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IN THE SUPREME COURT OF FLORIDA

RAYMOND M. AUSTIN,

Petitioner,

v.

CASE NO. SC14-2215

STATE OF FLORIDA,

First DCA No. 1D13-1046

Respondent.

_____/

ON DISCRETIONARY REVIEW
FROM THE FIRST DISTRICT COURT OF APPEAL

JURISDICTIONAL BRIEF OF PETITIONER

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STATEMENT OF THE CASE AND FACTS

Do the appellate courts have authority to correct a sentencing error that was not "preserved" for appeal by either an objection at sentencing or by a Rule 3.800 (b), Fla. R. Crim. P. motion to correct sentencing error? The Third District Court of Appeal says yes; The First District Court of Appeal says no.

Austin was a minor at the time of the underlying attempted murder and related crimes against victim Charles Soukup. He was tried as an adult. In Raymond M. Austin v. State of Florida, 1D13-1046 (Fla. 1st DCA , Sept. 11, 2014) he challenged the concurrent, 90-years-in-prison sentences he received in Duval County, Florida felony case number 2010-CF-01 for such crimes against victim Soukup. As the First District Court of Appeal noted in Raymond M. Austin v. State of Florida, 1D13-1046 (Fla. 1st DCA , Sept. 11, 2014) the trial court judge ran the 90-year concurrent sentences for such crimes against victim Charles Soukup consecutive to a 45-year sentence Austin had already received in a separate juvenile-tried-as-an-adult criminal case.

With regard to Austin's contention that the 90-year sentences he received on the non-homicide offenses were illegal and correctable on appeal, the First District Court of Appeal ruled as follows:

> Austin challenges his ninety-year sentences on the nonhomicide offenses on the ground that they constitute de facto life-without-parole sentences in violation of

Graham v. Florida, 560 U.S. 48 (2010), as interpreted by this Court in Floyd v. State, 87 So.3d 45 (Fla. 1st DCA 2012) (reversing an eighty-year sentence for a juvenile defendant, finding it to be the functional equivalent of a life sentence without parole). If Austin is correct, he has revealed a "sentencing error" as that term is defined in Jackson v. State, 983 So.2d 562 (Fla. 2008). However, our Supreme Court has dictated in no uncertain terms that such an error is not to be considered on direct appeal from a judgment and sentence, *even if it is fundamental*, unless it has been preserved by either a contemporaneous objection or a motion under Florida Rule of Criminal Procedure 3.800(b). Jackson, 983 So.2d at 569. As explained by Justice Raoul Cantero, writing for a unanimous Court:

> Thus, rule 3.800(b) creates a two-edged sword for defendants who do not object to sentencing errors before the sentence is rendered: on the one hand, it allows defendants to raise such errors for the first time *after* the sentence; on the other hand, it also *requires* defendants to do so if the appellate court is to consider the issue.

Id. (emphasis in original); *but see* Lightsey v. State, 112 So.3d 616, 617-18 (Fla.3d DCA 2013) (reversing an unpreserved Graham error because it was "so obvious" that the failure to raise it "clearly constitute[d] ineffective assistance of counsel").

Austin filed no motion under Rule 3.800(b), and his arguments at the sentencing hearing were insufficient to make the trial court aware of his position on appeal that a ninety-year sentence for a nonhomicide crime committed by a juvenile is a de facto life sentence. At the sentencing hearing, Austin did not argue that a lengthy term of years would be illegal; he noted that the state of the law was "muddled" and requested a shorter term of years. When

the court suggested that it could impose up to ninety-nine years on each count, Austin's counsel agreed. Austin did not file a Rule 3.800(b)(2) motion to clarify the issue or challenge the trial court's decision. Therefore, we cannot reach this claim.

Austin also points out that the aggregate sentence of 135 years exceeds any natural life expectancy. Again, however, this issue was not preserved. Austin failed to raise any argument before the trial court that the aggregation of sentences imposed in distinct cases at separate times violates Graham, or is even subject to a Graham analysis.[fn1] To the contrary, Austin argued for a seventy-year sentence, based on aggregate mandatory minimum terms, such that he would be approximately seventy-seven years old upon his earliest possible release from prison. No argument was made that at some point in time a lengthy term-of-years aggregate sentence crosses the amorphous threshold to become the functional equivalent of a life sentence.

Austin next claims that his ninety-year sentence for premeditated first-degree murder is illegal as a statutorily unauthorized term of years. He contends that the only statutorily authorized sentence for a juvenile who commits first-degree murder is mandatory life imprisonment. This argument, too, pertains to a sentencing error and, as a result, needed to be preserved one way or another. See Jackson, 983 So.2d at 569. Not only did Austin fail to raise this argument before the trial court, he advocated for a term-of-years sentence for first-degree murder. He cannot complain on appeal about a sentencing alternative that he requested below. Although we note that our Court recently approved a term-of-years sentence for first-degree murder, Thomas v. State, 135 So.3d 590 (Fla. 1st DCA 2014), we do not reach the merits of this issue due to a lack of preservation.

Finally, Austin challenges his ninety-year sentence for first-degree murder on the ground that it is a de facto life

sentence imposed without the benefit of sufficient evidence regarding Austin's background and other factors that may have affected the court's assessment of his culpability and amenability to. In other words, Austin argues that the trial court erred because it imposed a de facto life sentence without considering the information necessary to make the findings required by Miller v. Alabama, 132 S.Ct. 2455, 2475 (2012), to support a life sentence for a juvenile convicted of homicide. The portion of this argument concerning the content of the hearing pertains to an error in the sentencing process, not an error in the sentence itself. Such an error may be corrected on direct appeal if it is either preserved by a contemporaneous objection or fundamental. See Jackson, 983 So.2d at 566. However, this alleged error in the sentencing process is unique, at least as argued by Austin, because it is dependent on the conclusion that the ninety-year sentence is the equivalent of life. Whether the ninety-year sentence is the equivalent of life is an issue with the sentence itself, not the process. Therefore, this crucial aspect of Austin's argument pertains to a sentencing error. The sentencing error was not preserved and, consequently, renders the entire issue involving Austin's sentence for first-degree murder unreviewable on direct appeal.

(Raymond M. Austin v. State of Florida, 1D13-1046 [Fla. 1st DCA , Sept. 11,2014] at pgs. 8-12)

Austin seeks discretionary review based on the conflict between Raymond M. Austin v. State of Florida, 1D13-1046 (Fla. 1st DCA , Sept. 11,2014) and Lightsey v. State, 112 So.3d 616, 617-18 (Fla.3d DCA 2013).

SUMMARY OF ARGUMENT

By including the above-quoted "but see" citation to to the Third District Court of Appeal's decision in Lightsey v. State, 112 So.3d 616, 617-18 (Fla.3d DCA 2013) as a decision allowing appellate reversal of unpreserved sentencing errors which are "so obvious that the failure to raise it clearly constitute[d] ineffective assistance of counsel," the First District Court of Appeal in Raymond M. Austin v. State of Florida, 1D13-1046 (Fla. 1st DCA, Sept 11, 2014) recognized that its own rule prohibiting appellate correction of unpreserved sentencing errors conflicts with Lightsey's rule allowing such.

ARGUMENT

THIS COURT SHOULD RESOLVE INTERDISTRICT CONFLICT ON WHETHER UNPRESERVED SENTENCING ERRORS CAN BE CORRECTED ON APPEAL

Standard of review: This Court may review a decision of a district court of appeal that is in express and direct conflict with a decision of this Court or another district court on the same point of law. Art. V, § 3(b)(3), Fla. Const., Fla. R. App.

P. 9.030(a)(2)(A)(iv). Conflict jurisdiction encompasses "holding" conflict, described as follows:

> The majority opinion below contains a holding of law that is in irreconcilable conflict with a holding of law in a majority opinion of another district court or of the Supreme Court of Florida. In other words, there is an actual conflict of controlling, binding precedent. Where this is true, conflict jurisdiction unquestionably exists.

Anstead, Kogan, Hall, and Waters, The Operation and Jurisdiction of the Supreme Court of Florida, 29 Nova L. Rev. 431, 516-17 (2005). The authors added that factual distinctions between decisions "may be critical to a conflict analysis." Id. at 517.

Discussion: In Raymond M. Austin v. State of Florida, 1D13-1046 (Fla. 1st DCA, Sept 11, 2014) the First District Court of Appeal held that unpreserved sentencing errors are *not* correctable on appeal. In Lightsey v. State, 112 So.3d 616, 617-18 (Fla.3d DCA 2013), the Third District Court of Appeal held that unpreserved sentencing errors *are* correctable on appeal.

This Court should grant review to resolve this conflict.

CONCLUSION

Based on the arguments and authority contained herein, Appellant respectfully requests that this Honorable Court grant discretionary review and order briefing on the merits.

CERTIFICATES OF SERVICE AND FONT SIZE

I HEREBY CERTIFY that a copy of the foregoing has been furnished via The Florida Courts E-Filing portal and by Email to Virginia Chester Harris, Assistant Attorney General, at crimapptlh@myfloridalegal.com and at virginia.harris@myfloridalegal.com on this 21st day of November, 2014. I hereby certify that this brief uses Times New Roman 14 point font.

Respectfully submitted,

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