petitioner filed his initial brief in the Fourth District Court of Appeal on January 15, 2006. The State filed a response to the Fourth District's Order to show cause on January 27, 2006.

On June 7, 2006, the Fourth District Court of Appeals issued an opinion affirming the summary denial, receding from its opinion in Brotons v. State, 889 So. 2d 174 (Fla. 4th DCA 2004) and certifying conflict with the Wilson v. State, 913 So. 2d 1277 (Fla. 2d DCA 2005). Petitioner filed a Motion to Invoke Discretionary Jurisdiction on June 20, 2006. This Court postponed its decision on jurisdiction and issued a briefing schedule on July 20, 2006.

SUMMARY OF THE ARGUMENT

The Conflict Between the Decision of the Fourth District and the Second District on the Issue of What Harmless Error Standard Applies to 3.800(a) Motions Should be Resolved in Favor of the Fourth District's Opinion.

The State argues that a Rule 3.800(a) motion to correct sentence, which can be raised at any time, is intended to address a narrow type of sentencing error that is apparent from the face of the record and can be corrected without an evidentiary hearing.

The subjective question of whether a sentencing judge "would have imposed" the same sentence on a corrected score sheet, when the erroneous score sheet was within the guidelines, would require an evidentiary hearing and therefore would not be apparent on the face of the record. This standard would exempt a defendant from preserving and timely raising a sentencing error in the trial court and create an unreasonable burden on the State to conduct evidentiary hearings to determine what a sentencing judge "would have" done years and even decades after a sentence was imposed and therefore is inappropriate for 3.800(a) claims.

ARGUMENT

The Conflict Between the Decision of the Fourth District and the Second District on the Issue of What Harmless Error Standard Applies to 3.800(a) Motions Should be Resolved in Favor of the Fourth District's Opinion That the "Could Have Imposed" Standard Applies to 3.800(a).

JURISDICTION

Petitioner has properly sought Discretionary Review from this Court, pursuant to Article V, Section 3(b)(4) of the Florida Constitution, based on the Fourth District Court of Appeal Certification of Conflict with the Second District Court of Appeals in Wilson v. State, 913 So. 2d. 1277 (Fla. 2d DCA 2005).

STANDARD OF REVIEW

The issue of what harmless error test applies to 3.800(a) motions is a question of law to be reviewed de novo. Hale v. State, 630 So. 2d 521 (Fla. 1994).

ARGUMENT

In Brooks v. State, 930 So. 2d 835 (Fla. 4th DCA 2006), the Fourth District Court of Appeal addressed the question of whether the "could have imposed" or "would have imposed" harmless error standard should apply to 3.800(a) motions to correct sentence. Florida Rule of Criminal Procedure 3.800(a) provides the trial court with the power to correct a sentencing error at any time when it is affirmatively alleged that the court records demonstrate on their face an entitlement

to that relief. The Fourth District held that the "could have imposed" standard applies to 3.800(a) motions, receding from its earlier decision in Brotons v. State, 889 So.2d 174 (Fla. 4th DCA 2004).[1] In the conflict case, Wilson v. State, 913 So. 2d 1277 (Fla. 2nd DCA 2005), the court held that defendant was entitled to a hearing on his 3.800(a) claim of a score sheet error as the record did not conclusively show that the trial judge would have imposed the same sentence with a corrected score sheet. Respondent argues that this Court should find the "could have imposed" the correct harmless error standard for claims raised under 3.800(a).

In Judge v. State, 596 So. 2d 73, 76,77 (Fla. 2d DCA 1991) *review denied*, 613 So. 2d 5 (Fla. 1992), the court recognized that three types of sentencing errors:

> (1) an "erroneous sentence" which is correctable on direct appeal; (2) an "unlawful sentence" which is correctable only after an evidentiary hearing under rule 3.850; and (3) an "illegal sentence" in which the error must be corrected as a matter of law in a rule 3.800 proceeding.

In Davis v. State, 661 So. 2d 1193,1196 (Fla. 1995), this Court explained that an illegal sentence is one that exceeds the maximum period set forth by law for a particular offense without regard to the guidelines. In Carter v. State, 786 So. 2d 1173,1180-1181 (Fla. 2001), this Court stated that an illegal sentence is one that

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[1]In Brotons, the Fourth District reversed the trial court's order denying the 3.800(a) and remanded to the trial court determine whether the record conclusively showed that the court would have imposed the same sentence.

imposes the kind of punishment that no judge under the entire body of sentencing statutes could possibly inflict under any set of factual circumstances. The State argues that because Petitioner was sentenced pursuant to a negotiated plea which was well within the guidelines on the corrected score sheet, he is not entitled to a re-sentencing after the time for filing a 3.850 has expired.

In State v. Callaway, 658 So. 2d 983 (Fla. 1995), this Court held that "A rule 3.800(a) motion can be filed at any time, even decades after a sentence has been imposed, and as such, its subject matter is limited to those sentencing issues that can be resolved as a matter of law without an evidentiary determination." In Maddox v. State, 760 So. 2d 89,103 (Fla. 2000), this Court reviewed several decisions where defendants claimed the trial court erred by using an erroneous score sheet, but had not preserved the issue at trial. The Maddox Court stated that even in those cases where the score sheet error was apparent from the record, "it does not necessarily follow that all cases involving score sheet errors must be automatically reversed for re-sentencing." Id. *quoting* State v. Mackey, 719 So. 2d 284 (Fla. 1998). The Maddox Court also noted that assessing whether a score sheet error that appears on the face of the record constitutes fundamental error, the appellate courts should consider the qualitative effect of the error on the sentencing

process and consider if the error was likely to cause a quantitative effect on defendant's sentence. Maddox at 103.

The State argues that a score sheet error which does not result in the sentence exceeding the guidelines and could have could have been imposed under the corrected score sheet, should be considered harmless error. When the statutes and rules governing a post conviction sentence correction are reviewed as a whole, it is clear that 3.800(a) was intended to address a narrow class of sentencing errors: those which are apparent from the face of the record and can be resolved without an evidentiary proceeding.

In Maddox, this Court reaffirmed the principal that whether an unpreserved sentencing error is considered "fundamental" error for direct appeal does not equate with whether that error is correctable through a rule 3.800(a) motion, which can be filed even decades after the sentence became final. Id. at 100.

In explaining the difference between unpreserved sentencing errors cognizable on direct appeal and those cognizable in the post conviction process, Judge Altenbernd observed:

> Generally, fundamental errors are those of constitutional dimension. But not all errors of constitutional dimension are fundamental." On direct appeal, there is a healthy tendency to occasionally find a constitutional "dimension" in some errors and to declare the errors "fundamental," even though they may not rise to the level of an actual deprivation of the appellant's

> constitutional rights. . . . The mere fact that an error, especially a procedural error, is fundamental for purposes of relief on direct appeal is no guaranty that the error must be corrected on post conviction motion when it was neither preserved in the trial court nor argued on direct appeal.

Judge, 596 So. 2d at 79 n.3 (quoting Clark v. State, 336 So. 2d 468, 472 (Fla. 2d DCA 1976)(emphasis supplied) (citations omitted). This Court stated in Maddox:

> * * *in Davis, 661 So. 2d at 1197, we used the term "fundamental" errors and "illegal" sentences interchangeably. However, clearly the class of errors that constitute an "illegal" sentence that can be raised for the first time in a post conviction motion decades after a sentence becomes final is a narrower class of errors than those termed "fundamental" errors that can be raised on direct appeal even though un preserved. * * *

Id.

As this Court stated, the State's interests in finality are greater with the passage of time. Maddox at 100 n.8.

Sentencing errors which require remand to the trial court for further proceedings require preservation or a timely filing of a 3.850 motion. Section 924.051(6), Florida Statutes (2001), provides:

> (6) In a non capital case, a petition or motion for collateral or other post conviction relief may not be considered if it is filed more than **2 years** after the judgment and sentence became final, **unless** the petition or motion alleges that:
>
> > (a) The facts upon which the claim is predicated were unknown to the petitioner or his or her attorney and could not have been ascertained by the exercise of due diligence;

> (b) The fundamental constitutional right asserted was not established within the period provided for in this subsection and has been held to apply retroactively; or
>
> (c) The sentence imposed was illegal because it either exceeded the maximum or fell below the minimum authorized by statute for the criminal offense at issue. Either the state or the defendant may petition the trial court to vacate an illegal sentence at any time.
>
> * * *

None of these exceptions to the two year time limit are applicable to the case at bar. The error in the score sheet could have been timely discovered with the exercise of due diligence as Petitioner successfully raised another sentencing issue two years before this one, he has not argued that his claim involves a constitutional right which was established within the two year period, and finally, his sentence was not "illegal" as it did not exceed or fall below statutory maximum. Petitioner's sentence was based on a negotiated plea and was well below the guidelines maximum. (T. 4-6).

The legislature recognizes the necessity of time limits which ensure that claims are raised and resolved with a reasonable period of time. Section 924.051(8), states:

> It is the intent of the Legislature that all terms and conditions of direct appeal and collateral review be strictly enforced, including the application of procedural bars, to ensure that all claims of error are raised and resolved at the first opportunity. It is also the Legislature's intent that all procedural bars

> to direct appeal and collateral review be fully enforced by the courts of this state.
>
> * * *

Petitioner could have raised the score sheet issue in the trial court and then argued the error on direct appeal. Rule 3.800(b) provides that a motion to correct sentencing error may be filed during the time allowed for filing a notice of appeal or a motion pending appeal may be filed providing it is served prior to the filing of the initial brief. Rule 3.800(c) provides that a motion to modify or reduce the sentence may be filed within 60 days of the issuance of the appellate court mandate.

Rule 3.850 provides a defendant with an opportunity to raise a sentencing hearing and obtain an evidentiary hearing within two years of his sentence becoming final. Although the rule states that a motion to vacate a sentence which exceeds the limits provided by law may be filed at any time, Petitioner's sentence did not exceed the legal limit, and therefore his claim would have been subject to the two year limit if raised under 3.850.

A review of the sentencing transcript in the instant case reveals that Petitioner entered a negotiated plea with very favorable terms wherein he received a sentence for ten years to run concurrently with his sentences imposed for the underlying violation of probation charges (T. 4-6). This sentence was imposed on

remand to vacate an erroneous habitual felony offender sentence and was identical to the sentence originally imposed (T. 28-33). The record indicates that the new charges for false imprisonment and attempted robbery could have resulted in additional 15 years in prison if they had not been imposed to run concurrently with the 10 year sentence for the original carjacking charge (T.52-57).

Even under these circumstances, where the sentence is a result of a negotiated plea, and an identical sentence was imposed on remand to correct an unrelated sentencing error, it is not apparent from the face of the record whether the corrected score sheet "would have" resulted in a different sentence, especially in light of the favorable negotiated plea agreement Petitioner received. Add to this the fact that these claims can be raised years and even decades after the original sentence was imposed, and an unreasonable burden is placed on the state to facilitate an inquiry to discover what a judge "would have done." The passage of time results in lost files, the loss of memory and the unavailability of the judges who presided over the original sentences.

Preservation and time limitations are necessary to force parties to find and correct error within a reasonable period time so that the judicial system may adequately address the issues and provide an appropriate remedy. The "would have imposed" harmless error standard advocated by Petitioner would negate the

requirement that a defendant preserve a sentencing error in the trial court or raise it within the two year window provided by Rule 3.850. This is not the intent of the legislature as sentencing errors raised under 3.800(a) are clearly limited to those which are apparent from the record and do not require any evidentiary findings.

Recently this Court in Anderson v. State, 905 So. 2d 111, 118 (Fla. 2005), stated that while recognizing the importance of a correct score sheet, the rules provide several opportunities to raise such an error and the "could have imposed" test may be too speculative and subjective for purposes of 3.800(a). Id. The State urges this Court to find the "could have imposed" harmless error test applicable to motions raised under 3.800(a). Therefore the State urges this Court to adopt the "could have imposed" harmless error standard to errors raised under 3.800(a).

CONCLUSION

Based on the foregoing arguments and authorities cited therein, the State of Florida respectfully requests this Honorable Court to AFFIRM the lower court's decision.

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 Courier to: Isaac R. Ruiz-Carus, Counsel for Appellant, 3202 South Stirling Avenue, Tampa, Florida 33629, this 18th day of October, 2006.

/s/_____

Of Counsel

CERTIFICATE OF TYPE SIZE AND STYLE

The undersigned hereby certified that the instant brief has been prepared with 14 point Times New Roman, a font that is not proportionately spaced, this 18th day of October, 2006.

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