

NOT FINAL UNTIL TIME EXPIRES FOR REHEARING
AND, IF FILED, DETERMINED

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA IN AND FOR PINELLAS COUNTY

ROBERT JOHN STEIN

Appellant,

v.

Appeal No. CRC 11-00026 APANO
UCN: 522011AP000026XXXXCR

STATE OF FLORIDA

Appellee.

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Opinion filed January 13, 2012.

Appeal from Judgment and Sentence
entered by the Pinellas County Court
County Judge Henry J. Andringa

Thomas Matthew McLaughlin, Esquire
Attorney for Appellant

Dana M. DiSano, Esquire
Office of the State Attorney
Attorney for Appellee

ORDER AND OPINION

PETERS, Judge.

THIS MATTER is before the Court on Appellant, Robert John Stein's appeal
from a judgment and sentence entered by the Pinellas County Court following the

Appellant's guilty plea. After review of the record and the briefs, this Court reverses the sentence imposed by the trial court on the battery charge.

Trial Court Proceedings

On March 5, 2011, the Appellant, Robert John Stein, was arrested for domestic battery and criminal mischief. The Public Defender's office was appointed to represent Mr. Stein. On May 9, 2011 he entered a written plea of guilty in open court. Mr. Stein had served sixty-six (66) days in jail at the time he entered his guilty plea. A plea colloquy was conducted. Pursuant to the plea agreement Mr. Stein was adjudicated guilty and placed on twelve months probation on the domestic battery charge and six months concurrent probation on the criminal mischief charge. The trial court in announcing the sentence on the battery charge stated:

It's adjudication on the battery, a year probation, 26 weeks domestic violence counseling, alcohol evaluation, any treatment deemed necessary, 875, time served, 75 to Saint Pete Beach.

The written judgment placed Mr. Stein on probation for a period of 12 months. Special condition 2 of the judgment provided: "You will serve in the Pinellas County Jail for a term of Time Served, to-wit: 66 Days."

On May 19, 2011, a notice of appeal was filed. On August 16, 2011, pursuant to Fla. R. Crim. P. 3.800(b)(2), a motion to correct sentencing error was filed alleging that the probationary portion of his criminal mischief sentence was illegal because Mr. Stein had already served the maximum jail sentence on that charge. The motion did not address the sentence imposed on the battery charge. The trial court granted that motion and entered a written order on September 2, 2011.

Issue

Whether the sentence of probation for one year on the battery, a first degree misdemeanor, was lawful given the fact that Mr. Stein had already served sixty-six (66) days in jail?

Standard of Review

Our review of whether a sentence exceeds the statutory maximum is a pure question of law subject to the de novo standard of review. *Demps v. State*, 761 So2d 302 (Fla. 2000).

Sentences Imposed for First Degree Misdemeanors

The maximum period of incarceration for a first degree misdemeanor is one year. § 775.082(4)(a) Fla. Stat. (2009). “[W]hen determining whether a sentence is illegal, the court must consider the *total* time to be served which includes the sentence and any time served in jail prior to sentencing. *See Wicker v. State*, 445 So.2d 583 (Fla. 2d DCA 1983).” *Dyke v. State*, 700 So.2d 103, 103 (Fla. 1st DCA 1997).

Sentences of Incarceration and Probation

A trial judge is authorized by Florida Statute § 948.01(4) to sentence a defendant to a period of incarceration followed by a period of probation however the combined periods at the time of the original sentence cannot exceed the maximum period of incarceration provided by statute for the offense charged. *State v. Holmes*, 360 So.2d 380, 383 (Fla. 1978); *See Thompson v. State*, 1 So3d 1272 (Fla. 2nd DCA 2009); *Hernandez v. State*, 889 So2d 913, 915 (Fla. 2nd DCA 2004); *Smith v. State*, 584 So.2d 154, 154 (Fla. 2nd DCA 1991); *Grissinger v. State*, 905 So2d 982, 984 (Fla. 4th DCA 2005); *Baldwin v. State*, 558 So2d 173 (Fla. 5th DCA 1990) (holding that a defendant

sentenced to one year probation for a first degree misdemeanor must receive credit for all time previously served in the county jail against the term of probation so that the combination of both would not exceed the statutory maximum).

Direct Appeal of Fundamental Error

“[E]ven where the defendant has pleaded guilty, the trial court may not impose a sentence exceeding the statutory maximum. *See King v. State*, 681 So.2d 1136, 1140 (Fla.1996); *Williams v. State*, 500 So.2d 501, 503 (Fla.1986).” *Maddox v. State*, 760 So.2d 89, 101 (Fla. 2000). “[A] criminal defendant cannot, by virtue of a plea bargain, confer upon a court the authority to impose an illegal sentence. *Larson v. State*, 572 So.2d 1368, 1370 (Fla.1991).” *Brown v. State*, 609 So.2d 730, 732 (Fla. 1st DCA 1992). “[A]n unpreserved error resulting in a sentence in excess of the statutory maximum should be corrected on direct appeal as fundamental error.” *Maddox*, 760 So.2d at 101.

The Present Case

Mr. Stein had served sixty-six days in jail at the time he made his plea agreement, entered his guilty plea and was sentenced. At that point the longest probationary sentence the trial court could lawfully impose on the charge of battery, a first degree misdemeanor, was two hundred ninety nine (299) days. The State concedes that Mr. Stein’s combined sentence of sixty-six days in jail and twelve months of probation exceeds the statutory maximum for a first degree misdemeanor and is therefore illegal.

Conclusion

For the reasons set forth above, this court concludes that the sentence imposed for the charge of battery exceeded the statutory maximum for a first degree misdemeanor.

That sentence must be reversed and remanded with instructions to impose a probationary sentence of no greater than two hundred ninety nine (299) days.

IT IS THEREFORE ORDERED that the sentence the trial court imposed for the charge of battery is reversed and the case remanded to the trial court for the imposition of a probationary sentence of no greater than two hundred ninety nine (299) days.

ORDERED at Clearwater, Florida this 13 day of January, 2012.

Original order entered on January 13, 2012, by Circuit Judges Michael F. Andrews, Raymond O. Gross, L. Keith Meyer, Jr., and R. Timothy Peters.

cc: Honorable Henry J. Andringa
Thomas Matthew McLaughlin, Esquire
Robert John Stein, Appellant
Office of the State Attorney