IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 67,320

WILLIE PEARL WHITFIELD,

Respondent.
_____/

INITIAL BRIEF OF PETITIONER ON THE MERITS

JIM SMITH
Attorney General

JOHN W. TIEDEMANN
Assistant Attorney General
The Capitol
Tallahassee, FL 32301
(904) 488-0290

COUNSEL FOR PETITIONER

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INITIAL BRIEF OF PETITIONER ON THE MERITS

PRELIMINARY STATEMENT

Petitioner, the State of Florida, the prosecuting authority and appellee below in Whitfield v. State, ___So.2d___ (Fla. 1st DCA 1985), 10 F.L.W. 1564, will be referred to as "the State." Respondent, Willie Pearl Whitfield, the criminal defendant and appellant below, will be referred to as "respondent."

Pursuant to Fla.R.App.P. 9.120(d), a conformed copy of the decision under review is attached to this brief as an appendix. References to the four volume record on appeal will be designated "(R:)."

All emphasis will be supplied by the State.

STATEMENT OF THE CASE AND FACTS

This case reaches this Court upon its July 12, 1985 acceptance of certiorari jurisdiction to resolve the following question certified by the First District as being of great public importance under Fla.R.App.P. 9.030(a)(2)(A)(v):

> IS THE DECISION IN STATE V. RHODEN, 448 So.2d 1013 (FLA. 1984) TO BE LIMITED TO THOSE SITUATIONS IN WHICH A STATUTE PLACES A MANDATORY DUTY UPON THE TRIAL COURT TO MAKE SPECIFIC FINDINGS OR SHOULD RHODEN BE CONSTRUED TO MEAN THAT A DEFENDANT NEED NOT CONTEMPORANEOUSLY OBJECT TO ANY ALLEGED SENTENCING ERROR IN ORDER TO PRESERVE THAT ISSUE FOR APPEAL?

Those matters essential to a resolution of this narrow legal issue, and to a resolution of two related legal issues which the State properly preserved and presented below and hence is entitled to raise here, see Tillman v. State, ___So.2d___ (Fla. 1985), 10 F.L.W. 305, may be summarized as follows:

On April 24, 1984, the State filed an information in the Circuit Court for the Eighth Judicial Circuit in and for Alachua County, Florida, charging respondent with the March 28 aggravated battery of Frank J. Ferdella with intent to cause permanent disfigurement while armed with a deadly weapon in violation of §784.045(1)(a-b), Fla.Stat. (R 6). At trial on July 25, 1984, the State established that:

> the victim was admitted to a Gainesville hospital on the morning of the crime with a 6-inch laceration on his arm. An operation was performed to restore the muscle and nerve, but the victim nonetheless suffered some permanent loss of function in his arm and hand.

Whitfield v. State, 10 F.L.W. 1564,1565. Respondent never denied that she had inflicted these serious injuries upon Mr. Ferdella with a broken bottle during the altercation which led to the charge against her, but only argued that such had occurred either accidentally or in self-defense (R 351-355; 416; 440; 77-79). The jury nonetheless found respondent guilty of the lesser included offense of aggravated assault (R 68).

The trial judge adjudicated respondent guilty and proceeded immediately to sentencing (R 438). Pursuant to his responsibilites under Fla.R.Crim.P. 3.701(d)(1), the prosecutor submitted a sentencing guideline scoresheet apparently prepared in contemplation of an aggravated battery conviction which included an assessment of 36 points for the severe victim injury which respondent had indisputably inflicted upon Mr. Ferdella (R 438-439; 73-74). The total number of points assessed on the scoresheet was 125, which assessment mandated a sentence of from 12 to 30 months of either community control or incarceration (R 73-74). The judge recited all of the points assessments in open court, including the 36 points for severe victim injury, and inquired of defense counsel:

> [D]o you have any information that would indicate that that point split is inaccurrate?

And defense counsel replied:

> No, your Honor.

(R 439). Counsel then examined the scoresheet pursuant to his responsibilities under Rule 3.701(d)(1) and signed it to certify

that it had been "[r]eviewed as to accuracy of point totals" (R 439-440; 73).

Although twice agreeing with the total points assessed and hence the recommended sentencing range as described, defense counsel urged that respondent spend her indicated 12 to 30 months under community control rather than in prison (R 440-441). The prosecutor urged that the maximum recommended sentence of 30 months be imposed given respondent's prior convictions for robbery and battery, plus her infliction of both physical and financial injury upon the victim (R 438-439; 441). The judge accepted the prosecutor's recommendation and imposed 30 months of incarceration, indicating in the process that he would not depart to impose a higher sentence, given his belief that respondent's trial testimony was perjured, only out of respect for the finding of the jury (R 442-443).

Respondent filed her timely notice of appeal to this Court on August 7, and simultaneously filed a Fla.R.Crim.P. 3.800 motion to correct sentence with the trial judge, arguing for the first time that Fla.R.Crim.P. 3.701(d)(7) precluded the assessment of points for victim injury because such was not an element of the offense of aggravated assault (R 84-86). This motion was denied on August 27 (R 90).

Respondent pursued her argument concerning the impropriety of assessing points for victim injury on direct appeal, relying upon Motyka v. State, 457 So.2d 1114 (Fla. 1st DCA 1984), see also Toney v. State, 456 So.2d 569 (Fla. 2nd DCA 1984), in arguing for a remand for resentencing

seemingly with prejudice to a sentencing departure. The State candidly answered that the point assessment was improper, but argued that a remand for resentencing was not indicated because scoring errors were not appealable, because this scoring error was obviously not the subject of a specific contemporaneous objection insofar as it was twice invited by defense counsel, and because this scoring error was essentially harmless given that convincing reasons existed which would have prompted and justified the judge to enter a sentencing departure from the correct guideline recommendation of any non-state prison sanction in any event. Respondent replied by pungently taking issue with the State's view that the facts below supported an interpretation that the sentencing error complained of upon appeal was invited by defense counsel. Holding only that counsel's failure to contemporaneously object to the scoring error did not preclude appellate review thereof, the First District reversed and remanded for resentencing evidently without prejudice to a departure, certifying the aforeindicated question to this Court in the process. Two days later, the First District, in Dailey v. State, ___So.2d___(Fla. 1st DCA 1985), 10 F.L.W. 1583, on motion for rehearing denied, 10 F.L.W. 1584, review granted, (Fla. 1985), Case No. 67,381, stated that had the instant scoring error presented a question of fact rather than law, as in that case, it would have found the lack of a contemporaneous objection thereto a bar to appellate review. The Dailey court certified the following question, similar to that certified here, to this Court as being of great public importance:

DOES THE CONTEMPORANEOUS OBJECTION RULE APPLY TO PRECLUDE APPELLATE REVIEW OF AN ALLEGED SENTENCING ERROR UNDER THE GUIDELINES WHERE THE ERROR CLAIMED INVOLVES FACTUAL MATTERS THAT ARE NOT APPARENT OR DETERMINABLE FROM THE RECORD ON APPEAL?

Id., 10 F.L.W. 1584. See also Bradley v. State, ___So.2d___ (Fla. 2nd DCA 1985), 10 F.L.W. 1544.

SUMMARY OF ARGUMENT

This Court should answer the certified question by reconfirming the viability of the contemporaneous objection rule in the noncapital sentencing context by holding that its decision in State v. Rhoden, 448 So.2d 1013 (Fla. 1984) does not mean that a criminal defendant need not contemporaneously and specifically object to any alleged sentencing error in order to preserve that issue for appeal, but rather means that such an objection is unnecessary only where a trial judge has failed to make specific sentencing findings as mandated by statute without affording the defendant an opportunity to object thereto. The Florida trial judge should not be an insurer for the actions of defense counsel.

Regardless of how this Court answers the certified question, it should reverse the decision of the First District and reinstate the sentence imposed either because sentencing guideline scoring errors are not reviewable, or because the instant scoring error was harmless, since the judge would have had valid reasons to impose the sentence actually imposed via a departure, and would clearly have done so.

ISSUES PRESENTED ON APPEAL

ISSUE I

THIS COURT'S DECISION IN STATE V. RHODEN, 448 So.2d 1013 (FLA. 1984) DOES NOT MEAN THAT A DEFENDANT NEED NOT CONTEMPORANEOUSLY AND SPECIFICALLY OBJECT TO ANY ALLEGED SENTENCING ERROR IN ORDER TO PRESERVE THAT ISSUE FOR APPEAL; RATHER, THIS DECISION MEANS THAT SUCH AN OBJECTION IS UNNECESSARY ONLY WHERE A TRIAL JUDGE HAS FAILED TO MAKE SPECIFIC SENTENCING FINDINGS AS MANDATED BY STATUTE WITHOUT AFFORDING THE DEFENDANT AN OPPORTUNITY TO OBJECT THERETO.

ISSUE II

REGARDLESS OF HOW THIS COURT ANSWERS THE CERTIFIED QUESTION, IT SHOULD REVERSE THE DECISION OF THE FIRST DISTRICT AND REINSTATE THE SENTENCE IMPOSED EITHER BECAUSE SENTENCING GUIDELINE SCORING ERRORS ARE NOT REVIEWABLE, OR BECAUSE THIS SCORING ERROR WAS HARMLESS.

ISSUE I

THIS COURT'S DECISION IN STATE V. RHODEN, 448 So.2d 1013 (FLA. 1984) DOES NOT MEAN THAT A DEFENDANT NEED NOT CONTEMPORANEOUSLY AND SPECIFICALLY OBJECT TO ANY ALLEGED SENTENCING ERROR IN ORDER TO PRESERVE THAT ISSUE FOR APPEAL; RATHER, THIS DECISION MEANS THAT SUCH AN OBJECTION IS UNNECESSARY ONLY WHERE A TRIAL JUDGE HAS FAILED TO MAKE SPECIFIC SENTENCING FINDINGS AS MANDATED BY STATUTE WITHOUT AFFORDING THE DEFENDANT AN OPPORTUNITY TO OBJECT THERETO.

ARGUMENT

Should Florida criminal defendants generally be held strictly liable for the actions of their counsel, or should Florida trial judges generally be insurers for the actions of defense counsel? This case, the State submits, forces this Court to answer this critical question

* * *

In earlier times, the Florida courts regularly considered upon appeal issues which litigants had technically failed to preserve. State v. Jones, 204 So.2d 515 (Fla. 1967). But the reason for this liberality vanished with the United States Supreme Court's landmark decision in Gideon v. Wainwright, 372 U.S. 335 (1963) that all indigent felony defendants in this country are constitutionally entitled to the effective assistance of counsel as a matter of right:

> Application of the exception [to the rule requiring a contemporaneous objection in the absence of fundamental error as a prerequisite to appellate review of a putative error] 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.

State v. Jones, 204 So.2d 515,519. Faithful to these sentiments, this Court thereafter refused to consider in a variety of contexts alleged errors which had not been accompained by specific contemporaneous objections, see e.g., State v. Smith, 240 So.2d 807 (Fla. 1970), State v. Barber, 301 So.2d 7 (Fla. 1974), Clark v. State, 363 So.2d 331 (Fla. 1978), Castor v. State, 365 So.2d 701 (Fla. 1978), Lucas v. State, 376 So.2d 1149 (Fla. 1979) and State v. Cumbie, 380 So.2d 1031 (Fla. 1980), including alleged errors committed in capital sentencing proceedings, see, e.g., Ford v. Wainwright, 451 So.2d 471 (Fla. 1984) and Rose v. State, 461 So.2d 84 (Fla. 1984).[1] Unfortunately, in a recent

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1 These affirmations of the contemporaneous objection rule were frequently accompained by emphatic declarations such as "the fundamental error [exception shall not be employed as an] 'open sesame' for consideration of alleged trial errors not properly preserved", State v. Smith, 240 So.2d 807,810 (Adkins,J.), quoting Gibson v. State, 194 So.2d 19,20 (Fla. 2nd DCA 1967); "[a]n appellate court *must* confine itself to a review of only those questions which were before the trial court and upon which a ruling adverse to the appealing party was made", State v. Barber, 301 So.2d 7,9; and "appellate counsel must [ordinarily] be bound by the acts of trial counsel", Castor v. State, 365 So.2d 701,703.

line of decisions commencing with State v. Rhoden, 448 So.2d 1013 (Fla. 1984) and including Walker v. State, 462 So.2d 452 (Fla. 1985), State v. Snow, 462 So.2d 455 (Fla. 1985), and State v. Walcott, ___So.2d___(Fla. 1985), 10 F.L.W. 363, this Court has, inconsistently with its aforecited precedents, promulgated an exception to the rule requiring contemporaneous objections in the sentencing context, essentially holding that where a trial judge fails to make specific sentencing findings as mandated by statute, no objection is required to preserve the point for appeal. The State believes that the exception of State v. Rhoden and its progeny should be expressly limited to those situations in which the trial judge has failed to make statutorily required sentencing findings without affording the defendant an opportunity to object thereto - as was the case in State v. Rhoden itself.[2] Such a limitation would be thoroughly consistent with this Court's prior decisions, and thus serve all three interrelated rationales customarily advanced for the rule requiring contemporaneous objections, which the State shall now review and relate to the instant case:

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2 If the judge has imposed a sentence in excess of the maximum authorized by statute, whether or not the defendant has objected thereto, the defendant has a remedy either by direct appeal, see §924.06(1)(d) and Fla.R.App.P. 9.140(b)(1)(D), Williams v. State, 280 So.2d 518 (Fla. 3rd DCA 1973) and Cleveland v. State, 287 So.2d 347 (Fla. 3rd DCA 1973), or preferably, in order to give the trial judge the opportunity to rectify his own error, by a Fla.R.Crim.P. 3.850 motion to correct illegal sentence, which the defendant may appeal in the event of its denial, see Kelly v. State, 359 So.2d 493 (Fla. 1st DCA 1978).

1. The contemporaneous objection rule ensures that the trial judge will have the opportunity to either correct a possibly erroneous ruling on the spot or explain his reasons for standing firm, thus permitting full development of the record for appellate court review.

As this Court recently explained in justifying its refusal to review the alleged impropriety of admitting certain evidence:

> If appellant had objected to the evidence on the ground he now relies upon, the trial court could have made a determination of whether there was an adequate reason for excluding the evidence. The court could have inquired into the question of whether the precise quality or substance of the solution used should be a matter of predicate to the admissibility of the test by reason of its effect on the test's reliability. Because appellant did not raise this issue below, the trial court did not have an opportunity to evaluate and rule on this question. An appellate court is in a weak position to rule on the legal issue of admissibility of scientific evidence when, because of the lack of an objection or motion below, there is no unfolding of the factual basis upon which the legal question turns.

Troedel v. State, 462 So.2d 392,396 (Fla. 1984)(Boyd, C.J.). See also Cardinale v. Louisiana, 394 U.S. 437 (1969); Wainwright v. Sykes, 433 U.S. 72,88 (1977); United States ex.rel. Caruso v. Zelinsky, 689 F.2d 435,441 (3rd Cir. 1982).

In this case, had defense counsel objected to the putative scoring error, the trial judge would surely have departed for legitimate reasons to impose the exact same sentence, as explained under Issue II.

2. The contemporaneous objection rule ensures that the parties will concentrate their efforts on trial proceedings as the "main event" in the criminal justice process, thereby encouraging an orderly approach to litigation, a just result, finality in litigation, and the consequent conservation of judicial resources and labor.

The United States Supreme Court has decreed that as a matter of policy, "the state trial on the merits [should be] the 'main event'" in the criminal justice process, "rather than a 'tryout on the road'" for subsequent proceedings. Wainwright v. Sykes, 433 U.S. 72,90. The reasons for this policy have been well stated by this Court on several recent occasions:

> The importance of finality in any justice system, including the criminal justice system, cannot be understated. It has long been recognized that, for several reasons, litigation must, at some point, come to an end. In terms of the availability of judicial resources, cases must eventually become final simply to allow effective appellate review of other cases....Moreover, an absence of finality casts a cloud of tentativeness over the criminal justice system, benefiting neither the person convicted nor society as a whole.

Witt v. State, 387 So.2d 922,925 (Fla. 1980), cert. denied, 449 U.S. 1067 (1980). As Mr. Justice Ehrlich wrote for a unanimous Court in State v. Scott, 439 So.2d 219,221 (Fla. 1983) in the course of explaining the desirability of mandating the defendant's presence at a certain Fla.R.Crim.P. 3.850 resentencing proceeding:

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

See also Walker v. State, 462 So.2d 452,454-455, in which Mr. Justice Shaw, concurring, deplored the waste of societal resources inherent in evaluating unpreserved sentencing errors. See also United States ex.rel. Caruso v. Zelinsky, 689 F.2d 435, 441-442.

In this case, had defense counsel objected to the putative scoring error, the error would have been corrected and would not have been an issue upon direct appeal and certiorari.

3. The contemporaneous objection rule removes the incentive for defense attorneys to permit erroneous rulings in silence as insurance policies against an untoward outcome, and thus promotes the integrity of the legal profession.

In Cruz v. State, 465 So.2d 516,517 (Fla. 1985), cert. denied, ___U.S.___(1985), 37 Crim.L.Rptr. 4098, this Court decried police conduct which it believed would "induce an otherwise innocent individual to commit" a crime. Along similar lines, the Court had earlier recognized that the judicial promulgation of a rule liberally excusing the requirement of a contemporaneous objection as a prerequisite to appellate review of an alleged error had the unfortunate side side effect of inducing:

> defense counsel to stand mute if he chose to do so, knowing all the while that a verdict against him client was thus tainted and would not stand. By such action defendant had nothing to lose and all to gain, for if the verdict be "not guilty" it remainded unassailable.

> Such procedure is unmindful that an important function of an attorney in a trial is to assist the court.

State v. Jones, 204 So.2d 515,518; see also Wainwright v. Sykes, 433 U.S. 72,89; Clark v. State, 363 So.2d 331,333; United States ex.rel Caruso v. Zelinsky, 689 F.2d 435,442; York v. State, 232 So.2d 767 (Fla. 4th DCA 1969), and Fischer v. State, 429 So.2d 1309, 1313 (Fla. 1st DCA 1983), review denied, 438 So.2d 834 (Fla. 1983)(Joanos, J., dissenting). A procedure which offers defense counsel the Hobson's choice of ethically objecting to a judicial error and thus injuring his client's chances of reversal upon appeal in the event of an unassailable but equally disadvantageous correction, or of unethically remaining silent and thus enhancing his client's chances of reversal, is unconscionable and should be condemned.

In this case, had defense counsel objected to the putative scoring error, the First District would not have promulgated a rule which has the doubtlessly unintentional effect of encouraging other counsel to remain silent as to scoring errors, lest the judge merely exercise his discretion to depart should they speak up.

In conformity with the foregoing principles and its aforecited procedents, this Court should expressly limit its decision in State v. Rhoden and its progeny to mean only that a defendant need not specifically and contemporaneously object to alleged sentencing errors to preserve such issues for appeal only where a trial judge had failed to

make specific sentencing findings as mandated by statute without affording the defendant an opportunity to object thereto. Such limitation would preclude appellate review over the instance nonstatutory scoring error, to which defense counsel not only failed to object when given the opportunity but instead acceded thereto; compare State v. Swint, 464 So.2d 243 (Fla. 2nd DCA 1985). Although the State believes this scoring error was invited inadvertently rather than deliberately, the systemic damages resulting therefrom - the denial to the trial judge of his alternative prerogative to depart, the nondevelopment of the record, the consequent disorderliness of subsequent proceedings, and the attendant waste of societal resources - remain the same. These considerations compel the enforcement of the contemporaneous objection rule in this case.

* * *

The State's proposed limitation of State v. Rhoden would, if accepted by this Court, obviously have the general effect of holding Florida criminal defendants strictly liable for the actions of their counsel. Should this Court disagree with this proposed limitation and thus essentially hold that Florida trial judges are generally insurers for the actions of defense counsel, the State would respectfully suggest that the Court promote the effective functioning of the Florida criminal justice system by also holding prospectively that, where an error is fundamental enough for an appellate court to predicate a reversal thereupon even absent a specific

contemporaneous objection, counsel's failure to so object should be cause for some form of meaningful sanctioning, cf Fla.R.App.P. 9.410. As this Court explained in State v. Meyer, 430 So.2d 440,443 (Fla. 1983):

> All attorneys, whether state-supplied or privately retained, are under the professional duty not to neglect any legal matters entrusted to them. Fla.Bar Code Prof.Resp., D.R. 6-101(a)(3). Lack of knowledge of or compliance with prescribed rules of practice and procedure is a dereliction of professional responsibility not easily excused, which may subject the negligent attorney to liability for damages to the client as well as disciplinary proceedings before The Florida Bar.

Cf United States v. Hasting, ___U.S.___, 76 L.Ed.2d 96 (1983) and State v. Murray, 443 So.2d 955 (Fla. 1984). As the United States Supreme Court recently stated:

> [A] State may certainly enforce vital procedural rule by imposing sanctions against the attorney, rather than against the client. Such a course may well be more effective than the alternative of refusing to decide the merits of an appeal and will reduce the possibility that a defendant who was powerless to obey the rules will serve a term of years in jail on an unlawful conviction.

Evitts v. Lucey, ___U.S.___, 83 L.Ed.2d 821,832 (1985).

ISSUE II

REGARDLESS OF HOW THIS COURT ANSWERS THE CERTIFIED QUESTION, IT SHOULD REVERSE THE DECISION OF THE FIRST DISTRICT AND REINSTATE THE SENTENCE IMPOSED EITHER BECAUSE SENTENCING GUIDELINE SCORING ERRORS ARE NOT REVIEWABLE, OR BECAUSE THIS SCORING ERROR WAS HARMLESS.

ARGUMENT

This Court is obliged to answer the aforediscussed certified question vesting it with jurisdiction over this cause. See State v. Hegstrom, 401 So.2d 1343 (Fla. 1981). However, regardless of how this Court answers this question, its decision on this point will have the status of an advisory opinion, see State v. Kinner, 398 So.2d 1360 (Fla. 1981), insofar as the decision of the First District must be reversed and the sentence imposed reinstated either because sentencing guideline scoring errors are not reviewable, or because this scoring error was harmless. These positions will be developed sequentially.

The right to appeal a departure from the maximum sentence recommended under the guidelines is authorized by §§921.001(5) and 924.06(1)(e), Fla.Stat. and Fla.R.App.P. 9.140 (b)(1))(E).[3] These authorities contain no comparable authorization

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3 These provision reads as follows:

(Continued on next page)

for appellate review of a scoring error committed in computing this maximum recommended sentence, and the State would submit that the lack of such authorization precludes such review. Respondent will doubtlessly complain that scoring error are reviewable under the theory that they can result in de facto departures. However, this theory constitutes an interpretation of the applicable statutes and rule, contrary to the axiom that "[w]here the[ir] language is unambiguous, [they] must be accorded the[ir] plain and ordinary meaning." Rowe v. State, 394 So.2d 1059 (Fla. 1st DCA 1981). Unless the right to appeal a sentence is plainly authorized by statute, none exists. See Banks v. State, 342 So.2d 469 (Fla. 1976), Brown v. State, 13 So.2d 458 (Fla. 1943), and Weatherington v. State, 262 So.2d 724 (Fla. 3rd DCA 1972), cert. denied, 267 So.2d 330 (Fla. 1972), cert. denied, 411 U.S. 968 (1973), affirming the pre-guideline

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Footnote 3 Continued

921.001 Sentencing Commission....
(5) Sentences imposed by trial court judges must be in all cases within any relevant minimum and maximum sentence limitations provided by statute and must conform to all other statutory provisions. The failure of a trial court to impose a sentence within the sentencing guidelines shall be subject to appellate review pursuant to chapter 924.

924.06 Appeal by defendant.--
(1) A defendant may appeal from....
(e) A sentence imposed outside the range recommended by the guidelines authorized by s. 921.001.

Rule 9.140. Appeal Proceedings in Criminal cases....
(b) Appeals by Defendant.
(1) *Appeals Permitted.* A defendant may appeal....
(E) A sentence when required or permitted by general law.

tradition that the alleged severity of a sentence within statutory parameters was not appealable; cf Parker v. State, 214 So.2d 632 (Fla. 2nd DCA 1978), Kelly v. State, 359 So.2d 493 (Fla. 1st DCA 1978), Bertone v. State, 388 So.2d 347 (Fla. 1st DCA 1980), and Butler v. State, 343 So.2d 93 (Fla. 3rd DCA 1977), collectively standing for the proposition that unless a sentence is illegal as in excess of statutory maximum, a trial court's denial of a criminal defendant's Fla.R.Crim.P. 3.800 motion to correct sentence is not appealable. Respondent's sentence for aggravated assault was not in excess of that which could have lawfully been imposed by statute, see §§784.021(2) and 775.082(3)(d), Fla.Stat.; hence, she had no true appeal thereof, and her attempt at such should have been dismissed.

Of course, respondent has a remedy available to her to challenge the erroneous point assessment, that of filing a 3.800 motion with the trial court following the conclusion of this proceeding. Respondent may argue that such would be a futility in view of the fact that the judge below has already denied one such motion; however, chances are that this denial was predicated primarily upon the legally correct ground that the judge had no jurisdiction to hear the motion due to the pendancy of respondent's appeal, see State ex.rel. Faircloth v. District Court of Appeal, Third District, 187 So.2d 890 (Fla. 1966). Although the denial of a properly filed 3.800 motion by the trial judge would not be reviewable as explained, respondent and this Court should not presume that the judge would act dishonorably.

As the Fifth District recently explained in rejecting the stock defense contention that every time a trial judge advances one invalid reason for a sentencing departure the sentence imposed must be reversed and the cause remanded for resentencing (hopefully by a different judge) regardless of how many valid reasons for the departure were simultaneously advanced:

> We assume the trial judge understood his sentencing discretion and understood that the mere existence of "clear and convincing reasons" for departing from the sentencing guidelines never requires the imposition of a departure sentence and that the trial judge believed that a sentence departing from the guidelines should be imposed in this case if legally possible. Accordingly, a departure sentence can be upheld on appeal if it is supported by any valid ("clear and convincing") reason without the necessity of a remand in every case. This assumption in the trial judge's continuing belief in the propriety of a departure sentence is especially safe in view of the trial court's great discretion under Florida Rule of Criminal Procedure 3.800(b) to reduce or modify even a legal sentence imposed by it within sixty days after receipt of an appellate mandate affirming the sentence on appeal.

Albritton v. State, 458 So.2d 320 (Fla. 5th DCA 1984), review granted (Fla. 1985), Case No. 66,137.

Respondent would probably prefer that this Court correct the instant scoring error now in lieu of asking the trial judge to do so later not out of any fear that the judge could not be trusted, but rather out of the fear that after the judge had corrected the error he would simply depart to reimpose the original sentence based upon the valid predicate that the

true guideline-recommended sentence would not be commensurate with the seriousness of the offense given that she cruelly and indisputably caused her victim serious physical, financial, and emotional injury. Compare Williams v. State, 454 So.2d 751 (Fla. 1st DCA 1984), Hunt v. State, ___So.2d___(Fla. 1st DCA 1985), 10 F.L.W. 1223, Green v. State, 455 So.2d 586 (Fla. 2nd DCA 1984), Moore v. State, ___So.2d___(Fla. 3rd DCA 1985), 10 F.L.W. 1200, and Weems v. State, ___So.2d___(Fla. 1985), 10 F.L.W. 268. As noted, the judge basically relied upon these factors as reasons to sentence respondent to the maximum term of imprisonment ostensibly mandated within the guidelines, and indicated that if anything he was leaning towards a higher sentence (R 442-443).[4] Due to the inevitability of a thirty-month sentence, the State would submit that the fact that it was imposed as the result of an erroneous assessment of points for victim injury rather than through a readily-sustainable departure would be harmless error even if scoring errors were reviewable. Compare Hart v. State, 464 So.2d 592 (Fla. 2nd DCA

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4 Respondent may attempt to argue that the record does not clearly demonstrate that the judge would have departed if asked. But such will only be conjecture and "[r]eversible error cannot be predication upon conjecture." Sullivan v. State, 303 So.2d 632,635 (Fla. 1974), cert. denied, 428 U.S. 911 (1976); Jacobs v. Wainwright, 450 So.2d 200 (Fla. 1984), cert. denied, ___U.S.___, 83 L.Ed.2d 205 (1984)(Adkins, J.).

1985); cf McClain v. State, 356 So.2d 1256 (Fla. 2nd DCA 1978). As the United States Supreme Court recently stated:

> [W]hen courts fashion rules whose violations mandate automatic reversals, they retreat from their responsibilities, becoming instead impregnable citadels of technicality.

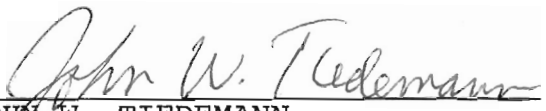
United States v. Hasting, 76 L.Ed.2d 96,106 (attribution omitted); see also Williams v. State, 468 So.2d 335 (Fla. 1st DCA 1985). In other words, a remand for resentencing here would be a useless act, and axiomatically courts are not required to perform useless acts. See State v. Strasser, 445 So.2d 322 (Fla. 1983), Boston v. State, 411 So.2d 1345 (Fla. 1st DCA 1982), review denied, 418 So.2d 1278 (Fla. 1982), and Burney v. State, 402 So.2d 38 (Fla. 2nd DCA 1981).

CONCLUSION

WHEREFORE Petitioner, the State of Florida, respectfully submits that the decision of the First District must be REVERSED and this cause remanded with directions that the sentence originally imposed be REINSTATED.

Respectfully submitted,

JIM SMITH
Attorney General

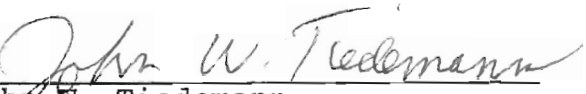


JOHN W. TIEDEMANN
Assistant Attorney General
The Capitol
Tallahassee, FL 32301
(904) 488-0290

COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief of Petitioner on the Merits has been forwarded to Ms. Paula S. Saunders, Assistant Public Defender, P.O. Box 671, Tallahassee, FL 32301, on this 26th day of July, 1985.



John W. Tiedemann
Assistant Attorney General