IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Appellant/Petitioner.

v. CASE NO.: 80,157

TYRONE M. CLAYBOURNE,

Appellee/Respondent,

APPELLANT/PETITIONER'S REPLY BRIEF

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WHETHER A CRIMINAL DEFENDANT'S RIGHT TO DUE PROCESS CAN BE DENIED MERELY BY THE NUMBER OF SUBJECTS IN A LEGISLATIVE ACT

Claybourne's argument, like the decision below, completely misses the point: the number of subjects in a legislative act simply cannot affect a criminal defendant's right to due process, or any other constitutional right. The number of subjects in a legislature act cannot vitiate the fairness of trial. Therefore, if ch. 89-280 violates the one-subject rule in Art. 111, §.6, Florida Constitution, that violation cannot be fundamental error and must be urged as error before the trial court. Claybourne's failure to do so precluded review.

Otherwise, the two cases relied upon in the opinion below (Parker v. Town of Callahan and Town of Monticello v. Finlayson) are discussed in the State's initial brief. Neither case dealt with a criminal prosecution; neither even attempted to explain how the number of subjects in a legislative act can rise to fundamental error.

Respondent's reliance on Rhoden v. State, 448 So.2d 1013 (Fla. 1984), for the proposition that the contempraneous objection rule does not apply to sentencing proceedings is misplaced. In Rhoden, this Court held that the total absence of

statutorily mandated findings essential to the legal imposition of the sentence was fundamental error which rendered the sentence illegal and cognizable for the first time on appeal. This error was equivalent to the imposition of a death penalty or a sentencing guidelines departure with no written order because it was not merely erroneous, it was illegal. Grossman v. State, 525 So.2d 833 (Fla. 1988) *cert. denied*, 489 U.S. 1071 (1989). Unfortunately, in dicta which has been widely misapplied outside the Rhoden context of a missing mandatory sentencing order, the Court commented:

> The purpose of the contempraneous 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, 448 So.2d at 1016.

This Court receded from the expansive Rhoden dicta in State v. Whitfield, 487 So.2d 1045, 1046 (Fla. 1986):

> 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 statutes 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 surmised, Snow makes clear that Rhoden is grounded on the failure to

> make mandatory findings and not on the proposition that contemporaneous objection? serve 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. (e.s.)
>
> [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.

Despite having been affirmed in Whitfield, the First District Court of Appeal thereafter adopted the inconsistent rule that there is an absolute right to appeal everything which occurs during the sentencing phase regardless of whether a sentencing issue is preserved, or even identifable. Ford v. State, 575 So.2d 1335 (Fla. 1st DCA), *review* ***denied,*** 581 So.2d 1318 (Fla. 1991)[1]. The

[1] In application, Ford routinely produces such professional embarassments as, to cite two examples from last week, Evans v. State, No. 91-2437 (Fla. 1st DCA August 18, 1992), **and** Cooper v. State, No. 91-2040 (Fla. 1st DCA August 18, 1992); where the appellants received a negotiated sentence of probation on felony convictions but nevertheless appealed. The "issue" on which the district court based its jurisdiction after full review was a standard assessment of $1 to a so-called First Step of Bay Co. Inc., which appears on all probation orders in Bay County and is not orally pronounced at sentencing. (First Step is patterned after a Pinellas County program initiated by then Circuit Judge Overton to develop a fund for assisting probationers attempting to find work). The appeals were taken without identifying any issue. The $1 assessment arose during the de novo review of the sentencing process.

court regressed into the Rhoden dicta by circularly reasoning that (1) there is a right to appeal an illegal sentence and (2) illegal sentences are sentences, therefore, (3) there is a right to appeal all sentences because all sentences are presumptively illegal until the completion of the appellate process demonstrates that they are legal. Thus, as here, opposing counsel whose practice has been entirely or primarily in the first district continue to rely on the disavowed Rhoden dicta because in the first district it is still the law. See, e.g., respondent's answer brief at page 4, "[t]he 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.' Id." On the cost of "simple remands" see Justice Shaw's concurring in result only opinion in Walker v. State, 462 So.2d 452, 454 (Fla. 1985).

Respondent's reliance on Castor v. State, 365 So.2d 701, 703 (Fla. 1978), is similarly misplaced. Castor holds contrary to respondent's position:

> The requirement of a contemporaneous objection is based on practical necessity and basic fairness in the operation of a judicial system. It placed the trial judge on notice that error may have been committed, and provides him an opportunity to correct it at an early stage of the proceedings. Delay and an unnecessary use of the appellate process result from a failure to cure early that which must be cured eventually.

Id.

The State urges the Court to make it very clear that routine sentencing issues must be preserved in the trial court in order to obtain the right to appeal, OK to raise the issue on appeal if appeal is otherwise permitted. The Court should declare that Rhoden applies only to sentences for which there is no statutory authority.

If the constitutionality of a substantive criminal statute could not be raised for the first time on appeal in Davis v. State, 383 So.3d 620 (Fla. 1980); it would be incredible to allow such for a sentencing statute.

Claybourne's sentence is not illegal, as it is within the range of punishment authorized by statute. See Infante v. State, 197 So.2d 542, 544 (Fla. 3d DCA 1967)(statute allowing appeal of "illegal" sentence means a sentence that exceeds the statutory maximum or is a type of punishment not prescribed by law).

Therefore, Claybourne cannot avail himself of the cases allowing illegality of a sentence, or of a sentencing statute, to be raised for the first time on appeal. This issue was not preserved, and should not have been considered by the First District. Its opinion must be vacated.

CONCLUSION

The opinion below must be vacated. If not, it must be reversed on the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by U.S. Mail to Abel Gomez, Assistant Public Defender, Leon County Courthouse, 301 South Monroe Street, Tallahassee, FL 32301, this 31st day of August, 1992.

CHARLIE MCCOY