

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC12-481

LOWER TRIBUNAL NO. DCA: 3D11-405

PEDRO ORTIZ,

Petitioner,

-VS-

THE STATE OF FLORIDA,

Respondent.

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

BRIEF OF RESPONDENT ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

The Petitioner, Pedro Ortiz, is seeking discretionary review in this Court following reversal, by the Third District Court of Appeal, of an order granting a motion for post-conviction relief filed pursuant to Fla. R. Crim. P. 3.800(a), and vacating the judgment and sentence entered on January 31, 1996, following the Petitioner's negotiated plea. The pertinent facts, as found by the district court, are as follows:

The defendant was charged with purchase of cannabis, a third degree felony, and unlawful possession of cannabis, a second degree misdemeanor. The defendant pled no contest to the charges in exchange for a withhold of adjudication and a suspended entry of sentence. A suspended sentence standing alone is however an illegal sentence. *See Helton v. State*, 106 So.2d 79, 80 (Fla.1958) (holding that "the power to suspend the imposition of sentence upon a convicted criminal can be exercised by a trial judge only as an incident to probation"); *State v. Galazz*, 2 So.3d 1083, 1084 (Fla. 3d DCA 2009); *Sainz v. State*, 811 So.2d 683, 686–88 (Fla. 3d DCA 2002). On August 20, 2011, over fourteen and one-half years after accepting the plea and its benefits without objection, the defendant filed a rule 3.800(a) motion for postconviction relief seeking to vacate his plea.

State v. Ortiz, 79 So. 3d 177, 178 (Fla. 3d DCA 2012).

In explaining its decision to reverse, the district court noted, "[W]here a sentence has already been served, even if it is an illegal sentence, the court lacks jurisdiction and would violate the Double Jeopardy Clause by resentencing the defendant to an increased sentence." 79 So. 3d at 178 (citations omitted). "Thus, the trial court may not correct the illegal suspended entry of sentence by imposing

probation or community control after the defendant accepted and entered his plea, because to do so would violate the Double Jeopardy Clause by increasing the sentence imposed.” 79 So. 3d at 178. “However, this does not mean that, because the illegality of the sentence imposed cannot be corrected, the sentence must be vacated.” *Id.*

The Third District explained that “where a defendant has already served his sentence and he has reaped the benefit of an illegal sentence, he is estopped from challenging the sentence, especially in the context of a negotiated plea.” 79 So. 3d at 178-79 (citations omitted). The Third District noted:

In the instant case, the defendant agreed to the illegal suspended sentence which did not include a term of probation, and he clearly benefitted from the improper sentence. Upon a conviction, he could have received a sentence of incarceration, community control, probation, or a combination of these sentencing options. Instead, the defendant was not made to serve any time under any of these sentencing alternatives.

This Court and others have upheld otherwise defective sentences when they were voluntarily accepted by the defendant as a part of a mutually advantageous agreement with the State. *See, e.g., Novaton v. State*, 610 So.2d 726, 727 (Fla. 3d DCA 1992) (holding that “a defendant who enters into a negotiated plea and sentence bargain with the prosecution thereby waives an otherwise viable double jeopardy objection to sentences which form a part of the agreement”); *Jacobs v. State*, 522 So.2d 540, 541 (Fla. 3d DCA 1988) (affirming the denial of a motion to correct an illegal sentence as a result of a negotiated plea); *Preston v. State*, 411 So.2d 297, 298–99 (Fla. 3d DCA 1982) (holding that a defendant who should have been sentenced as a youthful offender but was placed on probation waived his right to question the legality of a probation he enjoyed and violated).

We also agree with the State that because the defendant had already served his sentence to completion, the trial court lacked the authority to set it aside because the question became moot. *See Maybin v. State*, 884 So.2d 1174, 1175 (Fla. 2d DCA 2004) (holding that “[e]ven though Maybin’s modified sentence was invalid, he had already served it to completion, and the trial court could not set it aside because the question had become moot”); *Sneed*, 749 So.2d at 546 (holding that once a sentence has been served, even if it is an illegal or an invalid sentence, the trial court loses jurisdiction).

Reversed and remanded with instructions to reinstate the judgment.

79 So. 3d at 179-80 (footnotes omitted).

The Petitioner now seeks discretionary review of the Third District Court of Appeal’s decision. The State has filed this brief in response.

SUMMARY OF ARGUMENT

The Third District Court of Appeal’s opinion in *Ortiz* does not expressly and directly conflict with decisions of this Court nor is it inconsistent with prior decisions of the Third District other District Courts of Appeal. As such, this Court should decline to exercise its discretionary jurisdiction.

ARGUMENT

THE HOLDING OF THE THIRD DISTRICT COURT OF APPEAL DOES NOT CONFLICT WITH DECISIONS OF THIS COURT NOR IS IT INCONSISTENT WITH PRIOR DECISIONS OF THE THIRD DISTRICT OR THE SECOND AND FIFTH DISTRICT COURTS OF APPEAL.

As a general rule, conflict jurisdiction exists when a decision of a court of appeal expressly and directly conflicts with another court of appeal “on the same

question of law.” Art. V, § 3(b)(3), Fla. Const.; Fla. R. App. P. 9.030(a)(2)(A)(iv). In this case, however, there was no such conflict, and this Court should decline to exercise its discretionary jurisdiction for the reasons that follow:

The Petitioner’s argument is based on an alleged conflict between the Third District’s opinion in *Ortiz* and the decisions in *Forbert v. State*, 437 So. 2d 1079, 1081 (Fla. 1983); *Cleveland v. State*, 394 So. 2d 230 (Fla. 5th DCA 1981); and *Britt v. State*, 352 So. 2d 148 (Fla. 2d DCA 1977). He also alleges that the decision is in conflict with *State v. Galazz*, 2 So. 3d 1083, 1084 (Fla. 3d DCA 2009). Here, however, the State notes that the decisions in *Forbert*, *Cleveland*, and *Britt* have nothing to do with the authority of a court to vacate a sentence which has been fully served; that is the premise of *Ortiz*. Further, the decision in the *Forbert* does not include any issue regarding a suspended sentence. As such, there is no conflict with those cases.

As for *Galazz*, the Third District in that case noted that under precedent from this Court and other districts, “the power to suspend the imposition of sentence upon a convicted criminal can be exercised by a trial judge only as an incident to probation under the provisions of Ch. 948, [Florida Statutes].” 2 So. 3d at 1084 (citing *Helton v. State*, 106 So. 2d 79, 80 (Fla. 1958); *Mazza v. State*, 948 So. 2d 872, 874-75 (Fla. 4th DCA 2007); *Sainz v. State*, 811 So. 2d 683, 686-88 (Fla. 3d DCA 2002)). In *Galazz*, the defense argued that his sentence was illegal, as the

power to suspend the imposition of sentence could be exercised by the court only as an incident to probation. Since the defendant did not bargain for probation, the Third District's opinion agreed that the sentence could not be corrected by adding a probationary term. 2 So. 3d at 1084.

Unlike *Ortiz*, the *Galazz* decision addressed the legality of a sentence and the appropriateness of correcting that sentence by adding a probationary term to the sentence previously imposed but did not address the issue of mootness. In *Ortiz*, the Third District merely clarified that once the Petitioner has enjoyed the benefits of a sentence without challenging its legality, the Petitioner should thereafter be precluded from complaining that the sentence is illegal. Thus, the Third District merely held that, as in *Willingham*, the defendant's sentence was served, and as in *Sneed* and *Maybin*, the issue was moot. There is no indication on the face of the opinions in *Forbert*, *Galazz*, *Cleveland*, or *Britt* suggesting that the State raised the issue of mootness.

As both the facts and issues in the cases are different, express and direct conflict does not exist. *See Reaves v. State*, 485 So. 2d 829, 830 (Fla. 1986); *see also The Florida Bar v. B.J.F.*, 530 So. 2d 286, 288 (Fla. 1988) ("Conflict between decisions must be express and direct, i.e., it must appear within the four corners of the majority decision. Neither a dissenting opinion nor the record itself can be used to establish jurisdiction."). As there was no conflict, jurisdiction should be denied.

CONCLUSION

Accordingly, the Petitioner has failed to assert a basis to invoke this Court's jurisdiction as there is no express and direct conflict. Fla. R. App. P. 9.030 (a)(2)(A)(iv).

WHEREFORE, the State respectfully requests this Court to decline discretionary jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Respondent on Jurisdiction was mailed to Andres Quintero, Esq., 2333 Brickell Avenue, Suite A-1, Miami, Florida, 33129, this ____ day of May 2012.

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CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENTS

I HEREBY CERTIFY that this Answer Brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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