

IN THE SUPREME COURT OF FLORIDA

WALLACE BOUDREAUX,

Petitioner,

v.

CASE NO. 75,163

STATE OF FLORIDA,

Respondent.

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RESPONDENT'S BRIEF ON THE MERITS

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RESPONDENT'S BRIEF ON THE MERITS

PRELIMINARY STATEMENT

Wallace Boudreaux was the defendant in the trial court, the appellant in the district court, and will be referred to in this brief as the petitioner or by his proper name. The State of Florida was the prosecution and the appellee below and will be referred to herein as the state. The record on appeal will be referred to by use of the symbol "R," followed by the appropriate page number(s) in parenthesis. All trial court proceedings in this case were in the Second Judicial Circuit Court, in and for Leon County, Florida, the Honorable L. Ralph Smith, Circuit Judge, presiding. Initial appeal was before the District Court of Appeal. All emphasis in this brief is supplied unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Respondent hereby adopts the statement of the case and facts as contained in petitioner's brief on 'themerits.

SUMMARY OF ARGUMENT

Petitioner's reliance on State v. Rhoden, infra, is misplaced. This Court has qualified Rhoden 'to apply only to situations in which a trial court has failed to comply with mandatory statutory requirements. State v. Whitfield, infra. A contemporaneous objection is required to preserve any sentencing issue which does not impose an illegal sentence or illegally depart from the guidelines.

This Court has noted that the criminal justice system, particular the appellate process, is in a crisis of constitutional proportions due to enormous overload and backlog of appeals. For this reason alone the contemporaneous objection rule should be applied to sentencing issues not involving an illegal sentence in order to give the trial court the opportunity to consider the issue and avoid unnecessary appeals in many cases.

ARGUMENT

ISSUE

WHETHER A CONTEMPORANEOUS OBJECTION TO
CONDITIONS OF PROBATION IS NECESSARY TO
PRESERVE THE ISSUE OF THE PROPRIETY OF
THOSE CONDITIONS FOR APPELLATE REVIEW?

Petitioner argues that this Court should examine the stated purpose of the contemporaneous objection rule and determine whether it ought to be applied to probation conditions so as to preclude appellate review. Petitioner argues that the question of the propriety of probation conditions is purely one of law and therefore there is no practical reason to impose the contemporaneous objection rule. Petitioner relies on this Court's decision in State v. Rhoden, 448 So.2d 1013 (Fla. 1984). In Rhoden, by way of dicta, this Court discussed the primary purpose of the contemporaneous objection rule:

"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 of 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."

Id. at 1016 (emphasis added).

In Rhoden the trial court had failed to comply with the mandatory provisions of section 39.111(6), Florida Statutes, which requires the trial court to explain in writing why the

court is imposing adult sanctions on a juvenile. Defense counsel did not object to this failure to comply with the mandatory requirements of the statute but raised it for the first time on appeal. This Court held that under those facts where the trial court was mandated by statute to make written findings no contemporaneous objection in the trial court was required. Petitioner now argues that the decision in Rhoden eliminates the need for contemporaneous objections to *any* alleged sentencing error in order to preserve that issue for appeal and suggests that the contemporaneous objection rule is mere form, not substance.

Petitioner has overlooked the case of State v. Whitfield, 487 So.2d 1045 (Fla. 1986). In Whitfield the state erroneously included 36 points for victim injury in computing the sentencing guidelines scoresheet and no contemporaneous objection was made by defense counsel. On appeal the First District Court of Appeal agreed that it was error to assess the points for victim injury. The issue was whether the point had been preserved for appeal since no contemporaneous objection had been made to the trial court. Relying on Rhoden, the district court expansively held "that a defendant's failure to contemporaneously object upon imposition of a sentence does not preclude appellate review of sentencing error." Whitfield v. State, 471 So.2d 633, 634 (Fla. 1st DCA 1985). However, the First District Court of Appeal certified the following question to this Court:

"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?

Whitfield, 471 So.2d at 635.

In response to the certified question this Court clarified and explained its decision in Rhoden as it pertains to the contemporaneous objection rule and alleged sentencing errors. On this question this Court held:

"However, the district court was apparently troubled, and rightly so, by the implications of a rule of law which treats failure to advise the sentencing judge of error as of no consequence, and by language in Walker v. State, 462 So.2d 452 (Fla. 1985), and State v. Snow, 462 So.2d 455 (Fla. 1985), stating that Rhoden was applicable to instances where the trial court failed to make statutorily mandated findings of fact. Accordingly, the district court certified the following question of great public importance . . ."

Rhoden, Walker, and Snow all concern instances where the trial court sentenced in reliance on statute but failed to make the specific findings which the statute in question mandatorily required as a prerequisite to the sentence. An alternative way of stating the ground on which Rhoden, Walker, and Snow rest is that the absence of the statutorily mandated findings rendered the sentences illegal because, in their absence, there was no statutory authority for the sentences. Thus, as the district court summarized, Snow makes clear that Rhoden is grounded on the failure to make mandatory

findings and not on the proposition that contemporaneous objection serves no purpose in the sentencing process. Sentencing errors which do not produce an illegal sentence or an unauthorized departure from the sentencing guidelines still require a contemporaneous objection if they are to be preserved for appeal."

Id. at 1046 (emphasis added).

The Court further clarified Rhoden in a footnote to State v. Whitfield:

"(2) Our Rhoden dicta that the purpose of the contemporaneous objection rule is not present in the sentencing process does not apply in every case. It is true that sentencing errors can be more easily corrected on appeal than errors in the guilt phase, but it is still true that all errors in all phases of the trial should be brought to the attention of the trial judge particularly where there is a factual issue for resolution."

Id. at 1046.

In State v. Whitfield this Court concluded that the error in imposing victim injury points meant that the trial court departed from the guidelines without giving the mandatorily required written reasons for departure and thus no contemporaneous objection was required. However, this Court clearly answered the certified question to limit State v. Rhoden to those situations which a statute places a mandatory duty on the trial court to make specific findings and refused to construe Rhoden to mean that a defendant need not contemporaneously object to any alleged sentencing error in order to preserve the issue for appeal.

In the instant case petitioner does not claim that the trial court failed to make mandatorily required written findings or otherwise comply with any statutory mandates. Petitioner acknowledges that the conditions of probation were reduced to writing. (R 47) Petitioner's argument on appeal is that the conditions as imposed were not proper. Petitioner does not argue that the sentence imposed by the trial court was an illegal sentence or an unauthorized departure from the sentencing guidelines. Thus under this Court's decision in State v. Whitfield a contemporaneous objection is still required to preserve the issue of the propriety of conditions of probation to preserve this issue for appeal.

Petitioner's argument that the contemporaneous objection rule serves no purpose because appellate courts can decide the issues as well as trial courts is not only an affront to trial judges and the doctrine of finality, it also threatens the ability of the appellate system to perform its functions. In the recent case of In re: Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Public Defenders, Nos. 74,574, 74,580, 74,629, 74,630, 74,631 (Fla. May 3, 1990) [hereinafter In re: Order], this Court addressed the extreme crises faced by the Public Defender's Office in the Tenth Judicial Circuit regarding an enormous backlog of criminal appeals. This Court noted that the backlog of appeals to the Second District Court in which briefs are substantially overdue was

1,005 cases in March of 1989 and has since grown to an estimated 1700. This Court noted that the same problem exists to a lesser extent in the other four districts of the state. The Court cited from a finding of a special committee of the Florida Judicial Counsel which concluded that:

"The problem of the criminal workload within the judicial system of the State of Florida is a problem of volume that cannot be regulated, but must be dealt with as it occurs. Not only does the problem exist now in crisis proportions, but it appears that the workload in regard to all parts of the criminal justice system is likely to increase."

15 F.L.W. S278.

This Court noted that the enormous backlog of cases had developed "into a crisis situation of constitutional dimensions where an indigent defendant may wait in excess of two years for his case to be briefed." 15 F.L.W. S279. This Court has also recently addressed this "crisis situation of constitutional dimensions" in Hatten v. State, Case No. 74,694 (15 F.L.W. S282) (Fla. May 3, 1990).

In light of the tremendous crisis facing the entire criminal justice system it is clear that the last thing the courts need is a situation in which the contemporaneous objection rule is said not to apply in given situations, thus creating more and more appeals in a system already in a crisis of constitutional proportions due to the tremendous increase in the volume of appeals. Petitioner's argument

that because it is a pure question of law and not a question of fact the need for a contemporaneous objection "diminishes" does not consider the fact that there is a compelling need to impose the contemporaneous objection rule even when the issue is purely one of law. First, the State does not concede that there is no need to object before the trial court when the question is one purely of law. In Dodd v. State, 232 So.2d 235, 238 (Fla. 4th DCA 1970), the court held:

"The function of an objection is to signify to the trial court that there is an issue of law and to give notice of the terms of **the** issue. Wigmore on Evidence, (3d Ed.) p. 322."

It is also apparent that the imposition of the contemporaneous objection rule in the instant case and other sentencing areas would help to reduce the enormous overload of appeals pending in the State of Florida. This is so because many of these alleged sentencing errors could be corrected by the trial court if the defense were required to "signify to the trial court that there is an issue of law and to give notice of the terms of the issue." Dodd, supra. Even if one concedes that the primary purpose of the contemporaneous objection rule involves the questions of testimony and factual disputes which should be resolved when a witness is still on the witness stand and the facts are fresh, this is not the sole reason for the rule. This Court has specifically held in State v. Whitfield that it is not

true that contemporaneous objections serve no purpose in the sentencing process. Under petitioner's view, the Public Defender's Office, and the Office of the Attorney General, would have to expend valuable man-hours to brief and argue sentencing issues not raised in the trial court. The district court would have to consider the case and then, if appropriate, remand the case back to the trial court for consideration. At this point the state attorney and the public defender and the trial court must devote their valuable time once again to the case in question. It is not only the public defender's office that is overburdened in the criminal justice process. The Office of the Attorney General of Florida, which handles all criminal appeals for the State, also has a tremendous workload of appeals around the State. Unlike the public defender's offices, the attorney general's office cannot "farm out" appeals to private attorneys to reduce the workload. Likewise, the various state attorney's offices and the circuit courts of the State also face a tremendous increase in criminal cases without any corresponding increase in personnel. Since this Court has acknowledged that the workload has reached a crisis of constitutional proportions, it should make every effort to see that unnecessary issues on appeal which could be eliminated at the trial court level are not allowed to further clog the criminal justice system. To that end, this Court's decision in State v. Whitfield, supra, should be applied. Applying the contemporaneous objection rule to the

propriety of conditions of probation imposed by the trial court would give the trial court an opportunity to be advised on the issue of law presented and to resolve the issue at the trial court level. This would eliminate unnecessary appeals which would occur if the contemporaneous objection rule is not followed. This Court is well aware that the criminal justice system in Florida can ill-afford appeals that are unnecessary and which further drain the resources of the prosecutors, public defenders, and the trial and appellate courts. There is, therefore, a compelling reason for this Court to follow its reasoning in State v. Whitfield and declare that the question of the propriety of probation conditions must be raised by a contemporaneous objection before the trial court or the issue cannot be presented on appeal.

CONCLUSION

Based on the foregoing argument and citations of authority the decision of the First District Court of Appeal should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing brief on the merits has been furnished by U.S. Mail to Lawrence M. Korn, Assistant Public Defender, Leon County Courthouse, Fourth Floor, North, 301 South Monroe Street, Tallahassee, Florida 32301 , this 29th day of May, 1990.



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