

**IN THE CIRCUIT COURT, SEVENTH JUDICIAL CIRCUIT
IN AND FOR ST. JOHNS COUNTY, FLORIDA**

CASE NO: 2009-CF-000945

STATE OF FLORIDA,

vs.

GINJER ULLMAN

Division: 55

Defendant.

**DEFENDANT'S MOTION FOR POST-CONVICTION RELIEF PURSUANT TO
FLORIDA RULE OF CRIMINAL PROCEDURE 3.800(a)**

Defendant, GINJER ULLMAN, by and through her undersigned counsel, and pursuant to Rule 3.800(a) of the Florida Rules of Criminal Procedure, requests this Honorable Court correct the illegal sentence imposed upon Defendant in this case. As grounds for this Motion, Defendant states the following:

INTRODUCTION

The trial court's revocation of Defendant's driver's license for life is an illegal sentence. This sentence may be corrected at any time pursuant to Rule 3.800(a), Florida Rule of Criminal Procedure. Defendant pled guilty to one count of Leaving the Scene of Crash Involving Injury based on Florida's 2009 version of section, 316.027(1)(a), Florida Statutes. At sentencing, the trial court imposed a lifetime revocation on her driving privileges. In 2009, the Department of Highway Safety and Motor Vehicles¹ (hereinafter "the Department") only had the authority to suspend a driver's license based on this statute. § 316.027(2), Fla. Stat. (2009). When trial courts imposed a

¹ The Department of Highway Safety and Motor Vehicles is referred to as the "Department" in both Chapter 316, 322. See §§ 316.003(8) and 322.01(14), Fla. Stat.

license suspension or revocation this was reversible error. *Blake v. State*, 814 So. 2d 1163 (Fla. 1st DCA 2002); *Ferris v. State*, 558 So. 2d 179, 180 (Fla. 2d DCA 1990).

Defendant previously petitioned this court pursuant to Florida Rule of Criminal Procedure 3.850 to strike her lifetime driver's revocation. The trial court's order denying this motion relied on a later version of the statute as a basis for denying her motion. This later version of the statute did not apply to Defendant. At the time of the denial, section 316.027, Florida Statutes, had been recently amended to allow trial courts the authority to impose a minimum mandatory three-year suspension. *See* § 316.027(2)(e), Fla. Stat. (2014). But, at the time the Defendant was charged and the revocation was imposed, the trial court was without authority to impose a driving revocation (or any suspension). *Blake*, 814 So. 2d at 1163.

Therefore, this Court should vacate the judgment and sentence imposed in 2011, enter an amended judgment and sentence striking the Defendant's lifetime driver's license revocation, maintaining all other conditions of the judgment and sentence, and awarding Defendant credit for the length of her suspension from the date of her release from incarceration until the date of the signed order. §§ 322.28(1) and 322.283(1), Fla. Stat. (2009).

FACTS

1. On June 22, 2009, the State charged Defendant by information with one count of Leaving the Scene of Crash Involving Injury, a violation of section 316.027(1)(a), Florida Statutes. (Attached as Exhibit "A").

2. On January 10, 2011, Defendant pled no contest to the State's one count information.

3. On March 15, 2011, Defendant entered an open plea to the trial court and was sentenced to three years state prison, two years of community control, a lifetime driver's license

revocation, 50 hours of community service, and restitution to the victims. (Judgment and sentence attached as Exhibit “B” at page 4, ¶ 21).

4. Following the sentencing hearing, Defendant sought this Court’s review to modify her sentence and retained counsel for this same purpose.

5. On or about September 30, 2013, Defendant was released from her term of incarceration.

6. On October 8, 2014, Defendant’s retained counsel filed Defendant’s Motion for Postconviction Relief. (Attached as Exhibit “C”).

7. Defendant filed this motion pursuant to Florida Rules of Criminal Procedure 3.850 and 3.987 arguing that “the sentence imposed exceeds the maximum allowed by law by not allowing any hardship or business purposes driver’s license.” (*Id.* at ¶ 4).

8. Defendant requested the Court amend the judgment and sentence allowing Defendant to apply for a hardship driver’s license with the Department and issue an order instructing the Department that the Defendant that she was allowed to apply for a hardship license. (*Id.* at ¶ 10).

9. Following the filing of this motion, on December 1, 2014, the State filed its response arguing the claims raised were time barred and successive. (State’s Response attached as Exhibit “D”).

10. Additionally, in its argument, the State incorrectly relied on the recently amended version of section 316.027, Florida Statutes. (*Id.* at 2).

11. In the 2009 version of section 316.027, Florida Statutes, the imposition of a license suspension was not the province of the trial judge; rather, it was the Department. *See* § 316.027(2), Fla. Stat. (2009) (“The department shall revoke the driver's license of the person so convicted.”).

12. Similarly, in 2011, the suspension of a license was also limited to the Department. *See* § 316.027(2), Fla. Stat. (2011) (same).

13. In 2014, the Florida legislature amended the statute based on the “Aaron Cohen Life Protection Act”, *See* SB 102; HB 183, and these amendments to the statute were signed into law by the Governor that same year.²

14. This version of the statute included the minimum mandatory three-year license suspension. § 316.027(2)(e), Fla. Stat. (2014) (“A driver who violates paragraph (a), paragraph (b), or paragraph (c) shall have his or her driver license revoked for at least 3 years as provided in s. 322.84 (4).”)³.

15. This was the version of the statute relied upon by the State when it argued the trial court could impose a driver’s license revocation or suspension. (*See* Exhibit “D” at 2).

16. On December 8, 2014, the trial court issued its Order Denying Defendant’s motion. (Order attached as Exhibit “E”). In this order, the trial court stated the following:

Defendant was adjudicated guilty of a violation of section 316.027(1)(a), Florida Statutes. Section 316.027(2)(e) provides, “[a] driver violates paragraph (a), paragraph (b), or paragraph (c) shall have his or her driver license revoked for at least three years as provided in s. 322.28(4).” Florida law provides a minimum length of revocation for a violation of section 316.027(1)(a), but does not place a maximum limit on the length of the revocation. Defendant did not point to and the Court did not find any law that requires the Court to allow the Defendant to apply for a hardship or business purposes driver’s license. Accordingly, the Court finds that Defendant’s sentence does not exceed the limits provided by law, and Defendant’s request for relief must be denied.

² *See, Gov. Scott Signs “Aaron Cohen Protection Act,”* CBS Local News, Reported on July 16, 2014, available at: <http://miami.cbslocal.com/2014/07/16/gov-scott-in-town-to-sign-aaron-cohen-protection-act/> Last visited: July 7, 2017 (noting the new law imposes “a minimum driver license revocation period of at least three years.”).

³ Under this version of the statute, Defendant would have been in violation of § 316.027(2)(a), Fla. Stat. (2014).

(*Id.* at 2).

17. The trial court's order was based on the 2014 version of section 316.027, Florida Statute, that had been amended just a few months earlier. (*See* Exhibit "E").

18. At the time the trial court imposed sentence on Defendant, the trial court was without the legal authority to restrict her driver's license at all, let alone impose a life time revocation. *Blake*, 814 So. 2d at 1163 ("Although the Department of Highway Safety and Motor Vehicles has the authority to revoke Appellant's driver's license, the trial court lacks authority to suspend his license.") (citing *Ferris*, 558 So. 2d at 180) (holding the trial court lacked jurisdiction to suspend defendant's driver's license).

19. Since the time of Defendant driver's license revocation her license has been continuously revoked.

MEMORANDUM OF LAW

A. RULE 3.800(A) ILLEGAL SENTENCE STANDARD

Rule 3.800(a), Florida Rule of Criminal Procedure authorizes the trial court to "at any time correct an illegal sentence imposed by it ...when it is affirmatively alleged that the court records demonstrate on their face an entitlement to that relief[.]" Fla. R. Crim. P. 3.800(a). The rule does not define the term "illegal" sentence; however, an illegal sentence is one that can be raised at any time, and is a sentence that no judge under the entire body of sentencing law could impose under any set of factual circumstances. *Martinez v. State*, 211 So. 3d 989 (Fla. 2017). As the Florida Supreme Court recently reiterated, "[P]ut another way, '[a] sentence that patently fails to comport with statutory or constitutional limitations is by definition 'illegal.'" *Id.* at 991 (quoting *Plott*, 148 So. 3d at 94 (alteration in original) (quoting *State v. Mancino*, 714 So. 2d 429, 433 (Fla. 1994)). "[R]ule 3.800(a) vests trial courts with the broad authority to correct an illegal sentence without

imposing a time limitation on the ability of defendants to seek relief.” *Carter v. State*, 786 So. 2d 1173, 1176 (Fla. 2001). This is so because the “intent of rule 3.800(a) is to ‘balance the need for finality of convictions and sentences with the goal of ensuring that criminal defendants do not serve sentenced imposed contrary to the requirements of law.’” *Plott v. State*, 148 So. 3d 90, 93 (Fla. 2014) (quoting *Carter*, 786 So. 2d at 1176).

The Florida Supreme Court discussed examples of sentencing errors that are illegal under the rule, and that the “fundamental concern” behind rule 3.800(a) is to “correct a sentence in excess of the legal maximum” and these sentences are the “primary example for the rule’s policy of providing unlimited time to challenge” the illegality. *Wright v. State*, 911 So. 2d 81, 84 (Fla. 2005). The types of sentences that have been deemed illegal include sentences in which the trial court imposed a harsher sentence than the court was authorized by law to impose the sentence. *See Carter v. State*, 786 So. 2d 1173, 1180 (sentence illegal where the habitual offender statute in effect at the time of the crime prohibited the trial court from imposing an enhanced habitual offense status). This is so because the “court must apply the law in effect at the time the crime was committed.” *Brady v. State*, 65 So. 3d 599, 602 n. 2 (Fla. 5th DCA 2011) (citing *Allen v. State*, 383 So. 2d 674, 675 (Fla. 5th DCA 1980)); *see also Green v. State*, 907 So. 2d 489, 502 (Fla. 2005).

B. THE TRIAL COURT’S LIFETIME DRIVING SUSPENSION IS AN ILLEGAL SENTENCE IN THIS CASE

At the time the trial court imposed its sentence on Defendant, the trial court was without the legal authority to suspend her driver’s license at all, let alone impose a life time revocation. *Blake*, 814 So. 2d at 1163 (“Although the Department of Highway Safety and Motor Vehicles has the authority to revoke Appellant’s driver’s license, **the trial court lacks authority to suspend**

his license.”) (emphasis added) (interpreting § 316.027, Fla. Stat. (2000)) (citing *Ferris*, 558 So. 2d at 180 (holding the trial court lacked jurisdiction to suspend defendant’s driver’s license)).

In 2009, the time the offense occurred, the same language prohibiting the trial court from imposing a license restriction existed in both the 2000 (the version interpreted by *Blake*) and the 2009 version of section 316.027(2), Florida Statutes (the year of the alleged crime). *See* §§ 316.027(2), Fla. Stat. (2000) and (2009). This same restriction existed at the time of sentencing in 2011. *See* § 316.027(2), Fla. Stat. (2011).⁴

In 2014, at the time the trial court ruled on Defendant’s motion for postconviction relief, the statute imposed a new mandatory minimum. Specifically the new law required that, “A driver who violates paragraph (a), paragraph (b), or paragraph (c) shall have his or her driver license revoked for at least 3 years[.]” § 316.027(2)(e), Fla. Stat. (2014). However, the 2009 version, the version applicable to Defendant, *Brady*, 65 So. 3d at 602 n. 2, limited the authority to impose a license suspension solely to the Department. § 316.027(2), Fla. Stat. (2009) (“The department shall revoke the driver's license of the person so convicted.”). This minimum mandatory cited by the trial court in its denial of Defendant’s postconviction motion did not apply to Defendant at the time of the charged offense or sentencing. (*See* Exhibit “E”, at 2). This type of illegal sentence must be corrected because it is “in excess of the legal maximum,” *Wright*, 911 So. 2d at 84, and is a harsher sentence than the court was authorized by law to impose. *Carter*, 786 So. 2d at 1180. This case is strikingly similar to the Florida Supreme Court’s decision in *Carter*.

In *Carter*, the defendant received a 40 year sentence as a habitual offender. *Id.* at 1174. At the time the defendant committed his offense, the habitual offender statute in existence did not

⁴ Even if the language had been amended, as it was subsequently, the substantive portion (as opposed to the procedural changes) would still have applied to Defendant. *See Brady*, 65 So. 3d at 602 n. 2; *Green*, 907 So. 2d at 502.

provide an enhanced habitual offender penalty for a defendant who committed a life felony like the defendant. *Id.* at 1175. The Florida Supreme Court held that a habitual offender sentence was illegal where the habitual offender statute in effect at the time of the offense prohibited the imposition of a habitual offender sentence. *Id.* at 1181. The Court reasoned that because the defendant received a habitual offender sentence when the existing law did not authorize the imposition of a habitual offender sentence, the defendant's sentence was illegal pursuant to Rule 3.800(a). *Id.* at 1181-82.

Based on the foregoing, the trial court was restricted from imposing any restriction on Defendant's driver's license, *Blake*, 814 So. 2d at 1163; *Ferris*, 558 So. 2d at 180, let alone a lifetime revocation, and the reasoning relied on by the trial court to deny Defendant's prior motion is based on an inapplicable statute, thus resulting in an illegal sentence pursuant to Rule 3.800(a). *Carter*, 786 So. 2d at 1181-82. For these reasons, this Court should grant Defendant's motion and striking the Defendant's lifetime revocation from her sentence.

C. DEFENDANT SEEKS AN ORDER IDENTIFYING THE CREDIT DEFENDANT HAS EARNED FOR THE LENGTH OF HER DRIVER'S LICENSE SUSPENSION BECAUSE OF THIS ILLEGAL SENTENCE

In 2009, at the time Defendant was charged, section 322.28(1), Florida Statutes, titled "Period of suspension or revocation," stated that, "[u]nless otherwise provided by this section, the department shall not suspend a license for a period of more than 1 year[.]" § 322.28(1), Fla. Stat. (2009). The remainder of the statute makes no reference to section 316.027, Florida Statutes, and only makes specific reference to section 316.193, Florida Statutes (the DUI statute). *Id.* This same statutory language was in place in 2011 at the time Defendant was sentenced. § 322.28(1), Fla. Stat. (2011). Similar to the 2014 amendment of section 316.027, section 322.28 was amended to take into consideration the new minimum mandatory sentence in section 316.027(2)(e), Florida

Statutes. *See* § 322.28(4)(b), Fla. Stat. (2014) (“Upon a conviction for a violation of s. 316.027(2)(a), (b), or (c) involving injury, serious bodily injury, or death, the court shall revoke the driver license of the person convicted for a minimum period of 3 years.”). Therefore, based on the statutory basis at the time of the offense and sentencing, the longest suspension Defendant could have received as a matter of law was one year.

When a defendant’s license is suspended as part of a sentence that includes a period of incarceration, section 322.383, Florida Statutes governs the suspension. § 322.283(1), Fla. Stat. Specifically, the calculation for determining when a suspension begins occurs

[w]hen the court in a criminal traffic case orders the defendant to serve a term of incarceration or imprisonment and also suspends or revokes the defendant’s driver’s license as a result of the offense, the period of suspension or revocation shall commence upon the defendant’s release from incarceration. For purposes of calculating the defendant’s eligibility for reinstatement of his or her driver’s license or driving privilege under this section, the date of the defendant’s release from incarceration shall be deemed the date the suspension or revocation period was imposed.

§ 322.283(1), Fla. Stat. (2009) (emphasis added).

This statutory language in this statute is the same as it was in 2011, 2014, and today. *See* §§ 322.283(1), Fla. Stat. (2011), (2014), and (2017).

Defendant was released from her term of incarceration on or about September 30, 2013. Since her release, Defendant has not been eligible or applied for a driver’s license. Her suspension at this time has exceeded the one-year limitation based on section 322.28(1), Florida Statutes, and is now nearly ongoing for four years. Therefore, based on section 322.28(1) and 322.283(1), Florida Statutes, Defendant requests this Court enter an order awarding Defendant credit for the time she has had her license suspended since her release from incarceration to provide to the Department when she seeks reinstatement of her license.

WHEREFORE, the Defendant respectfully requests this Honorable Court amend the judgment and sentence striking the lifetime revocation of her driving privileges, and enter an Order making it clear Defendant's license is not suspended or revoked by the trial court and she has been awarded credit for the time her license was suspended from the date of her release from incarceration.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished, via electronic mail to the Office of the Seventh Circuit State Attorney at eservice@sao7.org on this 10th day of July 2017.

Respectfully submitted,

/s/ Rocco J. Carbone, III
ROCCO J. CARBONE, III