IN THE SUPREME COURT OF FLORIDA

CHARLES MAPP,	:	
Petitioner,	:	
vs.	:	Case No. SC09-1838
STATE OF FLORIDA,	:	
Respondent.	:	
	:	

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

INITIAL BRIEF OF PETITIONER ON THE MERITS

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PRELIMINARY STATEMENT

The record on appeal consists of one volume plus three supplements, all consecutively numbered. Citations to the record will be designated by volume number (I, 1S, 2S or 3S), followed by "R" and the appropriate page number.

STATEMENT OF THE CASE

In Polk County Circuit Court Case No. CF06-9191-XX, Charles Mapp, Petitioner, was charged by a three-count Information filed December 22, 2006 with burglary of a conveyance, grand theft, and dealing in stolen property (I, R39-41). The same day, a four-count Information filed in Circuit Court Case No. CF06-9192-XX charged Mapp with burglary of a conveyance, grand theft, possession of drug paraphernalia, and possession of cocaine (I, R44-7). At a hearing held May 4, 2007, Petitioner entered pleas of no contest to all charges (1S, R140-3). Defense counsel stipulated to a factual basis for the charges and the court accepted Petitioner's pleas (1S, R143).

The disposition hearing was held August 24, 2007 (I, R54-88). The State presented victim testimony from Roger Barfield, William Toth, and Robert Hockaday. Barfield, owner of High Tech Autos, testified that the equipment stolen from the business plus the damages to the premises amounted to between fifteen and twenty thousand dollars (I, R61-2, 65). He urged the court to impose a maximum prison sentence (I, R63).

William Toth testified that his automobile was stolen from High Tech Autos, where it had been repaired (I, R67). Eventually, it was recovered, but required additional repairs that were covered by insurance (I, R69). The witness estimated that his

monetary loss from the incident was $750 - $1000, “somewhere in that ballpark” (I, R68-9).

Robert Hockaday estimated losses and damages to his garage business at “$5025 or somewhere in there”. He requested the court to impose a maximum prison sentence (I, R72).

The court considered the presentence investigation and a scoresheet showing a minimum prison sentence of 30.7 months (I, R78-83, 90-2). Based upon the prosecutor’s statement that the State would have sought habitual offender sentences if the case had gone to trial (I, R81), the court proceeded to sentence Petitioner as a habitual felony offender in both cases.

In Case No. CF06-9191, the court imposed a ten year habitual offender sentence on the burglary of a conveyance count and a concurrent ten years on the dealing in stolen property count (I, R84-5, 102-6). The court did not impose sentence on the grand theft count (I, R85, 107). A judgment of restitution for $5025 was entered for the victim Hockaday (I, R85, 96).

In Case No. CF06-9192, the judge sentenced Petitioner to concurrent ten year habitual felony offender sentences on the burglary of a conveyance count and the grand theft count (I, R86, 111-2, 114). Concurrent sentences of five years on the possession of cocaine count and one year on the possession of drug paraphernalia were also imposed (I, R87, 113, 117). All of the sentences in Case No. CF06-9192 were made consecutive to the sentences imposed in Case No. CF06-9191 (I, R86, 116). Judgments

of restitution were entered for Toth ($1000) and High Tech Autos ($20,000) (I, R86-7, 97-8).

Petitioner filed a timely notice of appeal September 19, 2007 (I, R120). Appellate counsel filed a motion to correct sentencing error pursuant to Fla. R. Crim. P. 3.800(b)(2) on June 18, 2008 (2S, R150-230). He argued that the judge improperly imposed habitual felony offender sentences because the State had not given written notice of intent to seek habitual offender sentencing in either of Appellant's cases (2S, R150-1). Neither was Mapp advised when he entered his pleas that habitualized sentencing was possible (2S, R151).

The Rule (b)(2) motion also argued error in ordering restitution without documentary evidence to support the amounts (2S, R151-2). The trial judge reviewed the motion and set a status conference by an order entered June 20, 2008 (2S, R232). However, no ruling was made before September 5, 2008 when the Clerk of Court certified that the sixty day period had elapsed without a ruling on the motion (2S, R238). The trial judge later struck the habitual felony offender designations from Mapp's sentences and vacated the orders of restitution, but this untimely order was held "a nullity" when the Second District issued its later decision in his appeal. *See Appendix,* Mapp v. State, Case No. 2D07-4485 (September 4, 2009), Slip opinion at page 3.

Appellate counsel filed a subsequent Rule 3.800(b)(2) motion on September 24, 2008 (3S, R240-60). In this motion, he requested

the court to delete the adjudication of guilt for grand theft in Case No. CF06-9191-XX because Petitioner was also adjudicated guilty of dealing in stolen property in the same course of conduct (3S, R240-1). The judge granted this motion October 3, 2008 and a corrected written judgment and sentence was entered (3S, R262-70). Incorporated into this corrected judgment and sentence is a "Re-Sentence 9/15/08" which struck the habitual felony offender designation of the sentence and vacated the order of restitution (3S, R263, 266-70).

Petitioner then proceeded with his appeal to the Second District Court of Appeal. In an opinion entered September 4, 2009, the court held that a habitual offender sentence imposed without notice to the defendant (or request by the prosecution) was not a "sentencing error" within the parameters of Rule 3.800(b)(2). The court held that a contemporaneous objection at the sentencing hearing was necessary to preserve a claim that habitual offender sentences were imposed without notice to the defendant. Mr. Mapp's habitual offender sentences and orders of restitution as originally imposed were affirmed.

Petitioner filed his notice to invoke the discretionary jurisdiction of this Court on October 1, 2009, arguing that the decision of the Second District was reviewable under Fla. R. App. P. 9.030(a)(2)(A)(iv); express or direct conflict of decisions on the same question of law. This Court accepted jurisdiction April 20, 2010.

SUMMARY OF THE ARGUMENT

The Second District's opinion adopts an overly restrictive view of what sentencing errors may be corrected by motion pursuant to Rule 3.800(b). This Court's decision in Jackson v. State, 983 So. 2d 562 (Fla.2008) allows correction (or preservation for appeal) of "any error entered as a result of the sentencing process – that is, orders related to the sanctions imposed". Unlike the Second District's opinion at bar, Jackson specifically allows error to be preserved by a Rule 3.800 motion even when the defendant had not lodged a contemporaneous objection in the trial court.

Imposing habitual offender sentences when the State did not file a notice of intent to seek habitualization is a sentencing error directly related to the prison sentences imposed on Petitioner. Similarly, the orders of restitution entered with speculative insufficient evidence to support the amount Petitioner was ordered to pay were subject to correction under Rule 3,800(b)(2). The Second District's opinion should be quashed.

ARGUMENT

ISSUE I

IMPROPER IMPOSITION OF A HABITUAL OFFENDER SENTENCE WHERE THE STATE DID NOT FILE A NOTICE OF INTENT TO SEEK HABITUALIZATION IS AN ISSUE WHICH MAY BE PRESERVED FOR APPELLATE REVIEW VIA A RULE 3.800(b) MOTION.

In Ashley v. State, 614 So. 2d 486, 490 (Fla. 1993), this Court wrote:

> In sum, we hold that in order for a defendant to be habitualized following a guilty or nolo plea, the following must take place prior to acceptance of the plea: 1) The defendant must be given written notice of intent to habitualize, and 2) the court must confirm that the defendant is personally aware of the possibility and reasonable consequences of habitualization.

At bar, neither of the two Ashley prerequisites was satisfied. The State never filed a written notice of intent; in fact, the prosecutor said only at sentencing that Petitioner qualified as a habitual offender and that had he gone to trial, the State would have pursued habitualization. Since habitualization was not contemplated when Petitioner entered his plea, there was no reason for the court to include admonishment about possible habitual offender sanctions in the plea colloquy.

Clearly, Petitioner's habitual offender sentences were improperly imposed. The Second District's opinion does not disagree; it simply denied Mr. Mapp relief on direct appeal because defense counsel did not make a contemporaneous objection

when the sentences were imposed.

Appellate counsel filed a Rule 3.800(b)(2) motion in the trial court to preserve the error of imposing habitual offender sentences where the State had not filed a written notice of intent. This Court should note that prior to the 1996 adoption of the Criminal Appeals Reform Act, failure to object to lack of notice did not bar review on direct appeal. Indeed, in Ashley itself, this Court wrote:

> [A]lthough Ashley failed to object to lack of notice at trial, no contemporaneous objection is required in order to preserve a purely legal sentencing issue. Taylor v. State, 601 So. 2d 540 (Fla. 1992). The requirement of rule 3.172 and section 775.084 concerning pre-plea notice of habitualization is clearly a legal matter, involving no factual determination.

614 So. 2d at 490. *Accord*, State v. Thompson, 735 So. 2d 482 (Fla. 1999).

Fla. R. Crim. P. 3.800(b) originated because purely legal sentencing errors, previously arguable on direct appeal without preservation in the trial court, were no longer cognizable after adoption of the Criminal Appeal Reform Act. Rule 3.800(b) was intended to allow correction of these sentencing errors by the trial judge in the first instance, and to preserve the error for appellate review if the trial court denied or failed to rule upon the 3.800(b) motion.

The Second District, in Vann v. State, 970 So. 2d 878 (Fla. 2d DCA 2007), considered the situation where the defendant

received legally insufficient notice of intent to impose a habitual felony offender sentence prior to entry of his plea. The Vann court noted that the remedy for failure to follow the procedural rule was resentencing without a habitual offender sanction. However, the court declined to grant relief because "Mr. Vann did not object at sentencing, nor did he file a motion to correct sentence under Florida Rule of Criminal Procedure 3.800(b)(2)". Seemingly, the Second District in Vann was stating that had the defendant filed a Rule 3.800(b)(2) motion raising insufficient notice of intent to habitualize, he would have preserved the issue for appellate review.

The question is whether this Court's decision in Jackson v. State, 983 So. 2d 562 (Fla. 2008) has superseded the Vann analysis. Jackson recognized a difference between errors in the "sentencing process" and errors "in an order entered as a result of the sentencing process". 983 So. 2d at 574. Finding that partial denial of counsel at sentencing was an error in the sentencing process which was unrelated to the sentencing order, the Jackson court held that the defendant's claim could not be preserved for appellate review by filing a Rule 3.800(b) motion in the trial court. This Court summarized the holding:

> Thus, as written, rule 3.800(b) is not limited to correcting "illegal" sentences or errors to which the defendant had no opportunity to object. Instead, the rule may be used to correct and preserve for appeal any error in an order entered as a result of the sentencing process – that is, orders related to the sanctions imposed.

983 So. 2d at 574.

At bar, the Second District interpreted Jackson in a more restrictive fashion. It quoted from its opinion in Griffin v. State, 946 So. 2d 610 (Fla. 2d DCA 2007), *rev. on other grounds,* 980 So. 2d 1035 (Fla. 2008):

> Because sentencing documents are often created and served after the sentencing hearing, there has long been a problem with written sentences containing terms and conditions that were not imposed in open court and to which the defendant never received an opportunity to object. Rule 3.800(b) was created to address these issues. It also permits counsel to correct the kinds of issues that can be raised at any time because they render the sentence illegal.

Mapp, slip opinion at page 5. Aside from illegal sentences, this interpretation of Rule 3.800(b) includes little more than scrivener's errors as proper errors for correction under the rule.

This Court, in Jackson, clearly intended a wider parameter. It specifically stated, "the plain language of rule 3.800(b) is not limited to errors resulting in an "illegal" sentence or errors to which the defendant had no opportunity to object. Instead, it provides that it may be used to correct 'any sentencing error'". 983 So. 2d at 574. Whether defense counsel had an opportunity to object or not is not the prime concern. Rather the limit on Rule 3.800(b) is whether the claimed error actually affected a sentencing order imposed upon the defendant; *e.g.*, costs, restitution, probation, as well as a prison sentence.

The habitual offender sentences imposed upon Petitioner were a direct result of the trial judge's decision to sentence him as a habitual offender despite the lack of notice (or request) from the State. Habitual offender sanctions could not have been imposed otherwise. Therefore, improper imposition of a habitual offender sentence is an error that falls within the Jackson standard of "any error in an order entered as a result of the sentencing process".

Petitioner Mapp should be granted relief by quashing the decision of the Second District Court of Appeal and directing that he be resentenced in the trial court without designation as a habitual felony offender.

ISSUE II

IMPROPER IMPOSITION OF A RESTITUTION ORDER WHERE THE EVIDENCE OF AMOUNT OF DAMAGES WAS LEGALLY INSUFFICIENT IS AN ISSUE WHICH MAY BE PRESERVED FOR APPELLATE REVIEW VIA A RULE 3.800(b) MOTION.

When the three victims testified at Petitioner's sentencing hearing with regard to the damages they incurred because of his offenses, they did not provide any documentary evidence of their losses. The owner of High Tech Autos testified to "in between 15 to $20,000.00 with everything with what he did to our facility" (I, R62). Without further evidence, the judge entered an order of restitution against Petitioner for $20,000 (I, R86-7, 97).

Similarly, the trial court entered orders of restitution 0f $5,025 and $1000 based solely upon witness testimony of "It's in the 5,000 area – 5,025 or somewhere in there" (I,R71) and "there's probably 750 to a $1000, somewhere in that ballpark" (I, R68).

In Glaubius v. State, 688 So. 2d 913 (Fla. 1997), this Court held that evidence to support an order of restitution must be based upon more than speculation. The Glaubius court cited with approval the Second District's decision in Williams v. State, 645 So. 2d 594 (Fla. 2d DCA 1994) (State has not met its burden of demonstrating loss by preponderance of the evidence where victim's testimony is sole basis for determination and no documentary evidence is presented).

At bar, the Second District observed, "at the close of the evidence from victims about their monetary losses, defense counsel

did not object to what may have been insufficient evidence". Mapp, slip opinion at page 4. The Mapp court went on to hold that the issue had to be preserved by contemporaneous objection at the hearing. Petitioner's Rule 3.800(b)(2) motion could not preserve the error for appellate review.

As in Issue I, the Second District's opinion focuses upon opportunity to object, rather than the relationship between the error and the order of restitution. This Court's decision in Jackson, *supra*, quotes the court commentary to Rule 3.800 specifying that errors in restitution orders are included as orders entered in the sentencing process. 983 So. 2d at 574.

By analogy to court costs imposed without statutory authority, which may be corrected on a Rule 3.800(b) motion although there was opportunity at the sentencing hearing for defense counsel to object, improper imposition of restitution is likewise an "error in an order entered as a result of the sentencing process".

Moreover, restitution imposed with insufficient evidence to support the order may rise to the level of fundamental error. In Glaubius, this Court wrote:

> To hold that Beall's could recover $1600 based on the speculative evidence presented in this case would raise significant due process concerns regarding the validity of section 775.089 because such a holding would risk requiring Glaubius to pay a sum in excess of the amount of damages his criminal conduct caused the victim.

688 So. 2d at 916. Petitioner Mapp was ordered to pay restitution at the top end of the range estimated by the victims who testified. Even they allowed that this amount might exceed the actual amount of their losses caused by Petitioner's offenses.

Accordingly, this Court should quash the Second District's decision and direct that an evidentiary hearing be held in the trial court to determine the proper amount of restitution.

CONCLUSION

Based upon the foregoing argument, reasoning and authorities, Charles Mapp. Petitioner, respectfully requests this Court to quash the decision of the Second District and to direct that his case be remanded to the trial court for corrections to his sentences.

APPENDIX

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Donna S. Koch, Concourse Center #4, 3507 E. Frontage Rd. - Suite 200, Tampa, FL 33607, (813) 287-7900, on this _____ day of July, 2010.

CERTIFICATION OF FONT SIZE

I hereby certify that this document was generated by computer using Microsoft Word with Courier New 12-point font in compliance with Fla. R. App. P. 9.210 (a)(2).

Respectfully submitted,

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