NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

JIMMY CAZARES, Appellant, v. STATE OF FLORIDA, Appellee.	)	Case No. 2D11-5754

Opinion filed November 27, 2013.

Appeal from the Circuit Court for Manatee County; Gilbert Smith, Jr., Judge.

Howard L. Dimmig, II, Public Defender, and Carol J.Y. Wilson, Assistant Public Defender, Bartow, for Appellant.

Pamela Jo Bondi, Attorney General, Tallahassee, and Susan D. Dunlevy, Assistant Attorney General, Tampa, for Appellee.

SLEET, Judge.

Jimmy Cazares appeals his judgment and sentences for three counts of sexual activity with a child by a person in familial custodial authority following revocation of probation. We affirm the revocation of probation without further comment, but

because the trial court erred in resentencing Mr. Cazares after he had already begun serving his sentences on those charges, we reverse his amended sentences and remand for reinstatement of the original sentences.

In 1995, Mr. Cazares entered a plea of no contest to three counts of attempted sexual battery on a child less than twelve years old and three counts of sexual activity with a child by a person in familial custodial authority. The trial court imposed a sentence of ten years' prison on the attempted-sexual-battery charges with a consecutive sentence of fifteen years' prison followed by ten years' probation on the sexual-activity charges. In 2010, the State filed an affidavit of violation of probation alleging that Mr. Cazares violated his probation by failing to provide truthful information to his probation officer. Following a revocation of probation hearing, the trial court found that Mr. Cazares violated the terms of his probation and sentenced him to thirty years' prison on the attempted-sexual-battery charges and five years' prison on the sexual-activity charges, to run consecutively.

What transpired thereafter is a procedural quagmire, but for the purposes of this appeal it is sufficient to say that Mr. Cazares then filed a motion under Florida Rule of Criminal Procedure 3.800(b)(1) to correct an illegal sentence, arguing that the sentences imposed on the attempted-sexual-battery charges should be vacated because Mr. Cazares was not placed on probation with respect to those charges. The trial court granted the motion and vacated the sentences on the attempted-sexual-battery charges, but on motion by the State, the trial court increased the sentences on the sexual-activity charges to reflect the trial court's intended sentence of thirty years' prison. In this appeal, Mr. Cazares argues that the trial court erred in resentencing him

on the sexual-activity charges when he had already begun serving his sentences on those charges and did not challenge those sentences in his rule 3.800 motion.

"Once a sentence has been imposed and the person begins to serve the sentence, that sentence may not be increased without running afoul of double jeopardy principles." Ashley v. State, 850 So. 2d 1265, 1267 (Fla. 2003). Moreover, a motion to correct sentence directed at specified counts does not permit a trial court to modify legal sentences imposed in other counts in the same case. See Delemos v. State, 969 So. 2d 544, 549 (Fla. 2d DCA 2007).

Here, it is apparent that the trial court made a mistake in sentencing Mr. Cazares on the attempted-sexual-battery charges but intended that Mr. Cazares serve an overall sentence of thirty years. Nevertheless, under current Florida law we must hold that the trial court erred in increasing Mr. Cazares' sentences on the sexual-activity charges because Mr. Cazares had already begun to serve his sentences on those charges. See Ashley, 850 So. 2d at 1265; see also Taylor v. Dugger, 527 So. 2d 891, 892 (Fla. 1st DCA 1988) ("[O]nce the first sentence was vacated, the consecutive sentence must be calculated from the date it was imposed, not from the date the first sentence was vacated." (citing Falagan v. Wainwright, 195 So. 2d 562 (Fla. 1967); Helton v. Mayo, 15 So. 2d 416 (Fla. 1943))). Furthermore, Mr. Cazares' motion to correct illegal sentence was directed solely at the sentences imposed on the attempted-sexual-battery charges, precluding the trial court from increasing his sentences on the unchallenged sexual-activity charges. Accordingly, we conclude that the trial court erred in increasing Mr. Cazares' sentences on the sexual-activity charges, and we

reverse and remand for reinstatement of the original sentences imposed following revocation of probation.[1]

Affirmed in part; reversed in part; remanded.

KELLY, J., Concurs.
ALTENBERND, J., Concurs with opinion.

ALTENBERND, Judge, Concurring.

I agree that the outcome we reach in this case appears to be compelled by the holding in Ashley v. State, 850 So. 2d 1265 (Fla. 2003). I do not question the wisdom of examining criminal judgments and sentences individually in most contexts. However, for purposes of constitutional double jeopardy analysis, I continue to believe that the "package approach" utilized by federal courts and some other states is a better approach. See e.g., United States v. Watkins, 147 F.3d 1294 (11th Cir. 1998). Mr. Cazares apparently will be entitled to immediate release even though a thirty-year term of imprisonment was an entirely lawful sentence for each of the three judgments that actually were eligible for sentencing at the sentencing hearing on his violation of probation.

[1]Our decision renders Mr. Cazares' remaining argument that he was entitled to be present for his resentencing moot.

It is noteworthy that the sentences he received for attempted capital sexual battery at this sentencing hearing were more than illegal; they were void from inception because the original sentences had already been fully served. Under a package approach to sentencing, the void sentences entered on the three judgments for which he had already fully served his sentences would not prevent an amendment to the sentences on his three active judgments.

The Double Jeopardy Clause of the U.S. Constitution[2] should not prevent a trial court from readjusting the sentences imposed at a single sentencing hearing to impose lawful sentences consistent with the overall aggregate sentencing package intended by the pronouncement at that sentencing hearing. I am unconvinced that the Constitution compels the immediate release of a prisoner merely because the participants at a sentencing hearing were confused about the judgments eligible for sentencing at that hearing.

[2]U.S. Const. Amend. V.