IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

ROBERT EARL BRUMLEY,

Respondent.

CASE NO. 66,023

PETITIONER'S REPLY BRIEF ON THE MERITS

JIM SMITH
ATTORNEY GENERAL

RICHARD B. MARTELL
ASSISTANT ATTORNEY GENERAL
125 N. Ridgewood Avenue
Fourth Floor
Daytona Beach, Florida 32014
(904) 252-2005

COUNSEL FOR PETITIONER

TOPICAL INDEX

AUTHORITIES CITED

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

In his brief, Respondent suggests, apparently in light of State v. Rhoden, 448 So.2d 1013 (Fla. 1984), that the reason for the contemporaneous objection rule has ended; Respondent's choice of phraseology is derived from Mancini v. State, 273 So.2d 371 (Fla. 1973). Fortunately, Respondent limits his Mancini-inspired argument to sentencing proceedings, asking rhetorically what purpose is served by requiring objection by counsel, or notice to the trial court, when only "clerical" sentencing matters, easily remediable by remand, are involved (Brief of Respondent at 2). It is Petitioner's position that Respondent is precipitous in elegizing the contemporaneous objection rule; even under Rhoden, to report its demise would be to greatly exaggerate. Petitioner's reading of Rhoden is that such case excuses a failure of sentencing counsel to object only in instances where counsel is effectively denied a practical opportunity to do so, such as where counsel cannot foresee the contents or omissions of a later-rendered sentencing order. As noted in Petitioner's Brief on the Merits, to contrue Rhoden otherwise would, among other things, render meaningless this Court's decision of State v. Scott, 439 So.2d 219 (Fla. 1983), which recognized the obligation of defense counsel to preserve potential claims of error at sentencing.

In his brief, Respondent concedes that "it would have

been possible" for his attorney to have posed a proper objection to the retention of jurisdiction at the sentencing proceedings of July 18, 1983, pursuant to Williams v. State, 414 So.2d 509 (Fla. 1982), but suggests that such courtesy to the lower court was unnecessary, in that "there were no proceedings subsequent to the sentencing error which might have been necessitated or affected by counsel's failure to object." (Brief of Respondent at 5). Actually, there have been at least two proceedings effected, to their detriment, by counsel's failure to impose a contemporaneous objection. One was the sentencing proceeding itself. Had counsel spoken up in time, Judge McNeal would have had an opportunity to fully consider which version of § 947.16(3) would have been more applicable to the sentencing of Respondent; the judge would have had the chance to consider Respondent's arguments pertaining to the principle of lenity and to make an informed decision as to whether the prisoner in front of him should benefit from a change in the law, enacted after commission of the offense for which he was being sentenced. This dialogue in the trial court would have, in turn, benefited the appellate court, because such court would then have had a fully-developed record on appeal to review, as opposed to a "silent" transcript. In Castor v. State, 365 So.2d 701 (Fla. 1978) this Court discussed the benefit to both levels of the state's appellate structure of enforcement of the contemporaneous objection rule. As this Court recognized in Scott, supra, these principles do apply at sentencing.

There is no reason why they should not. Petitioner

fails to understand why, simply because of their timing, courts should review unpreserved errors which occur at the end of a criminal prosecution, as opposed to the beginning; Petitioner also fails to appreciate why sentencing errors vel non should be regarded as easier to correct than those which occur at trial. Respondent suggests that, given the fact that his sentencing issue was presented to the district court on direct appeal, however improperly, such court was correct in affording relief upon it, in that insistence upon proper presentation would simply have led to unnecessary public expense; Respondent describes the relief which he sought as basically "clerical" in nature, in that, in carrying out the district court's mandate, the secretary of the sentencing judge sub judice would need only to amend the sentencing order to "correct" the length of retention of jurisdiction.

It is likely that the "last act" in reversal of a conviction for insufficient evidence is an amendment of the judgment form to indicate discharge of the accused. This hardly means that the appellant was raising merely a clerical error all along, nor is it indicative of the time-consuming appellate review which has preceded such action. Further, Petitioner remains unconvinced that reviewing courts have less need of a developed record on appeal in regard to sentencing errors. Whereas some may be obvious from the transcript itself, i.e. a fifty year sentence for a misdemeanor, others involve complex issues of statutory construction; Petitioner urges this Court to take judicial notice of the number of certified questions pending before it, in which

district courts have sought guidance on sentencing issues.

Additionally, there is a fatal flaw in Respondent's contention that society benefits from a reviewing court's excusal of the failure to preserve a non-fundamental sentencing error; Respondent notes the additional cost to the public of the preparation of a Rule 3.850 appeal, which would have become necessary, had the district court failed to address his point on appeal. It is by no means clear that a defendant who fails to object to an allegedly improper retention of jurisdiction as to his sentence will secure relief in a post-conviction proceeding. In State v. Matera, 266 So.2d 661 (Fla. 1972), this Court held that a defendant could not raise a matter, by means of a 3.850 motion, which was known to him at the time of trial, whether such matter was litigated at trial or withheld. Petitioner suggests that ever since the sentencing proceeding of July 18, 1983 Respondent has known of Judge McNeal's intention to retain jurisdiction over his sentence for one-half of its length. The point of such cases as Clark v. State, 363 So.2d 331 (Fla. 1978), Castor, supra, and Steinhorst v. State, 412 So.2d 332 (Fla. 1982) is not so much that presentation of claims of error is a prerequisite to review, but that, in the absence of such preservation of non-fundamental error, one who have waived a point on appeal will be afforded no relief. This Court has understood that the alternative to such consequence is a total disincentive on the part of attorneys to object, with concomittant unpalatable consequences for the appellate system. Clark, supra; Ray v. State, 403 So.2d 956 (Fla. 1981).

To hold that Respondent has waived his claim for relief, by failing to object, does not lead to a harsh result, when one considers who should more properly bear the "cost" of a defendant's failure to preserve non-fundamental error, the defendant or the appellate system itself. Cf. Sullivan v. State, 303 So.2d 632 (Fla. 1974). Obviously, Respondent sub judice was in the best position to prevent the creation of any error in reference to the retention of his jurisdiction, and to find him ineligible for relief hardly seems inequitable in the context of this Court's holdings in such cases as Ray v. State, supra, Parker v. State, 456 So.2d 436 (Fla. 1984) or Whitted v. State, 362 So.2d 668 (Fla. 1978). Stated in other words, if a defendant can waive a contention that he has been convicted under an unconstitutional statute, or if a defendant who has filed and lost a pre-trial motion to suppress evidence can waive a claim of error through failure to object at trial at the time the contested evidence is admitted or if a defendant can be convicted of an offense with which he has never been charged, as long as such is lesser in degree to that chargedand his attorney has failed to object, one who stands mute while a judge "improperly" retains jurisdiction over a fraction of his sentence, surely secondary in importance incontrast to the above issues, should have no pre-emptive right to have his issue decided on the merits. To the extent that Rhoden holds otherwise, this Court should recede from it.

Finally, Respondent has, in affect, sown the seeds of his own destruction by relying upon Mancini, supra. In such case, this Court held that it was no longer necessary for a defendant

to move for a new trial, at the close of all proceedings, in order to preserve a claim of evidentiary insufficiency, as long as he had previously moved for a directed verdict in the trial court. The reason for such holding was that the trial judge had already had an opportunity to pass upon the sufficiency of the evidence, and that it made no sense to insist upon his having a "second chance". Respondent wishes this Court to read Mancini as standing for the proposition that a sentencing judge should have no opportunity to consider a putative sentencing error before being summarily reversed by a court of higher authority, acting upon a silent record. There is absolutely no good reason to adopt this scenario and, as this Court noted in Castor, except in rare cases of fundamental error, appellate counsel should be bound by the actions, or inactions, of trial, or sentencing, counsel. This Court should answer the instant certified question in the affirmative and quash the decision below.

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,

JIM SMITH
ATTORNEY GENERAL

RICHARD B. MARTELL
ASSISTANT ATTORNEY GENERAL
125 N. Ridgewood Avenue
Fourth Floor
Daytona Beach, Florida 32014
(904) 252-2005

COUNSEL FOR PETITIONER

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 Public Defender, 1012 S. Ridgewood Avenue, Daytona Beach, Florida 32014, this 14 day of December, 1984.

Of Counsel
Richard B. Martell