IN THE SUPREME COURT OF FLORIDA

VANNA BUTH,

Petitioner,

CASE NO. SC01-2662

v.

STATE OF FLORIDA,

Respondents.
__________________/

ON APPEAL FROM THE FIRST DISTRICT

ANSWER BRIEF OF RESPONDENTS

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PRELIMINARY STATEMENT

Petitioner, VANNA BUTH, the defendant in the trial court will be referred to as appellant, defendant, or by his proper name. Respondent, the State of Florida, will be referred to as the State.

The symbol "R" will refer to the record on appeal. Pursuant to Rule 9.210(b), FLA. R. APP. P. (1999), this brief will refer to the volume number. The symbol "T" will refer to the trial transcripts. The symbol "IB" will refer to the appellant's Initial Brief. Each symbol is followed by the appropriate page number. All double underlined emphasis is supplied.

STATEMENT OF THE CASE AND FACTS

The State accepts petitioner's statement of the case and facts.

SUMMARY OF THE ARGUMENT

ISSUE I

Buth asserts that the First District lacked jurisdiction because the state's notice of cross-appeal was filed in the wrong court, *i.e.* filed in the First District when it should have been filed in the trial court. The State respectfully disagrees. First, the First District was the correct court. A notice of cross appeal may be properly filed in the appellate court that will hear the appeal rather than the trial court that will not. Moreover, even if the notice of cross-appeal should have been filed in the trial court, filing the notice in the "wrong" court does not result in lack of jurisdiction. Rather, the appellate court merely treats the notice as filed in the correct court. *Kaweblum v. Thornhill Estates Homeowners Ass'n, Inc.*, 755 So.2d 85 (Fla. 2000). Thus, the First District has jurisdiction regardless of whether the notice was filed in the proper court.

ISSUE II

Buth asserts the First District lacked jurisdiction because he dismissed his direct appeal. The State respectfully disagrees. An appellate court retains jurisdiction over a independently valid cross appeal even if the defendant dismisses his direct appeal. Thus, the First District properly determined that it had jurisdiction over the cross-appeal issue regardless of the defendant's dismissal of his appeal.

ISSUE III

Buth argues that the trial court imposing an increased sentence based on an appellate court's mandate violates double jeopardy. The State respectfully disagrees. The double jeopardy clause does not apply to non-capital sentencing according to the United State Supreme Court. There simply is no such concept as an "acquittal" of a more serious sentence. Thus, a trial court may increase a sentence following a successful state appeal without violating double jeopardy principles.

ISSUE IV

Buth asserts that the trial court's failure to impose reoffender sanction is not preserved. The State respectfully disagrees. The prosecutor informed the trial court that the court was required to impose prison releasee reoffender sanctions. Thus, the issue is preserved.

ISSUE V

Buth asserts that he is not subject to prison releasee reoffender sanctions first degree felonies punishable by life. The issue is currently pending in this Court based on certified questions from the First District and the Fourth District. This Court should dismiss this appeal or hold it in abeyance pending these decisions.

ISSUE I

WHETHER THE FIRST DISTRICT HAD JURISDICTION WHEN THE STATE FILED A TIMELY NOTICE OF CROSS-APPEAL IN THE DISTRICT COURT BUT PETITIONER LATER DISMISSED HIS DIRECT APPEAL? (restated)

Buth asserts that the First District lacked jurisdiction because the state's notice of cross-appeal was filed in the wrong court, *i.e.* filed in the First District when it should have been filed in the trial court. First, the First District was the correct court to file an appellate notice of cross-appeal. The First District, not the trial court, had jurisdiction over the case once Buth filed a notice of appeal. Any cross-appeal would be litigated in the appellate court where the notice was filed, not in the trial court. A notice of cross appeal may be properly filed in the appellate court that will hear the appeal rather than the trial court that will not.

Moreover, even if the notice of cross-appeal should have been filed in the trial court, filing the notice in the "wrong" court does not result in lack of jurisdiction. Rather, the appellate court merely treats the notice as filed in the correct court. *Kaweblum v. Thornhill Estates Homeowners Ass'n, Inc.*, 755 So.2d 85 (Fla. 2000)(holding that a notice of appeal timely filed in the wrong court, *i.e,* in Broward County not Palm Beach County, should be treated as timely filed in the correct court).[1]

[1] The State's notice of cross-appeal was timely filed. Buth filed his notice of appeal on March 16, 2000. The state filed its notice of cross-appeal on March 23, 2000. The State's notice was filed seven days after the defendant's notice. Thus, the State's notice of cross-appeal was timely.

Indeed, here, unlike *Kaweblum,* were the notice was filed in the wrong county court, the actual court that needs to know about the notice, the First District, was the Court that received the notice. The First District is only the "wrong" court in the most technical sense. Thus, the First District has jurisdiction regardless of whether the notice was filed in the proper court.

ISSUE II

WHETHER THE FIRST DISTRICT HAD JURISDICTION OVER THE STATE'S CROSS APPEAL ISSUE REGARDING AN ILLEGAL SENTENCE AFTER PETITIONER DISMISSED HIS APPEAL?

Buth asserts the First District lacked jurisdiction because he dismissed his direct appeal. The State respectfully disagrees. An appellate court retains jurisdiction over a independently valid cross appeal even if the defendant dismisses his direct appeal. Thus, the First District properly determined that it had jurisdiction over the cross-appeal issue regardless of the defendant's dismissal of his appeal.

The rule of appellate procedure governing voluntary dismissals, rule 9.350(b), provides:

> A proceeding of an appellant or petitioner may be dismissed before a decision on the merits by filing a notice of dismissal with the clerk of the court without affecting the proceedings filed by joinder or cross-appeal; provided that dismissal shall not be effective until 10 days after filing the notice of appeal or until 10 days after the time prescribed by rule 9.110(b), whichever is later.

A cross-appeal continues after the main appeal has been dismissed if the cross-appeal could have been appealed on its own merits, independent of the of the main appeal. *State v. Fedor*, 714 So.2d 526 (Fla. 5th DCA 1998)(citing *State v. Smith*, 557 So.2d 904 (Fla. 1st DCA 1990); *Zimmerman v. State*, 467 So.2d 1119 (Fla. 1st DCA 1985) and Fla. R.App. P. 9.350(b)). Here, the State's cross-appeal was independently valid. The State may appeal an illegal sentence and the failure to impose a minimum mandatory is an illegal sentence. *State v. Young*, 766 So.2d 425 (Fla. 1st DCA 2000)(explaining that the trial court's failure to

impose reoffender sanctions was an illegal sentence and that the State has the right to appeal an order in a criminal case "imposing an unlawful or illegal sentence pursuant to Fla. R.App. P. 9.140(c)(1)(J)(2000)); *Zimmerman v. State*, 467 So.2d 1119 (Fla. 1st DCA 1985)(holding that a and the trial court's failure to impose a minimum mandatory it is an "illegal sentence" which the State may appeal). Thus, the First District had jurisdiction over the State's cross-appeal and properly denied Buth's motion to dismiss the cross-appeal.

ISSUE III

WHETHER A TRIAL COURT IMPOSING AN INCREASED SENTENCE BASED ON AN APPELLATE COURT'S MANDATE VIOLATES DOUBLE JEOPARDY? (Restated)

Buth argues that the trial court imposing an increased sentence based on an appellate court's mandate violates double jeopardy. The State respectfully disagrees. The double jeopardy clause does not apply to non-capital sentencing. Thus, a trial court may increase a sentence following a successful state appeal without violating double jeopardy principles.

Both the federal and Florida constitutions prohibit being twice put in jeopardy. The Fifth Amendment of the United States Constitution provides that no person shall be "subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. The Florida Constitution provides: "No person shall ... be twice put in jeopardy for the same offense." Art. I, § 9, Fla. Const. The federal and state double jeopardy prohibitions are the same. *Cohens v. Elwell*, 600 So.2d 1224, 1225 (Fla. 1st DCA 1992)(concluding that the scope of the double jeopardy clause in the Florida Constitution is the same as that in the federal constitution); *Carawan v. State*, 515 So.2d 161, 164 (Fla. 1987)(noting that Double jeopardy clause of State Constitution was intended to mirror double jeopardy clause of United States Constitution).

Imposing a minimum mandatory sentence on remand after a successful government appeal does not violate double jeopardy. In *United States v. DiFrancesco*, 449 U.S. 117, 141, 101 S.Ct. 426, 66 L.Ed.2d 328 (1980), the United State Supreme Court held

that increasing a defendant’s sentence following a successful government appeal did not violate double jeopardy. The government sought dangerous special offender sentencing but the district court while finding that the defendant qualified as a dangerous special offender declined to impose such sanctions. The government appealed. The dangerous special offender statute, 18 U.S.C. § 3575, specifically provided that such a sentence was subject to appeal. The *DiFrancesco* Court relied upon the fact that Congress specifically allowed appeals of that type of sentencing error by the government and the defendant should know via statutory notice that his sentence is subject to his sentence being appealed. Moreover, the *DiFrancesco* Court relied on common law practice which allowed a judge to increase a sentence during the same term of court. *DiFrancesco*, 449 U.S. at 133-134, 101 S.Ct. at 435. The *DiFrancesco* Court observed that the pronouncement of sentence has never carried the finality that attaches to an acquittal. The *DiFrancesco* Court also relied on the policy underlying the double jeopardy provision, which is to bar repeated attempts to convict, that subject the defendant to embarrassment, expense, anxiety, insecurity, and the possibility that he may be found guilty even though innocent. The Court noted that these policy considerations have no application to the prosecution’s statutorily granted right to appeal a sentence rather than a conviction. Thus, the defendant had no reasonable expectation of finality in his sentence.

Moreover, since *DiFrancesco*, the United States Supreme Court has held that the Double Jeopardy Clause does not apply to non-capital sentencing. *Monge v. California*, 524 U.S. 721, 118 S.Ct. 2246, 141 L.Ed.2d 615 (1998). *Monge* involved California's three-strikes law which provided for increased incarceration after a jury trial at the beyond a reasonable doubt standard established his prior criminal history. Monge waived his right to a jury trial on the sentencing issues. The judge determined that Monge qualified for three striking sentencing and doubled his five years term of incarceration. Monge appealed and the California appellate court determined that was insufficient evidence to support the three strikes findings. The State had conceded but requested another opportunity to prove the allegations on remand. The appellate court rejected that remedy holding that retrial on the three strike findings would violate double jeopardy. Monge argued that the three strike sentencing proceedings have the "hallmarks" of a trial on guilt or innocence because the sentencer makes an objective finding as to whether the prosecution has proved a historical fact beyond a reasonable doubt in contrast to traditional sentencing proceedings. The United States Supreme Court noted that double jeopardy protections have been inapplicable historically to sentencing proceedings because sentencing determination do not place a defendant in jeopardy for an offense. *Monge*, 524 U.S. at 728, 118 S.Ct. at 2250. The Court also observed that it was a "well established part of our constitutional jurisprudence that the guarantee against double jeopardy neither prevents the

prosecution from seeking review of a sentence nor restricts the length of a sentence imposed upon retrial after a defendant's successful appeal," *Monge*, 524 U.S. at 730, 118 S.Ct. at 2251. Furthermore, the *Monge* Court stated that double jeopardy "does not provide the defendant with the right to know at any specific moment in time what the exact limit of his punishment will turn out to be."

Here, unlike California's three strike sentencing procedures involving a jury and the reasonable doubt standard, prison releasee reoffender sentencing is traditional sentencing. It has none of the "hallmarks of a trial on guilt or innocence". See also *United States v. Mixon*, 115 F.3d 900 (11th Cir. 1997)(holding that double jeopardy clause was not violated by sentencing court's *sua sponte* enhancement of sentence following the defendants' successful collateral attack of firearm convictions).

In *Harris v. State*, 645 So.2d 386 (Fla.1994), the Florida Supreme Court denied the double jeopardy claim. At the original sentencing, Harris was not sentenced as a habitual offender because the trial court mistakenly believed that the defendant's convictions were not subject to habitualization. The trial court sentenced Harris to a guidelines sentence of 27 years. Harris appealed his conviction and the State cross-appealed the trial court's failure to impose habitual offender sanctions. The Second District affirmed the conviction but held that the offense were subject to habitualization and remanded the case for resentencing. *Harris v. State*, 593 So.2d 301 (Fla.2d DCA

1992). At the resentencing, the trial court habitualized Harris. Harris appealed, arguing the sentence violated the double jeopardy clause. The Second District upheld the imposition of habitual offender sanctions, concluding that the trial court's initial decision not to habitualize the defendant was based solely on a misconception of law, not an exercise of discretion. *Harris v. State*, 624 So.2d 279 (Fla. 2d DCA 1993). The Florida Supreme Court affirmed citing *United States v. DiFrancesco*, 449 U.S. 117, 101 S.Ct. 426, 66 L.Ed.2d 328 (1980) and reasoning that Harris was not deprived of any reasonable expectation of finality in his original sentence, nor has he been subject to repeated attempts to convict. The *Harris* Court reasoned that "sentencing should be a game in which a wrong move by the judge means immunity for the prisoner" and held that the Double Jeopardy Clause is not an absolute bar to the imposition of an increased sentence on remand from an authorized appellate review of an issue of law concerning the original sentence. *State v. Swider*, 799 So.2d 388 (4th DCA 2001)(holding that resentencing after original sentence was determined to be illegal did not violate due process or double jeopardy); *Ashley v. State*, 772 So.2d 42 (Fla. 1st DCA 2000)(holding that imposing HVFO sentence three days after mistakenly imposing HFO sentence did not violate double jeopardy).

Buth's reliance on *Brown v. State*, 521 So.2d 110 (Fla. 1988) and *Williams v. State*, 595 So.2d 936 (Fla. 1992), is misplaced. Both are capital cases. As the *Monge* Court explained, while double jeopardy does not apply to non-capital sentencing, the

clause does apply to capital sentencing. Once a defendant has been sentenced to life, the defendant may not be resentenced to a greater sentence, *i.e.*, death. *Bullington v. Missouri*, 451 U.S. 430, 438, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981). The *Monge* Court distinguished *Bullington* because it dealt with the "unique circumstances of a capital sentencing proceeding" in which there is "an acute need for reliability." *Monge*, 524 U.S. at 732, 118 S.Ct. at 2252.

The Double Jeopardy Clause does not apply to non-capital sentencing. An increased sentence following a remand may not be attacked on double jeopardy grounds in the wake of *Monge*. There simply is no such concept as an "acquittal" of a more serious sentence. Thus, imposing reoffender sanctions on remand does not violate either the federal or the state double jeopardy clauses.

ISSUE IV

WHETHER THE PROSECUTOR PROPERLY PRESERVED THE ISSUE BY CONTEMPORANEOUS OBJECTION? (Restated)[2]

Buth asserts that the trial court's failure to impose reoffender sanction is not preserved. The State respectfully disagrees. The issue is preserved. The prosecutor stated that the "court is required to impose the mandatory sentence of life in this case." (IV 237). The prosecutor not only cited but quoted *Woods v. State*, 740 So.2d 20 (Fla. 1st DCA 1999), *approved sub nom*. *State v. Cotton*, 769 So.2d 345 (Fla. 2000). (IV 236-237). The prosecutor pointed out that the First District had ruled that the courts did not have any discretion. (IV 242). The State disagrees with the characterization that the prosecutor presented the trial court with an array of decisions and then invited the trial court to follow anyone it liked. The prosecutor did not merely say choose the one you liked. Rather, the prosecutor correctly told the trial court it had to follow *Woods*. While the prosecutor responded yes to the trial court's question regarding whether the issue was pending in the Supreme Court, the prosecutor pointed out that the First District had ruled that the trial court did not have any discretion. (IV 242).

A party is not required to cite a case in support of its position. Thus, the prosecutor could have asserted that

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[2] Buth identifies this as a separate issue which, of course, it is not. Whether an issue is properly preserved is part of the analysis of the underlying issue, not a separate, free-standing issue.

reoffender sanction are mandatory without citing any case and the issue would be preserved. There are no cases holding that for an issue to be preserved that counsel must cite a case to the trial court and then explain to the trial court that the case cited is controlling precedent. Trial courts are expected to know which appellate courts are controlling precedent in their jurisdiction. The State in its numerous briefs to this Court merely cites cases without explaining which cases are controlling precedent and which cases are not. Florida Supreme Court cases are cited routinely by parties without the parties pointing out to this court that these cases are controlling precedent. Counsel has cited no case that holds that a party must cite a case in support of his position (which was done in this case) and then, additionally, state that the case is controlling precedent for the issue to be preserved. The prosecutor properly preserved this issue.

Buth's reliance on *Schummer v. State*, 654 So.2d 1215 (Fla. 1st DCA 1995); *State v. Alexander*, 731 So.2d 82 (Fla. 3d DCA 1999) and *State v. Bell*, 747 So.2d 1028 (Fla. 3d DCA 1999) is misplaced. *Schummer* involved *State v. Neil*, 457 So.2d 481 (Fla.1984) issue relating to the strike of a juror for race-neutral reasons. During jury selection, defense counsel wished to strike a juror due to the juror's military, conservative background. The trial court would not permit the strike. Defense counsel exclaimed: "That's ridiculous. I mean you're following the law, but I think that is ridiculous." This Court held that counsel's statement, "That's ridiculous," was

insufficient to preserve the issue because the statement did not constitute objection to judge's ruling, but merely amounted to exclamation of counsel's opinion that law on subject was "ridiculous." *Schummer*, 654 So.2d at 1217.

Here, by contrast, the prosecutor stated he "respectfully disagreed" after a lengthy discussion including the prosecutor informing the trial court that it was "required" to impose a life sentence. The prosecutor was being polite. The prosecutor does not have to use magic or rude words. Here, unlike *Schummer*, the prosecutor's disagreement was not ambiguous. The prosecutor was disagreeing with the trial court's sentence, not the state of the law. Indeed, because the law fully supported the prosecutor's position, the prosecutor's statement cannot possibly be viewed as an opinion on the law.

In *State v. Alexander*, 731 So.2d 82 (Fla. 3d DCA 1999), the Third District held that the sentencing issue was not preserved. During arraignment, the prosecutor stated that Alexander was a Gort, violent career criminal but the prosecutor had not yet filed a written notice seeking such sentencing. Alexander entered a plea of guilty in exchange for a thirty-month prison sentence. After the court accepted the plea and imposed sentence, the prosecutor voiced an objection stating that the thirty-month plea is the bottom of the guidelines. However, on appeal, the State argued that the trial court erred in accepting Alexander's plea at the arraignment and sentencing him to a guideline sentence after the state orally informed the court that Alexander qualified as a violent career criminal under the

Gort Act. The prosecutor's "bottom of the guidelines objection" was not sufficient to preserve the Gort issue.

In *State v. Bell*, 747 So.2d 1028 (Fla. 3d DCA 1999), the Third District held that a "perfunctory" objection was not sufficient. The trial court sentenced Bell to a guidelines sentence despite his qualification as a violent career criminal ("Gort"). The prosecutor "perfunctorily" objected on the basis that Bell qualified as a violent career criminal. The *Bell* Court found that the State did not preserve the issue by asserting the appropriate and specific objection below and that in the absence of specific pre-plea notice and subsequent appropriate objection at sentencing, the lower court was not required make the necessary findings as to whether Bell qualified as a violent career criminal. *Bell* is incorrectly decided. A "perfunctorily" objection that identifies the basis for the objection is sufficient to preserve an issue. Objections do not have to be long-winded; they can be perfunctory. Short and to the point is desirable and sufficient to preserve an issue.

Here, the prosecutor discussed at length reoffender sentencing and even the basis of his decision to seek such sentencing. The objection was more than sufficient to put the trial court on notice that the prosecutor was seeking prison releasee reoffender sentencing and it was error for the trial court to refuse to impose such sanctions. Thus, this issue is preserved.

ISSUE V

WHETHER A LIFE SENTENCE AS A PRISON RELEASEE REOFFENDER MAY BE IMPOSED FOR ARMED BURGLARY AND ARMED ROBBERY? (Restated)

In *Bennett v. State*, 26 Fla.L.Weekly D1300, 2001 WL 530477 (Fla. 1st DCA May 21, 2001) the First District certified the following question as one of great public importance:

> DOES SECTION 775.082(9)(A)3A, FLORIDA STATUTES (1999), WHICH MANDATES A LIFE SENTENCE FOR PRISON RELEASEE REOFFENDERS WHO COMMIT "A FELONY PUNISHABLE BY LIFE," APPLY BOTH TO LIFE FELONIES AND FIRST DEGREE FELONIES PUNISHABLE BY IMPRISONMENT FOR A TERM OF YEARS NOT EXCEEDING LIFE?

The issue is currently pending in the Florida Supreme Court based on certified questions from the First District and the Fourth District. *Knight v. State*, 791 So.2d 490 (Fla. 1st DCA Mar. 27, 2000), *review pending*, No. SC-001987 (Fla. Sept. 21, 2000); *Vargas v. State*, 2001 WL 456408 (Fla. 4th DCA May 2, 2001)(agreeing with the First District's position *Brown v. State*, 24 Fla. L. Weekly D2753 (Fla. 1st DCA Dec. 8, 1999) and certify the same question certified in *Knight*). This Court should dismiss this appeal or hold it in abeyance pending these decisions.

CONCLUSION

The State respectfully requests this case be remanded to the trial court to impose prison releasee reoffender sanctions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief has been furnished by U.S. Mail to Carl S. McGinnes, Esq., Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, this __11th___ day of January, 2002.

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CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was typed using Courier New 12.

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