

IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. SC09-223

TERESA SCHLABACH,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner is the Defendant and Respondent is the prosecution. Petitioner was the Appellee and Respondent was the Appellant in the Fourth District Court of Appeal. In this brief, the parties shall be referred to as they appear before this Honorable Court except that Respondent may also be referred to as the State.

All emphasis in this brief is supplied by Respondent unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Petitioner resentenced on February 14, 2007 after violating probation (R 22-25). Her attorney filed a motion to modify or reduce sentence on April 11, 2007, six days before the expiration of the sixty day period of Fla. R. Crim. P. 3.800(c) (R 31-34). A notice of hearing was filed by her attorney on May 14, 2007, setting the hearing for May 30, 2007 (SR).

The trial court granted the motion to modify or reduce at the May 30, 2007 hearing (T 4). The State filed a timely notice of appeal (R 37-38).

The Fourth District reversed, finding that because no hearing was scheduled and no action was taken within the sixty day period, the trial court lacked jurisdiction to modify the sentence. State v. Schlabach, 1 So. 3d 1091 (Fla. 4th DCA 2009). The Fourth District also certified conflict with Childers v. State, 972 So.2d 307 (Fla. 2d DCA 2008). This Court granted review. Schlabach v. State, 10 So.3d 632 (Fla. 2009).

Respondent reserves the right to include additions and clarifications in the argument portion of this brief.

SUMMARY OF THE ARGUMENT

Rule 3.800(c) is jurisdictional. Whether to grant a motion for mitigation is a question of grace, not a right. Petitioner filed her motion to mitigate just six days before the expiration of the sixty day period in Rule 3.800(c). Rule 3.050 provides a straightforward method for seeking an extension of the sixty day period. Petitioner chose not to avail herself of that rule. Accordingly, the trial court lacked jurisdiction.

ARGUMENT

POINT I

THE FOURTH DISRICT'S CORRECTLY CONCLUDED THAT
THE TRIAL COURT LACKED JURISDICTION TO MODIFY
PETITIONER'S SENTENCE.

Fla. R. Crim. P. 3.050 provides:

When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for good cause shown may, at any time, in its discretion (1) with or without notice, order the period enlarged if a request therefor is made before the expiration of the period originally prescribed or extended by a previous order or (2) upon motion made and notice after the expiration of the specified period, permit the act to be done when the failure to act was the result of excusable neglect; but it may not, except as provided by statute or elsewhere in these rules, extend the time for making a motion for new trial, for taking an appeal, or for making a motion for a judgment of acquittal.

In Abreu v. State, 660 So. 2d 703 (Fla. 1995), the defendant's attorney withdrew and a new lawyer was appointed four days before the expiration of the sixty day time limit for motions for mitigation. Id. at 704. On that same day, the defendant's new attorney filed a motion to mitigate and a motion to extend the time for ruling on the motion. Id. The trial judge granted the motion for extension. Id. The trial court began the hearing before the expiration of the sixty days and reduced the defendant's sentence about nine weeks later. Id. This Court concluded that the trial court had jurisdiction as the time was properly extended in accordance with Rule 3.050. Id.

Here, the defendant never sought an extension before or after the expiration of the sixty day period. Accordingly, the Fourth District correctly concluded that the trial court was without jurisdiction to modify the sentence.

Petitioner argues that the trial court should be allowed to sua sponte implicitly enlarge the time to rule on the motion to mitigate. Rule 3.050 clearly does not allow such action. See also, Davis v. State, 887 So. 2d 1286, 1288 (Fla. 2004)(time for ruling on Rule 3.800(b) motion may be extended if Rule 3.050 requirements are met prior to expiration of sixty days).

Petitioner also argues that time period is not jurisdictional. Respondent disagrees. Florida courts have consistently held that the period is jurisdictional. See, e.g., Knapp v. State, 741 So.2d 1150 (Fla. 2d DCA 1999); Hussey v. State, 739 So.2d 123 (Fla. 4th DCA 1999); Bowling v. State, 688 So.2d 947 (Fla. 5th DCA 1997); Gafford v. State, 783 So.2d 1191 (2001) and State v. Hudson, 920 So.2d 1223 (Fla. 3d DCA 2006).

Moreover, if the period were not jurisdictional, the trial court could rule on the motion at any time. See Evans v. State, 229 So. 2d 261, 261 (Fla. 1969)(finding that trial court lacked jurisdiction to rule on motion to mitigate nearly two years after mandate issued and holding that the district court decision was "simply adhering to jurisdictional time limits.").

Although not necessary to resolve this case, Respondent

disagrees that the federal courts have found similar rules not to be jurisdictional. See United States v. Addonizio, 442 U.S. 178, 189, 99 S.Ct. 2235, 60 L.Ed.2d 805 (1979)(rule allowing for modification of sentence was jurisdictional).

Whether to grant a motion for mitigation is a question of grace, not a right. Petitioner filed her motion to mitigate just six days before the expiration of the sixty day period in Rule 3.800(c). Rule 3.050 provides a simple, straightforward method for seeking an extension of the sixty day period. Petitioner chose not to avail herself of that rule. Accordingly, the trial court had no jurisdiction.

CONCLUSION

WHEREFORE, based on the foregoing arguments and the authorities, Respondent respectfully requests this Court approve the Fourth District's decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Respondent's Answer Brief on the Merits" has been furnished by courier to Barbara Wolfe , Criminal Justice Building\6th Floor, 421 Third Street, W. Palm Beach, FL 33401 on August 11, 2009.

James J. Carney

CERTIFICATE OF TYPE SIZE AND STYLE

In accordance with Fla. R. App. P. 9.210, the undersigned hereby certifies that the instant brief has been prepared with 12 point Courier New Type.

James J. Carney