047

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, Petitioner, vs. RANDALL WALCOTT, Respondent.	CASE NO. 66,391

PETITIONER'S BRIEF ON THE MERITS

FILED
SID J. WHITE
JAN 29 1985
CLERK, SUPREME COURT
By ______
Chief Deputy Clerk

JIM SMITH
ATTORNEY GENERAL

W. BRIAN BAYLY
ASSISTANT ATTORNEY GENERAL
125 N. Ridgewood Ave., 4th Floor
Daytona Beach, Florida 32014
(904) 252-2005

COUNSEL FOR PETITIONER

TOPICAL INDEX

	PAGE
AUTHORITIES CITED	ii
STATEMENT OF THE CASE	1-2
STATEMENT OF THE FACTS	3-5
SUMMARY OF ARGUEMENT	6
ARGUMENT	
RESPONDENT SHOULD HAVE MADE A CONTEMPORANEOUS OBJECTION TO ANY ALLEGED SENTENGING ERROR AND BY NOT DOING SO SHOULD FORFEIT HIS RIGHT TO DIRECT APPEAL AND BE RELAGATED TO A COLLATERAL ATTACK TO REMEDY A FUNDAMENTAL SENTENCING ERROR IF ANY.	7-13
CONCLUSION	14
CERTIFICATE OF SERVICE	14

AUTHORITIES CITED

CASES — PAGE

Castor v. State, 365 So.2d 701 (Fla. 1978) ------------------------- 9

Clark v. State, 366 So.2d 331 (Fla. 1978) ------------------------- 8

Cofield v. State, 453 So.2d 409 (Fla. 1st DCA 1984) ----------------- 11

Malloy v. State, 382 So.2d 1190 (Fla. 1979) ------------------------ 8

Rhoden v. State, 448 So.2d 1013 (Fla. 1984) -------------------- 9,10,11

Rose v. State, 425 So.2d 521 (Fla. 1982) ------------------------- 8

State v. Scott, 439 So.2d (Fla. 1983) ----------------------------- 9

Steinhurst v. State, 412 So.2d 332 (Fla. 1982) ------------------------- 8

Walcott v. State, 9 F.L.W. 2428, (Fla. 5th DCA, Nov. 15, 1984) -- 1,2,7,14

Wilson v. State, 436 So.2d 908 (Fla. 1983) ------------------------- 9

Williams v. State, 414 So.2d 509 (Fla. 1982) ------------------------ 10

OTHER AUTHORITIES

Fla. R. Crim. P. 3.800(a) ---------------------------- 4,9,11
Fla. R. Crim. P. 3.850 ---------------------------- 4,9,11

§ 39.111, Fla. Stat. (1983) -------------------------- 10
§ 39.111(d), Fla. Stat. (1983) ----------------------- 11
§ 39.111(6)(j), Fla. Stat. (1983) ------------------- 10
§ 39.14, Fla. Stat. (1983) -------------------------- 11
§ 924.06(1)(a), Fla. Stat. (1981) ------------------- 8
§ 924.06(1)(d), Fla. Stat. (1981) ------------------- 9
§ 947.16, Fla. Stat. (1981) ------------------------- 5
§ 947.16(3) Fla. Stat. (1981) ----------------------- 1,7
§ 947.16(3)(a) Fla. Stat. (1981) -------------------- 5,12

STATEMENT OF THE CASE

Respondent was charged by Information with two (2) counts of burglary of a structure (R 231). A jury trial was held on Count I of this Information on April 7, 1983 (R 3-13). Following the presentation of evidence and argument, the jury returned a verdict of guilty as charged to burglary of a structure in Count I (R 203-317). Respondent was adjudicated guilty on the same day (R 209).

Respondent appeared for sentencing on June 28, 1983 (R 216-229). The trial court sentenced appellant to a term of five (5) years imprisonment with jurisdiction retained for a period of two and one-half (2 1/2) years (R 323-324).

Thereafter, respondent took a timely appeal to the Fifth District Court of Appeal (R 327). Respondent, in his initial brief argued three (3) issues: 1. Whether the trial court erred in denying respondent's motion to suppress his confession; 2. Whether the trial court erred in retaining jurisdiction pursuant to section 947.16(3) Florida Statutes (1981); and 3. Whether the trial court erred in failing to give credit for time served.

The Fifth District Court of Appeal in Walcott v. State, 9 F.L.W. 2428 (Fla. 5th DCA, Nov. 15, 1984) affirmed the conviction. But the Fifth District reversed the retention of jurisdiction and certified the following question to this court:

> 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?

Pursuant to that question, in the opinion of Walcott, supra, petitioner, the State of Florida moved to invoke this court's jurisdiction and a brief on the merits follows herein.

STATEMENT OF THE FACTS

Prior to imposing sentence the trial court made the following comments regarding respondent and his criminal history:

> Prison has been a failure so far as rehabilitating you. You spent five (5) years in prison between 1972 and 1977, and when you got out, you went back on a one man crime wave committing, according to what you have been charged with, felonies where ever you went. You didn't learn in prison that is wasn't a fun place to be . . .
>
> I don't think that you've learned lessons that the criminal justice system tries to teach, and that is that crime doesn't pay, and I regret that this system somehow or another hasn't taught you that, because I think that if you had learned from your prior experience from incarceration, from whatever punishment was given to you, that we wouldn't be here today and so in effect, the punishment hasn't been affective in teaching you anything about living a law abiding life.
>
> You didn't learn it from rehabilitation, and so the only real purpose served in incarceration is to pull you away where you don't commit further crimes, and therein lies my last regret, and that is that I can't give you any more time right now then five (5) years in the state prison, because if it were in my authority, your sentence would be two times, three times that length. That's all I can sentence you to right now, because that's a maximum for the offense you've committed.

> Having condisered the Pre-sentence Investigation report in this case and being advised of your convictions and you having previously been adjudicated guilty of the offense for which you were tried and found guilty, it is the judgement of the law and sentence of the court that you, Randall Wayne Walcott, be committed into the care and custody of the Department of Corrections of the state of Florida to serve a term of five (5) years in the state prison. The court retains jurisdiction over that part of your sentence, the maximum part of your sentence allowed by law.

(R 224-226).

Thereafter, respondent objected to the sentence by advising the court:

> . . . to note for the record my objection your retention of jurisdiction in this case in that the evidence doesnt'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.

(R 227-228).

Subsequently the court in the written sentencing order did retain jurisdiction for two and one-half (2 1/2) years pursuant to a five (5) year imprisonment term (R 323). No other objections either written or oral were given by respondent either at the sentencing phase itself or in a post-sentencing motion pursuant to Florida Rules of Criminal Procedure 3.800(a) or 3.850.

On appeal, respondent argued that the court could not retain jurisdiction pursuant to section 947.16, Florida Statutes (1981), in that burglary of a structrue was not a statutorily designated offense whereby a trial court could excercise such power. Secondly, respondent objected to the retention of jurisdiction because the trial judge allegedly failed to state the justification for retention with individual particularity on the record pursuant to section 947.16(3)(a), Florida Statutes (1981). The last argument on appeal was that the statute as applied to the respondent allowed the trial court to retain up to one-third of the total sentence; not one-half.

SUMMARY OF ARGUMENT

A defendant who stands mute at sentencing in the face of judicial error should be forced to waive any sentencing error if it is not fundamental or be relegated to a collateral attack in the trial court initially if that putative sentencing error is deemed to be fundamental.

ARGUMENT

RESPONDENT SHOULD HAVE MADE A CONTEMPORANEOUS OBJECTION TO ANY ALLEGED SENTENCING ERROR AND BY NOT DOING SO SHOULD FORFEIT HIS RIGHT TO DIRECT APPEAL AND BE RELAGATED TO A COLLATERAL ATTACK TO REMEDY A FUNDAMENTAL SENTENCING ERROR IF ANY.

Respondent, for the first time on appeal in the Fifth District, raised three (3) issues regarding the retention of jurisdiction pursuant to section 947.16(3), Florida Statutes (1981). The first two issues, regarding the trial court giving sufficient justification on the record and regarding the statutory time that the trial court could retain jurisdiction, had not been decided by the Fifth District Court of Appeal in its opinion of Walcott v. State, 9 F.L.W. 2428, (Fla. 5th DCA, Nov. 15, 1984). The Fifth District did decide that the retention power was not justified whatsoever, inasmuch as burglary of a structure was not one of the enumerated offenses whereby the trial court could excercise this power. Petitioner will initially address this last issue inasmuch as the other two issues cannot be decided until this first issue is resolved.

The Fifth District, in Walcott commenting on the objection stated:

> Although not couched in the most artful language, it appears sufficient to advise the trial court of defendant's objection. We are mindful of the admonition that ". . . magic words are not needed to make a proper objection." (citation omitted)

Id. at 2428. Perusing the objection [(R 227-228) see also, statement of facts, supra], it is readily apparent that the objection does not remotely apprise the trial court that the trial court cannot retain jurisdiction for the offense of burglary of a structrue. In fact, looking at the objection, it would appear that the objection subsumes that the trial court does have the power to retain jurisdiction for the offense in the case at bar because the objection only argues that the evidence does not warranty retaining jurisdiction. In Steinhurst v. State, 412 So.2d 332 (Fla. 1982), this court held that an objection below must be the specific ground argued on appeal or else the point will not be preserved for appeal. Petitioner submits that if any contemporaneous objection requirement exists for sentencing, then the objection requriement must be no less stringent for purposes of sentencing than it would be for purposes pertaining to trials.

Section 924.06(1)(a), Florida Statutes (1981), gives an appeal to a defendant by right from a conviction. Yet it is axiomatic and well established that this appeal right is lost where no objection or adequate objection has been presented to the trial court below (unless the error is of a fundamental nature). Examples of the latter proposition would be Rose v. State, 425 So.2d 521 (Fla. 1982), (complaint regarding excusal of perspective jurors waived); Malloy v. State, 382 So.2d 1190 (Fla. 1979), (complaint regarding admission of events waived); Clark v. State, 366 So.2d 331 (Fla. 1978), (complaint regarding comment upon a defendant's right to remain silent not made below

and thus not preserved); Castor v. State, 365 So.2d 701 (Fla. 1978), (complaint regarding a jury instruction deemed waived); and Wilson v. State, 436 So.2d 908 (Fla. 1983), (an objection regarding closing argument deemed waived).

Likewise, under section 924.06(1)(d), Florida Statutes (1981), a defendant by right may appeal an illegal sentence. But this appeal right should not be absolute. The requirements of making a contemporaneous objection in the trial court to appeal should likewise be required for section 924.06(1)(d). If a sentencing error is not fundamental and the trial court has not been apprised of any puntative error, then the same rule that applies to appeals pertaining to convictions should also apply for sentencing appeals. If the sentencing error is fundamental, a defendant may file a post sentence motion pursuant to Florida Rule of Criminal Procedure 3.800(a), or file a collateral attack pursuant to Florida Rule of Criminal Procedure 3.850.

No doubt respondent will submit that the case of Rhoden v. State, 448 So.2d 1013 (Fla. 1984), has abolished any contemporaneous objection requirement regarding sentencing. Petitioner submits that this court has not completely abolished this rule. In State v. Scott, 439 So.2d (Fla. 1983), a defendant was being resentenced pursuant to a Villery violation. This resentencing was awarded as the result of the defendant's filing a motion pursuant to rule 3.850. On review of the resentencing, the Florida Supreme Court held that defendant was entitled to counsel. In so holding the court stated:

> It would be wasteful of the court's time and of limited resources of the appellate system to deny the sentencing judge the benefit of contemporaneous objections to a sentence and the concomitant opportuity to correct errors at the sentencing hearing.

Id. at 221. In lieu of this holding, petitioner submits that this court has not abolished the contemporaneous objection rule pursuant to sentencings.

In further support of this premise this court should consider its case in Williams v. State, 414 So.2d 509 (Fla. 1982). There the issue was whether section 947.16(3) as applied to this particular defendant was an ex post facto law. This court did specifically consider whether the objection was preserved. This court explained that general objections were not sufficient. Although in Williams, the record did disclose that there was a sufficient and specific objection, clearly this court examined and discussed the issue with a view towards applying the contemporaneous objection rule.

In Rhoden, supra the court was under a mandatory statutory duty to consider the criteria in section 39.111, Florida Statutes (1983), before sentencing a juvenile convicted as an adult to adult sanctions. This court quoted section 39.111(6)(j), Florida Statutes (1983), which states:

> . . . It is the intent of the legislature that the foregoing criteria and guidelines shall be mandatory in that a determination of disposition pursuant to this subsection is subject to the right of a child to appellate review pursuant to S. 39.14.

Furthermore, section 39.111(d), Florida Statutes (1983), mandates that any decision to impose adult sanctions must be in writing and must be in conformity with each of the criteria specified in the statute by which the court must evaluate whether to sentence the juvenile as an adult or not. Again, this subsection mandates that such an order shall be reviewable on appeal by the child pursuant to section 39.14, Florida Statutes (1983). In Rhoden, the trial court failed to address the criteria whatsoever. Significantly, this court stated:

> This right of sentence review is not provided to adults.

Id. at 1017. Rhoden's holding can be limited to this unique appellate remedy accorded to a juvenile under these circumstances as evidenced by the above quote from the opinion. Furthermore, the First District, in Cofield v. State, 453 So.2d 409 (Fla. 1st DCA 1984), further distinguished Rhoden as being limited to instances where sentencing judges failed to perform a mandatory duty. In the case at bar, the issue on review deals with a discretionary statute.

But there are even more cogent reasons to apply a contemporaneous objection rule at sentencing. A trial court should be given an opportunity to address any alleged sentencing error initially before any review court entertains the issue. By giving the trial court the first opportunity to address the issue (pursuant to rules 3.800(a) or 3.850), appellate courts may never have to review the sentence. If a defendant subsequently can note to the trial court a fundamental error, then

the trial court can either correct it or can give reasons and support why it will not alter the sentence. Not only would this policy prevent tedious litigation (whereby a trial court could initially correct its own errors), but would also 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.

Additionally, a defendant who remains mute while a judge imposes an illegal sentence should bear the burden of bringing a collateral attack against the sentence, since the error could have been corrected at the initial sentencing hearing had he brought it to the trial court's attention.

Petitioner submits that the objection interposed (R 227-228) was again not sufficient at all to apprise the trial court that the time of retention should be limited to one-third of the sentence as opposed to one-half. Again the same principles discussed above would be applicable to this issue.

Respondent's last argument on direct appeal was that the trial court had not stated the justification for obtaining jurisdiction with particularity pursuant to section 947.16(3)(a). Petitioner notes that again, the objection does not apprise the trial court of this specific ground, but merely challenges the sufficiency of the evidence to retain jurisdiction (R 227-228). Even if this court does find that the objection interposed was sufficient at least for this ground, petitioner submits that the trial court's comments [R 224-226 (<u>see also</u>, statement of the

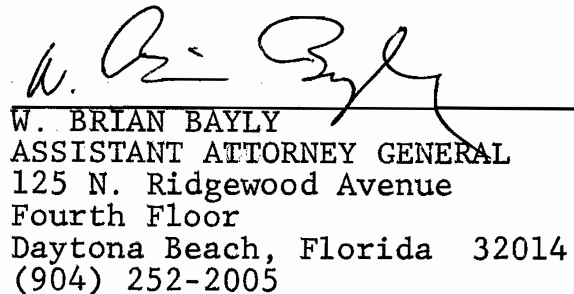
facts, supra)] at sentencing would be sufficient to comply with this requirement.

CONCLUSION

BASED UPON, the cases, authorities, and arguements presented herein, petitioner respectfully requests this honorable court to reverse the Fifth District Court of Appeal's opinion in Walcott v. State, 9 F.L.W. 2428, (Fla. 5th DCA, Nov. 15, 1984) to the extent that the opinion vacated the retention of jurisdiction. Furthermore, petitioner respectfully requests this honorable court to affirm the conviction and sentence in the case at bar and hold that respondent's remedy pursuant to any alleged sentencing error be corrected by collateral attack.

Respectfully submitted,

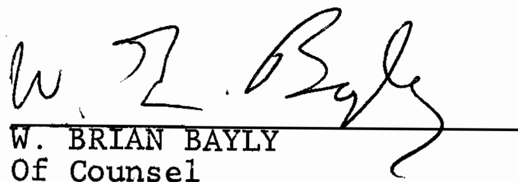
JIM SMITH
ATTORNEY GENERAL



W. BRIAN BAYLY
ASSISTANT ATTORNEY GENERAL
125 N. Ridgewood Avenue
Fourth Floor
Daytona Beach, Florida 32014
(904) 252-2005

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Brief on the Merits has been furnished, by mail, to Lucinda H. Young, Assistant Public Defender for Respondent at 1012 S. Ridgewood Avenue, Daytona Beach, Florida 32014, this 28th day of January, 1985.



W. BRIAN BAYLY
Of Counsel