IN THE SUPREME COURT OF FLORIDA

ANDRE ISAIAH DUNBAR,)
)
Petitioner,)
)
v.)
) CASE NO.: SC10-2296
STATE OF FLORIDA,)
)
Respondent.)
_________________________)

ON DISCRETIONARY REVIEW FROM
THE DISTRICT COURT OF APPEAL OF FLORIDA
FIFTH DISTRICT

REPLY BRIEF ON THE MERITS

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ARGUMENT

THE WRITTEN SENTENCE IS ILLEGAL BECAUSE IT CONFLICTS WITH THE SENTENCE THAT WAS PRONOUNCED.

Introduction

"[A] written sentence that conflicts with the oral pronouncement of sentence imposed in open court is an illegal sentence." *Williams v. State*, 957 So. 2d 600, 603 (Fla. 2007) (*citing Ashley v. State*, 850 So. 2d 1265 (Fla. 2003); *Justice v. State*, 674 So. 2d 123 (Fla. 1996)). The sentencing court in this case imposed a life sentence upon the defendant, but failed to pronounce a 10-year minimum mandatory provision. Neither the defendant nor his counsel were present when the written sentencing order that contained the minimum mandatory provision was rendered.

Oral Pronouncement of Sentence Controls

"Generally, the oral pronouncement prevails unless the oral pronouncement is in error due to a clerical error such as the calculation of jail credit." *State v. Akins*, __So. 3d__, 2011 WL 2061070, 9 (Fla. 2011) (footnote omitted) (*citing Ashley v. State*, 850 So. 2d 1265, 1267 (Fla. 2003); *Martindale v. State*, 678 So. 2d 883, 884 (Fla. 4th DCA 1996)). Imposition of the mandatory minimum term was substantive error, not merely a clerical error. In *Williams*, *supra*, this Court

pointed out that the Court "ha[s] generally defined an 'illegal sentence' as one that imposes a punishment or penalty that no judge under the entire body of sentencing statutes and laws could impose under any set of factual circumstances." *Id.*, 957 So. 2d at 602 (*citing Carter v. State*, 786 So. 2d 1171,1181 (Fla. 2001). Inasmuch as this Court has consistently held that the pronounced sentence controls over the written, no judge under the law could impose an enhanced written sentence. Noteworthy, the state in this proceeding makes the following concession: "[A] written sentence which differs from the trial court's oral pronouncement is normally not the sentence of the court." (MBR-4-5) (references to the merits brief of the respondent are indicated "(MBR-page)"). Moreover, further precluding such a sentence is the express holding of this Court "that a written sentence that conflicts with the oral pronouncement of sentence imposed in open court is an illegal sentence.... [N]o court has the authority to enter such a sentence, since the oral pronouncement controls and constitutes the legal sentence imposed." *Id.*, 957 So. 2d at 603 (*citing State v. Jones*, 753 So. 2d 1276, 1277, n. 2 (Fla. 2000)). In a very recent case, *State v. Akins*, __So. 3d__, 36 Fla. L. Weekly S__, 2011 WL 2061070 (Fla. May 26, 2011), this Court held similarly to prior holdings that "when there is a discrepancy between the written sentence and the oral pronouncement, the oral pronouncement prevails." *Id.*, 2011 WL 2061070 at 7.

Due Process

"Sentencing is a critical stage of criminal prosecution for which the defendant has a constitutional right to attend. *Santeuffemio v. State*, 745 So. 2d 1002, 1003 (Fla. 2d DCA 1999) (*citing* Fla. R. Crim. P. 3.180(a)(9) (other citation omitted). The cited rule provides in part: "**Presence of Defendant.** In all prosecutions for crime the defendant shall be present ... at ... the imposition of sentence." Fla. R. Crim. P. 3.180(a)(9) (bold face font in rule). Also, "[s]entencing is considered a critical stage at which a defendant is entitled to counsel." *Jackson v. State*, 983 So. 2d 562, 575 (Fla. 2008) (citation omitted). The rule also defines "presence." It provides that "[a] defendant is present for purposes of this rule if the defendant is physically in attendance for the courtroom proceeding, and has a meaningful opportunity to be heard through counsel on the issues being discussed." Fla. R. Crim. P. 3.180(b).

This Court has also held that its "cases recognize that the right to personal presence at all critical stages of the trial and the right to counsel are fundamental rights of each criminal defendant." *Lebron v. State*, 799 So. 2d 997, 1016 (Fla. 2001). There was no hearing held regarding the imposition of the mandatory minimum provision. Allowing the decision of the Fifth District to stand would result in the defendant and his counsel never having an opportunity to stand before

the sentencing court as to the mandatory minimum provision. Contrary to the state's assertion, the right to be present during a critical stage of the proceedings is a substantive right. *Hitchcock v. State*, 991 So. 2d 337, 353, n. 12 (Fla. 2008); *Morris v. State*, 931 So. 2d 821, 832, n. 12 (Fla. 2006).

The state relies improvidently upon *Griffin v. State*, 517 So. 2d 669, 670 (Fla. 1987), for the proposition that a defendant's presence at sentencing is not required if the sentencing court is not exercising judicial discretion (MBR-17). As the following passage makes clear, the *Griffin* case actually supports the petitioner's argument:

> This Court specifically directed a resentencing in this cause rather than directing the trial court to merely affirm that it would have imposed the same sentence absent the impermissible reasons. By resentencing we mean a full sentencing proceeding which necessarily includes the presence of the defendant and his or her attorney. The pronouncement of sentence upon a criminal defendant is a critical stage of the proceedings to which all due process guarantees attach whether the sentence is the immediate result of adjudication of guilt or, as here, the sentence is the result of an order directing the trial court to resentence the defendant. *See State v. Scott*, 439 So. 2d 219 (Fla. 1983). *The presence of the defendant is as necessary at resentencing as it was at the time of the original sentence* so that the defendant has the opportunity to submit evidence relevant to the sentence if warranted unless otherwise ordered by this Court.

Griffin v. State, 517 So. 2d 669, 670 (Fla. 1987) (emphasis added).

The state also contends that the petitioner's due process rights were adequately protected because he could have raised a claim that the minimum

mandatory term was illegally imposed by way of a motion filed under Florida Rule of Criminal Procedure 3.800(b). (MBR-18). That assertion is incorrect. "Florida Rule of Criminal Procedure 3.800(b) ... permits preservation of errors in orders entered as a result of the sentencing process, not all errors that happen to occur during that process." *Jackson v. State*, 983 So. 2d 562, 578 (Fla. 2008). This Court held that a claim of denial at sentencing could not be raised under the rule because "[t]he denial of counsel at sentencing is an error in the sentencing process, not an error in a sentence-related order." *Ibid.* The same is true of the imposition of a mandatory minimum provision after a sentence has been pronounced, *i.e.*, it was an error in the sentencing process rather than an error in the sentencing order.

Double Jeopardy

This Court in *Akins* expressly focused on the third type of double jeopardy protection, *i.e.*, protection from multiple punishments for the same offense. *Id.*, 2011 WL 2061070 at 6. It was explained that "[t]his protection is the genesis for the general rule that once a sentence has been imposed, the sentencing hearing has ended, and the defendant has begun to serve his sentence, the sentence may not thereafter be made more onerous, such as by extending the term of imprisonment." *Id.*, 2011 WL 2061070, at 6 (*citing Troupe v. Rowe*, 283 So. 2d 857, 859 (Fla. 1973)).

There are cases containing *dicta* that stand for the proposition that the protections under the state and federal double jeopardy clauses are coextensive. However, when one further analyzes the protections, it appears that the double jeopardy protection related to sentencings in non-capital cases is greater under the Constitution of Florida. For example, while this Court has written that "[t]he scope of the Double Jeopardy Clause is the same in both the federal and Florida Constitutions[,]" cases from this Court and other Florida appellate courts reveal differing treatments than in the federal courts. *Trotter v. State*, 825 So. 2d 362, 365 (Fla. 2002) (*citing Carawan v. State*, 515 So. 2d 161, 164 (Fla. 1987), *superseded on other grounds by* § 775.021(4), Fla. Stat. (2001); *Cohens v. Elwell*, 600 So.2d 1224, 1225 (Fla. 1st DCA 1992)).

The Supreme Court of the United States explained that "[h]istorically, [the Court] ha[s] found double jeopardy protections inapplicable to sentencing proceedings..." *Monge v. California*, 524 U.S. 721, 728 (1998). It is beyond serious dispute that Florida appellate courts have extended double jeopardy protection to sentencing proceedings. Most, if not all of the cases cited above, involve application of double jeopardy to sentencing proceedings. For example, in the most recent cited case, *Akins*, *supra*, this Court held that "[t]he absence of any clear intent of designating Akins as an HFO and the trial court's subsequent

imposition of an HFO status to Akins VOP judgment and sentence after Akins began serving his sentence violated double jeopardy and amounted to an illegal sentence and manifest injustice." *Id.*, 2011 WL 2061070 at 10.

The holdings in neither *Monge*, *supra*, 524 U.S. 721, nor *State v. Collins*, 985 So. 2d 985 (Fla. 2008), apply to this case. Both of those cases involve re-sentencings. This case, on the hand, involves the enhancement of the pronounced sentence by the sentencing judge through the rendering of a more onerous sentencing order. Noteworthy, perhaps, both *Monge* and *Collins* predate the 2011 *Akins'* case. *Id.*, 2011 WL 2061070. In any event, under the circumstances of the instant case the Double Jeopardy Clause of the Florida Constitution barred the written imposition of the minimum mandatory provision that had not been pronounced. Art. I, § 9, Fla. Const.

The petitioner disputes the analysis by the state that led to its conclusion that "[s]ince correction after appeal is permitted, double jeopardy principles are not implicated and correction of a defendant's sentence to include a statutorily mandated term is not prohibited on that basis." (Mr-8). There is a fundamental difference between a judge *sua sponte* adding an unstated term to a sentence and a re-sentencing after an appeal. In the former, as in this case, neither the defendant nor his counsel were present when the judge imposed the minimum mandatory

term. In the case of a post-appeal proceeding, on the other hand, both the defendant and his or her counsel are present for the re-sentencing.

"Potential Loophole"

The petitioner in his initial brief pointed to one of the statements by the Fifth District Court of Appeal that had been used by the court in an apparent attempt to justify its ruling in this case. The district court wrote in pertinent part:

> We conclude that *Salyer* is inconsistent with the legislative intent behind restricting the sentencing discretion of trial courts for certain enumerated crimes with mandatory minimum penalties and *creates a potential loophole which could allow a trial court to avoid the imposition of a mandatory minimum sentence* by simply failing to announce the mandatory minimum provision at sentencing....

Dunbar v. State, 46 So. 3d 81, 83 (Fla. 5th DCA 2010) (*citing Salyer v. State*, 951 So. 2d 68 (Fla. 5th DCA 2007) (emphasis added)).

The state before this Court contends that the statement merely "acknowledges the separation of powers issue which would be created by viewing double jeopardy as prohibiting the correction of an illegal sentence." (MR-15). Perhaps the first clause of the sentence serves the purpose the state suggests. However, the second clause, which reads, "creates a potential loophole which could allow a trial court to avoid the imposition of a mandatory minimum sentence by simply failing to announce the mandatory minimum provision at sentencing..." was clearly directed at trial courts in an almost accusatory fashion by the district court. As discussed in

the initial brief, not only is the concern expressed without foundation because a trial court could do the same in any event, but the tone of the district court is contrary to earlier holdings of this Court (IBM-17-19). For example, this Court once held: "Indeed, an appellate court presumes that a trial court judge followed the law." *Thomas v. Wainwright*, 495 So. 2d 172, 174 (Fla. 1986). The concern implied by the Fifth District was without foundation and should not be a basis for this Court to approve the decision under review. Again, the *Dunbar* holding by the district court will have no impact on a trial judge who is intent upon not imposing a mandatory sentence. Such a judge need only fail to impose the mandatory minimum provision to accomplish his or her goal.

Summary

The petitioner is entitled to relief. The mandatory minimum term that was imposed in writing is an illegal sentence because it conflicts with the sentence that had been pronounced in open court. Also, the petitioner was denied due process because neither he nor his counsel were present when the mandatory minimum was imposed. Further, double jeopardy under the Constitution of Florida at least was violated when the petitioner's sentence was enhanced after he began to serve his sentence.

CONCLUSION

The decision of the District Court of Appeal of the State of Florida, Fifth District, should be quashed and the 10-year mandatory minimum term under count one should be vacated.

Respectfully submitted,

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CERTIFICATE OF FONT

I certify that the font used in this brief is 14-point proportionally spaced Times New Roman.

CERTIFICATE OF SERVICE

I certify that an accurate copy of this brief was hand delivered to the Office of the Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, and a copy was mailed to Mr. Andre Dunbar, Inmate # X34150, L4213, Santa Rosa Correctional Institution - Annex, 5850 East Milton Road, Milton, Florida 32583-7914, on this ____ day of June 2011.

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