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IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

SIDNEY NORVIL, Jr.,
Petitioner,

vs. Case number SC14-746

STATE OF FLORIDA,
Respondent.
_________________________________/

PETITIONER'S INITIAL BRIEF ON THE MERITS

On Review from the Fourth District Court of Appeal

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PRELIMINARY STATEMENT

Petitioner, Sidney Norvil, Jr., Appellant in the Fourth District Court of Appeal and the defendant in the trial court, will be referenced in this brief as Petitioner or by his proper name.

Respondent, the State of Florida, the Appellee in the Fourth District Court of Appeal and the prosecution in the trial court, will be referenced in this brief as Respondent or as the State.

The record on appeal consists of two (2) record volumes, which will be referenced as "RI," and "RII," respectively, eight (8) numbered transcript volumes, which will be referenced as "TI," "TII," "TIII," "TIV," "TV," "TVI," "TVII," and "TVIII," respectively, followed by any appropriate page number, and also a Plea and Sentencing Hearing, and a Sentencing transcript, which will be referenced as "PSH," and "S," respectively, followed by any appropriate page number.

STATEMENT OF THE CASE AND FACTS

On January 22, 2009, the State of Florida filed an information charging Petitioner with: Count I – Burglary while Armed with a Firearm; Count II-IV – Grand Theft From A Dwelling (RI 1). During sentencing, the defense objected to the improper consideration of pending charges (S 705). After sentencing, a Motion to Withdraw the Plea was filed regarding involuntariness due to competency and sentencing errors due to improper consideration of pending charges (RI 124-148). The trial judge denied the motion without an evidentiary hearing (RII 150-156).

Trial

During opening statements of the trial the defense attorney admitted that Petitioner committed the burglary but asserted that he did not have any involvement with the firearm (TII 270). Nor, did he know there was a gun in the dwelling (TII 270). Counsel asked that the jury find Petitioner guilty of burglary of a dwelling, but not armed (TII 273). After the openings the trial court questioned Petitioner if he was in agreement with the strategy (TII 274-275). He was (TII 275).

During the defense closing, counsel spent most of the argument on the issue of the gun, "Because that's the one thing we disagree on." (TIV 506). The jury deadlocked on that issue but found Petitioner guilty as charged for each count of grand theft (TIV 601-602). The trial court declared a mistrial on the burglary count (TIV 608).

Plea Hearing

At the plea hearing held on December 28, 2010, the trial court entered a reduction of count one from burglary while armed with a firearm to burglary while armed with a weapon with no mandatory minimum (PSH 657). Burglary while armed with a weapon with no mandatory minimum is a first-degree felony punishable by life (PSH 658).

A plea colloquy was conducted during which Petitioner stated that he was 19 years old, went to college, was not under the influence of alcohol or drugs, did not undergo treatment by a mental health professional, and that he was represented by counsel (PSH 659-660). Petitioner wanted to change his previously entered a plea of not guilty for count one to guilty of burglary while armed with a weapon (PSH 660). He agreed that he was not forced, pressured or threatened into the guilty plea and that he was acting freely and voluntarily (PSH 660).

The court informed Petitioner that he could be sentenced anywhere between probation and five years for count two (PSH 661). The court also informed him that he could be sentenced anywhere between probation and life for count one (PSH 661). Petitioner answered that he understood (PSH 661). Petitioner was told that the court had wide discretion in sentencing him and that he could be sentenced as a youthful offender (PSH 661-62).

For count one, Petitioner was asked if he understood that he would be giving

up his right to appeal if he plead guilty, but could retain his right to a trial if he chose not to plead. (PSH 665-66). For count two, his right to appeal had been reserved (PSH 666). Petitioner asked if he could go to trial and when that trial would occur (PSH 669). The trial judge answered that the trial could be set within three weeks (PSH 669). He then asked the judge if he would have time to find a private attorney to represent him (PSH 670-71). The court told him that the matter was ready for trial, and if he wanted to hire an attorney, "they'd have to be ready to go right now on your case." (PSH 671). He was told that he could have a private attorney sit with Ms. Farnsworth-Baker because she knew the details of the case (PSH 672). Petitioner asked if he had time to get another lawyer to work with Ms. Farnsworth-Baker, the court responded that Ms. Farnsworth-Baker was available presently (PSH 672). Petitioner did not want to go to trial right away (PSH 673). The court gave a timeframe of a week or two but refused to postpone the date for very long because the new attorney should be able to be brought up to speed quickly (PSH 673-74). Petitioner spoke with his mother before determining his course of action (PSH 675-76). Upon return, Petitioner pled guilty (PSH 675). A factual basis for the plea was found under the principal theory (PSH 677). The judge adjudicated Petitioner guilty of the reduced count one (PSH 679).

At the sentencing hearing held on January 11, 2011, the trial court acknowledged that a new charge was included in the sentencing memorandum

offered by the prosecution, but then inquired into an open warrant for a trespass thought to have occurred at a mall (S 700). The State told the trial judge that the State had no knowledge of the case because it never came downtown (S 700). The judge remembered that he took Petitioner into custody on the trespass whereupon a plea was entered (S 700-1). Defense counsel confirmed that Petitioner had taken a plea in that case (S 701).

Defense counsel referenced her sentencing memorandum and objected to the new charge discussed by the State (S 705). She asked the trial judge to refer to defense counsel's sentencing recommendation requesting the new arrest remain unconsidered because it was denied by Petitioner and because little investigation had been done (S 705). She requested that the court not rely upon the new arrest in the sentence (S 705). The State informed the court that a prior offense, not the new arrest, occurred on October 14, 2010 (S 706). But the trial judge began asking specific questions about the new arrest (S 706). Referring to the State's sentencing memorandum, the trial judge pointed to information indicating an AFIS hit on Petitioner's fingerprint on a CD connected to the new arrest (S 706-07). The State said that the fingerprint was confirmed by a technician (S 707). And the State was in the process of preparing discovery for the new case (S 707).

The trial court stated that there were two Sidney Norvils, one who was very positive and one who got arrested while on bond for trespass and now for burglary of

a retired deputy sheriff's car with fingerprint identification (S 708). The judge pointed out that the arrests were not distant and that they occurred while Petitioner was on bond for this case (S 708). Although he found Petitioner persuasive, he again considered the new arrest and stated, "But the Sidney Norvil that is committing crimes is the Sidney Norvil that's running around with his friends breaking into people's cars." (S 708).

Finding that Petitioner was deserving of an adult sanction, the court declined to sentence him as a youthful offender (S 709). Instead, the trial judge found that he was deserving of a sentence in the Department of Corrections and sentenced Petitioner to twelve years for count one and five years for count two, the counts to run concurrently (S 709). Petitioner scored 35.7 months on his Criminal Punishment Code scoresheet (RI 114-115).

After the trial court denied Petitioner's post sentencing motion to withdraw his plea, Norvil appealed to the Fourth District Court of Appeal. He argued that by considering an uncharged and unproven criminal allegation, the trial court reversibly erred during the sentencing hearing entitling Appellant to resentencing.

The Fourth District affirmed, holding that a sentencing judge may consider the defendant's subsequent arrest and charges at sentencing in the present case because of these factors: (1) the new charge was relevant; (2) the allegations of criminal conduct were supported by evidence in the record; (3) the defendant had not

been acquitted of the charge that arose from the subsequent arrest; (4) the record does not show that the trial court placed undue emphasis on the subsequent arrest and charge in imposing sentence; and (5) the defendant had an opportunity to explain or present evidence on the issue of his prior and subsequent arrests. *Norvil v. State*, —— So.3d ——, ——, 39 Fla. L. Weekly D520, 522 (Fla. 4th DCA Mar. 12, 2014) review granted, No. SC14-746, 2014 WL 7251737 (Fla. Dec. 15, 2014).

Norvil filed a notice to invoke the discretionary jurisdiction of this Court. He asserted that the district court's holding expressly and directly conflicted with holdings from the First, Second, and Third District Courts of Appeal. This Court accepted jurisdiction on December 15, 2014.

SUMMARY OF THE ARGUMENT

A sentence is imposed in violation of due process where the proceedings are fundamentally unfair, as where the sentencing court considers a defendant's subsequent arrest and charges in determining the sentence.

ARGUMENT

ERROR OCCURED WHERE THE TRIAL COURT CONSIDERED PETITIONER'S SUBSEQUENT ARREST WHEN IMPOSING HIS SENTENCE.

A. *Background*

On January 11, 2011, Petitioner was before the trial court for sentencing. His "recommended" or "lowest appropriate sentence" (see § 921.00265, Fla. Stat.) under the Criminal Punishment Code (CPC) was 35.7 months.

After considering Petitioner's subsequent arrest for burglary of a conveyance, the trial judge did not sentence Petitioner to 35.7 months. Petitioner was sentenced to 144 months in prison on Count One (12 years), and a concurrent five year sentence on Count Two.

Petitioner appealed to the Fourth District Court of Appeal. The court affirmed, stating that "we uphold consideration of the defendant's subsequent arrest and charges at sentencing in the present case because of these factors: (1) the new charge was relevant; (2) the allegations of criminal conduct were supported by evidence in the record; (3) the defendant had not been acquitted of the charge that arose from the subsequent arrest; (4) the record does not show that the trial court placed undue emphasis on the subsequent arrest and charge in imposing sentence; and (5) the defendant had an opportunity to explain or present evidence on the issue of his prior and subsequent arrests." *Norvil v. State*, ––– So.3d –––, –––, 39 Fla. L.

Weekly D520, 522 (Fla. 4th DCA Mar. 12, 2014) review granted, No. SC14-746, 2014 WL 7251737 (Fla. Dec. 15, 2014).

Petitioner argues that consideration of a subsequent arrest violates his due process rights protected by the Fourteenth Amendment of the United States Constitution and article I, section 9 of the Florida Constitution for two reasons: first, the Criminal Punishment Code (CPC) states that the severity of the sentence increases with the length and nature of the offender's *prior* record. Fla. Stat. § 921.002(d). (Emphasis added). Second, under our constitutional scheme a defendant is presumed innocent until proven guilty, and therefore an arrest is consistent with innocence and should not prejudice the defendant during sentencing.

B. *Standard of Review*

This Court reviews *de novo* a pure question of law. *Cromartie v. State*, 70 So. 3d 559, 563 (Fla. 2011).

C. Criminal Punishment Code does not consider subsequent arrests.

The Criminal Punishment Code (CPC) states in pertinent part that: (d) The severity of the sentence increases with the length and nature of the offender's *prior* record. Fla. Stat. § 921.002(1)(d). (Emphasis added). Nowhere does the CPC mention subsequent arrests.

"In Florida, the plenary power to prescribe the punishment for criminal offenses lies with the legislature, not the courts." *Moore v. State*, 859 So. 2d 613,

617 (Fla. 1st DCA 2003) approved, 882 So. 2d 977 (Fla. 2004). Florida's primary goal under its sentencing scheme is punishment, and it is a stated policy that a defendant's sentence should increase with the length and nature of the defendant's prior record. § 921.002(1)(b), (d). Taking into account a subsequent arrest runs counter to this policy.

Because the purpose of sentencing is punishment (§ 921.002(1)(b), Fla. Stat.) the defendant should receive the punishment he deserves and no more.

The Legislature determines sentencing policy. *Hall v. State*, 823 So. 2d 757, 763 (Fla. 2002) ("Criminal sentences are a product of legislative decision."); *Ewing v. California*, 538 U.S. 11, 28 (2003) (noting that legislature "has primary responsibility for making the difficult policy choices that underlie any criminal sentencing scheme.") Its work deserves a court's respect and consideration. When the Legislature says that the lowest appropriate sentence for an offender is x, a court may not lightly dismiss this.

Furthermore, under section 921.00265, Fla. Stat., the lowest permissible sentence under the CPC is "assumed to be the lowest appropriate sentence for the offender being sentenced." *State v. Hodges*, 151 So. 3d 531, 533 (Fla. 3d DCA 2014). Because the purpose of sentencing under the CPC is punishment (*see* § 921.002(1)(b), Fla. Stat.) judges must always be trying to determine the lowest

appropriate sentence.[1] A sentence greater than the lowest appropriate sentence (whatever the lowest appropriate sentence might be) is more punishment than a defendant deserves and is simply the gratuitous infliction of pain and suffering.

Because the lowest permissible sentence under the CPC is "assumed to be the lowest appropriate sentence for the offender being sentenced," a trial court, in deciding what sentence to impose, should begin by considering whether the lowest permissible sentence under the CPC is not in fact the appropriate sentence.

A recent case supports this view. In *Cosme v. State*, 111 So. 3d 280 (Fla. 4th DCA 2013), the trial court imposed the sentence and afterwards calculated the CPC score. The Fourth District held that the court denied the defendant due process and committed fundamental error when it chose the sentence without first considering the CPC score.

The holding in *Cosme* is inconsistent with the idea that the CPC merely establishes a minimum sentencing "floor." If the CPC merely establishes a floor, and the court may impose any sentence above that, then it would never be error — or at least it would never be harmful error—to sentence a defendant without a properly

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1 Prosecutors should too. Florida has adopted the American Bar Association Standards of Criminal Justice Relating to Prosecution Function. *See* Comment, R. Regulating Fla. Bar 4-3.8. Standard 3-6.1(a) states: "The prosecutor should not make the severity of sentences the index of his or her effectiveness. To the extent that the prosecutor becomes involved in the sentencing process, he or she should seek to assure that a fair and informed judgment is made on the sentence and to avoid unfair sentence disparities." *See Zeigler v. State*, 60 So. 3d 578, 580 n.1 (Fla. 2d DCA 2011)(relying on that standard).

calculated CPC scoresheet. Therefore, the CPC score must have some anchoring effect on the trial court's sentencing discretion.

The Legislature has also accorded trial courts discretion to impose a sentence greater than x. But that discretion must be exercised reasonably. *See, e.g., McKinney v. State*, 27 So. 3d 160, 161 (Fla. 1st DCA 2010) ("[L]ike any other exercise of judicial discretion, the trial court's sentencing decision must be supported by logic and reason and must not be based upon the whim or caprice of the judge."); *Paroline v. United States*, 134 S.Ct. 1710, 1734 (2014) (Roberts, C.J., dissenting) (observing that allowing judges to sentence by 'instinct' or 'intuition' would violate due process).

We can see in this case what happens when the sentencing judge considers a subsequent arrest. Petitioner's CPC score in this case was 35.7 months. Yet the trial judge, after considering Petitioner's subsequent arrest for burglary of a conveyance, sentenced him to 144 months on Count One. Had the trial court scored the subsequent arrest as a conviction, it would have only added 2.7 months (3.6 months reduced by 25%) as a Level Four additional offense. The new total comes to 38.4 months. Thus, it appears that in sentencing Petitioner to over three times the lowest appropriate sentence the trial judge did, contrary to one of the Fourth District Court's guidelines, place undue emphasis on the subsequent arrest and charge in imposing sentence.

Furthermore, although the above example showed the disparity of Norvil's sentence to a scoresheet adding the new charge, the CPC does not consider new arrests. So instead of basing the sentence on an accurate scoresheet, the trial court is essentially sentencing Petitioner with an incorrect scoresheet. This Court has recognized that it is undoubtedly important, even essential, for the trial court to have the benefit of a properly calculated scoresheet when making a sentencing decision. *State v. Anderson*, 905 So. 2d 111, 117 (Fla. 2005).

The Fourth District Court's decision allows the sentencing judge to base the sentence on subjective factors rather than the appropriate factors to be considered in imposing sentence, which are, the crime charged, the particular circumstances of the individual before the court and the purposes of penal sanctions. It cannot be the policy of this State to have disparate and nonuniform sentencing. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417-18 (2003) ("[T]he Due Process Clause does not permit a State to classify arbitrariness as a virtue." *Quoting Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 59 (1991)(O'Connor, J., dissenting)). The essence of law and justice is to treat like cases alike. "[T]he uniform general treatment of similarly situated person . . . is the essence of law itself." *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 587-88, (1996)(Breyer, J., concurring).

Various courts in this State have held that there are impermissible sentencing considerations related to other crimes. For instance, it is improper to consider

uncharged offenses. *Hernandez v. State*, 145 So. 3d 902 (Fla. 2d DCA 2014). And improper to consider unsubstantiated allegations of misconduct. *McGill v. State*, 148 So. 3d 531 (Fla. 5th DCA 2014) (unsubstantiated allegations of gang affiliation, robberies); *Craun v. State*, 124 So. 3d 1027 (Fla. 2d DCA 2013) (court incorrectly attributed to Craun his codefendant's misconduct, and counsel was ineffective for not objecting to it); *Martinez v. State*, 123 So. 3d 701 (Fla. 1st DCA 2013) (appellate counsel was ineffective for failing to raise the issue); *Reese v. State*, 639 So. 2d 1067 (Fla. 4th DCA 1994) (judge considered argument by prosecutor that defendant was seen in other videotaped drug sales); *Challis v. State*, 40 Fla. L. Weekly D321 (Fla. 2d DCA Jan. 30, 2015) (judge speculated that defendant's drug trafficking caused the deaths of users); *Epprecht v. State*, 488 So. 2d 129, 130 (Fla. 3d DCA 1986) (speculation that defendant committed other crimes); *Goldstein v. State*, 40 Fla. L. Weekly D137, D140 (Fla. 2d DCA Jan. 7, 2015) (evidence at hearing showed that defendant, who was convicted of possession of child pornography, had not touched children and was unlikely to do so; but judge said risk was uncertain and he would not take it; court reversed: "It seems even more evident to us that a court cannot rely on crimes it fears the defendant might possibly commit in the future simply because he has admitted the charged offenses.").

This Court should hold that the consideration of subsequent arrests or charges during sentencing is a violation of Petitioner's due process rights.

D. A subsequent arrest should not prejudice the defendant during sentencing

"The presumption of innocence is a basic tenet of our criminal justice system and attaches to each person charged with a crime." *Parker v. State*, 843 So. 2d 871, 874 (Fla. 2003). "A jury starting from a presumption of guilt from the fact of the defendant's indictment could readily reach the conclusion that the defendant had been proved guilty beyond a reasonable doubt because of his failure to advance affirmative proof of his innocence, whereas starting from a presumption of innocence would lead to no such result." *McKenna v. State*, 119 Fla. 576, 585, 161 So. 561, 564 (1934). It is worth repeating that a defendant is presumed innocent until proven guilty. Yet under some of the Fourth District's guidelines it is sufficient for the sentencing judge to consider subsequent arrests if (1) the new charge is relevant; (2) the allegations of criminal conduct are supported by evidence in the record; (3) the defendant had not been acquitted of the charge that arose from the subsequent arrest; and (5) the defendant had an opportunity to explain or present evidence on the issue of his prior and subsequent arrests." *Norvil v. State*, ––– So.3d –––, –––, 39 Fla. L. Weekly D520, 522 (Fla. 4th DCA Mar. 12, 2014) review granted, No. SC14-746, 2014 WL 7251737 (Fla. Dec. 15, 2014). The Fourth District Court's scheme is similar to a jury starting from a presumption of guilt and then asking the defendant to extricate himself.

First, it would be hard to imagine a new arrest that was not relevant in some way. A court could find that the arrest was relevant to the defendant's character, or to propensity, if nothing else — someone who commits crimes. Second, the arrest itself must be supported by a certain amount of evidence, so that any arrest will be supported by evidence in the record. To make an arrest requires an officer to have probable cause. Probable cause for an arrest exists when the circumstances are sufficient to cause a reasonably cautious person to believe that the person accused is guilty of the offense charged. *Fla. Game & Freshwater Fish Comm'n v. Dockery*, 676 So.2d 471, 474 (Fla. 1st DCA 1996). Third, it is doubtful that any subsequent arrest would have been resolved prior to the sentencing. But if it had jumped the queue, and the defendant had been acquitted, the court could not consider the arrest anyway. (It is a violation of due process for the court to rely on conduct of which the defendant has actually been acquitted when imposing a sentence). *Doty v. State*, 884 So. 2d 547, 549 (Fla. 4th DCA 2004). And fourth, the District Court is correct that the defendant's opportunity to explain or present evidence on his prior and subsequent arrests is "illusory." *Norvil v. State*, ––– So.3d –––, –––, 39 Fla. L. Weekly D520, 522 (Fla. 4th DCA Mar. 12, 2014) review granted, No. SC14-746, 2014 WL 7251737 (Fla. Dec. 15, 2014). No defense attorney would allow a client to speak under the circumstances. And what would happen if the defendant did speak? Would the sentencing hearing become a mini trial? What is the burden of

proof? It is unlikely, as here, that any discovery of the new charge was taken. Nor would there have been an opportunity to investigate. Furthermore, as happened in the present case, if the defendant does not defend the charge the judge will tend to believe the State and punish the defendant accordingly -- "[T]he Sidney Norvil that is committing crimes is the Sidney Norvil that's running around with his friends *breaking into people's cars* — breaking into people's houses." *Id.* (Emphasis added). So if a defendant is presumed innocent until proven guilty, when is there sufficient evidence to support the court believing otherwise?

This Court has held that the criminal process may not penalize someone merely for the status of being under indictment or otherwise accused of a crime. *State v. Potts*, 526 So.2d 63 (Fla.1988). In the context of sentencing this is what the Fourth District Court's decision does. This Court should hold that the consideration of subsequent arrests or charges during sentencing is a violation of Petitioner's due process rights.

CONCLUSION

This Court should reverse the sentence and remand for resentencing before a different judge.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Asst. Attorney General Jeanine Germanowicz crimappwpb@myfloridalegal.com, 1515 N. Flagler Dr., West Palm Beach, FL 33401, this 19th day of February, 2015.

S/Patrick Barfeiled Burke
Patrick Barfield Burke

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY this brief is written in 14 point Times New Roman.

S/Patrick Barfield Burke
Patrick Barfiled Burke