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IN THE FLORIDA SUPREME COURT

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 81,544

FELICE JOHN VEACH,

Respondent.

ON DISCRETIONARY REVIEW
FROM THE FIRST DISTRICT COURT OF APPEAL

BRIEF OF RESPONDENT ON THE MERITS

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PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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TABLE OF CONTENTS

TABLE OF CITATIONS

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,	:	
Petitioner,	:	
v.	:	CASE NO. 81,544
FELICE JOHN VEACH,	:	
Respondent.	:	

BRIEF OF RESPONDENT ON THE MERITS

I PRELIMINARY STATEMENT

Respondent was the defendant in the trial court and the appellant in the lower tribunal. Attached hereto as an appendix is the opinion of the lower tribunal, which has been reported as Veach v. State, 614 So. 2d 680 (Fla. 1st DCA 1993). The two volume record on appeal will be referred to as "R," followed by the appropriate page number in parentheses. Petitioner's brief will be referred to as "PB," followed by the appropriate page number.

II STATEMENT OF THE CASE AND FACTS

Respondent accepts petitioner's recitation, PB at 2-4.

III SUMMARY OF THE ARGUMENT

Respondent will argue in this brief that petitioner has not demonstrated any reason why this Court should grant review and reverse the First District. The holding of the First District was that the trial court erred in sentencing respondent, who was a juvenile at the time of the crime, as an adult, without compliance with the juvenile statute. The First District properly found no waiver of the juvenile statute from the silent record at the time respondent originally was placed on community control and probation, nor from the silent record at the time he received a state prison sentence. A very recent case from this Court is directly on point and requires affirmance.

IV ARGUMENT

THE LOWER TRIBUNAL DID NOT ERR IN REVERSING RESPONDENT'S SENTENCES OF INCARCERATION IMPOSED AFTER REVOCATION OF COMMUNITY CONTROL AND PROBATION WHERE RESPONDENT NEVER WAIVED HIS RIGHT TO HAVE THE COURT DETERMINE WHETHER ADULT SANCTIONS WERE APPROPRIATE.

(Issue restated by respondent).

Amazingly, petitioner's brief ignores this Court's recent unanimous opinion in Sirmons v. State, 18 Fla. L. Weekly S356 (Fla. June 24, 1993), which is directly on point and requires affirmance of the lower tribunal's opinion. In Sirmons, the defendant, a juvenile who was waived into adult court, entered a plea of no contest in exchange for a nine year adult prison sentence. He received that sentence, but the judge failed to make the findings required by §39.111(7)(d), Fla. Stat. (1989). The Second District held that by entry of his plea, he had implicitly waived the right to have the findings made by the judge.

This Court quashed the Second District's view. This Court relied upon its previous opinion in Rhoden v. State, 448 So. 2d 1013 (Fla. 1984) and held:

> However, before the plea agreement may be accepted by the court, the court must inform the juvenile of the rights provided by the Legislature under section 39.111 and insure that the juvenile voluntarily, knowingly, and intelligently waives those rights. Under Florida Rule of Criminal Procedure 3.170(d), courts are charged with the determination "that the circumstances surrounding the plea reflect a full understanding of the significance of the plea and its voluntariness." We find that in order for a juvenile to have a full understanding of the significance of the plea the juvenile must be made aware of the

> rights that are waived by the plea agreement.
>
> Applying the law to the instant case, we find that the record does not show that Sirmons gave a knowing and intelligent waiver of his rights under section 39.111. Thus, the instant case must be remanded for resentencing.

18 Fla. L. Weekly at S357.[1]

Sirmons requires affirmance of the opinion in the instant case. Respondent's written plea agreement (R 9-10) is silent with regard to any waiver of the right to the findings required by §39.059(7)(c), Fla. Stat. (1990 Supp.)[2]. Respondent's sentencing hearing at the time he received adult community control and probation (R 60-63) is silent with regard to any waiver of the right to the findings required by the statute.

The only difference between Sirmons and the instant case is that the error did not come to light in the instant case until an appeal was taken from the community control revocation. But that is a distinction without a difference, because respondent's sentencing hearing at the time he received adult prison sentences after violating community control and probation (R 33-37) is likewise silent with regard to any waiver of the right to the findings required by the statute.

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[1]Chief Justice Barkett, in a specially concurring opinion, wondered whether a juvenile could ever waive the right to the statutory findings. Id.

[2]This Court has noted that the statutory numbering scheme was changed in 1990, but "the rationale of this opinion also applies to section 39.059." 18 Fla. L. Weekly at S356, note 1.

Petitioner's citation to Pendarvis v. State, 400 So. 2d 494 (Fla. 5th DCA 1991) (PB at 6-7), is not good authority, since it has been sub silentio overruled by this Court's opinion in Sirmons.

Petitioner's analogy to guidelines departure cases (PB at 7-8) is not good authority, since they have absolutely nothing to do with the right of a juvenile to have the judge justify adult sanctions.

Petitioner's main argument is that respondent, having accepted community control and probation as an adult, waived his right to challenge his adult punishment (PB at 8-11). Such an argument cannot fly in the face of this Court's holding in Sirmons, supra, that a waiver of a valuable statutory right cannot be inferred from a silent record.

The statute requires that the propriety of adult sanctions "...shall be determined by the court before any other determination of disposition." §39.059(7)(c), Fla. Stat. (1990 Supp.). There is no waiver provision in the statute. Respondent made no express waiver of the written findings, and we cannot infer a waiver from a silent record.

Petitioner fails to acknowledge the following cases, which both hold that entering a plea in adult court does not act as a waiver of the requirements of the statute: Sullivan v. State, 587 So. 2d 599 (Fla. 5th DCA 1991); and Toussaint v. State, 592 So. 2d 770 (Fla. 5th DCA 1991). See also McCray v. State, 588 So. 2d 298 (Fla. 2nd DCA 1991), in which the court found no waiver, even though the defense attorney affirmatively asked

for adult probation, because there was no express waiver by the defendant.

See also the following quote from Lang v. State, 566 So. 2d 1354, 1357 (Fla. 5th DCA 1990), which was cited with approval by this Court in Sirmons:

> A juvenile can waive his rights under section 39.111 but such a waiver must be manifest either in the plea agreement or on the record. We can find no waiver in the present case.

Petitioner also fails to acknowledge the well-settled principle that one cannot agree to an illegal sentence. Williams v. State, 500 So. 2d 501 (Fla. 1986).

Petitioner next boldly states that "Rhoden does not control the outcome of the instant case." PB at 11. Petitioner fails to acknowledge that this Court reaffirmed its Rhoden holding in Sirmons, by quoting Rhoden as controlling authority:

> As we noted in Rhoden, the Legislature has given "juveniles the right to be treated differently from adults." Rhoden, 448 So. 2d at 1016.

18 Fla. L. Weekly at S356-357 (emphasis in original).

Petitioner's citation to Croskey v. State, 601 So. 2d 1326 (Fla. 2nd DCA 1992) (PB at 12-13), is largely historical, since it has been sub silentio approved by this Court's opinion in Sirmons.

The remainder of petitioner's brief (PB at 13-16) is a discussion of what remedy petitioner is entitled to, assuming it succeeds in having this Court overturn the lower tribunal's

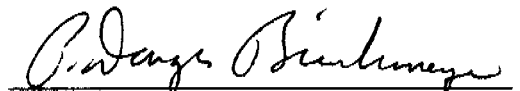
opinion in this case. Respondent sees no need to address this part of petitioner's brief, since petitioner has failed to attempt to distinguish, or even acknowledge, the controlling authority of Sirmons.

V CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, respondent submits that this Court should decline to grant review, or, in the alternative, must approve the opinion of the lower tribunal.

Respectfully Submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to James W. Rogers and Wendy S. Morris, Assistant Attorneys General, by delivery to The Capitol, Plaza Level, Tallahassee, Florida, and a copy has been mailed to respondent, this 12th day of August, 1993.

P. DOUGLAS BRINKMEYER

Jackson v. Publix Supermarkets, Inc., 520 So.2d 50 (Fla. 1st DCA 1987); *Wilbanks v. Cianbro Corp.*, 512 So.2d 300 (Fla. 1st DCA 1987).

Because of the irreconcilable opinions offered by Dr. Burgess, his testimony does not constitute competent substantial evidence to support the findings of the judge of compensation claims. As a result, the only competent evidence on the issue of permanent impairment is Dr. Aparicio's testimony, to the effect that claimant has reached maximum medical improvement with a 3-percent permanent impairment of the body as a whole. Thus, Dr. Aparicio's testimony is unrefuted. "Although a [judge of compensation claims] clearly has the right to accept the opinion of one physician over that of others, ... he does not have the right to reject the *unrefuted* medical testimony of an expert witness." *Patterson v. Wellcraft Marine*, 509 So.2d 1195, 1197 (Fla. 1st DCA 1987) (citations omitted). Accordingly, we reverse and remand with directions that the judge of compensation claims address and decide the remaining disputed issues applicable to the claim for wage-loss benefits for the period from May 1, 1989, to May 19, 1990. *See Collazo v. Sourini Painting Co.*, 516 So.2d 288 (Fla. 1st DCA 1987).

REVERSED and REMANDED, with directions.

ERVIN and BOOTH, JJ., concur.

Felice John VEACH, Appellant,

v.

STATE of Florida, Appellee.

No. 92-1506.

District Court of Appeal of Florida, First District.

March 4, 1993.

Certification Denied April 1, 1993.

Defendant was convicted of committing lewd and lascivious act in presence of child, while he was 17, in the Circuit Court, Escambia County, T. Michael Jones, J. Defendant appealed sentence. The District Court of Appeal held that defendant had not waived, and was entitled to compliance with, statutory procedure regarding sentencing of juvenile as an adult.

Reversed and remanded for resentencing.

1. Infants ⇐69(8)

Failure to follow provisions setting forth procedure for sentencing juvenile as adult requires remand for resentencing, regardless of whether juvenile objected to failure. West's F.S.A. § 39.059(7)(c).

2. Infants ⇐69(5)

While juvenile can waive his right to compliance with statutory procedure for sentencing juveniles as adults, waiver must be knowing, intelligent, and manifest on record. West's F.S.A. § 39.059(7)(c)1-6.

3. Infants ⇐69(6, 8)

Unless juvenile has waived his right to compliance with statutory procedures governing sentencing of juveniles as adults, it is reversible error for trial court to impose adult sanctions upon juvenile without making required findings, even though sanctions were imposed pursuant to negotiated plea agreement which omitted any reference to statute. West's F.S.A. § 39.059(7)(c).

4. Infants ⇐69(1)

Defendant could not be sentenced as an adult, for committing lewd and lascivious act in presence of child, while he was 17; there was no indication that he had waived compliance with statutory requirements for imposition of adult sentence. West's F.S.A. § 39.059(7)(c).

James C. Banks, Sp. Asst. Public Defender, Tallahassee, for appellant.

Robert A. Butterworth, Atty. Gen., and Gypsy Bailey and Michelle Konig, Asst. Attys. Gen., Tallahassee, for appellee.

PER CURIAM.

Felice John Veach has appealed from the imposition of adult sanctions after his plea of nolo contendere to crin when he was a juvenile. W remand for resentencing.

In May 1990, Veach was c No. 90-1963 with grand thef dealing in stolen property, when he was 18. In June 1 charged in Case No. 90-202 ting a lewd and lascivious a ence of, and on, a child, and on a child less than 12 year mitted when he was 17. V contendere to all charges, an current 5-year terms of pr tioned on 2 years of comr The plea agreement did Veach's juvenile status in 9 the trial court determine th adult sanctions as to that c ence to the factors set fo 39.059(7)(c), Florida Statut not appeal.

In February 1991, an aff tion of community control which Veach pled nolo co trial court revoked commun sentenced Veach to 20 yea degree felony (90-2027), 15 2d-degree felony (two in 9 90-2027) and 5 years for felony (90-1963), all concurr gues that the sentences in 9 reversed based on the tria imposition of sentence with findings required by sectio

The state does not disput ings were initially required Veach waived the issue b peal. Rather, the state Veach waived his entitleme ings, citing *Preston v. Stat* (Fla. 3d DCA 1982) (whe never sought designation a fender and was not sentenc incarceration, but was plac he waives the right to ques

1. In the *Preston* case cited by effectively held that the de waived the right to sentenc offender by not seeking th accepting the benefits of pr the courts have since held waivers are insufficient, an "knowing, intelligent and m

of nolo contendere to crimes committed when he was a juvenile. We reverse and remand for resentencing.

In May 1990, Veach was charged in Case No. 90–1963 with grand theft, burglary and dealing in stolen property, all committed when he was 18. In June 1990, Veach was charged in Case No. 90–2027 with committing a lewd and lascivious act in the presence of, and on, a child, and sexual battery on a child less than 12 years of age, committed when he was 17. Veach pled nolo contendere to all charges, and received concurrent 5–year terms of probation, conditioned on 2 years of community control. The plea agreement did not mention Veach's juvenile status in 90–2027, nor did the trial court determine the suitability of adult sanctions as to that case with reference to the factors set forth at section 39.059(7)(c), Florida Statutes. Veach did not appeal.

In February 1991, an affidavit of violation of community control was filed, to which Veach pled nolo contendere. The trial court revoked community control, and sentenced Veach to 20 years for the 1st-degree felony (90–2027), 15 years for each 2d-degree felony (two in 90–1963, two in 90–2027) and 5 years for each 3d-degree felony (90–1963), all concurrent. Veach argues that the sentences in 90–2027 must be reversed based on the trial court's initial imposition of sentence without making the findings required by section 39.059(7)(c).

The state does not dispute that the findings were initially required, or argue that Veach waived the issue by failing to appeal. Rather, the state maintains that Veach waived his entitlement to those findings, citing *Preston v. State*, 411 So.2d 297 (Fla. 3d DCA 1982) (where a defendant never sought designation as a youthful offender and was not sentenced to a period of incarceration, but was placed on probation, he waives the right to question the legality of a probation which he has enjoyed and violated). Veach responds that, absent a manifest knowing and intelligent waiver of the right to the findings, it is reversible error to sentence a juvenile as an adult, even in the absence of objection and even though sanctions were imposed pursuant to a negotiated plea omitting any reference to Chapter 39. *Walker v. State*, 605 So.2d 1341, 1341–42 (Fla. 1st DCA 1992).

[1–3] Failure to follow the provisions of section 39.059(7)(c) in sentencing a juvenile as an adult requires remand for resentencing, regardless of objection. *State v. Rhoden*, 448 So.2d 1013, 1016 (Fla.1984). While a juvenile can waive his right to findings under section 39.059(7)(c)(1–6) before being sentenced as an adult, *Rhoden*, that waiver must be knowing, intelligent and manifest on the record.[1] *Hill v. State*, 596 So.2d 1210, 1211 (Fla. 1st DCA 1992). Without such a waiver, it is reversible error for a trial court to impose adult sanctions upon a juvenile without making the required findings, even though sanctions were imposed pursuant to a negotiated plea agreement which omitted any reference to the statute. *Walker* at 1341–42.

[4] Here, there was no waiver by Veach, either at the original sentencing proceeding or in the written plea agreement, of his right to section 39.059(7)(c) findings prior to adult sentencing in Case No. 90–2027. Therefore, as to that case only, we reverse the sentence imposed herein, and remand for resentencing. Reimposition of adult sanctions is permitted, upon compliance with the statute. *Walker* at 1342.

JOANOS, C.J., and MINER and ALLEN, JJ., concur.

1. In the *Preston* case cited by the state, the court effectively held that the defendant implicitly waived the right to sentencing as a youthful offender by not seeking that designation and accepting the benefits of probation. However, the courts have since held that such implicit waivers are insufficient, and must rather be "knowing, intelligent and *manifest on the record.*" Therefore, we do not follow *Preston*. As for *Goldsmith v. State*, 613 So.2d 1327 (Fla. 1st DCA 1992), we note that the case did not involve a juvenile as to whom the trial court failed to make the findings required by section 39.059(7)(c) at the time of the initial imposition of community control.