IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, Petitioner, vs. ROBERT EARL BRUMLEY, Respondent.	)	CASE NO. 66,023

PETITIONER'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Respondent was charged by Information with one count of burglary with an assault, in violation of § 810.02(2)(a) Fla. Stat. (1981), one count of robbery, in violation of §812.13(2)(c) Fla. Stat. (1981), one count of false imprisonment, in violation of § 787.02(1)(a) Fla. Stat. (1981) and one count of kidnapping, in violation of § 787.01 Fla. Stat. (1981)(R 473); such charging document alleged that the offenses at issue had taken place on March 12, 1983 (R 473). Respondent entered a plea of not guilty to all charges and was tried before a jury in Marion County Circuit Court on June 16, 1983 (R 1-451). Appellant was found guilty on all charges and sentencing took place on July 18, 1983.

Prior to such date, the State had filed a notice of intent to seek enhanced penalty, pursuant to § 775.084 Fla. Stat. (1981). At the hearing, the State presented testimony of two witnesses and introduced certified copies of judgments and sentences in reference to Appellant's prior convictions. At the conclusion of the proceeding, Judge McNeal announced that he found Appellant to be an habitual offender. He then adjudicated Appellant guilty of all charges and sentenced him to sixty years incarceration as to Count I, thirty years as to Count II, ten years as to Count III and sixty years as to Count IV; all sentences were to run concurrently (R 470,523-530). Judge McNeal also declared, in open court, that he would retain jurisdiction over one-half of Appellant's sentences (R 470); as the record indicates, no objection was interposed in

reference to this retention (R 470-1)(See Appendix, Attachment #1). A formal order retaining jurisdiction, and setting out the reasons for such pursuant to § 947.16(3) Fla. Stat. (1982 Supp) was filed on July 22, 1983 (R 531).

Appellant appealed his judgments and sentences to the Fifth District Court of Appeal. He raised two points on appeal; one related to the use of tape-recorded jury instruction, the other to the trial court's retention of jurisdiction. As to the latter point, Appellant contended that the trial court should only have retained jurisdiction for one-third of the sentences, in that the legislature had so amended § 947.16(3), to be effective June 16, 1983. In its brief, the State, relying upon such decisions as Williams v. State, 414 So.2d 509 (Fla. 1982), contended that the point had been waived due to lack of objection. In its opinion, Brumley v. State, __So.2d__, Case No. 83-1124 (Fla. 5th DCA September 13, 1984)[9 FLW 1945], the Fifth District affirmed the convictions and sentences, but remanded with instructions that the trial court retain jurisdiction only over one-third of the sentences (See Appendix Attachment #2).

In its opinion, the district court noted that the State's position as to waiver was arguable under Williams and one which the Fifth District itself had previously adopted. Vacation of the retention, however, was based upon the court's view that this Court had held in State v. Rhoden, 448 So.2d 1013 (Fla. 1984) that the purpose for the contemporaneous objection rule did not exist in sentencing proceedings. The

district court noted the seemingly contrary position of the First District Court of Appeal in Cofield v. State, 453 So.2d 409 (Fla. 1st DCA 1984), and certified the following question to this Court, pursuant to Rule 9.030(a)(2)(A)(v) Fla. R. App. P., as one of great public importance:

> WHETHER, BY OPERATION OF THE CONTEMPORANEOUS OBJECTION RULE, A DEFENDANT IS PRECLUDED FROM CHALLENGING, ON DIRECT APPEAL, THE TRIAL COURT'S RETENTION OF JURISDICTION OVER ONE-HALF OF HIS SENTENCE WHEN NO OBJECTION TO SUCH RETENTION IS MADE AT THE TIME OF SENTENCING?

On October 12, 1984 Petitioner filed a timely Notice to Invoke Discretionary Jurisdiction.

ISSUE ON CERTIORARI

THE CONTEMPORANEOUS OBJECTION RULE SERVES A VALID PURPOSE AT SENTENCING PROCEEDINGS, ESPECIALLY IN REFERENCE TO OBJECTIONS BASED UPON AN ALLEGEDLY IMPROPER APPLICATION OF THE STATUTE PERTAINING TO RETENTION OF JURISDICTION BY THE SENTENCING JUDGE

At the time that Appellant committed the instant offenses, § 947.16(3) provided that a sentencing judge, if so inclined, could retain jurisdiction over the sentences imposed for up to one-half of their length. By the time that Appellant's sentencing hearing was held, July 18, 1983, such statute had been amended to provide that retention could not exceed one-third of the sentence; the legislature provided that such amendment would take effect upon becoming law, i.e. June 16, 1983. At sentencing, however, Appellant's counsel did not object to Judge McNeal's announcement that he would retain jurisdiction over one-half of his sentence. Rather, that task fell to Appellant's appellate counsel, who in November of 1983 raised a point on appeal in reference to the retention, contending that the more recent statutory amount should have been utilized. The district court, relying upon this Court's recent decision of State v. Rhoden, supra, awarded relief on this basis and vacated the retention.

The question before this Court is, in essence, whether a reviewing court's function is to redress non-fundamental sentencing errors to which defense counsel has interposed no contemporaneous objection, although provided the opportunity

to do so. Petitioner's position is, Rhoden notwithstanding, that this question must be answered in the negative. This Court has continuously and repeatedly stated, in reference to all types of putative error, that it would not, in the absence of fundamental error, address questions on appeal which had not been raised in the court below. See e.g. Dewey v. State, 135 Fla. 443, 186 So. 224 (1938); State v. Barber, 301 So.2d 7 (Fla. 1974); Steinhorst v. State, 412 So.2d 332 (Fla. 1982); Jackson v. State, 451 So.2d 458 (Fla. 1984). This Court has applied this maxim, literally from start to finish, in evaluating claims of error in regard to criminal prosecutions. See State v. King, 426 So.2d 12 (Fla. 1982), (defense challenge to jurisdiction of court waived); Rose v. State, 425 So.2d 521 (Fla. 1982), (complaint regarding excusal of prospective jurors waived); Ross v. State, 386 So.2d 1191 (Fla. 1980)(complaint regarding judge's comment waived); Malloy v. State, 382 So.2d 1190 (Fla. 1979)(complaint regarding admission of evidence waived); G.E.G. v. State, 417 So.2d 975 (Fla. 1982)(claim regarding failure of State to admit evidence waived); Clark v. State, 363 So.2d 331 (Fla. 1978)(complaint regarding comment upon defendant's silence waived); Castor v. State, 365 So.2d 701 (Fla. 1978)(complaint regarding jury instructions waived); Wilson v. State, 436 So.2d 908 (Fla. 1983)(complaint regarding closing argument waived); White v. State, 446 So.2d 1036 (Fla. 1984)(complaint regarding admission of exhibits, closing argument and jury instructions in capital sentencing proceeding waived); Vaught v. State, 410 So.2d 147 (Fla. 1982), (point

regarding jury instructions during capital sentencing hearing waived); Jones v. State, 411 So.2d 165 (Fla. 1982)(point regarding prosecutor's argument during capital sentencing hearing waived). Thus, unless any error sub judice is fundamental and unless this Court's decision in Rhoden was designed to recede from all of the above decisions, the district court should not have addressed or granted relief upon the instant claim of error.

The error complained of sub judice is not fundamental. It relates to whether or not the district court should have applied the newly-amended § 947.16(3), as opposed to the version extant at the time that the offenses had been committed; it is something of a converse ex post facto point. In Williams v. State, 414 So.2d 509 (Fla. 1982), this Court was confronted with a situation in which a defendant, whose crime had been committed prior to any statute allowing for retention of jurisdiction, was sentenced in such a way that the court retained jurisdiction of one-half of his sentence. The First District held that the appellant's failure to make a sufficiently specific objection, and the failure of the court below to rule upon such, barred review of the point on appeal. This Court disagreed and vacated the sentence only because it found that a prior objection had in fact been made; this Court, citing to Castor, supra, and Mariani v. Schleman, 94 So.2d 829 (Fla. 1957), noted the necessity that a point be properly presented to the trial court before it could be reviewed by any appellate court.

Further, this Court's position in Williams is in accord with a number of other precedents, which have all held

that constitutional questions, including the application of a statute to a particular set of facts, as opposed to its facial validity, can be waived through failure to object. See Silver v. State, 188 So.2d 300 (Fla. 1966); Whitted v. State, 362 So.2d 668 (Fla. 1978); Davis v. State, 383 So.2d 620 (Fla. 1980); Trushin v. State, 425 So.2d 1126 (Fla. 1982). It is worth noting that three of the district courts of the state, citing to Williams and occasionally to Trushin, have all held that contemporaneaous objections are essential to preserve points on appeal in reference to allegedly improper retention of jurisdiction. See Brown v. State, 428 So.2d 369 (Fla. 5th DCA 1983); Frederick v. State, 440 So.2d 433 (Fla. 1st DCA 1983); Springfield v. State, 443 So. 484 (Fla. 2d DCA 1984); Mobley v. State, 447 So. 2d 328 (Fla. 2d DCA 1984). Accordingly, Respondent sub judice should have had to preserve this point, pursuant to the above precedent, before the district court reviewed or awarded relief upon it, unless State v. Rhoden has held otherwise.

State v. Rhoden does not hold otherwise or, to the extent that it can be read to do so, it should be limited to its facts. In Rhoden, this Court was confronted with a situation in which defense counsel failed to object to the contents or sufficiency of a later-rendered order regarding the sentencing of the defendant as an adult; the district court, regarding the trial judge's duties in this matter as mandatory, had vacated the sentence despite the lack of objection. On certiorari, this Court agreed that such course was the proper one, citing to, in part, the dissenting opinion in Glenn v.

State, 411 So.2d 1367 (Fla. 5th DCA 1982), which had discussed the difficulty which counsel would have in objecting to a written order which would or could come to be filed subsequent to the sentencing proceeding. This Court went on to hold that the primary purpose of the contemporaneous objection rule was not present in sentencing, in that any error committed therein could be rectified by a simple remand to the trial court, a situation thus, presumably, distinguishing it from a trial situation, in which a full retrial would be necessary for correction.

Rhoden represents the first instance in which this Court, in considering the fundamentality of error, has placed more reliance on the ease of remedy, as opposed to the gravity of harm caused by the error. In Ray v. State, 403 So.2d 956 (Fla. 1981), this Court reviewed its many prior refusals to allow defendants to object for the first time on appeal. This Court admonished district courts as to the infrequency with which they should find fundamental error and equated the concept with a denial of due process. This Court further cited to Sullivan v. State, 303 So.2d 632 (Fla. 1974) for the proposition that when a trial judge has extended counsel an opportunity to cure any error and counsel has failed to take advantage of such, any error thereupon committed is invited and will not warrant reversal. If in Williams v. State, the instant type of error could be regarded as not fundamental, Petitioner respectfully asks what, in the intervening twenty-three months, has occurred to so drastically alter the land-

scape? Further, one must note that a mere eight months before Rhoden, this Court observed in State v. Scott, 439 So.2d 219 (Fla. 1983) that it would be wasteful of the court's time and of the limited resources of the appellate system to deny a sentencing judge the benefit of contemporaneous objection to a sentence and a concurrent opportunity to correct errors at the sentencing hearing itself. This Court's decision in Rhoden does not discuss, overrule, or recede from Williams or Scott, and the question remains as to how the three precedents can be reconciled.

Petitioner suggests that the most logical way of harmonizing these precedents is to read Rhoden not as overruling decades of precedent, but as merely, understandably, holding that defense counsel cannot do the impossible, i.e. object to an as-yet non-existent sentencing order. Certainly the purpose of the contemporaneous objection rule is, as noted in Scott, present in any sentencing hearing. Such purpose, as noted by this Court in Castor, is to put the lower court judge on notice that error may have been committed and to afford him an opportunity, early in the proceedings, to correct such. This Court regarded such requirement as one rooted in practical necessity and basic fairness in the operation of the judicial system, noting further that delay and unnecessary use of the appellate process would be the alternative results. Petitioner contends that an appeal raising an unpreserved sentencing point is just as wasteful of the appellate process as one raising an unpreserved trial point, especially when read

from the reviewing court's point of view. No adequate appellate record has been developed below, and such appeal undermines the essential aspect of finality in reference to trial courts' judgments and sentences. Rhoden does not cite to any statistical evidence that the caseload of appellate courts has dropped since the Scott decision and Petitioner respectfully suggests that this Court recede from the overbroad language of Rhoden.

One must also question why defense counsel should become a silent appendage at any sentencing hearing and whose interests would be served thereby. In State v. Jones, 204 So.2d 515, 519 (Fla. 1967), this Court receded from its prior position that it would review remarks of counsel in the absence of objection. This Court went on to observe,

> [a]t the present time all defendants in criminal trials who are unable to engage counsel are furnished counsel without charge. Application of the exception is no longer necessary to protect those charged with crime who may be ignorant of their rights. Their rights are now well guarded by defending counsel. Under these circumstances further application of the exception will contribute nothing to the administration of justice, but rather will tend to provoke censure of the judicial process as permitting 'the use of loopholes, technicalities, and delays in the law which frequently benefit rogues at the expense of decent members of society.'

These observations are applicable to sentencing. Additionally, in the interest of fairness, one must wonder why a counsel representing a defendant in a capital sentencing proceeding must object to preserve points of error regarding jury instruc-

tions, closing argument or the admission into evidence, whereas his peer defending one charged with the pettiest of petit offenses can simply stand mute. It would be correct to read Rhoden as holding that one defending a capital defendant need not object to the sentencing judge's findings of fact, inasmuch as such will not be rendered until after the sentencing hearing; Petitioner contends, as previously noted, that Rhoden should be limited to excusing this type of failure to object. This Court should answer the certified question in the affirmative and recede from Rhoden to the extent necessary.

It is also worth noting that one district court has already refused to apply Rhoden beyond its perceived parameters. Thus, in Cofield v. State, supra, the First District held that a defendant still had to preserve by objection a point on appeal regarding the allegedly improper retention of jurisdiction over a life sentence, and over a sentence which, apparently, represented a crime already committed prior to the time the statute was enacted. The court, while certifying a question which was never taken up to this Court, stated that Rhoden was limited to instances in which a sentencing judge failed to perform a mandatory duty. Whereas Petitioner prefers the manner of distinguishment described above, i.e. excusing only an impossible objection, Cofield represents the proper approach to Rhoden.

Finally, inasmuch as this Court may consider any issue ancillary to that involving the question certified, see Trushin, supra, it is instructive to consider whether or not any error has occurred sub judice. Respondent was sentenced

in accordance with the retention statute existing at the time of the offense. This is the customary situation. Compare Castle v. State, 330 So.2d 10 (Fla. 1976); Ex Parte Brown, 93 Fla. 332, 111 So. 518 (1927); Ellis v. State, 298 So.2d 527 (Fla. 2d DCA 1974). No Weaver v. Graham, 450 U.S. 24 (1981) problem would seem to exist, and Petitioner questions the wisdom of Hayes v. State, 448 So.2d 84 (Fla. 2d DCA 1984), relied upon by the court below. In any event, Petitioner suggests that even if error of any sort has occurred, one such as Respondent, who wishes to take advantage of quite literally a legislative windfall, should be required, at minimum, to ask the trial judge for such. The decision below should be quashed.

CONCLUSION

Based on the arguments and authorities presented herein, Petitioner respectfully moves this Honorable Court to answer the instant certified question in the affirmative and to quash the decision of the district court below and reverse and remand with instructions consistent therewith.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished by delivery, to Brynn Newton, Assistant Attorney General, Counsel for Appellant at 1012 S. Ridgewood Avenue, Daytona Beach, Florida 32014-6183 this 5 day of November, 1984

Of Counsel
Richard B. Martell