W00A 017

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

PETITIONER,

-VS- CASE NO. 64,890

STEVEN SNOW,

RESPONDENT.

FILED
SID J. WHITE
JUL 9 1984
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

PETITIONER'S BRIEF ON THE MERTIS

JIM SMITH
ATTORNEY GENERAL

RAYMOND L. MARKY
ASSISTANT ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32301
(904) 488-0600)

COUNSEL FOR PETITIONER

TOPICAL INDEX

TABLE OF CITATIONS

TABLE OF CITATIONS (Cont'd)

TABLE OF CITATIONS (Cont'd)

TABLE OF CITATIONS (Cont'd)

OTHER AUTHORITIES

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

PETITIONER,

-VS- CASE NO. 64,890

STEVEN SNOW,

RESPONDENT.
---/

PETITIONER'S BRIEF ON THE MERITS

PRELIMINARY STATEMENT

Petitioner, State of Florida, was the appellee below and will be referred to hereinafter as the State. Respondent was the appellant in the lower tribunal and the defendant in the trial court. He will be referred to as the defendant or respondent.

STATEMENT OF THE CASE AND FACTS

The defendant was charged by direct information with kidnapping and sexual battery of Carla Reid (Corry) (R 1).

The defendant entered a plea of not guilty and after pre-trial discovery had been completed the cause was tried before a jury.

Carla Mae Corry, a five-foot-two, one hundred pound, sixteen year old child (R 174) testified that she was grabbed from behind as she was walking on the sidewalk and dragged into a corridor of the Leon County High School (R 172-173). She related that the defendant (R 174) threatened her with a gun and told her not to scream (R 173). When she screamed he put his hand over mouth (R 173) to where she was unable to breathe (R 174). She was "scared to death" because she thought the defendant was going to kill her (R 175).

Miss Corry calmed down and temporarily convinced the defendant further force was unnecessary (R 175). When he let go of her she fled (R 175), however, the defendant caught her whereupon he threw her to the ground and began slapping her while she continued screaming (R 177). He again took her to the school corridor where he raped her (R 177-178). Miss Corry stated that afterwards she was very sore on her back and arms and that her face was "pretty sore" (R 179).

John Shields (R 215) and Phillip Adams (R 210) who summoned the police and rescued the victim both testified they

heard her scream and both described them in terms that it sounded like "someone was being killed", in pain and "terror-stricken." (R 212).

The defendant, who said after his arrest that he had been swimming with his girlfriend (R 236-237), testified at trial that Miss Corry accepted a ride in his automobile (R 246), that they drove to Leon High School to "talk" (R 247) and engaged in consensual sexual activity both oral sex and conventional sexual intercourse (R 250-251).

The jury, obviously rejecting the testimony of the defendant, Tibbs v. State, 397 So.2d 1120 (Fla.1981), found him guilty of kidnapping and sexual battery using force likely to cause serious personal injury (R 36-37).

On February 7, 1983, the defendant appeared before the trial judge for sentencing and his trial attorney--not the attorney who represented him in the district court or is presently representing him--urged the court not to retain jurisdiction, if incarceration was imposed (T.S. 66). The State argued against any leniency because of the nature and circumstances of the crime saying it believed the defendant was a danger to society (T.S. 67). Judge Miner in announcing sentence stated:

> THE COURT: As to Count Number 2, sentencing first on the sexual battery, it is the judgment of the law and the sentence of court that you be committed to the Department of Corrections for a period of sixty years. As to Count 1, sixty years to run concurrently. Because you did terrify, terroized a 16-year-old girl, I feel that's amply justification to retain jurisdiction for one-third of the sentence here imposed and I do so under Chapter 947 Florida Statutes.

(T.S. 67).

Trial counsel then stated, "Your Honor, I would object to the retaining jurisdiction" without specifying just what his objection was (T.S. 67).

A timely appeal was instituted to the lower tribunal and appellate counsel argued that the order retaining jurisdiction should be vacated, not remanded for a statement of justification. Counsel relied upon those cases which hold retention is improper if the trial judge does not state the reasons therefor as required by §947.16(3)(a). The State urged in reply that since trial counsel did not raise an objection to the alleged failure to specify the justification for retention of jurisdiction, but rather objected to the court retaining jurisdiction period, the issue was not properly preserved for appellate review. The State specifically argued that defendant could not raise the issue either on appeal or in a post-conviction proceeding citing to Pedroso v. State, 420 So.2d 908 (Fla.2d DCA 1983). No reply brief was filed by the respondent urging the alleged error was fundamental.

The lower Tribunal, on January 18, 1984, rendered the decision now under review, properly declined to consider the issue of whether the trial judge erred in retaining jurisdiction without stating the reasons for doing so with individual particularity because the alleged err was not raised below citing to Walker v. State, 442 So.2d 977 (Fla.1st DCA 1983), discretionary review granted, Case No. 64,747. The court, however, dismissed the appeal without prejudice for defendant to raise the issue pursuant

to Fla.R.Crim.P. 3.850. Snow v. State, ___ So.2d ___ (Fla.1st DCA 1984), 9 F.L.W. 193; Appendix A.

A timely petition for discretionary review was filed in this Court pursuant to Art. V, §3(b)(3), Fla.Const., and on June 18, 1984, this Court accepted the cause for review.

ISSUE

THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, ERRED IN HOLDING RESPONDENT COULD RAISE THE ISSUE, NOT RAISED AT TRIAL AND THUS NOT COGNIZABLE ON APPEAL, IN A MOTION TO VACATE SENTENCE PURSUANT TO RULE 3.850, FLA.R.CRIM.P.

The lower tribunal, consistent with its own prior decision in Sawyer v. State, 401 So.2d 939 (Fla.1st DCA 1981) and other district courts of appeal, Alexander v. State, 425 So.2d 1197 (Fla.2d DCA 1983); Hernandez v. State, 425 So.2d 213 (Fla.4th DCA 1983) and Landrou v. State, 442 So.2d 418 (Fla.4th DCA 1984), held the alleged deficiency was a procedural violation of Section 947.16(3)(a) and not subject to review in the absence of an objection interposed in the trial court.

This, of course, 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 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 sub judice objected on the grounds that Judge Miner did not state his reasons for retaining jurisdiction with adequate specificity, the trial judge might well have stated additional reasons. Since no other issues were presented on appeal, all the judicial energy wasted thus far could have been avoided! As will be demonstrated later, the reasons stated were sufficient which explains the absence of a specific objection and were not subject to appellate review as to sufficiency.

Were the Court to consider the issue on appeal notwithstanding the procedural default and decide a remand was required for a more specific statement of the reasons for retaining jurisdiction, the appropriate remedy for non-compliance with the procedural requirements of §947.16(3)(a), Arnett v. State, 397 So.2d 330

---

1 Where the defendant does not have a reasonable opportunity to object to the judicial act, which should be rare, there is a reasonable justification for excusing the default. State v. Rhoden, 448 So.2d 1013, 1016 (Fla.1984). It should be noted that if a sentence is illegal because it exceeds the limit prescribed by law, ti can be corrected in the trial court at any time. Fla.R.Crim.P. 3.800.

(Fla.1st DCA 1981), cert.den., 408 So.2d 1092 (Fla.1981), Judge Miner would have to reschedule a new sentencing hearing in order to give the defendant an opportunity to be heard and perhaps transport him from the state prison so he could personally be present! Additionally, a year and one-half having transpired since the imposition of sentence would probably require the trial judge to re-examine the record to refresh his recollection as to the facts and circumstances of the case, for judges, like witnesses, do not have total recall.

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 procudural rules will lead to the distruction 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.

The record in this case is without contradiction that in open court Judge Miner announced his reasons for retaining jurisdiction--although there could be more, including the fact that the defendant was not even capable of acknowledging guilt and obviously lied to the jury, see: United States v. Grayson, 438 U.S. 41, 51-52(1978)--counsel could have and should have objected and put Judge Miner on notice of what he was actually complaining about. That is: whether he was objecting to retention or the failure to be specific as to the reasons therefor.

Since he did not, but could have, the District Court was correct in not reaching the issue of whether the trial judge complied with §947.16(3)(a) by stating his reason with specificity. This is particularly true since appellate counsel did not attempt to demonstrate trial counsel had no opportunity to object (this could not seriously be argued) and that the respondent was actually

prejudiced or his fundamental rights were adversely affected. Stewart v. State, 420 So.2d 862 (Fla.1982) (cite fundamental error cases).

The State at this time will show the reason stated was an adequate compliance with §947.16(3)(a) and that it is legally impossible for the respondent to have been prejudiced, although such is not the State's obligation, but was the obligation of appellate counsel for respondent before the District Court.

Section 947.16(3)(a) does not require a written order by the trial judge stating the reasons he is retaining jurisdiction, and even if it did, the recital in the record would be sufficient. See, e.g., Thompson v. State, 410 So.2d 500 (Fla.1982). Judge Miner's reason for retaining jurisdiction, which the record supports, was that defendant was convicted of a crime involving violence and the defendant's acts were aggressive to say the least. Indeed, the defendant behaved as though man still lived in the Stone Age and it was acceptable to drag his prey away to satisfy his sexual appetite! That he did it to a sixteen-year-old child of such a size that she could not successfully prevent the bestial act only aggravates this crime. In Moore v. State, 392 So.2d 277 (Fla.5th DCA 1980), the court held "a reputation for and a conviction for aggressive and injurious behavior is certainly sufficient justification for the retention of jurisdiction." 392 So.2d at 278. The undersigned submits it was the early parole

release of individuals like defendant which caused the Legislature to provide judicial control by trial judges of the actions of the Florida Parole and Probation Commission.

Given the fact that a reason was stated it is obvious Judge Miner was aware that he was exercising the discretion given to him by the Legislature and was not retaining jurisdiction as a matter of course and that the defendant was being informed of why Judge Miner was retaining jurisdiction. The statement of reasons for retaining jurisdiction are not given to enable judicial review by an appellate court. Section 947.16(3)(a) contains no legislative authorization for review of whether retention of jurisdiction in a particular case is proper as in the cases where juveniles are sentenced as adults, §39.111(6)(j), where a sentence is enhanced beyond the limits prescribed by law for commission of the underlying offense, §775.084(3)(d), or an individual is sentenced pursuant to Florida's Sentencing Guidelines Act.

Of course, appellate review of a sentence is a substantive right, and unless authorized by the Legislature is not permitted. Brown v. State, 13 So.2d 458 (Fla.1943); Ennis v. State, 300 So.2d 325 (Fla.1st DCA 1974); O'Donnell v. State, 326 So.2d 4 (Fla.1975); and Dorszynski v. United States, 418 U.S. 424 (1974). Inasmuch as there is no authority to review the propriety of Judge Miner's reasons for retaining jurisdiction over defendant's sentence, he could not possibly have been prejudiced by the

alleged error[2]. Arnett v. State, 397 So.2d 330,332 (Fla.1st DCA 1981), cert.den., 408 So.2d 1092 (Fla.1981); Moore v. State, 392 So.2d 277, 279 (Fla.5th DCA 1980), Cowart, J., concurring specially; and Wilson v. State, ___ So.2d ___ (Fla.1st DCA 1984), 9 F.L.W. 429, 430, Nimmons, J., concurring specially, suggesting this issue should be certified to this Court for resolution.

Given that the objection could have been presented to the trial judge and was not, the District Court properly declined to reach the issue on its merits. 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. This is the only reason the State of Florida saw fit to institute this review. Indeed, defendant did not seek review of the decision below which held the issue was not properly preserved although surely he will attempt to backdoor the issue.

The District Court was in error in pretenting to hold the defendant could have the issue determined in a collateral proceeding because this Court has consistently held that issues

---

[2] For this reason, State v. Rhodes, supra, is distinguishable from this case. Cofield v. State, ___ So.2d ___ (Fla.1st DCA 1984), 9 F.L.W. 1293, rehearing pending.

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 c. 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 is 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.

CONCLUSION

For the reasons stated herein, the State of Florida urges this Court to quash the decision rendered by the lower tribunal to the extent that it allows defendant to file a motion to vacate challenging the propriety of the sentence imposed by the Circuit Court in and for Leon County, Florida, in a collateral proceeding.

Respectfully submitted,

JIM SMITH
Attornry General

Raymond L. Marky

RAYMOND L. MARKY
Assistant Attorney General
The Capitol
Tallahassee, FL 32301
(904) 488-0600

COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief on the Merits has been forwarded to P. Douglas Brinkmeyer, Assistant Public Defender, Post Office Box 671, Tallahassee, FL 32302, via U. S. Mail, this 9th day of July 1984.

Raymond L. Marky

Raymond L. Marky
Assistant Attorney General