W 00A

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

PETITIONER,

-VS-

CASE NO. 64,890

STEVEN SNOW,

RESPONDENT.

PETITIONER'S REPLY BRIEF ON THE MERITS

JIM SMITH
ATTORNEY GENERAL

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

COUNSEL FOR PETITIONER

TOPICAL INDEX

	Page
ISSUE	1
ARGUMENT	1
CONCLUSION	8
CERTIFICATE OF SERVICE	8

TABLE OF CITATIONS

	Page
Butler v. State, 343 So.2d 93 (Fla.3rd DCA 1977)	2
Castor v. State, 365 So.2d 701 (Fla.1978)	6
Cofield v. State, ___ So.2d ___ (Fla.1984), Case No. AT-157, Opinion filed June 15, 1984, 9 F.L.W. 1293, reh.den., August 2, 1984	4
Pedroso v. State, 420 So.2d 908 (Fla.2d DCA 1983)	6
Robinson v. State, ___ So.2d ___ (Fla.4th DCA 1984), Case No. 83-1094, 9 F.L.W. 1486	5,6
Roy v. Wainwright, 151 So.2d 825 (Fla.1963)	1
State v. Rhoden, 488 So.2d 1013 (Fla.1984)	2,4,5
State v. Smith, 240 So.2d 807 (Fla.1970)	3
State v. Washington, ___ So.2d ___ (Fla.1984, Case No. 65,569, 9 F.L.W. 296	2,6

TABLE OF CITATIONS (Cont'd)

	Page
Stewart v. State, 420 So.2d 862 (Fla.1982)	3
United States v. Frady, 456 U.S. 152 (1982)	3
Walker v. State, 442 So.2d 977 (Fla.1st DCA 1983), rev.pending, Case No. 64,747	2
Williams v. State, 400 So.2d 542 (Fla.3rd DCA 1981)	3

OTHERS

	Page
Fla.R.Crim.P. 3.800	2
Fla.R.Crim.P. 3.850	1,2,8

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

PETITIONER,

-VS- CASE NO. 64,890

STEVEN SNOW,

RESPONDENT.
---/

PETITIONER'S REPLY BRIEF ON THE MERITS

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.

ARGUMENT

Respondent urges the District Court's decision to allow the issue improperly preserved and therefore not reached could be raised pursuant to Rule 3.850 is consistent with the intention of the rule quoting from Roy v. Wainwright, 151 So.2d 825, 828 (Fla.1963).

Petitioner respectfully disagrees. The decisions of this Court have repeatedly stated that 3.850 is not a substitute for an appeal and that matters which could have been raised in the

trial court and, if necessary, on appeal from an adverse ruling may not be raised in a motion to vacate pursuant to Rule 3.850. See cases cited on p. 14 of petitioner's brief on merits, and State v. Washington, ___ So.2d ___(Fla.1984), Case No. 65,569, 9 F.L.W. 296.

Respondent's claim that this would leave him without a remedy from the illegal sentence is totally without merit. The sentence imposed herein is not an illegal sentence for it is within the limits proscribed by law. Walker v. State, 442 So.2d 977 (Fla.1st DCA 1983), review pending, Case No. 64,747; Butler v. State, 343 So.2d 93 (Fla.3rd DCA 1977). Of course, if the sentence was illegal it may be corrected at any time pursuant to Rule 3.800(a), Fla.R.Crim.P. not 3.850 for imposition of a sentence which is greater than that which is authorized by law is fundamentally defective. Thus, the majority opinion of this Court in State v. Rhoden, 448 So.2d 1013 (Fla.1984) is incorrect when it opined

> . . . 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.

Whether this Court was aware of Rule 3.800 or considered it in deciding Rhoden cannot be ascertained from the face of the opinion. Be that as it may, because of the nature of the statutory right and the lack of opportunity to object this Court concluded

the error in that case was fundamental. In this case the respondent had an opportunity to object: indeed he did so albiet without proper specificity and the error, if there was an error at all, was not fundamental. Counsel, as anticipated now urges the error was "fundamental" in order to secure relief under Rhoden, or that he has a right to be heard under some notion of "judicial expediency". Respondent's Brief at p. 13.

It is interesting to note that respondent never argued below the "error" was fundamental or that his failure to properly raise the issue should allow appellate consideration on the basis of "judicial expediency"! It is also worth noting that respondent never addressed petitioner's argument that the contemporaneous objection rule served a compelling governmental interest to-wit: the proper and effecient utilization of finite judicial resources and the finality of judgments. (See Pet.'s Br. at p. 9,10). It should be obvious to this Court that respondent is attempting to use the "fundamental error" phrase as an "open sesame" for procedural errors in order to secure review on appeal. This Court has rejected this notion in State v. Smith, 240 So.2d 807, 810 (Fla.1970) and has recognized fundamental error is not an abstract concept. Stewart v. State, 420 So.2d 862 (Fla.1982). See also: Williams v. State, 400 So.2d 542 (Fla.3rd DCA 1981) and United States v. Frady, 456 U.S. 152 (1982). A fundamental error is an error in the defendant's case that adversely affects the integrety of the truth finding process and which actually prejudices the defendant. No case cited by respondent even

purports to hold the alleged sentencing error in this case constitutes fundamental error and he has not shown he has suffered any actual prejudice by said error, even though the State of Florida dealt extensively with this in its main brief. See Pet's Br. at p. 11-13. Lastly, every court that has been presented with the issue presented herein has found the error to be procedural in nature. The attempt to use Rhoden as an open sesame or as a holding that no objection need be interposed to a perceived sentencing error even though the opportunity existed for doing so has been rejected by the District Court of Appeal, First District, in Cofield v. State, ___ So.2d ___ (Fla.1984), Case No. AT-157, Opinion filed June 15, 1984, 9 F.L.W. 1293, reh.den., August 2,1984. Cofield involved an alleged sentencing error pertaining to retention of jurisdiction and whether it could be considered on appeal in the absence of a timely or proper objection. The court held said error could not be raised on direct appeal[1] and said with regard to Rhoden:

> In reaching this decision, we are not unaware of the recent Florida Supreme Court decision of State v.Rhoden, ___ So.2d ___, 9 FLW 123 (Fla., April 5, 1984), where, in dicta, it was stated that "[t]he purpose for the contemporaneous objection rule is not present in the sentencing process" as it is at trial. Id. at 124. We decline, however, to adopt the broad interpretation of that decision advanced by appellant which would, in effect, eliminate the need for a contemporaneous objection to allege sentencing errors in all cases. Rather, we find

---

1 The Court incorrectly held it could be raised pursuant to Fla.R. Crim.P. 3.850 as it did in the instant case.

> that decision to be limited to situations where the trial court, in sentencing a defendant, fails to comply with a mandatory duty imposed upon him by statute. For example, the trial judge in Rhoden failed to set out, in writing, his reasons for sentencing a juvenile as an adult as required by Section 39.111, Florida Statutes (1981). Here, however, the trial court fully complied with the requisites of section 947.15 by stating, with particularity, his justification for retention of jurisdiction. We therefore find Rhoden does not apply to the circumstances of this case.

9 F.L.W. at 1294. The petitioner submits this Court should affirmatively hold that it was not abolishing the contemporaneous objection rule as it relates to sentencing errors and should limit the holding in Rhoden to cases wherein there was no fair opportunity to raise the issue. It is noted that in Robinson v. State, ___ So.2d ___ (Fla.4th DCA 1984), Case No. 83-1094, 9 F.L.W. 1486, the District Court of Appeal, Fourth District, without any discussion whatsoever granted rehearing in light of Rhoden, supra, reached the issue and remanded for a correction of the sentence. This Court should reject that decision. It is interesting to note that the case was remanded with instructions that "the trial court should therefore state on the record as a part of the sentencing in open court the reasons for retention which would permit defendant to respond and to make appropriate objection in order to preserve any error for appellate review." 9 F.L.W. at 1486. But that is exactly what happened at the initial sentencing hearing in this case! How many opportunities to object must a court accord a defendant and should he be entitled to two appeals one of the judgment and a second one on the sentence after the remand. Surely that is not what this Court intended in Rhoden.

It is strange indeed that alleged errors pertaining to guilt may be forever barred from consideration by failing to timely object thereto, where an opportunity exists, State v. Washington, supra, but all sentencing errors, procedural or substantive, are not forfeited. If the judgment of guilt is illegal no sentence may be imposed at all.

Pedroso v. State, 420 So.2d 908 (Fla.2d DCA 1983) is the decision which is in harmony with the sound administration of justice and properly states the law as consistently applied by this Court. Robinson incorrectly reached the issue on direct appeal and in this case it was incorrectly ordered to be considered in a collateral proceeding.

Respondent, while asking that the retention of jurisdiction be vacated when he was before the District Court, now asks the cause be remanded to the circuit court for reconsideration. Respondent's legal position has changed every time he finds himself in a different tribunal simply because it appears expedient to him whether it is judicially expedient or not. This is because he is unwilling to be bound by the acts of his attorney in the trial court. Castor v. State, 365 So.2d 701 (Fla.1978) held that the appellate attorney was limited to the grounds asserted in the lower tribunal. Counsel for respondent apparently views that judicial admonision mere dictum as is evident from the number of cases wherein it is ignored. What was said in Castor bears repeating.

> "Nor did trial counsel object, before or after re-instruction, to the trial court's failure to follow our rule regarding the procedure for submitting to counsel all responses to a jury's questions. His failure to do either not only prevented the judge from correcting an inadvertent error, but it produced the delay and systemic cost which result from invoking both levels of the state's appellate structure for the application of a legal principle which was known and unambiguous at the time trial. Except in rare cases of fundamental error, moreover, appellate counsel must be bound by the acts of trial counsel.

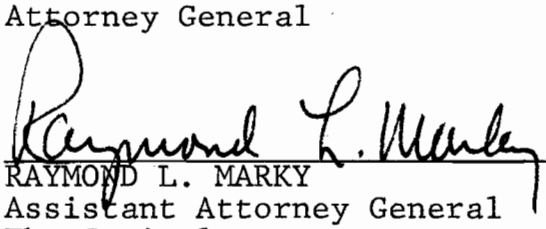
Id., at 703.

CONCLUSION

Since respondent did not establish cause for the procedural default and that he suffered actual prejudice from the alleged error, he should be barred from a consideration thereof either on direct appeal or in a proceeding instituted pursuant to Rule 3.850. The decision of the lower tribunal authorizing the latter should be quashed. Moreover, this Court should make it clear that alleged sentencing errors are not subject to review on direct appeal in the absence of a timely and proper objection unless it can be shown that no opportunity existed for interposing an objection.

Respectfully submitted,

JIM SMITH
Attorney General

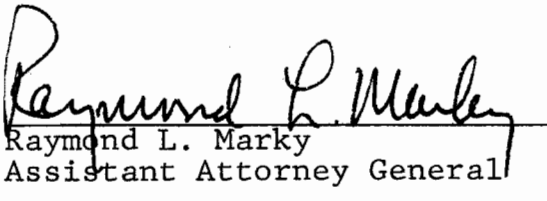


RAYMOND L. MARKY
Assistant Attorney General
The Capitol
Tallahassee, FL 32301
(904) 488-0600

COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief on the Merits has been forwarded to Mr. P. Douglas Brinkmeyer, Assistant Public Defender, Post Office Box 671, Tallahassee, FL 32302, via U. S. Mail, this 6th day of August 1984.



Raymond L. Marky
Assistant Attorney General