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IN THE SUPREME COURT OF FLORIDA

BENNIE LEE WALKER,

Petitioner,

vs. CASE NO. 64,747

STATE OF FLORIDA,

Respondent.

_____/

RESPONDENT'S BRIEF ON THE MERITS

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TOPICAL INDEX

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PRELIMINARY STATEMENT

Bennie Lee Walker, the appellant below, will be rererred to herein as "Petitioner". The State of Florida, the appellee below, will be referred to herein as "Respondent."

Citations to the record on appeal will be indicated parenthetically as "R" with the appropriate page number(s). Citations to the supplemental record on appeal will be indicated parenthetically as "SR" with the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

The pertinent facts are contained in the district court's original opinion and as clarified when Petitioner's motion for rehearing or rehearing en banc was denied. Walker v. State, 442 So.2d 977 (Fla. 1st DCA 1983).

It should be noted as was done by the district court, that Petitioner never questioned that facts and circumstances existed which justified the sentence he received. Moreover, the record is devoid of any indication that Petitioner objected to any matters contained in the pre-sentence investigation (SR 214-217), which the prosecutor requested the trial judge to consider (R 42), on the basis that it contained hearsay or on any other basis.

ISSUE I

THE TRIAL COURT'S FAILURE TO INCLUDE THE UNDERLYING FACTS AND CIRCUMSTANCES UPON WHICH IT RELIED IN MAKING ITS ORAL FINDING THAT THE ENHANCED SENTENCE WAS NECESSARY FOR THE PROTECTION OF THE PUBLIC FROM FURTHER CRIMINAL ACTIVITY WAS NOT FUNDAMENTAL ERROR AND CONSEQUENTLY NOT SUBJECT TO REVIEW IN THE ABSENCE OF TIMELY OBJECTION AND, ALTERNATIVELY, WAS NOT REVERSIBLE ERROR. (Restated by Respondent)

Petitioner argues that "the District Court's ruling is erroneous since the contemporaneous objection rule should not be applicable to such sentencing errors and, in any event, the error here is fundamental, thereby obviating the necessity for an objection, since the error will cause petitioner to be incarcerated for a greater length of time than the law permits"(Petitioner's Brief on the Merits, at page 9).

As expected, Petitioner seeks to gain entry to the appellate courts with his unpreserved issue by uttering that renowned jurisprudential equivalent to "open sesame" -- FUNDAMENTAL ERROR. State v. Smith, 240 So.2d 807, 810 (Fla. 1970). Petitioner quite correctly notes, as did the lower tribunal, that a sentencing error is fundamental when it causes a defendant to be incarcerated for a greater length of time than the law permits. Walker v. State, 442 So.2d 977 (Fla. 1st DCA 1983). However, the instant record shows that Petitioner stipulated to the fact that the threshold requirements of Florida Statutes §775.084 had been met (R 41, 42) and he was therefore subject to an enhanced sentence. In

fact, defense counsel stated "He [Petitioner] has been in trouble before, and the court could correctly sentence him as a [sic] habitual offender, but I don't think that is warranted in this case" (Emphasis added) (R 48).

Since the enhanced sentence imposed by the trial judge was within the limits prescribed by statute, the provisions of which Petitioner conceded he was subject to, there is no basis for concluding that the error complained of was fundamental or the sentence was illegal. Respondent emphasizes that it was Petitioner's stipulation that subjected him to an enhanced sentence, not the trial judge's procedural faux pas that was not objected to and which, arguably, may have been to some degree invited by defense counsel's comments (R 48).

Moreover, Petitioner's reliance upon Adams v. State, 376 So.2d 47 (Fla. 1st DCA 1979) and Roberts v. State, 402 So.2d 1365 (Fla. 1st DCA 1981) (see Petitioner's Brief on the Merits, footnote 1 at page 9) for the proposition that absent proper findings, an enhanced sentence is illegal, is misplaced. Neither Adams nor Roberts, addressed the illegality of the sentence imposed. In Adams v. State, supra, the court dealt with issues involving trial counsel's objection to the trial court's consideration of hearsaid matters contained in a pre-sentence investigation report and the sufficiency of the trial court's findings that an enhanced sentence was necessary to protect the public from further criminal activity by the defendant. The defendant did not

challenge the legality of his enhanced sentence. Similarly, in Roberts v. State, supra, the issue on appeal centered on the absence of the underlying facts and circumstances the trial judge relied on in imposing an enhanced sentence. The sentence was not challenged as being illegal on this ground.

Accordingly the lower tribunal's holding that the alleged error was procedural and not subject to review in the absence of an objection interposed in the trial court is merely a recognition of the well established principles of appellate procedure emanating from this Court in varying contexts, that an appellate court will not consider alleged errors raised on appeal for the first time unless they were presented to the trial court with sufficient specificity to place him on notice of the putative error that counsel perceives is being or has been committed. North v. State, 65 So.2d 77 (Fla. 1953); Clark v. State, 363 So.2d 331 (Fla. 1978); Lucas v. State, 376 So.2d 1152 (Fla. 1979); Castor v. State, 365 So.2d 701 (Fla. 1978); State v. Cumbie, 380 So.2d 1031 (Fla. 1980); Steinhorst v. State, 412 So.2d 332 (Fla. 1982); and State v. King, 426 So.2d 12 (Fla. 1982).

The reasons for this well recognized and essential requirement is to insure not only the integrity of the adjudicatory process but the finality of judgments and sentences. Wainwright v. Sykes, 433 U.S. 76 (1977); Engle v. Isaac, 456 U.S. 107 (1982); Cardinale v. Louisiana, 394 U.S. 437 (1969). While the contemporaneous objection rule is most critical during the trial proceedings--or sentencing proceedings

in a capital case, see e.g., Ford v. Wainwright, ___ So.2d ___ 9 F.L.W. 203, 204 (Fla. 1984) in which this Court refused to allow review of an alleged sentencing error where the defendant was claiming it "might" have altered the jury's recommendation--to prevent "sandbagging" there are sound reasons why it is also applicable to sentencing proceedings where the defendant has an opportunity to present the claim prior to the formal entry of the judgment and sentence.

The United States Supreme Court in Cardinale refused to reach an issue not properly raised in the lower courts for the explicit reason that where an issue is not raised with specificity it is doubtful the record is adequately developed so as to allow a just determination of the issue, 394 U.S. at 438. This is why this Court forbids consideration of the competency of counsel on direct appeal, State v. Barber, 301 So.2d 7 (Fla. 1974). How can an appellate court determine if there has been an error of fundamental dimension without the factual development of a record because the matter was not put in legal issue but surely could have?

Of course, an additional reason for requiring a timely objection where an opportunity exists[1] to present said objection

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[1]Where the defendant does not have a reasonable opportunity to object to the judicial act, a rare circumstance indeed and certainly not the case here, there is a reasonable but narrow justification for excusing the default. State v. Rhoden, 448 So.2d 1013, 1016 (Fla. 1984).

is that it can be dealt with at that time and possibly corrected thereby avoiding the issue as a point on appeal or obviating an appeal entirely. Castor and Sykes. See especially, York v. State, 232 So.2d 767 (Fla. 4th DCA 1970). Had trial counsel in the case at bar objected on the grounds that Judge Agner did not state the underlying facts and circumstances upon which he relied in making his finding that the extended sentence was necessary for the protection of society, the trial judge could have made such a statement. Since no other issues were presented on appeal, all the judicial energy wasted thus far could have been avoided!

As the State reads it, Rhoden stands for the limited proposition that, where a lack of specific advance notice and the nonfullfilment of a mandatory writing requirement renders a defendant's failure to contemporaneously object to a substantive sentencing error of constitutional dimensions explainable as an honest mistake rather than one caused by either negligence or an intent to "sandbag," this procedural default does not constitute a waiver of the right to appellate review. The unchallanged "error" of the judge here in failing to make the requisite findings to justify Petitioner's sentence as an habitual offender does not fit into this narrow category because Petitioner had advance notice of the basis upon which this sentencing would be sought, because the writing requirement for such a sentencing is not mandatory, Eutsey v. State, 383 So.2d 219 (Fla. 1980), and because such a sentencing is attended by only limited constitutional ramifications, Eutsey v. State, supra. See also Cofield v. State, ___ So.2d ___ (Fla. 1st DCA June 15, 1984), Case No. AT-157, rehearing en banc pending.

This Court and the Legislature recognizes that the State of Florida's resources are finite, Fla.R.Crim.P. 3.701 (b)(7), and it can take judicial notice that trial judges have extremely heavy caseloads and calendaring problems. The State of Florida has a compelling and legitimate governmental interest in seeing that its resources are used in as efficient a manner possible consistent with affording citizens due process of law. Therefore, when the defendant and his trial attorney have been provided a forum in which to litigate all issues between him and the State, it is permissible to require him to raise the issues at that time, or suffer a forfeiture of his right to raise them thereafter meaning on appeal or in a collateral proceeding, unless he can demonstrate some valid reason for not raising the issue and that he has been actually prejudiced by the alleged judicial error. Wainwright v. Sykes, and Engle v. Isaac. As this Court noted in King citing to Sawyer v. State, 94 Fla. 60, 113 So. 736 (1927), "[n]either the common law nor our statutes favor allowing a defendant to use the resources of the court and then wait until the last minute to unravel the whole proceeding." 426 So.2d at 15. The proper utilization of finite resources and the State's legitimate interest in the finality of criminal judgments and sentences are compelling and this Court has so held. Witt v. State, 387 So.2d 922, 925 (Fla. 1980). The failure to recognize the legitimacy of the forfeiture of rights by failing to comply with orderly procedural rules will

lead to the destruction of the administration of justice. See: Fay v. Noia, 372 U.S. 391 (1963), Clark, J. dissenting at 445-446; and Harlan, J. dissenting at 448-476. Indeed, the havoc spawned by Fay is what lead to Sykes and Engle, supra.[2]

The record in the instant case is without contradiction that defense counsel stipulated that Petitioner met the statutory criteria for sentencing as an habitual offender (R 41, 42); that defense counsel did not contest the prosecutor's statements concerning Petitioner's criminal history (R 45-49) but offered pleas from family and friends for mercy (R 43, 44); that defense counsel did not challenge the pre-sentence investigation (R 214-217) that the prosecutor asked the court to consider (R 42), on the basis that it may have contained hearsaid statements (See Adams v. State, 376 So.2d 47 (Fla. 1st DCA 1979) and Eutsey v. State, 383 So.2d 219 (Fla. 1980)); and that defense counsel was given ample opportunity to object to the trial court's failure to state the underlying facts and circumstances it relied upon in finding that it was necessary for the protection of society

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[2]Respondent submits that extension of this Court's decision in Rhoden v. State, supra, beyond the facts of that case are precisely the "open sesame" tactic this Court refused to condone in State v. Smith, supra, and will result in similar havoc and the wholesale evisceration of the contemporaneous objection rule in sentencing context not to mention finality. In fact, the handwriting is already appearing on the proverbial wall. See State v. Snow, Case No. 64,890, review granted; State v. Weston, Case No. 65,536, petition for review pending.

that Petitioner be sentenced to an extended term pursuant to Florida Statutes §775.084, and chose not to do so (R 49, 50). Consequently, the lower tribunal's holding that the alleged error was procedural and not subject to review in the absence of an objection interposed in the trial court was correct.

Having thus held, however, the District Court then went on to hold the defendant could raise the issue in a collateral action instituted pursuant to a motion to vacate filed under Fla.R.Crim.P. 3.850. The Court clearly erred in doing so and this Court should quash that portion of the opinion.

The District Court was in error in pretending to hold the defendant could have the issue determined in a collateral proceeding because this Court has consistently held that issues which could be raised at trial, and if necessary, on appeal, whether litigated or not are not cognizable in a proceeding instituted pursuant to Rule 3.850. State v. Matera, 266 So.2d 661 (Fla. 1972); Spinkellink v. State, 350 So.2d 85 (Fla. 1977); Meeks v. State, 382 So.2d 673 (1983); Hargrave v. State, 396 So.2d 1127 (Fla. 1981); Booker v. State, 441 So.2d 148, 150 (Fla. 1983) and Ford v. Wainwright, supra. Of course, the reason is that 3.850 and the writ of habeas corpus are not to be used to serve as a substitute for an appeal. Raulerson v. State, 420 So.2d 567 (Fla. 1982); State v. Mayo, 87 So.2d 501 (Fla. 1956) and

Ford v. Wainwright, supra. Federal law is to the same effect. United States v. Timmreck, 441 U.S. 780 (1979).

In Pedroso v. State, 420 So.2d 908 (Fla. 2d DCA 1983), the Second District Court of Appeal affirmed an order summarily denying a motion to vacate which attempted to raise the claim that the trial judge violated §947.16(3)(a) in retaining jurisdiction. The Court, citing to Raulerson and Meeks, supra, said:

> [1, 2] A rule 3.850 motion is not a substitute for a direct appeal. Raulerson v. State, 420 So.2d 567, at 569 (Fla. Aug. 26, 1982). In other words, where issues raised on a Rule 3.850 motion could have been or were raised on a direct appeal, denial of the motion is proper. Id.; Meeks v. State, 382 So.2d 673, 675 (Fla. 1980). Appellant could have raised the retention of jurisdiction issue on direct appeal. Thus, the issue is not now cognizable for collateral attack.
>
> We respectfully disagree with our sister court's decision in Sawyer v. State, 401 So.2d 939 (Fla. 1st DCA 1981), dismissing a direct appeal alleging improper retention of jurisdiction without prejudice to raise the issue on a Rule 3.850 motion. Accordingly, the trial judge's denial of the Rule 3.850 motion is AFFIRMED.

420 So.2d at 908.

To allow the defendant to raise collaterally that which he had forfeited by failing to raise at trial thereby precluding review on direct appeal, although he had the opportunity to do so, would be to destroy orderly state court procedures, waste judicial resources, throw finality out the window, and create a state "habeas corpus merry-go-round", like that which now persists in the federal system in spite of Sykes and Engle although those cases have

contributed to a reduction of the abuse of the writ of habeas corpus and has restored some finality to state and federal court judgments.

This Court should not permit this to develop in state collateral proceedings. Indeed, rigorous enforcement of the procedural default doctrine--not waiver--will have a salutory effect of requiring counsel to properly comply with known procedural rules, reduce errors from occurring in the first place, and will cause appellate attorneys to confine themselves to raising only the specific issues raised and disposed of in the trial court, if the error is not avoided at trial, as they are required to do, Castor v. State, supra, instead of searching the record for some perceived error regardless of whether it was presented to the trial judge. Otherwise appellate counsel is not bound by the acts of trial counsel, even though Castor says he is. The undersigned suggests any other judicial approach will adversely affect the administration of justice.

Should this Court disagree with Respondent's contention that review of the alleged error has been procedurally barred, Respondent would argue alternatively that the trial court's failure to include the underlying facts and circumstances upon which it relied in finding that the extended sentence was necessary for the protection of the public from further criminal activity was not reversible error. McClain v. State, 356 So.2d 1256 (Fla. 2nd DCA 1978). See also Roberts v. State, 402 So.2d 1364 (Fla. 1st DCA 1981), Joanos, J.,

concurring in part and dissenting in part.

In McClain v. State, supra, the appellant argued that the evidence upon which his enhanced sentence was based was not presented in open court with full rights of confrontation and cross-examination and that the trial jduge erred in failing to make specific findings of the basis upon which the enhanced sentence was given. The court rejected appellant's arguments holding:

> . . . appellant made no objection to the consideration of evidence presented through the reading of the "rap sheet." No doubt, the recitation of convictions constituted hearsay, but even hearsay evidence is admissible in the absence of objection (Citations omitted). We see no purpose to be served in requiring the state to prove in the traditional way the convictions contained in a defendant's "rap sheet" when no objection has been raised and the truth of the recitation has not been denied.
>
> * * *
>
> Turning to the instant case, we note that the judge made conclusionary findings by tracking the statutory language. It would have been helpful if he had outlined specific reasons for concluding that the sentencing of the appellant to an extended term was necessary for the protection of the public. However, the record in this case amply supports the ultimate conclusion, because the evidence concerning appellant's prior cirminal record reflects that he has been engaged in a lifetime of crime. Since the findings required by the statute are fully supported in this record, the judge was at liberty to impose the extended sentence.

Id. at 1257.

In the instant case, it is readily apparent that the trial judge was quite familiar with Petitoner's history. This was stated by the prosecutor on the record and totally undisputed by Petitioner (R 45-46). Moreover, there is no indication that Petitioner disputed any of the matters in the pre-sentence investigation report (SR 214-217), which the prosecutor requested the court to consider (R 42), on the basis that it contained hearsay or on any other basis.[3]

Petitioner's history included a burglary conviction in 1975 (R 45), problems while on probation (R 45-46), another burglary conviction in 1978 (R 46), and finally, new convictions of trafficking in stolen property while still on parole for earlier offenses (R 46).

The prosecutor summed up by saying that between 1975 and 1982 he couldn't "think of a period of time in which [Petitioner] wasn't supposedly under some form of supervision . . ." (R 46).

The foregoing evidence alone is enough to support the finding that the lawfully prescribed sentence was necessary. Eutsey v. State, supra; Grey v. State, 362 So.2d 425, 427 (Fla. 4th DCA 1978).

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[3] Adams v. State, supra, is distinguishable from the instant case on this basis because the trial judge in Adams relied upon disputed hearsay evidence at sentencing.

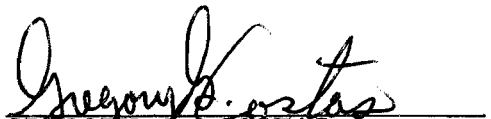
Accordingly, the trial court's failure to state the underlying facts and circumstances upon which it relied in finding that the extended sentence was necessary for the protection of the public from further criminal activity was not reversible error.

CONCLUSION

Based on the foregoing arguments and the authority cited herein, the State of Florida urges this Court to quash the decision rendered by the lower tribunal to the extent that it permits Petitioner to file a motion to vacate challenging the propriety of the sentence imposed by the trial court. In all other particulars the decision of the lower tribunal should be affirmed.

Respectfully submitted:

JIM SMITH
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded to Glenna Joyce Reeves, Assistant Public Defender, Post Office Box 671, Tallahassee, Florida 32302, this 17th day of July, 1984.

Gregory G. Costas

GREGORY G. COSTAS