IN THE SUPREME COURT OF FLORIDA

MICHAEL GISI,

Appellant,

v. **CASE NO. SC07-319**

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

The record on appeal is contained in one volume. The pages in the volume have stamped numbers on the lower right of the page. All numbers are consecutive. Reference to the record will be (R __) using the stamped numbers.

It should be noted the only issue certified, and thus upon which jurisdiction was granted, dealt with the question of whether, since the sentence was changed from concurrent to consecutive, Appellant should get credit for time served on each of the consecutive sentences.

Since the Appellant has raised all the issues presented to the Second District anew in this Court, Appellee has answered each, but issues other than the certified question should not be considered.

STATEMENT OF THE CASE AND FACTS

This case arrived here based upon a certified question from the District Court:

> IS A DEFENDANT, ON RESENTENCING, ENTITLED TO CREDIT ON EACH NEWLY IMPOSED CONSECUTIVE SENTENCE FOR PRISON TIME ALREADY SERVED ON THE ORIGINAL CONCURRENT SENTENCES?

Gisi v. State, 948 So. 2d 816 (Fla. 2nd DCA 2007)

Appellee herein incorporates the statement of the case facts and case as set forth in the answer brief in the Second District case.

Appellee accepts Appellant's statement of the case with the following additions and corrections:

Appellant was originally convicted after a trial of four counts of lewd and lascivious acts on a child under sixteen, eight counts of handling and fondling a child under sixteen, one count of interference with custody, and one count of seduction of a child via computer. (R 20)

The Second District Court of Appeal, in Gisi v. State, 909 So. 2d 531 (Fla. 2d DCA 2005)[1] reversed, after new appellate counsel was assigned to brief additional issues, one of the lewd and lascivious charges and all of the fondling charges and sentences were vacated as a violation of double jeopardy, based

[1] This Court, in Gisi v. State, 848 So. 2d 1278 (Fla. 2d DCA 2003) ordered the trial court to assign new appellate counsel to brief issues enumerated in the opinion.

upon a failure of the jury to find penetration. The case was remanded for resentencing.

At the resentencing hearing[2] on December 14, 2005 (R 97), Appellant's counsel argued the State, once Appellant had been sentenced to concurrent terms, was vindictive to resentence him to consecutive terms. Further, because he was originally sentence to the bottom of the guideline range, he should again be sentenced to the bottom of the range. (R 106)

The State responded that the trial court had determined 71 year sentences concurrent were the appropriate sentences, not because that was the bottom of the range. (R 107)

After further argument, the trial court pronounced sentence.

> THE COURT: Okay. Thank you. And if the defendant will stand. And the Court having listened carefully to what was said today and having reviewed the sentencing that took place in 2000 and taking into account the enticement of an educated person who was computer savvy and the devastating effect of his actions on a child of 13 years of age and the devastating and destructive effect that those actions had on her life and continues to have on her life and even on her family, the Court finds that you, Michael Gisi, should be sentenced on counts one, count two, and count four, to 15 years on each count to be served consecutively for a total of 45 years from the date of the original sentence, which was May 26th of 2000, with credit for time served prior to

[2] The same judge who originally sentenced Appellant also presided at the resentencing.

> that and credit for time served since the date of sentencing in the Department of Corrections.
>
> And you are remanded to the Department of -- or resent to custody of the Department of Corrections to serve that sentence in the state prison system. You have 30 days to appeal. And when I said in the prior sentencing that I was being generous by sentencing you at that time to 71 years, it was because my alternative would have been a life sentence and I think that you are once, again, the recipient of generosity, because the acts that you committed as an adult with his own family and the effects on your own family as well as that of those on the victim, were horrendous.

(R 167-168)

After hearing the sentence, Appellant's counsel claimed he was entitled to time served on each of the consecutive sentences the trial court imposed. The State responded the calculation of proper credit for time served is done by the Department of Corrections based upon the sentencing documents. (R 169)

SUMMARY OF THE ARGUMENT

The trial court did not err in resentencing Appellant as required by the decision of this court. The sentence was not vindictive. It was legal. Credit for time served was properly applied.

The trial court did not abuse its discretion in imposing consecutive sentences on resentencing, since the aggregate sentence was substantially less than the original sentence.

The trial court did not abuse its discretion in not taking into account other sentences in other sexual abuse cases.

ARGUMENT

ISSUE I

DID THE TRIAL COURT ERR IN NOT CREDITING THE APPELLANT WITH TIME SERVED ON EACH OF THE THREE CONSECUTIVE COUNTS OF HIS RESENTENCE. (RESTATED)

Appellant claims since the original sentence was concurrent and the resentence was consecutive, Appellant is entitled to time served on the three counts for which he was newly sentenced. In other words, since he had served over five years on the original concurrent sentences, he should get five years credit on each count in which he was resentenced consecutively, or a total of in excess of fifteen years credit, though he only served a third of that time.

> Section 921.161(1), Florida Statutes (2004), directs that any person sentenced must receive credit for all time spent in jail prior to the imposition of sentence. See Crompton v. State, 728 So. 2d 1188, 1189 (Fla. 1st DCA 1999)("The failure to award jail credit for time served before sentencing constitutes an illegal sentence."). But the precise legal consequences of spending time in jail before initial sentencing can remain unclear until acquittal or sentencing. If a defendant is acquitted of all charges, of course, his prosecution will result in no sentence against which time spent in jail must be credited under section 921.161(1). If convicted of a single offense, the defendant is entitled to credit for time he spent in jail before any incarcerative sentence was pronounced.
>
> If convicted of multiple offenses, the defendant must be given credit only on the

> first of consecutive sentences. When consecutive sentences are imposed, "the defendant 'is not entitled to have his jail time credit pyramided by being given credit on each sentence for the full time he spends in jail awaiting disposition.'" Daniels v. State, 491 So. 2d 543, 545 (Fla. 1986)(emphasis omitted)(quoting Martin v. State, 452 So. 2d 938, 938-39 (Fla. 2d DCA 1984)). See also Bell v. State, 573 So. 2d 10, 11 (Fla. 5th DCA 1990). On the other hand, when a defendant is entitled to presentence jail-time credit against concurrent sentences, jail time must be credited against each concurrent sentence. *See* Daniels, 491 So. 2d at 545. When sentences are imposed concurrently, the defendant receives credit on each sentence for time spent in jail before sentencing.

Barnishin v. State, 927 So. 2d 68, 70-71 (Fla. 1st DCA 2006)

Though Barnishin speaks about an initial sentence, with the time served prior to conviction and sentence, the logic is no different for a resentence after a determination the original sentence was illegal.

In crafting the certified question, the Second District said:

> Gisi claims the trial court was required to give credit for time served on each of the three resentenced counts. He argues that, until he was resentenced on December 14, 2005, he served five years on each of his concurrent sentences, and pursuant to section 921.161, Florida Statutes (1997), credit for time served on each count is mandatory. In other words, the total credit Gisi seeks is fifteen years-five years on each of his new consecutive sentences. We cannot adopt this logic because it elevates a legal fiction into a reality that would thwart society's ability to have its judges fully impose a punishment

that the judges believe to be appropriate. Section 921.161 is not applicable to this case because it addresses the requirement for county jail time credit incurred while a defendant awaits sentencing and does not address the application of state prison time served prior to a resentencing. In any event, jail credit against consecutive sentences is mandatory on only one of the consecutive sentences; anything further is discretionary with the sentencing court. See Keene v. State, 500 So. 2d 592, 594 n.2 (Fla. 2d DCA 1986).

Gisi also asserts that case law supports his argument, primarily relying on Drymon v. State, 878 So. 2d 438 (Fla. 1st DCA 2004). However, Drymon was a certiorari proceeding dealing with a defendant's right to receive credit for unforfeited gain time when later resentenced to consecutive terms. Id. Thus, Drymon does not control the outcome here because it does not deal with the issue before us. Rather, we find the logic of Barnishin v. State, 927 So. 2d 68 (Fla. 1st DCA 2006), persuasive, even though it deals only with county jail time credit.

If convicted of multiple offenses, the defendant must be given credit only on the first of consecutive sentences. When consecutive sentences are imposed, "the defendant 'is not entitled to have his jail time credit pyramided by being given credit on each sentence for the full time he spends in jail awaiting disposition.'"

Barnishin, 927 So. 2d at 71 (quoting Daniels v. State, 491 So. 2d 543, 545 (Fla. 1986)). However, "[w]hen sentences are imposed concurrently, the defendant receives credit on each sentence for time spent in jail before sentencing." Id. By way of analogy, because a resentencing hearing imposes a new sentence, the state prison time served becomes tantamount to county jail time served awaiting sentencing. If accorded the

> same treatment, this jail credit must be given at sentencing, but the issue of whether credit will be given on each consecutive sentence remains the prerogative of the sentencing judge.
>
> Although we find the logic of Barnishin persuasive in this affirmance, Barnishin is factually distinguishable because it did not deal with the issue of prison credit in the context of resentencing. Thus, because there is little case law in this area and none exactly on point to our knowledge and because this concerns a matter of statewide impact upon which trial courts will need future guidance, we certify a question of great public importance for the supreme court to consider providing resolution:

Gisi v. State, 948 So. 2d 816 (Fla. 2nd DCA 2007)

What Appellant now seeks, and sought on appeal to the Second District, is counter intuitive. He seeks not time served, but time served stacked on to time he has not yet served. His argument is also flawed because it is predicated upon his claim he is entitled to be sentenced only concurrently, because this is what happened the last time. He neglects to appreciate, that by his own actions (and the fortuitous change in the law brought about by Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), which was decided after Appellant was originally sentenced) the original sentence was vacated and a new sentencing hearing ordered.

Appellant is not entitled to credit for three times the time he already spent prior to his resentence.

ISSUE II

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN IMPOSING CONSECUTIVE SENTENCES ON RESENTENCING, SINCE THE AGGREGATE SENTENCE WAS SUBSTANTIALLY LESS THAN THE ORIGINAL SENTENCE. (RESTATED)

The initial sentence in this case was illegal based upon Apprendi v. New Jersey, 530 U.S. 466 (2000), however, the trial court did not have the benefit of Apprendi at the time of sentencing[3].

At original sentencing, the trial court sentenced Appellant on the sexual abuse counts to 71 years in prison concurrent, predicated upon penetration, which was not presented to the jury for there determination[4]. (R 107)

Appellant now claims the change of Appellant's sentence from concurrent to consecutive is vindictive. The United States Supreme Court in North Carolina v. Pearce, 395 U.S. 711 (1969), discussed vindictive sentencing.

> It can hardly be doubted that it would be a flagrant violation of the Fourteenth Amendment for a state trial court to follow an announced practice of imposing a heavier sentence upon every reconvicted defendant

[3] Appellant was sentenced on May 26, 2000. The opinion in Apprendi was issued on June 26, 2000. Therefore, this was a pipeline case. Appellate counsel should have been aware of Apprendi. Dates are set forth in Gisi v. State, 848 So. 2d 1278, 1282 (Fla. 2d DCA 2003), which opinion appointed new appellate counsel to prosecute the appeal.

[4] The two third degree felonies, which this Court affirmed, are not relevant to this claim, since Appellant has already served his sentence on those.

for the explicit purpose of punishing the defendant for his having succeeded in getting his original conviction set aside. Where, as in each of the cases before us, the original conviction has been set aside because of a constitutional error, the imposition of such a punishment, "penalizing those who choose to exercise" constitutional rights, "would be patently unconstitutional." United States v. Jackson, 390 U.S. 570, 581. And the very threat inherent in the existence of such a punitive policy would, with respect to those still in prison, serve to "chill the exercise of basic constitutional rights." Id., at 582. See also Griffin v. California, 380 U.S. 609; cf. Johnson v. Avery, 393 U.S. 483. But even if the first conviction has been set aside for nonconstitutional error, the imposition of a penalty upon the defendant for having successfully pursued a statutory right of appeal or collateral remedy would be no less a violation of due process of law. "A new sentence, with enhanced punishment, based upon such a reason, would be a flagrant violation of the rights of the defendant." Nichols v. United States, 106 F.2d 672, 679. A court is "without right to . . . put a price on an appeal. A defendant's exercise of a right of appeal must be free and unfettered. . . . It is unfair to use the great power given to the court to determine sentence to place a defendant in the dilemma of making an unfree choice." Worcester v. Commissioner, 370 F.2d 713, 718. See Short v. United States, 120 U. S. App. D. C. 165, 167, 344 F.2d 550, 552. "This Court has never held that the States are required to establish avenues of appellate review, but it is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts. Griffin v. Illinois, 351 U.S. 12; Douglas v. California, 372 U.S. 353; Lane v. Brown, 372 U.S. 477; Draper v. Washington,

372 U.S. 487." Rinaldi v. Yeager, 384 U.S. 305, 310-311.

North Carolina v. Pearce, 395 U.S. 711, 723-725 (U.S. 1969)

Since handing down Pearce, the Supreme Court has limited its application.

> While the Pearce opinion appeared on its face to announce a rule of sweeping dimension, our subsequent cases have made clear that its presumption of vindictiveness "do[es] not apply in every case where a convicted defendant receives a higher sentence on retrial." Texas v. McCullough, 475 U.S., at 138. As we explained in Texas v. McCullough, "the evil the [Pearce] Court sought to prevent" was not the imposition of "enlarged sentences after a new trial" but "vindictiveness of a sentencing judge." Ibid. See also Chaffin v. Stynchcombe, 412 U.S. 17, 25 (1973) (the Pearce presumption was not designed to prevent the imposition of an increased sentence on retrial "for some valid reason associated with the need for flexibility and discretion in the sentencing process," but was "premised on the apparent need to guard against vindictiveness in the resentencing process"). Because the Pearce presumption "may operate in the absence of any proof of an improper motive and thus . . . block a legitimate response to criminal conduct," United States v. Goodwin, supra, at 373, we have limited its application, like that of "other 'judicially created means of effectuating the rights secured by the [Constitution],'" to circumstances "where its 'objectives are thought most efficaciously served,'" Texas v. McCullough, supra, at 138, quoting Stone v. Powell, 428 U.S. 465, 482, 487 (1976). Such circumstances are those in which there is a "reasonable likelihood," United States v. Goodwin, supra, at 373, that the increase in sentence is the product of actual

> vindictiveness on the part of the sentencing authority. Where there is no such reasonable likelihood, the burden remains upon the defendant to prove actual vindictiveness, see Wasman v. United States, 468 U.S. 559, 569 (1984).

Alabama v. Smith, 490 U.S. 794, 799-800 (U.S. 1989)

Unlike the Federal cases cited above, Appellant did not receive a greater sentence, but his total sentence was lowered from 71 to 45 years.

Appellant further argues the re-sentence was in violation of the spirit of Gisi v. State, 909 So. 2d 531 (Fla. 2d DCA 2005) (Gisi II) (See Brief at page 8). Appellant goes on to say that the Second District ordered contact points be substituted for penetration points previously applied.

It needs to be pointed out that the State conceded this point in the District Court because after the original sentencing hearing and during the appeal process, the United States Supreme Court came down with the decision in Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). At the time of the sentencing, the trial court's assessing victim injury points was correct based upon the law prior to June 26, 2000. Only because this was a pipeline case, did Apprendi apply.

However, Appellant now claims, as he did below, the resentence was defective because it did not follow the mandate

of the Second District. In addressing that claim below, the Second District said:

> First, Gisi claims that his sentences violated Gisi I. In Gisi I, we imposed no limitations on the trial court's resentencing scheme, except that Gisi was to be sentenced using contact points instead of penetration points. On remand, Gisi was sentenced using contact points. Thus, there is no credence to the assertion that the trial court did not follow our mandate. As noted at oral argument, Gisi's malaise in this regard relates more to his general assertion that because the original sentences fell near the low end of the guidelines, so too should the new sentences; in other words, the resentencing proceeding should be more of a formality than a "de novo" sentencing hearing. The case law on this issue dictates otherwise. See Wilson v. State, 913 So. 2d 1277, 1279 (Fla. 2d DCA 2005) (noting that the defendant may or may not obtain a different sentence upon resentencing based on a corrected scoresheet).

Gisi v. State, 948 So. 2d at 816 (Fla. 2d DCA 2007)

This case stemmed from conduct occurring after October 1, 1998. A legal sentence for three second degree felonies could be, if the trial court so dictated, fifteen years on each count, which is exactly what the trial court did here. The total sentence of forty five years was based upon stacking the counts. A score sheet, if one were not done, was not necessary based upon the State’s requested and approved sentence. When a penalty at the maximum allowed by statute is imposed, victim injury points are irrelevant, though the trial court can

certainly take into consideration the conduct proved through trial.

Appellant also claims the State's presentation of additional evidence at the re-sentencing violated double jeopardy because the State already had the opportunity to present evidence at the original hearing. Appellant does not account for the fact the sentence handed down at the original hearing was in part reversed.

In a concurring opinion in Lloyd v. State, 844 So. 2d 713 (Fla. 2d DCA 2003), a case dealing with presenting evidence for enhancement after the first sentence was reversed for insufficient evidence of prior felonies, Judge Altenbernd said:

> Although the topic is somewhat complex, as a general proposition, double jeopardy does not apply to sentencing hearings. See Doggett v. State, 584 So. 2d 116 (Fla. 1st DCA 1991). So long as double jeopardy is not implicated, I believe that both sides to the controversy are simply entitled to a new sentencing hearing where the necessary evidence is presented and the correct law is applied. See Cameron v. State, 807 So. 2d 744 (Fla. 4th DCA 2002); Brown v. State, 701 So. 2d 410 (Fla. 1st DCA 1997); Henderson v. State, 651 So. 2d 822 (Fla. 4th DCA 1995). See, e.g., Pelham v. State, 815 So. 2d 733 (Fla. 2d DCA 2002); Singleton v. State, 760 So. 2d 250 (Fla. 2d DCA 2000); Yankovski v. State, 785 So. 2d 1283 (Fla. 5th DCA 2001); see also Mann v. State, 453 So. 2d 784 (Fla. 1984).

Lloyd, 844 So. 2d at 714-715

ISSUE III

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN NOT TAKING INTO ACCOUNT OTHER SENTENCES IN OTHER SEXUAL ABUSE CASES. (RESTATED)

Appellant next alleges because other courts at other times and places have given different sentences for what he claims to be similar behavior, this sentence is improper because it is not proportional. A request for a downward departure was made at the resentencing hearing and rejected by the trial court. That was within the discretion of the trial court. There is no claim here the sentence imposed is illegal, only that it is inappropriate.

> For each defendant, the Criminal Punishment Code establishes a "lowest permissible sentence." § 921.0024(2), Fla. Stat. (2000). The code provides that a "court may impose a departure below the lowest permissible sentence based upon circumstances or factors that reasonably justify the mitigation of the sentence." § 921.002(3), Fla. Stat. (2000) (emphasis added). One of those mitigating factors is physical disability which is amenable to treatment. See § 921.0026(2)(d), Fla. Stat. (2000). However, the use of the word "may" shows that the determination of whether to reduce the sentence is discretionary, as is the decision of the proper sentence between the lowest permissible sentence and the statutory maximum. Neither are appealable issues.
>
> Prior to the adoption of sentencing guidelines, which preceded the Criminal Punishment Code, a trial court's sentencing discretion up to the statutory maximum was unreviewable by the court. In Brown v.

State, 152 Fla. 853, 13 So. 2d 458, 461-62 (Fla. 1943), the court stated:

> The legislature has by statute fixed the maximum punishment which may be imposed for violation of the provisions of the statutes, and, therefore, it is within the province of the trial court to fix by sentence the punishment within the limits prescribed by statute. If in any particular case the sentence and punishment imposed thereunder appears to be excessive, that is a matter which should be presented to the State Board of Pardons for the exercise of its power of commutation and is not a matter for review and remedy by the appellate court.
>
> Again, in Davis v. State, 123 So. 2d 703, 707 (Fla. 1960), the court stated, "in a long adhered to line of cases, we have held that where a sentence is within the statutory limit, the extent of it cannot be reviewed on appeal regardless of the existence or nonexistence of mitigating circumstances." (Emphasis added). See also Wallace v. State, 299 So. 2d 643, 643 (Fla. 1st DCA 1974) (declining to disturb trial court's discretionary sentencing decision within statutory limits). With the adoption of the Criminal Punishment Code, giving the trial court the discretion both to impose any sentence between the lowest permissible sentence and the statutory maximum and to apply mitigating factors to reduce the sentence below the lowest permissible sentence, this line of case law is again relevant to sentencing appeals. Based upon this authority, judicial discretion in sentencing is not appealable.

Winther v. State, 812 So. 2d 527, 528-529 (Fla. 4d DCA 2002)

In dealing with this claim, the Second District indicated:

> Gisi's third claim is that the new sentences were disproportional and violate equal protection but offers no authority supporting this contention. This is a platitude that has no application that

> we are aware of in nondeath penalty cases, except as it may somehow relate to a downward departure request. Even then, a decision not to depart is generally not reviewable on appeal as it is discretionary with the trial court, provided only that the statutory maximum is not exceeded. Brown v. State, 152 Fla. 853, 13 So. 2d 458, 461-62 (Fla. 1943). Further, although Gisi does not argue that his sentences are cruel and unusual, he does argue that they are disproportional, a somewhat similar concept. We note that his sentences are not "grossly disproportionate" to his crimes, and accordingly, reversal on cruel and unusual punishment grounds is not justified. See Adaway v. State, 902 So. 2d 746, 749 (Fla. 2005).

Gisi v. State, 948 So. 2d 816 (Fla. 2d DCA 2007)

There is no merit to Appellant's claim his sentence should reflect other sentences he found in other counties or other parts of the country at different times. The trial court sentenced Appellant based upon this case, not some other case that was not tried before the sentencing judge.

CONCLUSION

Appellee respectfully requests Appellant's convictions and sentences be affirmed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing has been furnished by U.S. mail to Charles E. Lykes, Esq., 501 S. Ft. Harrison Ave., Suite 101, Clearwater, Florida 33756, this 14th day of May 2007.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY 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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