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IN THE FLORIDA SUPREME COURT

STATE OF FLORIDA,

Petitioner,

v.

CASE NO. 64,890

STEVEN SNOW,

Respondent.

ON DISCRETIONARY REVIEW FROM
FIRST DISTRICT COURT OF APPEAL

BRIEF OF RESPONDENT ON THE MERITS

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BRIEF OF RESPONDENT ON THE MERITS

I PRELIMINARY STATEMENT

Respondent was the appellant below, and the defendant in the trial court. A two volume record on appeal and transcript is sequentially numbered at the bottom of each page, and will be referred to as "R" followed by the appropriate page number in parentheses. The decision of the lower tribunal has been reported as Snow v. State, 443 So.2d 1074 (Fla. 1st DCA 1984), and is attached hereto as an appendix.

II STATEMENT OF THE CASE AND FACTS

Respondent rejects petitioner's recitations at pages 2-5 of its initial brief on the merits because of excessive editoralizing and because the facts are not material to the issues presented.

By information filed August 20, 1982, respondent was charged with kidnapping with intent to commit sexual battery and sexual battery with use or threat of a firearm (R 1). The cause proceeded to jury trial on December 16, 1982, before Circuit Judge Charles E. Miner, Jr., and at the conclusion thereof respondent was found guilty as charged of kidnapping and guilty of sexual battery without a firearm (R 36-37). Respondent's timely motion for new trial (R 40) was orally denied (R 66). On February 7, 1983, respondent was adjudicated guilty on both counts and sentenced to 60 years in state prison on each, to run concurrently, with the court retaining jurisdiction over parole for one third of each, over objection (R 42-46; 66-67). Respondent's counsel argued that his presentence investigation showed no serious prior record and asked the court not to retain jurisdiction (R 66). The court retained jurisdiction over parole because respondent "did terrify, terrorize a 16 year old girl" and respondent's counsel objected to the retention (R 67).

On appeal, respondent argued that the court did not sufficiently justify retention of jurisdiction over parole by saying that respondent "did terrify, terrorize a 16 year old girl". Although respondent's counsel objected to the retention, the First District apparently found the objection to be insufficient to preserve the question for appellate review, and dismissed the appeal without prejudice to seek relief via Fla.R.Crim.P 3.850 (Appendix).

III ARGUMENT

THE DISTRICT COURT DID NOT ERR IN HOLDING THAT RESPONDENT COULD RAISE THE ISSUE IN A MOTION TO VACATE SENTENCE PURSUANT TO RULE 3.850; OR, IN THE ALTERNATIVE, RESPONDENT CONTENDS ALL SENTENCING ERRORS ARE FUNDAMENTAL AND NEED NOT BE PRESERVED BY THE CONTEMPORANEOUS OBJECTION.

The First District's decision to allow a collateral attack is consistent with the purpose of Rule 3.850, which was stated by this Court in its initial adoption in 1963:

> The rule is intended to provide a complete and efficacious post-conviction remedy to correct convictions on any grounds which subject them to collateral attack.

Roy v. Wainwright, 151 So.2d 825, 828 (Fla. 1963). Moreover, the First District's view is consistent with other cases which hold that unobjected-to sentencing errors, which cannot be argued on direct appeal, are properly reached by Rule 3.850. See, e.g., Gonzalez v. State, 392 So.2d 334 (Fla. 3d DCA 1981); Massey v. State, 389 So.2d 712 (Fla. 2d DCA 1980); Skinner v. State, 366 So.2d 486 (Fla. 3d DCA 1879); Smith v. State, 414 So.2d 274 (Fla. 5th DCA 1982); and Walker v. State, 442 So.2d 977 (Fla. 1st DCA 1983)(on rehearing), discretionary review pending, Case Number 64,747. To accept petitioner's position

would be to leave a defendant with no remedy while he is required to serve out an illegal sentence.

In the alternative, respondent will argue that sentencing errors are fundamental and should be addressed for the first time on appeal regardless of any objection below. Respondent contends the First District's decision 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 obligating the necessity for an objection, since the error will cause respondent to be incarcerated for a greater length of time than the law permits.

In State v. Rhoden, 448 So.2d 1013 (Fla. 1984), the trial judge sentenced the juvenile defendant as an adult without making the findings required by Section 39.111(6), Florida Statutes. Therein, this Court rejected the state's contention that Rhoden's failure to object in the trial court barred him from asserting on direct 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 the give trial judges an opportunity to address objections made by counsel in trial proceedings and correct errors. . . .

> 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 insure 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 1016 (citations omitted; emphasis added). The foregoing observation is entirely applicable to the instant case. If the state's position is accepted by this Court, not only will defendants not be able to appeal an illegal sentence, they will not be able to raise via collateral attack.

While this Court's opinion in Rhoden might be nearly construed as limited only to the juvenile proceedings involved therein, the language quoted above and the rationale in equally applicable in adult sentencing proceedings. The First District so held in Weston v. State, __So.2d__ (Fla. 1st DCA Case Number AS-470, opinion filed May 31, 1984) (9 FLW 1205), discretionary review pending, Case Number 65, 536. Therein, the First District held that the adult de-

fendant's challenge to his habitual offender sentence based upon the trial court's failure to make the requisite findings under Section 775.084, Florida Statutes, was properly raised on appeal even though no objection had been made at the trial court on this ground. The First District found that the rationale of State v. Rhoden, supra, implicitly overruled its prior decision in Walker v. State, supra. The court noted:

> Section 39.111(6)(d), with which the Rhoden case dealt, specifically provides for the right of appelalnt view 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 . . . is not a basis for any meaningful distinction between Rhoden and the instant case, particularly in view of the rationale articulated in Rhoden opinion for not requiring an objection in the trial court as a prerequisite to appellate review.

Id. 9 FLW at 1206.

Rhoden is directly applicable to the present case. As in the juvenile justice statutory scheme, the Legislature has proscirbed specific criteria to be followed in retention of jurisdiction. Section 947.16(3), Florida Statutes allows the court to retain jurisdiction over

parole for specified crimes and requires that: "the trial court judge shall state the justification with individual particularity, and such justification shall be made a part of the court record". The lack of sufficient justification has routinely been raised and addressed on direct appeal, even without specific statutory authority for review. See, e.g., Wilson v. State, 449 So.2d 822 (Fla. 1st DCA 1984); Saname v. State, 427 So.2d 1083 (Fla. 1st DCA 1983), appeal after remand, 448 So.2d 14 (Fla. 1st DCA 1984); McClellan v. State, 434 So.2d 1 (Fla. 2d DCA 1983); Marquez v. State, 431 So.2d 618 (Fla. 2d DCA 1983); McCoy v. State, 429 So.2d 1256 (Fla. 1st DCA 1983); Harden v. State, 428 So.2d 316 (Fla. 4th DCA 1983); Ross v. State, 426 So.2d 1228 (Fla. 4th DCA 1983); Abbott v. State, 421 So.2d 24 (Fla. 1st DCA 1982); Hampton v. State, 419 So.2d 354 (Fla. 4th DCA 1982); Kendrick v. State, 418 So.2d 465 (Fla. 2d DCA 1982); Mathis v. State, 417 So.2d 1178 (Fla. 2d DCA 1982); Sellers v. State, 406 So.2d 75 (Fla. 2d DCA 1981); Humphry v. State, 402 So.2d 1322 (Fla. 1st DCA 1981); Sanders v. State, 400 So.2d 1015 (Fla. 2d DCA 1981); and LaChance v. State, 396 So.2d 1234 (Fla. 2d DCA 1981).

A recognition of the realities of sentencing procedures also militates against application of the contemporaneous objection rule to sentencing errors. In the sentencing context, often no procedural mechanism exists

for an objection to be made. For example, in retention proceedings, requisite findings must be made to support the order. These findings may be made, however, without advance notice to the defendant, or 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 remedy this situation. Presumbly, if a motion for reconsideration or reduction of sentence were authorized, it might be incumbent upon a defendant to proceed under that rule before taking an appeal. See Fla.R.Crim.P. 3.800. 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). Since a Rule 3.800 motion does not toll the time for filing a notice of appeal, if a trial judge delayed ruling on a 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 untenable options choose, the state would be sure to argue on appeal either that the defendant had abandoned

the ground by not waiting until the trial judge ruled, or that by waiting 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, respondent 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 of findings) that emerge from a contested sentencing proceeding. The objection is inherent in the proceeding and in 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 would 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.

In Noble v. State, 353 So.2d 819 (Fla. 1977), this Court defined fundamental error:

> 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 for the trial court for it to be considered at the appellate level.

Id. at 820, footnote 4.

In Gonzalez v. State, 392 So.2d 334 (Fla. 3d DCA 1981), the court recognized the importance of Noble:

> 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.

Id. at 336 (footnotes ommitted). 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 affirming judgments and sentences without prejudice to file a Rule 3.850 motion, confusion is added to the trial court. Id. at 336-337, footnote 7. See also Wigham v. State, 441 So.2d 678 (Fla. 1st DCA 1983).

Respondent submits that allowing a trial judge to veto release on parole, without sufficient justification, will cause a defendant to be incarcerated for a greater length of time than the law permits.

As a matter of judicial economy, it is preferable to allow an attack upon an unobjected to sentencing error on

direct appeal, instead of remanding back to the trial court. For example, in Brown v. State, 435 So.2d 940 (Fla. 3d DCA 1983), the defendant was sentenced as a habitual offender but the trial judge made to make the specific finding that the sentence was necessary for the protection of the public as required by the statute. The court nevertheless considered that non-fundamental sentencing error on direct appeal despite the defendant's failure to "preserve" the issue below. The court relied upon its previous language in Gonzalez, supra, in which it found that "considerations of expediency" compelled that result. The court said it was faced with "a case where the error is patented 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 initiation of Rule 3.850 proceedings were 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.

Gonzalez, supra at 337.

Applying this rule even to sentencing errors which are not fundamental is a wiser approach than requiring a contemporaneous objection, which needlessly postpones adjudication of the merits, by requiring a Rule 3.850 motion in the trial court. Indeed, in McCoy v. State, supra,

the First District addressed an unobjected-to retention issue "in the interest of finality". Curiously, the Attorney General does not argue procedural default in a case where two consecutive three year minimum mandatory sentences are imposed without objection. Ames v. State, 449 So.2d 826 (Fla. 1st DCA 1984)(footnote 1).

In summary, then, respondent submits that the First District's decision to dismiss the appeal and to allow a Rule 3.850 motion is consistent with prior cases, but is questionable in light of State v. Rhoden. Respondent will accept that remedy unless this Court agrees with the above argument that sentencing errors should be reached on direct appeal as either fundamental, or in the interest of judicial economy. The following observation in Pettis v. State, 448 So.2d 565, 566 (Fla. 4th DCA 1984) is particularly applicable:

> We can think of no more fundamental error than the excess caging of a human being without statutory authority. Such an error in sentencing should be visited by an appellate court even if the trial court did not have the opportunity to do so.

To accept the state's argument, however, is to allow a weed to be planted without any opportunity to pluck it. This Court must reject the state's position for all of the above reasons.

IV CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, respondent urges this Court to approve the decision of the First District, or, in the alternative, respondent urges that this Court hold that all sentencing errors are fundamental, and need not be objected to.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above Brief of Respondent on the Merits has been furnished by hand delivery to Mr. Raymond L. Marky, Assistant Attorney General, The Capitol, Tallahassee, Florida 32301; also a copy mailed to respondent, Steven Snow, #088150, Post Office Box 1500, Cross City, Florida 32628 on this 17th day of July, 1984.

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P. DOUGLAS BRINKMEYER