IN THE SUPREME COURT OF FLORIDA

BENNIE LEE WALKER,

Petitioner,

v. CASE NO. 64,747

STATE OF FLORIDA,

Respondent.

PETITIONER'S BRIEF ON THE MERITS

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

GLENNA JOYCE REEVES
ASSISTANT PUBLIC DEFENDER
POST OFFICE BOX 671
TALLAHASSEE, FLORIDA 32302
(904) 488-2458

ATTORNEY FOR PETITIONER

TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS
(cont.)

IN THE SUPREME COURT OF FLORIDA

BENNIE LEE WALKER,	:	
Petitioner,	:	
v.	:	CASE NO. 64,747
STATE OF FLORIDA,	:	
Respondent.	:	
	:	

PETITIONER'S BRIEF ON THE MERITS

I PRELIMINARY STATEMENT

Petitioner was the defendant in the trial court, appellant before the First District Court of Appeal, and will be referred to herein as petitioner. Respondent, the State of Florida, was the prosecuting authority in the trial court and the appellee before the lower appellate court.

The record on appeal consists of two volumes, consecutively numbered, which will be referred to as "R."

The opinion of the First District Court of Appeal is attached as an appendix hereto.

II STATEMENT OF THE CASE AND FACTS

By information, petitioner was charged with two counts of dealing in stolen property, in violation of Section 812.-019(1), Florida Statutes. (R-5-6,20). Following a jury trial, petitioner was found guilty as charged. (R-21).

The state then served notice of its intent to request sentencing as an habitual felony offender (R-25). At the sentencing hearing, it was stipulated that the offense was committed within five years of petitioner's release from prison. (R-41). The trial judge sentenced appellant as an habitual offender based on the finding that "it is necessary for the protection of society for the defendant . . . to be sentenced to an extended term." (R-49-50). A sentence of twenty years was imposed. (R-50,31-33). No written order finding appellant to be an habitual offender appears in the record. No objection was made to the judge's oral finding that appellant was a habitual offender or to the judge's failure to enter a written order to that effect.

Notice of appeal was timely filed. (R-34,35).

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-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).

By opinion dated December 14, 1983, the District Court denied rehearing finding that the sentencing error was not a fundamental one. (A-2-4).

Petitioner timely filed a Notice to Invoke Discretionary Jurisdiction. By order of June 8, 1984, this Court accepted jurisdiction. This brief on the merits follows.

III ARGUMENT

ISSUE PRESENTED

THE TRIAL COURT FUNDAMENTALLY ERRED IN SENTENCING PETITIONER AS AN HABITUAL OFFENDER BECAUSE THE TRIAL COURT FAILED TO INCLUDE THE UNDERLYING FACTS AND CIRCUMSTANCES UPON WHICH IT RELIED IN MAKING ITS ORAL FINDING THAT THE EXTENDED SENTENCE WAS NECESSARY FOR THE PROTECTION OF THE PUBLIC FROM FURTHER CRIMINAL ACTIVITY.

Section 775.084, Florida Statutes (1981) authorizes extended terms of imprisonment for habitual felony offenders where "it is necessary for the protection of the public to sentence the defendant to an extended term." Pursuant to Section 775.084(3)(d):

> Each of the findings required as the basis for such sentence shall be found to exist by a preponderance of the evidence and shall be appealable to the extent normally applicable to similar findings.

[Emphasis supplied]. Case law requires that the court find the extended sentence necessary for the protection of the public from further criminal activity and that this finding include the underlying facts and circumstances which the trial judge relied on in making that finding. E.g. Adams v. State, 376 So.2d 47, 57-59 (Fla. 1st DCA 1979); Roberts v. State, 402 So.2d 1364 (Fla. 1st DCA 1981). Petitioner contends that his enhanced sentence must be reversed because the sentencing proceeding fails to specify the facts on which the trial court relied to support his oral conclusory finding that it is necessary for the protection of the public from criminal activity that an extended sentence be imposed.

At petitioner's sentencing hearing, it was stipulated

that he qualified as an habitual felony offender pursuant to Section 775.084(1)(a). (R-42). The trial court also considered a presentence investigation report. (R-42). No evidence was presented by the state to establish the necessity for an extended sentence. The trial judge imposed an enhanced sentence finding "it is necessary for the protection of society for the defendant . . . to be sentenced to an extended term." (R-49-50). The trial judge totally failed to specify the underlying facts justifying such finding. This deficiency mandates reversal of petitioner's sentence.

In Adams v. State, supra, the First District cogently explained the reason for the necessity of specific findings of fact which show on their face that an extended term is necessary to protect the public from the defendant's further criminal activity. The Court noted:

> The appellate court in discharging its statutory duty cannot supplement or enhance the stated findings by reference to uncorroborated hearsay recitals, accusations, or innuendos which may be found in the presentence report. The statutory requirement for findings of fact, capable of review on appeal, is the cap of a legislative purpose which, taken as a whole, assures the defendant in Section 775.084 proceedings of confrontation in cross-examination rights. . . .
>
> * * *
>
> In order that an appellate court may perform its duty to review the sentencing court's ultimate finding, that an extended sentence is necessary to protect the public from further criminal activity by the defendant, we must be apprised of the underlying facts and circumstances which the trial judge relied on in making that finding. Otherwise, the appellate court will

> be left with the hopeless task of determining from the raw data in the pre-sentence report and elsewhere what material might have influenced the trial judge to the ultimate finding; the appellate court cannot know what data was disregarded by the trial court as unreliable or unpersuasive; the appellate court cannot effectively determine what hearsay, possibly relied on, should have been corroborated by witnesses subjected to cross-examination; and, in a real sense, the appellate court will be put in a position of duplicating the sentencing function which is properly and exclusively that of the trial court.

Id. at 58-59.

The present case exemplifies the problems identified in Adams. The total absence of any recitation of facts upon which the extended sentence was based precludes the appellate court from complying with its statutory duty imposed under Section 775.084(3)(d) to review the adequacy of the "facts" upon which the trial judge relied. The absence of findings also precludes petitioner from challenging their sufficiency. To uphold an enhanced sentence here in the absence of stated findings, the appellate court would have to act as the sentencer, which, of course, is not its function.

Numerous decisions have reiterated that specific findings are required. In Chukes v. State, 334 So.2d 289 (Fla. 4th DCA 1976), the defendant contended on appeal that his sentence as an habitual offender was improper because the state adduced no proof to show that imposition of an extended sentence was necessary for the protection of the public from further criminal activity. In reversing defendant's extended sentence, the Fourth District stated:

> It is quite clear that not every subsequent

> felony offender must automatically be sentenced as a recidivist under §775.084, F.S. 1975. A subsequent felony offender may be sentenced as a recidivist only if the court makes various findings in accordance with §775.084. Such findings must be based upon some evidence. Without such evidence in the record to justify the court's findings, a defendant's right to appellate review would be effectively stifled.

Id. at 290. The court further noted that to justify an extended sentence, the court must "make findings of fact supported by the record which justify such sentence." Id. at 291. Accord, King v. State, 369 So.2d 1031 (Fla. 4th DCA 1979).

In Grimmett v. State, 357 So.2d 461 (Fla. 2d DCA 1978), the Second District agreed with Chukes to the extent that it requires all evidence relied upon by the court to justify an enhanced sentence to be produced in open court. The court opined, however, that in some cases, a defendant's prior record alone might be sufficient to justify a finding that he is likely to engage in further criminal activity. The court stated, however, that "in any event, the trial should, if it finds an enhanced sentence necessary, state the basis for its finding." Id. at 462. Accord, Grey v. State, 362 So.2d 425 (Fla. 4th DCA 1978); Fry v. State, 359 So.2d 584 (Fla. 2d DCA 1978); Hunter v. State, 388 So.2d 3 (Fla. 2d DCA 1980); Eichhorn v. State, 386 So.2d 604 (Fla. 5th DCA 1980); Ruiz v. State, 407 So.2d 1042 (Fla. 3d DCA 1981).

In Adams, supra, the First District found that the supported findings that Adams was convicted of armed robbery in 1971, violated his parole from prison by using heroin, possessed heroin and paraphernalia as charged, and was arrested but not prosecuted for two other crimes, were "insufficient

on their face to show that the public requires Adams' extended imprisonment for its protection against his further criminal activity." Id. at 59. Accordingly, the court vacated Adams' enhanced sentence and remanded the case for resentencing. Accord, Mangram v. State, 392 So.2d 596 (Fla. 1st DCA 1981) ("[N]o findings of fact which show on their face that an extended term is necessary for the protection of the public appear either in the written order or in the transcript of the sentencing proceeding, therefore the enhanced sentence must be vacated and the case remanded for resentencing." Id. at 597).

Similarly, in Scott v. State, 423 So.2d 986 (Fla. 3d DCA 1982), the court held that the stated finding that the enhanced sentence "is necessary for the protection of society" was "woefully short of what is required by statute." Accordingly, the enhanced portion of the sentence was reversed and the cause was remanded for further findings and resentencing.

Under the foregoing cases, petitioner submits his extended sentence must be vacated. The transcript of the sentencing proceeding fails to reflect findings of fact which show on their face that an extended term is necessary for the protection of the public. Adams v. State, supra; Mangram v. State, supra; Scott v. State, supra. If the trial judge's conclusion was based upon the fact of petitioner's prior record, this is insufficient because the judge failed to state the basis for the finding that the sentence was necessary for the protection of the public. Grimmett v. State, supra. As noted in Roberts v. State, supra, at 1365, where "neither the trial

court's order nor the transcript of the sentencing proceeding specify the facts on which the trial court relied" in finding the extended sentence necessary for the protection of the public from further criminal activity, the sentence must be reversed.

The District Court held that since petitioner had not objected at the trial level to the sentencing error involved here, he was precluded from raising the issue on direct appeal, but rather was relegated to raising the issue via a motion for post-conviction relief under Rule 3.850, Florida Rules of Criminal Procedure. Petitioner contends 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.[1]

In State v. Rhoden, __So.2d__ (Fla.1984) Case No. 62,918 [9 F.L.W. 123], the trial court sentenced the juvenile defendant as an adult without making the findings required by Section 39.111(6), Florida Statutes (1981). Therein, this Court rejected the state's contention that Rhoden's failure to object in the trial court barred him from asserting on direct

---

1 Absent proper findings, an enhanced sentence is illegal. Adams v. State, supra; Roberts v. State, supra. Here, by virtue of the illegal enhancement of his sentence, petitioner has been sentenced to a term of imprisonment of 20 years, although the statutory maximum (absent proper enhancement) for his crime is 15 years imprisonment. §§812.019(1) and 775.082-(3)(c), Fla. Stat. (1981).

appeal that the failure to make the requisite findings was error. This Court recognized that the contemporaneous objection rule is ill-suited in the sentencing context. The Court noted:

> The contemporaneous objection rule, which the state seeks to apply here to prevent respondent from seeking review of his sentence, was fashioned primarily for use in trial proceedings. The rule is intended to give trial judges an opportunity to address objections made by counsel in trial proceedings and correct errors. See Simpson v. State, 418 So.2d 984 (Fla.1982); State v. Cumbie, 380 So.2d 1031 (Fla. 1980); Clark v. State, 363 So.2d 331 (Fla.1978). The rule prohibits trial counsel from deliberately allowing known errors to go uncorrected as a defense tactic and as a hedge to provide a defendant with a second trial if the first trial decision is adverse to the defendant. The primary purpose of the contemporaneous objection rule is to ensure that objections are made when the recollections of witnesses are freshest and not years later in a subsequent trial or a post-conviction relief proceeding. The purpose for the contemporaneous objection rule is not present in the sentencing process because any error can be corrected by a simple remand to the sentencing judge. If the state's argument is followed to its logical end, a defendant could be sentenced to a term of years greater than the legislature mandated and, if no objection was made at the time of sentencing, the defendant could not appeal the illegal sentence.

Id. at 124. While the Court's opinion might be narrowly construed as limited to the juvenile proceedings involved therein, the rationale is equally applicable in adult sentencing proceedings. The First District, in Weston v. State, __So.2d__

(Fla. 1st DCA 1984) Case No. AS-470 [9 F.L.W. 1205], recognized this. Therein, the First District held that the adult defendant's challenge to his habitual offender sentence based on the trial court's failure to make the requisite findings under Section 775.084 was properly raised on appeal even though no objection had been made in the trial court on this ground. The First District found that the rationale of Rhoden v. State, supra, implicitly overruled their decision herein. The Court noted:

> Section 39.111(6)(d), with which the Rhoden case dealt, specifically provides for the right of appellate review of the trial court's determination to impose an adult sentence. Similarly, Section 775.084(3)(d) provides for appellate review of the court's decision to impose an extended term upon an habitual offender.
>
> The fact that Section 39.111(6) findings must be in writing whereas Section 775.084 findings may be stated on the record in open court if not made in writing, Eutsey v. State, supra, at p. 226, is not a basis for any meaningful distinction between Rhoden and the instant case, particularly in view of the rationale articulated in the Rhoden opinion for not requiring an objection in the trial court as a prerequisite to appellate review.

Id. at 1206. But see, Cofield v. State, __So.2d__ (Fla. 1st DCA June 15, 1984) Case No. AT-157, where the First District narrowly construed Rhoden's "dicta".

Rhoden is directly applicable to the present case. As in the juvenile justice statutory scheme, the legislature has proscribed specific criteria to be followed in habitual offender sentencing. Section 775.084 requires findings that the defendant qualifies as an habitual offender and that imposition

of an enhanced sentence "is necessary for the protection of the public from further criminal activity by the defendant." The legislature has also provided that:

> Each of the findings required as the basis for such sentence shall be found to exist by a preponderance of the evidence and shall be appealable to the extent normally applicable to similar findings.

[Emphasis supplied]. §775.084(3)(d), Fla. Stat. (1981). The requirement of specific findings, as in the juvenile context, is necessary to make effective this right to review.[2] Therefore, as in Rhoden, the contemporaneous objection rule should not be applicable.

A recognition of the realities of sentencing procedures also militate against application of the contemperaneous objection rule to sentencing errors. In the sentencing context, often no procedural mechanism exists for an objection to be made. For example, in an habitual offender proceeding, the requisite findings must be made to support an enhanced sentence. These findings may be made, however, by a written order entered after the hearing has concluded. In that instance, the defendant has no opportunity to object to the insufficiency or inadequacy of the findings. No rule is specifically tailored to this situation. Presumably, if a motion for reconsideration or reduction of sentence were authorized, it might be incumbent

---

2 In Rhoden, the Court did indicate that the "right to sentence review is not provided to adults." Id. at 124. As noted, however, Section 775.084(3)(d) does provide a right to review. Likewise, Section 921.001(5), Florida Statutes (1983) provides appellate review for sentences imposed outside the range recommended by the guidelines. See also, §§921.141(3) and 947.16(3), Fla. Stat. (1983).

upon a defendant to proceed under that rule before taking an appeal. See Rule 3.800, Fla. R. Crim. P. However, this option is not open to a defendant because a motion under Rule 3.800 does not toll the time for taking an appeal. Joseph v. State, 437 So.2d 245 (Fla. 5th DCA 1983); Potts v. Wainwright, 413 So.2d 156 (Fla. 4th DCA 1982); Guzman v. State, 364 So.2d 523 (Fla. 2d DCA 1978).

The rationale of these decisions is based upon Rule 9.020-(g), Florida Rules of Appellate Procedure, defining "rendition" as:

> The filing of a signed, written order with the clerk of the lower tribunal. Where there has been filed in the lower tribunal an authorized and timely motion for new trial or rehearing, to alter or amend, for judgment in accordance with prior motion for directed verdict, notwithstanding verdict, an arrest of judgment, or challenge to the verdict, the order shall not be deemed rendered until disposition thereof.

[Emphasis added].

When a final order has been entered, the time for appeal expires within 30 days unless "rendition" of the order is delayed by the filing of an "authorized and timely motion." Since a motion under Rule 3.800 is not an authorized motion of the type specified in Rule 9.020(g), it does not delay the time for taking an appeal. In Joseph, supra, the Court said:

> The current rule 9.020(g), Florida Rules of Appellate Procedure, limits the motions which will delay rendition. Because the new rule no longer provides that any petition or motion permitted by the rules will delay rendition, and instead specifically enumerates an exclusive list of such motions which does not include the motion to reduce sentence, such motion does not toll rendition of appellant's judgment and sentence and the notice of appeal was untimely.

[footnote omitted]. 437 So.2d 246. Since a Rule 3.800 does not toll the time for filing a notice of appeal, if a trial judge delayed ruling on the motion for 30 days, the defendant would have the choice of either abandoning the motion or foregoing an appeal. Williams v. State, 276 So.2d 94 (Fla. 2d DCA 1973); Perez v. City of Tampa, 181 So.2d 571 (Fla. 2d DCA 1966). Regardless of which of these options the defendant chose, the state would be sure to claim on appeal either that the defendant had abandoned the ground by not waiting until the trial judge ruled or that by wating more than 30 days, the defendant had not filed his appeal on time. Neither of these inequitable situations should be approved by this Court.

In short, petitioner submits that the notion of contemporaneous objection should be inapplicable to sentencing errors made by a trial judge. There is no clear procedural default committed by a defendant who fails to file or voice an objection to a trial judge's erroneous findings (or lack thereof) that emerge from a contested sentencing proceeding. The objection is inherent in the proceeding and the court's ruling. Likewise, in the absence of a procedural mechanism for objection to an illegal sentence, no procedural default has been committed which should preclude a defendant from challenging initially on appeal an illegal sentence. Further, as noted in Rhoden, the purposes of the contemporaneous objection rule are simply not present in the sentencing process.

The decision of the First District here, requiring that petitioner's sentencing error be raised by a post-conviction motion, 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). Petitioner submits these decisions are erroneous and should be overruled. 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 the 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. 3d 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 objection, 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, Wigham v. State, 441 So.2d 678 (Fla. 1st DCA 1983).

In Brown v. State, 435 So.2d 940 (Fla. 3d DCA 1983) the defendant was sentenced as a habitual offender but the trial judge failed to make the specific finding that the sentence was necessary for the protection of the public as reuqired by §775.084(4)(a), Fla. Stat. (1981). The Court nevertheless considered that non-fundamental sentencing error on direct appeal despite the defendant's failure to "preserve" the issue below. Brown is based in part on Gonzalez v. State, 392 So.2d 334 (Fla. 3d DCA 1981) which did involve a fundamental error. Nevertheless, in Gonzalez the Court noted that "considerations of expediency" compelled the result. The Court said it was faced with "a case where the error is patent on the face of the record" and also said:

> Were the error not obvious, we would not hesitate to deny review without prejudice to the later institution of Rule 3.850 proceedings where the appropriate record could be developed, or otherwise remand the case to the trial court. But in the absence of such a compelling need to have the trial court consider the matter, it is improper for us to deny review.

392 So.2d at 337.

Brown, supra, applying this rule even to errors which are not fundamental, is a wiser approach than Jones and Walker, which needlessly postpones adjudication of the merits without any compelling justification.

Petitioner contends, therefore, that since the trial court made absolutely no findings to support the enhanced sentence, he is entitled to a reversal of his illegal sentence and a remand for proper sentencing. The First District's opinion refusing to consider this issue on direct appeal should be quashed.

IV CONCLUSION

For the reasons stated, petitioner requests a reversal of his enhanced sentence and a remand for proper sentencing.

Respectfully submitted,

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

Glenna Joyce Reeves

GLENNA JOYCE REEVES
Assistant Public Defender
Post Office Box 671
Tallahassee, Florida 32302
(904) 488-2458

ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery to Raymond Marky, Assistant Attorney General, The Capitol, Tallahassee, Florida 32301 and a copy by mail to appellant, BENNIE LEE WALKER, #029168, Post Office Box 7, Cross City, Florida 32628 on this 27th day of June, 1984.

Glenna Joyce Reeves

GLENNA JOYCE REEVES