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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC14-258

VIRGIL LEE HARRIS,

Petitioner,

-vs.-

THE STATE OF FLORIDA,

Respondent.

INITIAL BRIEF OF PETITIONER ON THE MERITS

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL
OF FLORIDA, THIRD DISTRICT

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INTRODUCTION

Petitioner, Virgil Lee Harris, was the appellee in the district court of appeal and the defendant in the circuit court. Respondent, the State of Florida, was the appellant in the district court of appeal, and the prosecution in the circuit court. In this brief, the symbol "R" will be used to designate the record on appeal, and the symbol "T," will be used to designate the transcript dated July 20, 2012.

STATEMENT OF THE CASE AND FACTS

Following a trial, Virgil Lee Harris was convicted of two counts of robbery with a firearm, one count of aggravated assault with a firearm, two counts of battery on an elderly person, and one count of burglary with an assault or battery (R. 6). At Mr. Harris's initial sentencing hearing, the court found that Mr. Harris was not amenable to rehabilitation, and was sentenced to life in prison on counts one, two and six, and fifteen years on counts three and four, to run concurrently. But, Mr. Harris only received a career criminal enhancement as to count four:

> [T]he Court has read 775.084 and found you qualifies [sic] as a habitual violent offender as well as a career criminal . . .
>
> Based upon 775084 [sic] you meet the criteria for life in prison for count one, robbery against Charles Ashmore with a firearm. Count two, robbery against Beatrice Ashmore. Consecutive life in prison.
>
> Count three, aggravated assault with a firearm to 15 years to run concurrent with counts one and two. Count four, battery on a person over 65 to 15 years as a career criminal to run concurrent with counts one, two, three, and four. Count six, life in police [sic] on the burglary charge to run concurrent with counts one two [sic].

(R. 204-205).

Despite the fact that the court only imposed the "career criminal" enhancement on count four, the clerk entered a written sentence, signed by the

judge, indicating that Mr. Harris was sentenced as a violent career criminal on all counts (R. 57-61).

Mr. Harris filed a *pro se* "Motion to Correct an Illegal Sentence" arguing in part that his sentence was illegal because the court did not orally pronounce the violent career criminal enhancement as to counts one, two, and six (R. 24-30). The successor judge granted the motion, holding that the sentencing court's oral pronouncement controlled. 144). The court struck Mr. Harris's violent career criminal designation as to counts one, two and six, but left the life sentences in place on each count, as life was a legal sentence for each conviction even without the enhancement (R. 144).

The state appealed the sentence. *See State v. Harris*, 129 So. 3d 1166 (Fla. 3d DCA 2014). The state argued that reversal was required because the sentencing judge's intent to impose the violent career criminal enhancement on all counts was discernable from the record. *Id.* In response, Mr. Harris argued that under this Court's ruling in *State v. McMahon*, 94 So. 3d 468 (Fla. 2012), the sentence imposed upon Mr. Harris was not illegal, and thus the sentence was not appealable by the state, and the Third District Court of Appeal lacked jurisdiction to hear the case. Reaching the merits nonetheless, the Third District reversed, holding that that the sentencing judge's intent to impose the career criminal enhancement on all

counts was discernable from the record. *State v. Harris*, 129 So. 3d 1166 (Fla. 3d DCA 2014).

A jurisdictional brief was filed based upon conflict with this Court's holding in *State v. McMahon*, 94 So. 3d 468 (Fla. 2012), and the Fourth District Court of Appeals case of *Soanes v. State*, 31 So. 3d 914 (Fla. 4th DCA 2010). This Court granted discretionary jurisdiction, and this merits brief follows.

SUMMARY OF THE ARGUMENT

This Court should reverse the Third District Court of Appeal because the trial court's order sentencing Mr. Harris to life in prison without violent career criminal enhancement was not illegal, and therefore not appealable by the state. The state's right to appeal is strictly controlled by statute, and the state may only appeal an order granting a motion to correct sentence if the resulting sentence is itself illegal. Here the resulting sentence was not illegal because imposition of the sentencing enhancement was discretionary. Nor was the sentence imposed – life in prison – appealable by the state as a downward departure. Because the court imposed a statutorily permissible sentence, the state had no right to appeal the trial court's order, and this Court should reverse.

ARGUMENT

BECAUSE THE SENTENCE IMPOSED BY THE TRIAL COURT WAS NOT ILLEGAL, THE STATE HAD NO RIGHT TO APPEAL.

"[T]he State's right to appeal in criminal cases historically has been extremely limited." *State v. McMahon*, 94 So. 3d 468, 472 (Fla. 2012). Indeed, "the state has only those rights of appeal as are expressly conferred by statute." *Ramos v. State*, 505 So. 2d 418, 421 (Fla. 1987). Furthermore, this Court has historically held that "statutes which afford the government the right to appeal in criminal cases should be construed narrowly." *State v. Jones*, 488 So. 2d 527, 528 (Fla. 1986).

The limited circumstances in which the state may appeal are exhaustively listed in sections 924.07 and 924.071 of the Florida Statutes.[1] As to sentences, the state may only appeal from an *illegal* sentence or a sentence imposed below the criminal punishment code guidelines. §924.07, Fla. Stat. (2014); § 924.071, Fla. Stat. (2014); *State v. Brooks*, 890 So. 2d 503 (Fla. 2d DCA 2005) (holding that

[1] Section 924.07 authorizes the state to appeal from: an order dismiss, an order granting a new trial, an order arresting judgment, a ruling on a question of law when the defendant appeals a judgment, the sentence, on the ground that it is illegal, a judgment discharging a prisoner on habeas corpus, an order adjudicating a defendant insane, any other pretrial order, a sentence imposed below the criminal punishment code guidelines, a ruling granting a judgment of acquittal after a jury verdict, an order denying restitution, order suppressing evidence, or an order withholding adjudication. §924.07, Fla. Stat. (2014). Section 924.071 adds the additional ground of an order dismissing a search warrant. § 924.071, Fla. Stat. (2014).

state appeal from new sentence issued following 3.800 motion was only appealable because it fell within statutory category of a downward departure). Here the life sentences imposed were not downward departures. Therefore the sentence would only be appealable if it were *illegal*. *Id.*

The sentence imposed here - life in prison absent the violent career criminal enhancement - was *not* illegal. An illegal sentence is strictly defined by this Court 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." *State v. McMahon*, 94 So. 3d 468, 477 (Fla. 2012) (quoting *State v. Akins*, 69 So. 3d 261, 268-69 (Fla. 2011); *Williams v. State*, 957 So. 2d 600, 602 (Fla. 2007)). The imposition of the violent career criminal enhancement is discretionary. *Soanes v. State*, 31 So. 3d 914 (Fla. 4th DCA 2010). Thus, the imposition of a life sentence absent enhancement in this case was *not* a sentence that no judge could impose under any set of circumstances, and was therefore *legal*.

In *McMahon*, this Court distinguished an *illegal* sentence subject to state appeal from one that is merely procedurally *erroneous*. In that case, the defendant was charged with possession of cocaine, drug paraphernalia, and grand theft. *State v. McMahon*, 94 So. 3d 468, 470 (Fla. 2012). The state filed a notice of intent to seek a habitual offender sentence. *Id.* Rather than hold a hearing to determine if

the defendant qualified as a habitual offender, as required by statute, the court told the defendant that it would not impose the habitual offender enhancement if he would accept a plea to the bottom of his guidelines. *Id.* The state objected, but the court did not hold a habitual offender hearing. *Id.* Additionally the court did not make findings that the defendant was not a danger to the community, as is statutorily required if the court declines to impose an enhancement. *Id.*; §775.084 Fla. Stat. (2014). The state appealed. *Id.*

This Court reviewed the case, and held that while the trial court erred in withholding the habitual offender enhancement absent a hearing and findings that the defendant was not a danger to the community, the state could not appeal because the sentence ultimately entered by the court was not *illegal*. This Court reached that holding because imposition of the habitual offender enhancement is not mandatory *even if* the defendant qualified:

> Section 775.084 requires the trial court to hold the HFO hearing, and we in no way condone a trial court's disregard of the statutory procedure. However, the question is whether this is simply an error in the sentencing process for which the State is not authorized to appeal or whether the error renders the sentence "illegal" thus qualifying under section 924.07 for a State appeal. The district court held below:
>
> > [T]he trial court's failure to conduct a hearing on the defendant's habitual felony offender status is not an appealable issue for the state. ...

> As discussed above, the sentence imposed by the trial court in the instant case was within the sentencing guidelines and, therefore, legal. Accordingly, the sentencing order is not appealable by the state, and this appeal must be dismissed.
>
> *McMahon*, 47 So.3d at 370 (citing *State v. Hewitt*, 21 So.3d 914 (Fla. 4th DCA 2009)). We agree. The sentence imposed in this case was within the range determined by the sentencing scoresheet. An illegal sentence has generally been defined 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." *State v. Akins*, 69 So.3d 261, 268–69 (Fla.2011) (quoting *Williams v. State*, 957 So.2d 600, 602 (Fla.2007)); *see also Jackson v. State*, 983 So.2d 562, 574 (Fla.2008) (same).[7] Because the sentence imposed in this case was within the range established by the sentencing scoresheet, and because the trial court was not mandated to impose an HFO sentence even if a hearing had been held and McMahon was proven to qualify, the sentence in this case is not "illegal."

State v. McMahon, 94 So. 3d 468, 476-477 (Fla. 2012).

In short, "[a] sentence cannot be deemed illegal due to procedural error if it is within statutory limits." *State v. Hewitt*, 21 So. 3d 914, 916 (Fla. 4th DCA 2009). *See also State v. F.G.*, 630 So. 2d 581, 582-3 (Fla. 3d DCA 1993) (where sentences were within the statutory authority of court to impose, claim of procedural error leading up to the entry of sentences did not render the sentences

"illegal" for purposes of a state appeal); *Riley v. State,* 648 So. 2d 825, 826 (Fla. 3d DCA 1995) (a sentence within "statutory limits" is a legal sentence from which the state cannot appeal); *Raley v. State,* 675 So. 2d 170 (Fla. 5th DCA 1996) (an "illegal" sentence is one that is not authorized by the law).

When a court declines to impose the habitual offender enhancement, the resulting sentence is not illegal because it is not "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." Although a court may be guilty of procedural error by declining to impose the habitual offender enhancement absent the appropriate findings, the fact that the court could have legally imposed the sentence prevents true illegality in the context of a state appeal.

Designation as a violent career criminal functions identically. *Soanes v. State*, 31 So. 3d 914 (Fla. 4th DCA 2010) (court is not mandated to impose VCC sentence, even if defendant qualifies). Where a defendant meets the criteria for the violent career criminal enhancement section, 775.084(4)(c) grants the trial court discretion to *either* impose an enhanced violent career criminal sentence, *or* to find that an enhanced sentence is not necessary and instead impose a standard guidelines sentence. *See Id.;* § 775.084(4)(d), Fla. Stat. (1997).

Thus, exactly as with the habitual felony offender enhancement contemplated in *McMahon,* failure to make the finding necessary to waive the

violent career criminal enhancement may be *erroneous*, but it does not render a sentence *illegal*, so long as the imposed sentence falls within statutory limits. Because a court may properly decline to impose a violent career criminal sentence, failure to make the findings necessary to do so is procedural error, and does not render the sentence illegal and appealable by the state.

It should also be noted that section 775.084 - the violent career criminal statute - expressly recognizes a defendant's, but *not* the state's, right of direct appeal, and limits the state's ability to challenge a VCC sentence to those sentences that are "illegal." The statute states, "A person sentenced under paragraph (4)(d) as a violent career criminal has the right of direct appeal, and either the State or the defendant may petition the trial court to vacate **an illegal sentence** at any time." *See* § 775.084(3)(d)(1), Fla. Stat. (2013). Moreover, the statute further provides that:

> **the determination of the trial court to impose or not to impose a violent career criminal sentence is presumed appropriate** and no petition or motion for collateral or other postconviction relief may be considered based on an allegation either by the state or the defendant that such a sentence is inappropriate, inadequate, or excessive.

Id. Thus, disagreement with a trial court's decision as to non-necessity to sentence as a violent career criminal does not render such a sentence appealable by the state; indeed, such a disagreement is *expressly* precluded as a reason for appeal. There is

no state right of appeal unless a trial court actually imposes a sentence that no judge could impose under any legal circumstances, such as one that omits a required minimum, or exceeds a statutory maximum.

In this case, exactly as in *McMahon*, the state is attempting to appeal a legal sentence based upon the failure to impose an enhancement. The sentence ultimately imposed was life in prison absent the violent career criminal enhancement. Now on review, the question before this Court is whether that sentence - in which the violent career criminal enhancement was not imposed on three qualifying counts - was legal, or rather "a punishment or penalty that no judge under the entire body of sentencing statutes and laws could impose under any set of factual circumstances." *State v. McMahon*, 94 So. 3d 468, 477 (Fla. 2012)(quoting *State v. Akins*, 69 So. 3d 261, 268-69 (Fla. 2011). Failure by the sentencing court to impose the violent career criminal enhancement was procedurally erroneous at worst, and did not render the ultimate sentence illegal since Mr. Harris received a sentence of life in prison, which was within the statutory limits. *State v. McMahon*, 94 So. 3d 468, 472 (Fla. 2012). As such, the state had no right to appeal, and the Third District Court of Appeals lacked the subject matter jurisdiction to hear this case. Because the Third District lacked jurisdiction, this Court should reverse their decision and dismiss the state's appeal.

CONCLUSION

Based upon the foregoing facts, authorities and arguments, petitioner respectfully requests this Court to quash the decision of the Third District Court of Appeal, and dismiss the state's appeal.

Respectfully submitted,

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CERTIFICATE OF FONT

Undersigned counsel certifies that the type used in this brief is 14 point proportionately spaced Times New Roman.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was emailed to the Office of the Attorney General at CrimAppMIA@MyFloridaLegal.com on September 3, 2014. Undersigned counsel hereby designates, pursuant to Rule 2.516, the following e-mail addresses for the purpose of service of all documents required to be served pursuant to Rule 2.516 in this proceeding: AppellateDefender@pdmiami.com (primary E-Mail Address); jmoody@pdmiami.com (Secondary E-Mail Address).

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