IN THE SUPREME COURT OF FLORIDA

BENNIE LEE WALKER,

Petitioner,

v. CASE NO. ~~67~~ 64,747

STATE OF FLORIDA,

Respondent.

PETITIONER'S BRIEF ON JURISDICTION

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TABLE OF CONTENTS

TABLE OF CITATIONS

IN THE SUPREME COURT OF FLORIDA

BENNIE LEE WALKER,	:	
Appellant,	:	
v.	:	CASE NO. 67,747
STATE OF FLORIDA,	:	
Appellee.	:	
	:	

PETITIONER'S BRIEF ON JURISDICTION

I PRELIMINARY STATEMENT

Petitioner, BENNIE LEE WALKER, was the defendant in the trial court and the appellant in the First District Court of Appeal. He will be referred to in this brief as petitioner. Respondent, the State of Florida, was the prosecution in the trial court and the appellee on appeal and will be referred to in this brief as respondent or the state. All references shall be to the appendix designated by the symbol "A" followed by the appropriate page number, in parenthesis.

II STATEMENT OF THE CASE AND FACTS

The pertinent facts are taken from Walker v. State, __ So.2d __ (Fla. 1st DCA 1983). (A-1-2, 8-11)

Following a jury trial, petitioner was convicted of trafficking in stolen property. (A-1) He was sentenced as a habitual felony offender under Section 775.084, Florida Statutes (1981). (A-1)

On the appeal to the First District, petitioner argued that his enhanced sentence was illegal because the trial judge failed 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. (A-1)

In its initial opinion, the First District ruled that since petitioner failed to object before the trial court, any error in sentencing was not preserved for review on direct appeal. The Court indicated, however, that its ruling was "without prejudice to Walker raising this issue by a Rule 3.850 motion." (A-1-2)

In his timely Motion for Rehearing or Rehearing En Banc petitioner asserted conflict with the decisions in Brown v. State, 435 So.2d 940 (Fla. 3d DCA 1983); Polk v. State, 418 So.2d 388 (Fla. 1st DCA 1982); and Pugh v. State, 423 So.2d 398 (Fla. 1st DCA 1982). (A-3-7)

By opinion dated December 14, 1983, the District Court denied rehearing finding that the sentencing error was not a fundamental one. (A-8-11)

Petitioner timely filed a Notice to Invoke Discretionary Jurisdiction. (A-12) This jurisdictional brief follows.

III ARGUMENT

ISSUE I

THIS COURT SHOULD ACCEPT JURISDICTION BECAUSE THE DECISION OF THE FIRST DISTRICT IN WALKER V. STATE, __ So.2d __ (Fla. 1st DCA 1983) EXPRESSLY AND DIRECTLY CONFLICTS WITH BROWN V. STATE, 435 So.2d 940 (Fla. 3d DCA 1983).

In Brown v. State, 435 So.2d 940 (Fla. 3d DCA 1983), the Third District reversed the defendant's sentence as an habitual offender and remanded the cause so that the trial court could make the requisite specific finding that an enhanced sentence was necessary for the protection of the public from further criminal activity by the defendant. The Court specifically held:

> We recognize this sentencing error despite the defendant's failure to preserve the issue below. See Gonzalez v. State, 392 So.2d 334 (Fla. 3d DCA 1981). . . .

Id.

The decision of the First District herein directly and expressly conflicts with that in Brown since the court holds that the sentencing error may not be raised on direct appeal but rather must be raised via a post-conviction motion.

This Court should accept jurisdiction in this cause because there is widespread confusion and disagreement among the districts as to the necessity to preserve sentencing errors. The First District's decision herein is consistent with a line of Fifth District decisions. E.g., Jones v. State, 384 So.2d 956 (Fla. 5th DCA 1980); Smith v. State, 378 So.2d 313 (Fla. 5th DCA 1980), approved on other grounds, 394 So.2d 407 (Fla.

1981). However, it appears that this line of cases was spawned from the decision of the Third District in Engel v. State, 353 So.2d 593 (Fla. 3d DCA 1977), which the Third District has now recognized as erroneous.

In Engel, the Third District had held that since challenges to defendant's sentence as an habitual offender had not been presented to the trial court, they were not cognizable on direct appeal. In reaching that conclusion, the Third District relied upon Noble v. State, 338 So.2d 904 (Fla. 1st DCA 1976). Reliance upon Noble, however, was totally misplaced since this Court, on October 20, 1977, had reversed the First District's Noble decision. Noble v. State, 353 So.2d 819 (Fla. 1977). There, this Court stated:

> The opinion of the District Court could be read as a refusal to consider the sentencing error because it was not raised in the trial court. But, fundamental error need not be raised before the trial court for it to be considered at the appellate level.

Id. at 820 n. 4.

In Gonzalez v. State, 392 So.2d 334 (Fla. 3rd DCA 1981), the Third District recognized the erroneousness of its ruling in Engel. The Court correctly noted:

> Clearly, then, since the Supreme Court's decision in Noble, appellate courts may not reject appeals which raise, even exclusively, fundamental sentencing errors even though no issue concerning the error was first addressed by the trial court. Noble does not give us the option to consider a fundamental sentencing error. If a sentencing error is raised on appeal, we must consider it where objection was

> made below or, absent object, where the error is fundamental.

[Footnotes omitted.] Id. at 336. The Court also noted that:

> It is indisputable that an error in sentencing that causes a defendant to be incarcerated or restrained for a greater length of time than the law permits is fundamental.

Id. The Court further recognized that by affirming judgments and sentences without prejudice to a Rule 3.850 motion, confusion is added to the trial court. Id. at 336-337 n 7. See e.g., Whigham v. State, __ So.2d __ (Fla. 1st DCA 1983)(On Motion for Rehearing) 8 FLW 2825 (Defendant caught in "catch 22" where state argued on direct appeal that improper sentencing under Section 775.084 for failing to make findings of fact sufficient to demonstrate that enhanced sentence necessary to protect public should be raised on direct appeal, resulting in affirmance on direct appeal by p.c.a. Rule 3.850 then denied by trial court on ground that issue was or should have been raised on prior direct appeal). Because of the conflict between the districts and the obvious fact that affirmances of sentencing errors without prejudice to file a post-conviction motion indeed places defendants in a "catch 22", appellant requests that this Court exercise its jurisdiction to resolve the conflict demonstrated here.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery to Andrew Thomas, Assistant Attorney General, The Capitol, Tallahassee, Florida 32301 and a copy mailed to petitioner, Bennie Lee Walker, #C-019168, Post Office Box 1500, Cross City, Florida 32628 on this 19th day of January, 1984.

Glenna Joyce Reeves
GLENNA JOYCE REEVES