IN SUPREME COURT OF FLORIDA

MARLON KELLY,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC14-916

RESPONDENT'S ANSWER BRIEF

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PRELIMINARY STATEMENT

Respondent, the State of Florida, the Appellee in the District Court of Appeal (DCA) and the prosecuting authority in the trial court, will be referenced in this brief as Respondent, the prosecution, or the State. Petitioner, Marlon Kelly, the Appellant in the DCA and the defendant in the trial court, will be referenced in this brief as Petitioner or by proper name.

The record on appeal will be referenced according to the volume number expressed in roman numerals. The record also contains supplemental volumes, the first of which will be referred to as "R.Supp." followed by any appropriate page number, and the second of which will be referred to as "R.Supp.II" followed by any appropriate page number. "DCA IB" will designate Petitioner's Initial Brief in the district court. "IB" will designate Petitioner's Initial Brief. Each symbol will be followed by the appropriate page number in parentheses.

All emphasis through bold lettering is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

The State accepts Defendant's statement of the case and facts as generally supported by the record, but rejects the legal argument contained within the statement.

SUMMARY OF ARGUMENT

The First District erred in interpreting §775.087(2)(b), Fla. Stat. However, the First District should never have reached the issue of interpreting the statute, as it primarily erred in holding that the trial court could not restructure Petitioner's original sentence of forty years, including a twenty-five year minimum mandatory portion, to a 37.5 year minimum mandatory term upon resentencing. Because the new sentence of 37.5 years was equal to or less than the original sentence's length of 40 years, the trial court was free to impose it on resentencing. Therefore, the First District's decision should be quashed and the trial court's sentence affirmed.

ARGUMENT

ISSUE: WHETHER THE TRIAL COURT WAS FREE TO IMPOSE A SENTENCE EQUAL TO OR LESSER THAN THE ORIGINAL SENTENCE UPON RESENTENCING? (RESTATED)

Standard of Review

The interpretation of a statute is reviewed de novo. See Delva v. Continental Group, Inc., 137 So.3d 371 (Fla. 2014).

When determining whether a double jeopardy violation occurred, the standard of review for the legal determination based upon undisputed facts is also de novo. See State v. Paul, 934 So. 2d 1167, 1171 (Fla. 2006), overruled on other grounds by Valdes v. State, 3 So. 3d 1067 (Fla. 2009); see also Pizzo v. State, 945 So. 2d 1203, 1206 (Fla. 2006).

Burden of Persuasion

Appellant bears the burden of demonstrating prejudicial error. Section 924.051(7), Fla. Stat. (2008), provides:

> In a direct appeal ..., the party challenging the judgment or order of the trial court has the burden of demonstrating that a prejudicial error occurred in the trial court. A conviction or sentence may not be reversed absent an express finding that a prejudicial error occurred in the trial court.

"In appellate proceedings the decision of a trial court has the presumption of correctness and the burden is on the appellant to demonstrate error." Applegate v. Barnett Bank of Tallahassee, 377 So. 2d 1150, 1152 (Fla. 1979). Moreover, because the trial court's decision is presumed correct, "the appellee can present any argument supported by the record even if not

expressly asserted in the lower court." Dade County School Bd. v. Radio Station WQBA, 731 So. 2d 638, 645 (Fla. 1999); see Robertson v. State, 829 So. 2d 901, 906-907 (Fla. 2002).

Preservation

This issue appears preserved, pursuant to well-settled authority.

Merits

The First District reached two holdings in the instant case. First, the district court held that the trial court could not resentence Petitioner to an increased minimum mandatory term that was less than or equal to the original length of the sentence. Second, the First District held that §775.087(2)(b), Fla. Stat., permits the trial court on remand to sentence Petitioner to the original twenty-five year minimum mandatory portion of his sentence, followed by any term of years up to life in prison without regard to whether additional statutory authorization existed to do so.

The State acknowledges that the First District erred in interpreting §775.087(2)(b), Fla. Stat. However, the First District also erred in holding that the trial court could not restructure Petitioner's sentence upon resentencing to a term equal to or less than the original. In utilizing authority concerning the modification of currently imposed sentences, as opposed to the law governing resentencing after a vacated sentence, the district court applied the wrong law. It is well-settled that during

resentencing a trial court has freedom to restructure a sentence as long as the new sentence does not exceed the total length of the original.

In Blackshear v. State, 531 So.2d 956, 958 (Fla. 1988), the defendant was originally sentenced to concurrent sixty-five year sentences, which had been previously overturned on appeal. Upon resentencing, the defendant received a longer term of incarceration of two concurrent life sentences. Id. The defendant claimed that the increased sentence violated the principle of North Carolina v. Pearce, 395 U.S. 711 (1969), partially overruled by Alabama v. Smith, 490 U.S. 794 (1989), concerning vindictive sentencing. Id. This Court quoted the following relevant passage from Pearce:

> Due process of law, then, requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. And since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge.
>
> In order to assure the absence of such a motivation, we have concluded that whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding. And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal.

Id. at 957. Thus, when a term of incarceration longer than the original is imposed, evidence must exist to justify the increase. However, when a term of incarceration is not longer than the original, this requirement does not exist. This Court held that the trial court could restructure the sentences from concurrent to consecutive to reach its original total of sixty-five

years, but could not exceed that length without additional justification. Id. at 958.

More recently, in Gisi v. State, 948 So.2d 816 (Fla. 2d DCA 2007), reversed in part on other grounds, Gisi v. State, 4 So.3d 613 (Fla. 2009), Gisi had previously challenged his fourteen convictions and the resulting sentence of seventy-one years in prison, with all counts running concurrently. Id. at 817. Upon remand and resentencing after the reversal of nine of the fourteen convictions, the defendant was sentenced to three consecutive fifteen year sentences. Id. The defendant claimed that the new consecutive sentences, which had previously been concurrent with each other, were vindictive and "were in violation of the principles established in North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969)." Id. at 818. However, the court stated that "[m]erely restructuring sentences from concurrent to consecutive is not enough to support a claim that sentences were increased. *Pearce*, at its core, prohibits vindictive sentencing, not an increased sentence, but establishes that the reasons for an increased sentence must affirmatively appear on the record to avoid a presumption of vindictiveness." Id. The court also noted that "*Pearce*'s presumption of vindictiveness does not apply to every increased sentence but applies only where there is a 'reasonable likelihood' of actual vindictiveness." Id. The court also specifically held that "*Pearce*'s vindictiveness presumption is not implicated at all when the combined years of consecutive new sentences do not exceed the longest original concurrent sentence." Id.; see also Finethy v. State, 962 So.2d 990(Fla. 4th DCA 2007)(rejecting Finethy's claim that his

sentence was vindictive and holding that "the imposition of consecutive sentences after concurrent sentences are reversed on appeal is not per se prohibited" along with noting that "[w]henever a cause is remanded for resentencing, the trial judge may impose any lawful sentence, but the judge may not increase the sentence unless such an increase is based on conduct occurring subsequent to the imposition of the first sentence."); Brown v. State, 918 So.2d 409, 412 (Fla. 5th DCA 2006)("the defendant's claim of error regarding the trial court's vindictiveness lacks merit because, as the State aptly notes, the defendant's amended sentence effectuates the intent of the trial court's original sentencing scheme without increasing the amount of the State's supervision over the defendant."); Sands v. State, 899 So.2d 1208, 1209 (Fla. 5th DCA 2005)(holding that: "We believe that it is within a trial court's discretion to restructure a sentence so long as the aggregate sentence remains within the parameters of the plea agreement, does not exceed the maximum sentence that may be lawfully imposed, and is not vindictive."); James v. State, 868 So.2d 1242, 1246 (Fla. 4th DCA 2004)("'A trial court can legally restructure a defendant's sentences by changing concurrent terms to consecutive terms, as long as the new sentence is not found to be vindictive.'" Richardson v. State, 821 So.2d 428, 431 (Fla. 5th DCA 2002)").

Thus, the principle that a trial court can structure a defendant's sentence however it chooses on resentencing, as long as it does not exceed the original length, is well-settled. The greatest length of Petitioner's original sentence was forty years, including a twenty-five year minimum mandatory portion. (I 50-63). Upon vacation of that sentence at Petitioner's

request and resentencing, the greatest sentence length was 37.5 years. (Supp. RII. 203-223). Since the current sentence is equal to or less than the original sentence, it is perfectly valid.

Petitioner challenged this sentence based on double jeopardy grounds. (DCA IB). The federal proscription against double jeopardy provides: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb." Amend. V, U.S. Const. Similarly, Florida's proscription against double jeopardy provides: "No person shall be ... twice put in jeopardy for the same offense." Art. I, § 9, Fla. Const. Generally, both the federal and state proscriptions apply to criminal cases and provide three separate constitutional protections: (1) they protect against a second prosecution for the same offense after acquittal; (2) they protect against a second prosecution for the same offense after conviction; and (3) they protect against multiple punishments for the same offense. See Delemos v. State, 969 So. 2d 544, 546 (Fla. 2d DCA 2007) (citing United States v. DiFrancesco, 449 U.S. 117, 129 (1980)). However, as this Court stated in State v. Collins, 985 So. 2d 985, 992 (Fla. 2008), "[n]one of these protections is involved in a resentencing."

Additionally, when there is no expectation of finality in a sentence, double jeopardy concerns are not implicated. See Dunbar v. State, 89 So.3d 901, 904 (Fla. 2012). It is axiomatic that when Petitioner requested that his sentence be vacated, he had no expectation in its finality, for it is a de novo proceeding. See State v. Fleming, 61 So.3d 399, 408 (Fla. 2011).

While not labeling the issue as one involving double jeopardy, the First

District nonetheless relied on authority in which increases in lawfully imposed sentences were reversed based on double jeopardy concerns. The district court cited to Rizzo v. State, 430 So.2d 488 (Fla. 1st DCA 1983), and Macias v. State, 572 So.2d 22 (Fla. 4th DCA 1990), to support its holding that the trial court erred in increasing the minimum mandatory portion of Petitioner's sentence to 37.5 years. Macias explicitly identifies the issue as one involving double jeopardy in the context of a lawfully imposed sentence, and while Rizzo does not explicitly identify its issue involving a lawfully imposed sentence as one of double jeopardy, the authority it relies upon does. See Pooley v. State, 403 So.2d 593 (Fla. 1st DCA 1981). Because the instant case does not involve an already imposed and valid sentence being increased in contradiction of the defendant's expectation of finality, the line of authority upon which the First District relied does not apply. The First District therefore applied the wrong law in holding that the trial court could not increase on resentencing Petitioner's minimum mandatory sentence to a level that was equal to or below his original sentence length. The applicable rule is simple and well-settled: double jeopardy concerns are not implicated by resentencing hearings. Collins, 985 So. 2d 985 at 992.

Additionally, the First District disagreed with the trial court's factual finding that its original intent was that Petitioner serve forty years in prison. While a new sentence's correctness is not predicated on whether the original sentencing intent is adhered to, but instead on whether the sentence exceeds the length of the original, it should be noted that the original sentencing judge and the resentencing judge were one and the same. (I 62-63;

Supp. RII. 203). Thus, the trial court was certainly aware of its own intent in the original sentencing, its statement to that effect was competent substantial evidence to support it, and the First District erred in reweighing the finding.

It is worth noting that, pursuant to Williams v. State, 125 So.3d 879 (Fla. 4th DCA 2013), §775.087(2)(d), Fla. Stat., mandates that a sentence imposed under it must be consecutive to any other felony sentence.[1] Petitioner's minimum mandatory sentence was imposed pursuant to this statute, and the trial court was therefore required to impose this sentence consecutive to any other felony sentence. Thus, even if Petitioner's minimum mandatory sentence was twenty-five years as to both challenged counts, as he has requested, they would run after each other and after the twenty-year minimum mandatory sentences for his other counts, resulting in a total sentence of ninety years. Petitioner's current minimum mandatory sentence of 37.5 years is potentially more lenient than the forty years he originally received, only part of which was a minimum mandatory sentence, and is far less than what the law requires.

While the First District erred in interpreting §775.087(2)(b), Fla. Stat., it also erred in finding that the trial court could not restructure Petitioner's sentence on resentencing. The First District applied the law

[1] This issue is currently before this Court on a certified question of great public importance in Williams v. State, SC13-1080.

regarding increases in imposed, valid sentences, rather than the law regarding resentencing after the lawful vacation of a sentence, and therefore applied the wrong law. The sentences in the instant should be affirmed because the trial court was free to impose the current sentences upon Petitioner.

CONCLUSION

Based on the foregoing, the State respectfully submits the decision of the District Court of Appeal reported at 137 So.3d 2 should be quashed, and the sentence entered in the trial court should be affirmed.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to the following by electronic mail on January 12, 2015: M.J. Lord, Esq., at mj.lord@flpd2.com.

CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Courier New 12 point font.

Respectfully submitted and certified,
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