IN THE SUPREME COURT OF FLORIDA

TERESA SCHLABACH,	)	
	)	CASE NO. SC09-223
Petitioner,	)	
	)	Lower Tribunal No. 4D07-2445
vs.	)	
	)	
STATE OF FLORIDA	)	
	)	
Respondent.	)	
_____	)	

PETITIONER'S AMENDED INITIAL BRIEF

On Review from the District Court of Appeal
Fourth District, State of Florida

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STATEMENT OF THE CASE AND FACTS

On July 7, 2005, Petitioner, Teresa Schlabach, was placed on five years probation for possession of cocaine, and one year concurrent probation for each count of possession of drug paraphernalia and resisting/obstruction without violence.

Notwithstanding that Ms. Schlabach successfully completed all of the court ordered drug treatment which was a condition of her probation, after almost nineteen months on probation, she tested positive for the use of cocaine, and on January 31, 2007, her probation was violated. (R17, 46).

The events leading to the violation of probation began on December 17, 2006, when Ms. Schlabach, who has a history of having been Baker Acted on several occasions, was, once again, Baker Acted. At that time, drug testing indicated that Ms. Schlabach was "clean", and was not using cocaine. Subsequently, Ms. Schlabach was diagnosed with Bipolar Disorder, and was placed on medication. Soon thereafter, she began self-medicating and relapsed into cocaine addiction, resulting in her probation violation. (R31, 45-46).

On February, 14, 2007, Judge Kaplan revoked Ms. Schlabach's probation, and, although she scored non-state sanctions, (R22-23), sentenced Ms. Schlabach to

the maximum sentence of five years in the Department of Corrections. (R20, 27-29).

On April 11, 2007, six days before the sixty day period for modification of sentence expired, Ms. Schlabach, through counsel, timely filed a Motion to Reduce or Modify Sentence, pursuant to Florida Rule of Criminal Procedure 3.800 (c). (R31-32).

On April 23, 2007, seven days after the sixty day modification period expired, the court clerk sent the court file to Judge Kaplan for review. (R- Clerk's Docket).

On May 14, 2007, Ms. Schlabach, through counsel, filed a Notice of Hearing, to have the Motion to Reduce or Modify Sentence heard. The State did not object to the motion being heard outside the sixty day time period. (SR).

On May 17, 2007, Judge Kaplan, without objection from the State, ordered that Ms. Schlabach be transported from the Department of Corrections for the hearing. (R35).

At the mitigation hearing of May 30, 2007, attended by Ms. Schlabach, her two young daughters, and her aunt, Judge Kaplan granted Ms. Schlabach's motion to mitigate her sentence, and, without objection from the State, terminated the balance of her five year Department of Corrections sentence. (R36, 47).

The State appealed the trial court's mitigation of Ms. Schlabach's sentence, arguing that, pursuant to rule 3.800(c), the trial court lacked jurisdiction to mitigate the sentence after the expiration of the sixty day time period.

The Fourth District granted certiorari, quashed the mitigation order of the trial court, and certified direct conflict with *Childers v. State*, 972 So.2d 307 (Fla. 2d DCA 2008). The court adopted the view that, where a motion to mitigate is timely filed, but no hearing is scheduled and no action is taken within sixty days after imposition of sentence, the trial court loses jurisdiction to do so. *State v. Schlabach*, 1 So.3d 1091 (Fla. 4th DCA 2009).

Petitioner filed Notice to Invoke Discretionary Jurisdiction on February 3, 2009.

SUMMARY OF THE ARGUMENT

The trial court did not lack jurisdiction to modify Petitioner's sentence.

Although the trial court did not rule on Petitioner's timely filed Motion to Reduce or Modify Sentence within the sixty day period required by Rule 3.800(c), Florida Rules of Criminal Procedure, the court did not lack jurisdiction to do so.

Without objection from the State, the trial court effectively exercised it's discretion to enlarge the time period for consideration of the motion by taking the following action: Reviewing the court file in chambers; ordering the Petitioner to be transported for a hearing on the motion; agreeing to hear the motion outside the sixty day period.

Federal courts consider rules which are analogous to Florida's Rule 3.800(c), to be "claims processing" rules, and, as such, the time limitations are not jurisdictional. Applying this interpretation to Florida's Rule 3.800(c), would foster the administration of justice, by affording busy trial courts the opportunity to resolve timely filed motions within a "reasonable time", rather than subjecting the trial courts to the strict jurisdictional time limitations now imposed.

Petitioner respectfully requests, therefore, that this Court quash the decision of the Fourth District Court of Appeal, and remand this cause with instructions to reinstate the trial court's order mitigating Petitioner's sentence.

ARGUMENT

THE TRIAL COURT DID NOT LACK JURISDICTION TO MODIFY PETITIONER'S SENTENCE, AS THE COURT, IN EFFECT, ELECTED TO ENLARGE THE TIME PERIOD IN WHICH TO CONSIDER PETITIONER'S TIMELY FILED MOTION.

The issue before this Court is whether the trial court had jurisdiction to grant Petitioner's timely filed motion to reduce or modify sentence, after the expiration of the sixty day modification period required by Florida Rules of Criminal Procedure 3.800(c).

A. The trial court had jurisdiction to modify Petitioner's sentence.

Although the trial court in the instant case did not rule on Petitioner's timely filed Motion to Reduce or Modify Sentence within the sixty day time period required by Rule 3.800(c), the trial court did not lack jurisdiction to modify Petitioner's sentence, as the trial court, in effect, exercised it's discretion to enlarge the time for consideration of the motion.

Rule 3.050, Fl.R.Cr.P., provides for the enlargement of procedural time limits upon good cause shown. Pursuant to *Abreu v. State*, 660 So. 2d 703 (Fla. 1995), Rule 3.050 is applicable to Rule 3.800(b).[1]

In *Abreu*, this Court held:

> The Florida Rules of Criminal Procedure are designed to promote justice and equity while also allowing for the efficient operation of the judicial system. We see no reason why the provision of rule 3.050 should not be applied to rule 3.800. We hold that the sixty day period in rule 3.800(b) may be extended pursuant to rule 3.050, providing the matter is resolved within a reasonable time.

The trial court in the instant case did resolve the matter within a reasonable time period, entering the order granting the motion to mitigate sentence, within forty-five days of the expiration of the sixty day window. (R- 47).

The Second District has held that the trial court is allowed to, sua sponte, extend the time for considering a defendant's motion to mitigate or reduce sentence, without the need for the defendant to file a motion for enlargement of time. *McCormick v. State*, 961 So.2d 1099 (Fla. 2d DCA 2007).

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[1] The 1996 Amendments renumbered then existing subsection (b) as subsection (c).

The trial court, in effect, exercised it's discretion to enlarge the time period for consideration of Petitioner's Motion to Reduce or Modify Sentence, by taking the following action:

First, the trial court commenced action by ordering that the court file be sent to chambers for review.[2] (R-Clerk's Docket). Second, the trial court ordered that Ms. Schlabach be transported from the Department of Corrections for the hearing.(R35). Third, without objection from the State, the trial court agreed to hear the motion outside the sixty day time period. (R36, 47, SR).

Although the record is silent as to why the trial court, in effect, exercised it's discretion to enlarge the time period for consideration of the motion, in all likelihood, the court needed additional time due to the demands of a busy trial docket. Such would constitute "good cause", as defined by this Court in *State v. Boyd*, 846 So.2d 458 (Fla. 2003):

> "A substantial reason, one that affords a legal excuse, or a cause moving the court to its conclusion, not arbitrary or contrary to all the evidence and not mere ignorance of law, hardship on petitioner, and reliance on [another's] advice".

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[2] It is not known whether the judge requested the file before or after expiration of the sixty day period. The record reflects only that the file was sent to the judge on April 23, 2007, seven days after the expiration of the sixty day period.

This Court further defined "good cause" in *Davis v. State*, 887 So.2d 1286 (Fla. 2004):

> "The determination of good cause is based on the peculiar facts and circumstances of each case. Obviously, the trial court is in the best position to weigh the equities involved, and his exercise of discretion will be overruled only upon a showing of abuse."

After weighing the equities involved in the instant case, the trial court exercised it's discretion to mitigate Ms. Schlabach's sentence.

B. Jurisdiction vs. "Claims Processing Rules"

Federal courts consider rules which are analogous to Florida's Rule 3.800(c), to be "claims processing rules", and, as such, the time limitations are not jurisdictional.

In the case of *Eberhart v, United States*, 126 S. Ct. 403 (Oct. 31, 2005), the defendant filed an untimely motion for new trial. The government did not object until after the judge granted the motion. The Court contrasted subject-matter and personal jurisdiction with "claims-processing rules", such as the time limits established by court rule, and held that the seven day limit for filing a motion for new trial is a "claims-processing rule", and is not jurisdictional. The opposing party must bring a violation of a claims-processing rule to the court's attention, or it is forfeited. If the violation is brought to the court's attention, however, the

court must enforce the rule.

Similarly, in the instant case, the time limitations of Rule 3.800(c) have been established by court rule, and do not involve subject-matter or personal jurisdiction. Following the logic of *Eberhart,* therefore, this Court could interpret the time limitations of 3.800(c), as "claims-processing", rather than "jurisdictional" in nature. This would foster the administration of justice by affording busy trial courts the opportunity to resolve timely filed motions within a "reasonable time", rather than subjecting the trial courts to the strict jurisdictional time limits now imposed.

The strict time limitations of Rule 3.800(c), have apparently been burdensome to both trial and appellate courts, due to the increased volume of litigation generated by the time limitations of this rule. Judges in both the Second and Fourth District Courts have voiced their opinions regarding the need to change the interpretation of the strict time limitations of this rule, to be in accordance with the federal and civil procedure rules.

Chief Judge Northcutt, of the Second District Court stated the following in *Childers v. State,* 972 So.2d 307 (Fla. 2d DCA 2008):

> [T]he current state of the law is effectively extending the life of these motions, resulting in more delay rather than less. A rule 3.800(c) motion is directed to a circuit

> court's absolute discretion, and the court's ruling cannot be appealed. *Arnold v. State*, 621 So.2d 503 (Fla. 5th DCA 1993). But it is subject to certiorari review "in an extraordinary case." *Moya v. State* 668 So.2d 279, 280 (Fla. 2d DCA 1996). When the issue is whether a motion to modify a sentence should have been dismissed as untimely, however, the extraordinary has become ordinary. Appellate courts are routinely called upon to determine whether the motions should have been dismissed. Most of these review proceedings, and the delay occasioned by them, could be eliminated by amending the rule to provide, that the motion must be filed within a stated period and the circuit court must determine the motion within a reasonable time. *See Wilson v. Salamon*, 923 So.2d 363, 367 (Fla. 2005) (adopting interpretation of civil procedure rule to decrease litigation over rule's purpose and foster smooth administration of trial court's docket).

In this excerpt of his specially concurring opinion in *Grosse v. State*, 511 So.2d 688 (Fla. 4th DCA 1987), Judge Anstead opined that the rule should be interpreted in accordance with the federal rules:

> I recognize that precedent from this court seems to require the result announced in the majority opinion, however, I believe this construction of Rule 3.800(b) is unreasonable and too inflexible to serve the basic purposes of the rule.
>
> Florida's rule provides that the trial court may modify or reduce a sentence within 60 days after the sentence is imposed. Our courts have interpreted this language as a mandatory, jurisdictional limitation: the motion *and* the order must be entered within the time period. That is not the case under the Federal Rules. Federal rule of

Criminal Procedure 35(b) provides that a motion to reduce sentence may be made within 120 days after imposition of the sentence, and that the court "shall determine the motion within a reasonable time." The notes of the advisory committee indicate that the rule was amended in 1985 to clarify that as long as defendant's motion is *filed* within the time imit, the court has a "reasonable time" to make a determination. Clarification was necessary to counteract "dictum" in some cases which found the time period to be jurisdictional, requiring the court to act within the time period. Even before amendment, most federal courts interpreted the rule as requiring the motion to be timely, but giving the court a reasonable time to make a determination. *United States v. DeMier*, 671 F.2d 1200 (8th Cir. 1982); *United States v. Mendoza*, 581 F.2d 89 (5th Cir. 1978); *United States v. Stollings*, 516 F.2d 1287 (4th Cir. 1975). Cases subsequent to amendment have, of course, continued to so hold. *United States v. House*, 808 F.2d 508 (7th Cir. 1986); *United States v. Wheeler*, 645 F. Supp. 250 (N.D.Ind. 1986).

CONCLUSION

For the reasons outlined above, Petitioner respectfully requests that this Court quash the decision of the Fourth District Court of Appeal, and remand with instructions to reinstate the trial court's order mitigating Petitioner's sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy the Petitioner's Amended Initial Brief has been furnished to James Carney, Assistant Attorney General, 1515 North Flagler Drive, 9th Floor, West Palm Beach, Florida 33401, by electronic mail on June _____, 2009, and by courier on June _____, 2009.

BARBARA J. WOLFE
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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared in compliance with the font standards required by Florida Fla. R. App. P. 9.210. The font is Times New Roman, 14 point.

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BARBARA J. WOLFE
Assistant Public Defender

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