Filing # 10088307 Electronically Filed 02/10/2014 01:23:05 PM

RECEIVED, 2/10/2014 13:23:41, John A. Tomasino, Clerk, Supreme Court

IN THE SUPREME COURT OF FLORIDA

CASE NO.

VIRGIL LEE HARRIS,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

BRIEF OF PETITIONER ON JURISDICTION

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

Carlos J. Martinez
Public Defender
Eleventh Judicial Circuit
of Florida
1320 N.W. 14th Street
Miami, Florida 33125
(305) 545-1958

James Moody
Assistant Public Defender
Florida Bar No. 88223
JDM@pdmiami.com
Appellatedefender@pdmiami.com

Counsel for Petitioner

TABLE OF CONTENTS

PAGE

TABLE OF CITATIONS

CASES **PAGE(S)**

STATUTES

STATEMENT OF CASE AND FACTS[1]

In 1997, Virgil Lee Harris was tried under a six count information (A. 2). He was found guilty as charged of two counts of robbery with a deadly weapon or firearm two counts of battery on a person 65 years old or older, and one count of burglary with a battery (A. 2). He was additionally charged with one count of attempted first degree murder, however on this count he was convicted of the lesser included offense of aggravated assault with a firearm (A. 2). The court entered a written order sentencing Mr. Harris as a Violent Career Criminal (VCC) on all counts (A. 2). On three counts he was sentenced to a term of natural life with no minimum mandatory term (A. 2). On the rest of the counts he was sentenced to fifteen years in state prison (A. 2). All counts were to run concurrently (A. 2).

In 2012, Mr. Harris filed a motion to correct sentence in the trial court (A. 2). In that motion he alleged that the sentencing judge failed to specifically orally pronounce his enhancement as a VCC on the counts to which he was sentenced to life imprisonment (A. 2-3). As to that issue, the trial court agreed, and struck Mr. Harris's VCC enhancement as to those three counts (A. 2-3).

[1]This is a petition for discretionary review on the ground that the Third District Court of Appeal's decision, *Harris v. State*, 3D12-1996 (Fla. 3d DCA January 8, 2014), conflicts with Florida law. Attached to this brief is the appendix, paginated separately and identified herein as "A."

The state appealed the trial court's order striking the VCC enhancements (A. 1). The state did not allege that the trial court's order created an illegal sentence; rather the state argued that while the sentencing court may not have specifically pronounced the VCC enhancement as to the life counts, the intention of the court to impose the VCC designation was sufficiently discernible from the record (A. 3).

The Third District Court of Appeals agreed, holding that under the totality of circumstances, the intent of the trial court to impose the VCC enhancement was clear from the record (A. 3-5). Furthermore, they held that because the VCC statute "requires" the imposition of the enhancement if the defendant qualifies the intent of the trial court to impose the designation could be inferred (A. 5). Accordingly, the Third District Court of Appeals reversed, and remanded the case for denial of Mr. Harris' motion to correct sentence (A. 5).

Mr. Harris contends that the Third District Court of Appeals opinion in *Harris* stands in direct conflict with the law of the Florida Supreme Court as established in *State v. McMahon,* 94 So. 3d 468 (Fla. 2012). Appellant filed a notice to invoke this Court's discretionary jurisdiction to review the Third District's decision on February 4, 2014. This jurisdictional brief follows.

SUMMARY OF ARGUMENT

In *Harris v. State*, 3D12-1996 (Fla. 3d DCA January 8, 2014), the Third

District Court of Appeals reversed a non-illegal sentencing order issued by the trial court following a State appeal. Under this Court's clear holding in *State v. McMahon*, 94 So. 3d 468, 472 (Fla. 2012), the state had no jurisdiction to appeal a non-illegal sentencing order.

The sentence imposed by the trial court following Mr. Harris' 3.800 motion was *not* illegal because it was 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." *Id. at 477.* In this case the trial court sentenced Mr. Harris to life in prison but struck his designation as a Violent Career Criminal. Because life imprisonment without enhancement was not a sentence that legally could *not* be imposed, the state had no right to appeal *even if* the judge improperly exercised his discretion in striking Mr. Harris' enhancement.

ARGUMENT

UNDER THIS COURT'S HOLDING IN *MCMAHON,* THE THIRD DISCTRICT COURT OF APPEALS LACKED JURISDICTION TO RULE ON THIS APPEAL, AND IN ISSUING AN OPINION WAS THEREFORE IN DIRECT CONFILICT WITH ESTABLISHED FLORIDA LAW.

The Law of the Florida Supreme Court

"[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, "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). Florida Statute 924.07(1)(e) clearly states that the state may appeal "The sentence, *on the ground that it is illegal*." (Emphasis added). For determining the state's right to appeal, an *illegal* sentence is "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)).

Here, Judge Gayle's struck Mr. Harris' VCC designation on three counts, but left his life sentences intact. While the trial court's ruling may have been *erroneous*, the resulting sentence was not *illegal,* and therefore his order was not appealable by the state. This sentence was not *illegal* because the VCC designation is ultimately discretionary. *Soanes v. State*, 31 So. 3d 914 (Fla. 4th DCA 2010); *Harris v. State*, 849 So. 2d 449, 450 (Fla. 3d DCA 2003). Even if the trail court improperly exercised its discretion to *not* impose the VCC designation, that impropriety renders the sentence *erroneous,* but not *illegal*. *State v.*

McMahon, 94 So. 3d 468 (Fla. 2012).

In *McMahon,* this Court clearly distinguished an *illegal* sentence from one that was merely procedurally *erroneous* under circumstances nearly identical to the case at bar. In that case, this Court held that where the trial court refused to hold a hearing to determine if a defendant qualified as a habitual offender as required by law, the resulting sentence, while erroneous, was not *illegal* because the court ultimately sentenced the defendant within the required guidelines. *See State v. McMahon*, 94 So. 3d 468 (Fla. 2012). In reaching that holding this Court stated:

> 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."

Id. at 476-477. Here, just as in *McMahon,* while Judge Gayle's order might have been *erroneous* for striking the VCC designation although Mr. Harris qualified, it was not *illegal* because the sentence ultimately imposed - life in prison - was within the sentencing guidelines and was not a sentence that "no judge under the entire body of sentencing statutes and laws could impose under any set of factual circumstances."

This Court rested their decision in *McMahon* in part on the fact that a court is not *mandated* to impose the habitual felony offender sentence and enhancement *even if* the defendant qualifies. *Id.* at 477. In this regard, designation as a VCC is no different. Exactly as with the habitual felony offender enhancement, Florida Statutes section 775.084(4)(c) grants the trial court discretion to *either* impose the violent career criminal designation, ***or not***, if the court makes the appropriate findings. As in *McMahon,* failure to make these findings renders a sentence

erroneous, but not *illegal*, as there is a possible set of circumstances in which the court *could* have declined to impose the enhancement. Further confirming that there is no appreciable difference between the operation of the habitual felony offender enhancement as contemplated by *McMahon,* and the VCC statute, The Fourth District Court of Appeals explicitly recognized the discretion available to the sentencing court when considering a VCC enhancement in *Soanes v. State*, 31 So. 3d 914 (Fla. 4th DCA 2010).

Lastly, this Court recognized in *McMahon* that "[m]ost importantly, neither section 775.084 nor section 924.07 provides for a State appeal from a sentence imposed after the trial court denies a request for an HFO hearing." *State v. McMahon*, 94 So. 3d 468, 477 (Fla. 2012). Similarly, 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 post conviction 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 to *not* impose the VCC enhancement does not render such a sentence appealable by the state; indeed, such a disagreement is *expressly* precluded as a reason for appeal.

The Third District's Holding and Basis for Conflict

In their opinion in *Harris v. State,* 3D12-1996 (Fla. 3d DCA January 8, 2014), the Third District Court of Appeals declined to directly address Mr. Harris' primary argument on appeal that the Court lacked the jurisdiction to rule on the appeal (A. 1-5). Nonetheless, given the fact that *McMahon* establishes that the trial court's order granting Mr. Harris' motion to correct sentence was not appealable whatsoever, the very fact that the Third District issued an opinion reversing a non-illegal sentence on a state appeal puts their decision in direct conflict with this Court's established law in *State v. McMahon*, 94 So. 3d 468, 477 (Fla. 2012). Moreover, the Third District's assertion that the imposition of VCC status is *required* if the defendant qualifies is in direct conflict with the holding of the Fourth District in *Soanes v. State*, 31 So. 3d 914 (Fla. 4th DCA 2010), discussed, *supra.*

The direct and express conflict necessary for this Court to exercise its discretionary jurisdiction need not be made explicit by the District Court of Appeals. *Ford Motor Co. v. Kikis*, 401 So. 2d 1341, 1342 (Fla. 1981). Rather, the legal principles discussed by the District Court of Appeals may provide a sufficient basis for conflict. *Id.* Here, the Third District issued an opinion reversing an order after a state appeal in a case where the state had no right to appeal. Thus, while the Third District did not explicitly cite to a case in conflict with its decision, the very fact that it issued an opinion at all is sufficient to create a conflict.

Put another way, just as the state lacked the jurisdiction to appeal this case, the Third District also lacked the jurisdiction to hear it. In *State v. Jordan,* 783 So. 2d 1179 (Fla. 3d DCA 2001), the Third District had occasion to address a nearly identical issue. In *Jordan*, the state attempted to appeal a trial court sentencing order that departed from the terms of a plea agreement. *Id.* at 1182. In that case, the state procedurally framed their appeal as a writ of certiorari. *Id.* The Third District *dismissed* the case, holding that because the sentencing order was not *illegal* they *lacked jurisdiction* over the case. *Id.* at 1182-1183. Additionally, the Court held that a writ of certiorari could not be used to supply the right to appeal a legal sentencing order where no statutory right existed. *Id.* Thus, under *Jordan*, the Third District lacked jurisdiction to consider this case.

Lastly, the holdings of *Harris* and *McMahon* are legally irreconcilable. McMahon clearly holds that the state may not appeal a non-illegal sentence. In *Harris,* the Third District reverses an order imposing a non-illegal sentence. These two holdings are irreconcilable on their face. Irreconcilability is also a test to determine if there is direct and express conflict between decisions. *Aravena v. Miami-Dade County*, 928 So. 2d 1163, 1166 (Fla. 2006). As such, this Court should exercise its discretionary jurisdiction to settle the direct conflict between *Harris,* and the holdings of *McMahon* and *Soanes.*

CONCLUSION

Based on the foregoing facts, authorities and arguments, petitioner respectfully requests this Court to exercise its discretionary jurisdiction to review the decision of the Third District Court of Appeal.

Respectfully submitted,

Carlos J. Martinez
Public Defender
Eleventh Judicial Circuit
of Florida
1320 N.W. 14th Street
Miami, Florida 33125

BY: /s/ James Moody
JAMES MOODY
Assistant Public Defender

CERTIFICATE OF FONT

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

/s/ James Moody
JAMES MOODY
Assistant Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing document has been furnished to Assistant Attorney General, Jill Kramer, of the Office of the Attorney General, CrimAppMia@myfloridalegal.com by email, on 7th day of February, 2014.

/s/ James Moody
JAMES MOODY
Assistant Public Defender