IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

RANDALL WAYNE WALCOTT,

Respondent.

CASE NO. 66,391

RESPONDENT'S ANSWER BRIEF ON THE MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

LUCINDA H. YOUNG
ASSISTANT PUBLIC DEFENDER
1012 South Ridgewood Avenue
Daytona Beach, Florida 32014-6183
Phone: 904/252-3367

ATTORNEY FOR RESPONDENT

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PRELIMINARY STATEMENT

The Petitioner is the State of Florida which was the Prosecution in the trial court and the Appellee in the Fifth District Court of Appeal.

The Respondent, RANDALL WAYNE WALCOTT, was the Defendant in the trial court and the Appellant in the Fifth District Court of Appeal.

In this brief the parties will be referred to as the State or Petitioner, and Walcott or Respondent.

The following symbol will be used:

"R" - Record on Appeal

ARGUMENT

RESPONDENT MADE A SUFFICIENT OBJECTION TO THE TRIAL COURT'S RETENTION OF JURISDICTION; AND EVEN IF THERE WERE NO OBJECTION, THE CONTEMPORANEOUS OBJECTION RULE DOES NOT PRECLUDE A DEFENDANT FROM CHALLENGING ON DIRECT APPEAL RETENTION OF JURISDICTION OVER AN OFFENSE WHICH IS NOT ENUMERATED IN SECTION 947.16(3), FLORIDA STATUTES.

Section 947.16(3), Florida Statutes (1983), empowers the trial court to retain jurisdiction only over certain enumerated crimes, among which is the offense of burglary of a structure in which a human being is present. The information in the instant case did not allege that a human being was present in the burglarized structure (R231) and no evidence of this fact was presented at trial.

Respondent submits first of all that defense counsel's objection to the trial court's retention of jurisdiction over his sentence was sufficient, as the Fifth District recognized in its opinion in Walcott v. State, 460 So.2d 915 (Fla. 5th DCA 1984). The record shows that defense counsel made the following objection:

> I would like to note for the record my objection to your retention of jurisdiction in this case in that the evidence doesn't warrant it. There is no evidence before the Court to justify it, no proper findings, and it's not a lawful retention in this case.

(R227-228). Although it would have been advisable for defense counsel to have been more specific by stating that there was no evidence showing that a human being was present in the burglar-

ized structure, "magic words are not needed to make a proper objection". Williams v. State, 414 So.2d 509 (Fla. 1982). Because the Fifth District found a sufficient objection to the trial judge's retention of jurisdiction, this was not a proper case for the appellate court to certify the question, "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".[1/] Therefore, this Court may want to dismiss this cause.

Turning to the merits of the certified question, Respondent relies on Rhoden v. State, 448 So.2d 1013 (Fla. 1984), Walker v. State, 10 FLW 35 (Fla., January 10, 1985), and State v. Snow, 10 FLW 40 (Fla., January 10, 1985). Rhoden dealt with the trial court's failure to set out written reasons for sentencing a juvenile as an adult, as required by Section 39.111, Florida Statutes (1981). In holding that the contemporaneous objection requirement did not preclude the defendant from challenging the error on appeal, this Court stated:

1/ The Fifth District Court of Appeal certified the same question in Brumley v. State, 455 So.2d 1096 (Fla. 5th DCA 1984), review pending (Sup.Ct. Case No. 66,023). The sentencing error at issue in Brumley was the trial court's retention of jurisdiction for a period in excess of that authorized by statute. This error is similar, though not identical, to the sentencing error in the case at bar.

> 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 to give trial judges an opportunity to address objections made by counsel in trial proceedings and correct errors. See Simpson v. State, 418 So.2d 984 (Fla. 1982), cert. denied, 459 U.S. 1156, 103 S.Ct. 801, 74 L.Ed.2d 1004 (1983); State v. Cumbie, 380 So.2d 1031 (Fla. 1980); Clark v. State, 363 So.2d 331 (Fla. 1978). 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 ensure 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.

Rhoden, supra at 1016. Similarly, in Walker and Snow, this Court held that Rhoden applied to the trial court's failure to make findings in support of an enhanced sentence under the habitual offender statute and to the failure to state justification for retaining jurisdiction over a sentence pursuant to Section 947.16(3), Florida Statutes.

It is true that the sentencing errors in Rhoden, Walker, and Snow, all involved the trial court's failure to make findings mandated by statute, unlike the error in the present case. However, this is not a meaningful distinction. There is no reasonable basis for making the contemporaneous objection rule applicable to a trial court's retention of jurisdiction over an offense which is not enumerated in Section 947.16(3), but not applicable to sentencing errors such as those in Rhoden, Walker, and Snow. The rationale enunciated in Rhoden applies with equal force to the sentencing error in the case at bar.

The State suggests that Rhoden results in waste and inefficient use of judicial resources, and that it should therefore be limited. According to the State's position, in a case such as this, the appellate court should refrain from ruling on the unlawful retention of jurisdiction because no objection was made below. The defendant would then be entitled to file a post-conviction motion under Florida Rule of Criminal Procedure 3.850. If the trial court denies the motion, the next step would be for the defendant to appeal denial of the 3.850 motion. The appellate court could then review the unlawful rentention, vacate, and remand to the trial court. Hence, to correct this sentencing error, it might be necessary to present the case to the trial court a total of three times and to the appellate court twice. No knowledge would be gained by this burdensome, time-consuming procedure, more public funds would be expended, and many defendants would have long served the period of retention by the time the error is finally corrected. The State argues that this pro-

cedure should be followed in order to "develop a record whereby sentencing review would be facilitated rather than trying to speculate as to what or why the trial court's actions were in imposing the controverted sentence". (Petitioner's Brief on the Merits at 12). What possibly could be developed in a 3.850 motion hearing in this case which would put the appellate court in a better position to review the trial court's retention of jurisdiction than it was in when the case was before it on direct appeal? Requiring this procedure to be followed for correction of errors such as the present one defies logic and common sense and benefits neither the public nor the defendant.

The trial judge had no legislative authority to retain jurisdiction over Walcott's sentence. As such, this error seems even more in the nature of a fundamental error than the sentencing errors in Rhoden, Walker, and Snow. See Walker, supra at 36 (Shaw, J., concurring). The Florida courts have found a sentencing error fundamental when it could cause a defendant to be incarcerated for a greater length of time than provided by law in the absence of the error. See Noble v. State, 353 So.2d 819 (Fla. 1977); Brosz v. State, 10 FLW 352 (Fla. 5th DCA, February 7, 1985); Pettis v. State, 448 So.2d 565 (Fla. 4th DCA 1984); Reynolds v. State, 429 So.2d 1331 (Fla. 5th DCA 1983); Gonzalez v. State, 392 So.2d 334 (Fla. 3d DCA 1981); Warmble v. State, 393 So.2d 1164 (Fla. 3d DCA 1981). In Pettis, supra, the court stated that it could "think of no more fundamental error than the excess caging of a human being without statutory authority".

Thus, even if Rhoden, Walker, and Snow were inapplicable, the trial court's unlawful retention of jurisdiction over Walcott's sentence should be reviewed by the appellate court even in the absence of a sufficient objection at the trial level because it constitutes fundamental error.

CONCLUSION

BASED UPON the foregoing arguments and authorities, the Respondent respectfully requests that this Honorable Court affirm the decision of the Fifth District Court of Appeal of the State of Florida.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

Lucinda H. Young

LUCINDA H. YOUNG
ASSISTANT PUBLIC DEFENDER
1012 South Ridgewood Avenue
Daytona Beach, Florida 32014-6183
Phone: 904/252-3367

ATTORNEY FOR RESPONDENT

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon the Honorable Jim Smith, Attorney General, 125 N. Ridgewood Avenue, Fourth Floor, Daytona Beach, Florida 32014; and mailed to Randall Wayne Walcott, Inmate No. A-040944, #D-3, Lawtey Correctional Institute, P.O. Box 229, Lawtey, Florida 32058, on this 19th day of February, 1985.

Lucinda H. Young

LUCINDA H. YOUNG
ASSISTANT PUBLIC DEFENDER