W00A

047

IN THE SUPREME COURT OF FLORIDA

RICO CARGLE, :

Petitioner, :

v. : CASE NO. 92,031

STATE OF FLORIDA, :

Respondent. :

INITIAL BRIEF OF PETITIONER ON THE MERITS

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

KATHLEEN STOVER
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 0513253
LEON COUNTY COURTHOUSE
SUITE 401
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(850) 488-2458

ATTORNEY FOR PETITIONER

TABLE OF CONTENTS

TABLE OF CITATIONS

STATUTES

OTHER AUTHORITIES

IN THE SUPREME COURT OF FLORIDA

RICO CARGLE,	:	
Petitioner,	:	
vs.		CASE NO. 92,031
STATE OF FLORIDA,	:	
Respondent.	:	
	:	

INITIAL BRIEF OF PETITIONER ON THE MERITS

I PRELIMINARY STATEMENT

Petitioner is a juvenile who was sentenced as an adult without the trial court complying with the requirement of Chapter 39, Florida Statutes, that a written order be entered. This is an appeal from the First District Court's affirmance of that sentence. Cargle v. State, 701 So.2d 359 (Fla. 1st DCA 1997). Petitioner also argues that his sentence is illegal for exceeding the statutory maximum.

Petitioner, appellant in the district court and defendant in the circuit court, will be referred to by name or as petitioner. Respondent, appellee in the district court and prosecutor in the circuit court, will be referred to as the state.

The one-volume record on appeal will be referred to as "R," and the one-volume trial transcript as "T."

II STATEMENT OF THE CASE AND FACTS

Petitioner, Rico Cargle, was charged with attempted armed robbery with a firearm and aggravated battery. The aggravated battery was charged in the information as having caused great bodily harm, **and** with a firearm (R 1-2). The jury was instructed that aggravated battery included an element that petitioner "caused great bodily harm. . .**or** that he used a deadly weapon" (T 124). On a verdict form indicating that Count II was for "aggravated battery with a firearm," the jury found him guilty of aggravated battery, and answered special interrogatories in the affirmative that he "carried, displayed, used," etc. a firearm, and that he personally possessed the firearm (R 22). Petitioner was also convicted of the attempted robbery (R 21).

The trial judge sentenced petitioner as an adult. The court departed from a recommended guidelines sentence of 93 to 156 months (R 79), and imposed 15 years on the attempted robbery and 30 years concurrent on the aggravated battery, with 3-year minimum mandatories on each for the firearm (R 66-75).

In sentencing petitioner as an adult, the trial court did not enter a written order, as required by Chapter 39, Florida Statutes, for sentencing a juvenile as an adult, but defense counsel did not object.

Because there was no objection or motion to correct under Rule 3.800(b), Florida Rules of Criminal Procedure, the First District Court of Appeal held the issue was not preserved under

the Criminal Appeal Reform Act of 1996 ("the Act"). The First District has previously held that the preservation requirements of the Act do not apply to juvenile delinquency cases, and this court has recently approved those decisions. R.A.M. v. State, 695 So.2d 1308 (Fla. 1st DCA 1997), app'd, State v. T.M.B., no. 90,432 (Fla. April 2, 1998).

In the instant case, the First District held the lack of compliance with Chapter 39 was not preserved under section 924.051 because Cargle was sentenced as an adult under a hybrid procedure, thus the court's exception for juvenile proceedings did not apply. Cargle v. State, 701 So.2d at 361. The court noted that this was an issue of first impression in Florida. Id. at 360.

III SUMMARY OF ARGUMENT

Issue I: Petitioner is a juvenile who was sentenced as an adult without the trial court complying with the requirement of Chapter 39, Florida Statutes, that such a sentence be entered in writing. In Rhoden, infra, this court held that noncompliance with Chapter 39 was reversible error on appeal, even without a contemporaneous objection. Acknowledging the question to be one of first impression, and without mentioning Rhoden, the First District below held essentially that Rhoden has been abrogated sub silentio by the Criminal Appeal Reform Act of 1996 ("the Act").

The First District has held previously that juvenile proceedings are not covered by the Act, and this court has approved that decision. T.M.B., infra. In reaching a different result as to the Chapter 39 requirements for sentencing a juvenile as an adult, the district court gave different constructions to similar language in two sections of the same chapter. That is, the court read a preservation requirement into one section, but not the other, despite virtually identical language.

Moreover, it is particularly inappropriate to find an issue not preserved where the issue is a written order, for which there is no requirement that it be entered contemporaneously with sentencing, and which, in fact, has no time limit.

Even if sentencing a juvenile as an adult is a hybrid proceeding, there is no way to make a principled distinction

between the **right**-to-appeal language of section 39.059(7) (juvenile sentenced as an adult) and the right to appeal language of that part of the juvenile statute at issue in T.M.B. Petitioner therefor asks this court to affirm its decision in T.M.B. as it applies to Chapter 39, and to hold the issue here is cognizable on appeal, without regard to preservation under the Act.

Issue II: Petitioner was convicted of aggravated battery, charged as having caused great bodily harm, **and** with a firearm. The jury was instructed that the element was great bodily harm **or** the firearm, and the jury convicted, finding that Cargle "carried, displayed, or used" a firearm, and personally possessed it.

At sentencing, the prosecutor said the conviction was reclassified to a first-degree felony (R 60), and the trial court departed from the guidelines and imposed the statutory maximum sentence for a first-degree felony of 30 years in prison, even though petitioner was 17 at the time of the crime.

When a firearm is an essential element, the offense cannot be reclassified. Based on the information, instructions, and verdict, the firearm was an essential element of Cargle's conviction. Thus, his conviction of aggravated battery is a second-degree felony, for which the statutory maximum sentence is 15 years in prison, and the 30 year-sentence imposed is illegal.

Undersigned, who is successor appellate counsel, concedes

that this issue is being raised for the first time in this court, but relies on the provision of Rule 3.800(a), Florida Rules of Criminal Procedure, that an illegal sentence can be raised at any time. The error is apparent on the face of the record. The information, the verdict and the judgment and sentence provide all the information this court needs to find the 30-year sentence to be illegal.

IV ARGUMENT

ISSUE I

DOES THIS COURT'S HOLDING IN STATE V. RHOEN, 448 SO.2D 1013 (FLA. 1984) - THAT THE TRIAL COURT'S FAILURE TO ENTER A WRITTEN ORDER UNDER CHAPTER 39, FLORIDA STATUTES, WHEN SENTENCING A JUVENILE AS AN ADULT - SURVIVE THE CRIMINAL APPEAL REFORM ACT OF 1996?

Petitioner is a juvenile who was sentenced as an adult. In imposing sentence, the trial court did not enter a written order, as required by Chapter 39,[1] Florida Statutes, when sentencing a juvenile as an adult, but defense counsel did not object.

Because there was no objection or motion to correct under Rule 3.800(b), Florida Rules of Criminal Procedure, the First District Court of Appeal held the issue was not preserved under the Criminal Appeal Reform Act of 1996 (codified as section 924.051, Florida Statutes, and referred to hereinafter as the "Act" or section 924.051). The First District has previously held that the preservation requirements of the Act do not apply to juvenile delinquency cases and this court has recently affirmed that decision. R.A.M. v. State, 695 So.2d 1308 (Fla. 1st DCA), app'd, State v. T.M.B., no. 90,432 (Fla. April 2, 1998).

In the instant case, the First District held the lack of

---

[1]The juvenile statutes have been transferred recently from Chapter 39 to Chapter 985. See Ch. 97-238, § 42, at 4286, Laws of Fla. which provides: "Section 39.069, Florida Statutes [governing juvenile appeals], is transferred and renumbered as section 985.234, Florida Statutes."

compliance with Chapter 39 was not preserved under section 924.051 because Cargle was sentenced as an adult under a hybrid procedure, thus the court's exception for juvenile proceedings did not apply. Cargle v. State, 701 So.2d at 361. The court noted that this was an issue of first impression in Florida. Id. at 360.

The issue here is virtually identical to that in State v. Rhoden, 448 So.2d 1013 (Fla. 1984). Rhoden was also a juvenile sentenced as an adult. The trial court failed to enter a written order as required by Chapter 39, Florida Statutes, and Rhoden raised this sentencing error for the first time on appeal. Rhoden is the seminal case for the principle that the contemporaneous objection rule does not apply to sentencing errors which are apparent on the face of the record. This court said:

> Further, with regard to [Rhoden's] failure to contemporaneously object to the trial judge's failure to follow the statute in sentencing respondent, we agree with the reasoning of Judge Sharp in her dissent in Glenn v. State, [infra]. Judge Sharp pointed out that it is difficult, if not impossible, for counsel to contemporaneously object to the absence of a written order at the sentencing hearing "since counsel at that stage does not know for sure what the written sentence may be, and a written order pursuant to section 39.111 may indeed be subsequently filed."

Id. at 1016. The court also said in general about the contemporaneous objection rule:

> The contemporaneous objection rule, which the state seeks to apply here to prevent respondent from seeking review of his sentence, was fashioned primarily for use in trial proceedings. The rule is intended to

> give trial judges an opportunity to address objections made by counsel in trial proceedings and correct errors. The rule prohibits trial counsel from deliberately allowing known errors to go uncorrected as a defense tactic and as a hedge to provide a defendant with a second trial if the first trial decision is adverse to the defendant.

Id. The court continued:

> 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.

In an opinion entered well after the effective date of the Act, this court reaffirmed the holding of Rhoden:

> We have repeatedly held that absent an illegal sentence or an unauthorized departure from the sentencing guidelines, only sentencing errors "*apparent on the face of the record* do not require a contemporaneous objection in order to be preserved for review." (emphasis added in Montague; footnote omitted)

State v. Montague, 682 So.2d 1085 (Fla. 1996), quoting Taylor v. State, 601 So.2d 540, 541 (Fla. 1992); see also Davis v. State, 661 So.2d 1193, 1997 (Fla. 1995).

Neither the Act nor the creation of Rule 3.800(b) expressly overruled Rhoden's holding that sentencing errors apparent on the face of the record are **not** subject to the contemporaneous objection rule, yet the First District has effectively

overruled Rhoden on the very same facially apparent sentencing error, without mentioning Rhoden.

Moreover, in reaching a different result in the instant case than it did in T.M.B., the First District necessarily reached different conclusions based on very similar statutory language. T.M.B. v. State, 689 So.2d 1215 (Fla. 1st DCA 1997). In Cargle, when a juvenile is sentenced as an adult, the statute provides:

> It is the intent of the Legislature that the criteria and guidelines in this subsection are mandatory and that a determination of **disposition** under this subsection **is subject to the right of the child to appellate review** under s. 39.069. (emphasis added)

§ 39.059(7), Fla.Stat. (1995). When a trial court deviates from the Department of Juvenile Justice recommendation as to the restrictiveness level of placement, section 39.052(4)(e)3, Florida Statutes (1995), provides:

> The court shall commit the child to the [D]epartment at the restrictiveness level identified [by the Department in its predisposition report,] or may order placement at a different restrictiveness level. The court shall state for the record the reasons. . . **Any party may appeal the court's findings** resulting in a modified level of restrictiveness pursuant to this subparagraph. (emphasis added)

See T.M.B. v. State, 689 So.2d at 1216.

As to the restrictiveness level of placement, the court said the preservation requirements of section 924.051 do not apply to a juvenile sentence imposed under Chapter 39. In contrast, as to the written order required to sentence a

juvenile as an adult, the First District said:

> The application of section 924.051 to the procedure whereby a juvenile is sentenced as an adult does not obviate the right to appeal guaranteed in section 39.059(7), it merely requires that any such error be preserved as explained below.

Cargle, 701 So.2d at 361.

Petitioner urges this court not to overlook the similarity of the language the district court was construing. The district court held that no preservation requirement could be read into section 39.052(4)(e)3's provision that **"[a]ny party may appeal the court's findings,"** but in the instant case, the court did read a preservation requirement into section 39.-059(7)'s provision that "**disposition** under this subsection **is subject to the right of the child to appellate review.**" In other words, the district court reached opposite conclusions based on virtually identical statutory language as to the child's right to appeal in the very same chapter. Petitioner contends that, given the great similarity in the language of two provisions of the same chapter, no principled or defensible distinction between them can be made on the preservation question, and the district court's purported distinction should be overturned by this court.

Finally, petitioner contends that finding a sentencing error is not preserved is especially inappropriate where the error is the trial court's sin of omission, that is, the court's failure to enter a written order. Finding waiver is particularly unfair where there is also no time limit on when

the written order may be entered.

Petitioner reminds the court that in Rhoden, this court agreed with the reasoning of Judge Sharp in her dissent in Glenn v. State, 411 So.2d 1367 (Fla. 5th DCA 1982):

> Judge Sharp pointed out that it is difficult, if not impossible, for counsel to contemporaneously object to the absence of a written order at the sentencing hearing "since counsel at that stage does not know for sure what the written sentence may be, and a written order pursuant to section 39.111 may indeed be subsequently filed."

Rhoden, 448 So.2d at 1016. Similarly, here, there was ample opportunity for the trial judge to have entered a written order **after** imposing sentence. How can a defendant be liable for failing to object to something which is not objectionable at the time it is done, or not done? That is, how can the defendant be liable for not objecting that no written order was entered, when the order need not be entered contemporaneously with the imposition of sentence, and in fact, there is no time limit on the entry of the order?

Moreover, under this circumstance, how is the defendant to identify the point at which an objection must be made or a post-conviction motion be filed? This point is more difficult to identify here, where the order has no deadline than, for example, where the judge has imposed a guidelines departure. The applicable statute sets a time limit for entering a written order justifying departure from the guidelines. Further, this analogy fails because, should the trial court fail to enter a written departure order, a competent defense attorney would not

move to "correct the sentencing error." Rather, a competent defense attorney would raise the omission on appeal, where an appellate court would have to overturn the departure as unjustified. See Ree v. State, 565 So.2d 1329 (Fla. 1990).

Even if sentencing a juvenile as an adult is a hybrid proceeding, neither wholly juvenile nor wholly adult, there is no way to make a principled distinction between the **right**-to-appeal language of section 39.059(7) (juvenile sentenced as an adult) and the right to appeal language of that part of the juvenile statute at issue in T.M.B., supra. Petitioner therefor asks this court to affirm its decision in T.M.B. as it applies to Chapter 39. Petitioner asks this court to hold that, where the trial court has failed to comply with the requirements of Chapter 39 in sentencing a juvenile as an adult, the issue is cognizable on appeal, without regard to preservation under section 924.051, Florida Statutes.

ISSUE II

BECAUSE AGGRAVATED BATTERY IS A SECOND-DEGREE FELONY, THE 30-YEAR SENTENCE IMPOSED IS ILLEGAL AND MUST BE REDUCED. WHEN A FIREARM IS AN ESSENTIAL ELEMENT OF THE CRIME, AS IT WAS HERE, THE CRIME CANNOT BE RECLASSIFIED UNDER SECTION 775.087, FLORIDA STATUTES.

Petitioner was convicted of aggravated battery. It was charged in the information as having caused great bodily harm, **and** with a firearm (R 1-2). The jury was instructed that aggravated battery included an element that petitioner "caused great bodily harm. . . **or** that he used a deadly weapon" (T 124). On a verdict form indicating that Count II was for "aggravated battery with a firearm," the jury found him guilty of aggravated battery - the highest offense listed - and answered special interrogatories in the affirmative that he "carried, displayed, used," etc. a firearm, and personally possessed the firearm (R 22).

At sentencing, the prosecutor said the conviction was reclassified to a first-degree felony (R 60), and the trial court departed from the guidelines and imposed the statutory maximum sentence for a first-degree felony of 30 years in prison, even though petitioner was 17 at the time of the crime.

The prosecutor was mistaken and thereby misled the trial court, for when a firearm is an essential element of the offense at conviction, the offense cannot be reclassified. Based on the information, instructions, and verdict, the firearm was an essential element of Cargle's conviction. Thus his

conviction of aggravated battery is properly a second-degree felony, for which the statutory maximum sentence is 15 years in prison, and the 30-year sentence imposed is illegal.

Section 775.087, Florida Statutes (1995), "Possession or use of weapon; aggravated battery; felony reclassification; minimum sentence," provides in pertinent part:

> (1) Unless otherwise provided by law, whenever a person is charged with a felony, **except a felony in which the use of a weapon or firearm is an essential element**, and during the commission of such felony the defendant carries, displays, uses, threatens, or attempts to use any weapon or firearm, or during the commission of such felony the defendant commits an aggravated battery, the felony for which the person is charged shall be reclassified as follows:
>
> ....
>
> (b) In the case of a felony of the second degree, to a felony of the first degree. (emphasis added)

This court has said, in a case involving the reclassification of third-degree murder due to the use of a firearm:

> We find that this issue is controlled by Lareau v. State, [infra], where we held that although aggravated battery causing great bodily harm can be enhanced pursuant to section 775.087(1) because the use of a weapon is not necessary to cause great bodily harm, the crime of aggravated battery with the use of a deadly weapon is not subject to reclassification because the use of a weapon is an essential element of the crime. In this case, the jury was instructed that the use of a firearm was an essential element of third-degree felony murder.

Gonzalez v. State, 585 So.2d 932, 933 (Fla. 1991), citing Lareau v. State, 573 So.2d 813 (Fla.1991).

Hervey Lareau was charged with attempted first-degree murder for shooting Hortense Lareau with a handgun. Pursuant to a plea bargain, Lareau pleaded to the lesser-included offense of "Aggravated Battery (great bodily harm) w/firearm" for a guidelines sentence. Id. The parties did not agree as to what the guidelines were. Lareau argued he pleaded to a second-degree felony; the state argued he pleaded to a first-degree felony. The case turned on the fact that Lareau had pleaded to then-section 784.045(1)(**a**), Florida Statutes (1985), which provided:

> 784.045 Aggravated battery -
>
> (1) A person commits aggravated battery who, in committing battery:
>
> (a) Intentionally or knowingly causes great bodily harm, permanent disability, or permanent disfigurement; or
>
> (b) Uses a deadly weapon.
>
> (2) Whoever commits aggravated battery shall be guilty of a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

Lareau, 573 So.2d at 814.

The supreme court summarized the state's position thus:

> By basing Lareau's conviction on section 784.045(1)(**a**) and not on section 784.-045(1)(**b**), the trial and district court determined, as the state argues here, that the use of a weapon was not an essential element of the crime, and therefore section 775.087(1)(b) could be used to enhance the penalty. (emphases in Lareau)

Id. The court further analyzed the issue, and ultimately agreed with this reasoning, and approved the district court's

decision.

No such statutory subtlety saves the reclassification here. Cargle was charged in the information with aggravated battery, causing great bodily harm, **and** with a firearm, citing sections 784.045(**1**)(**a**)(aggravated battery), 775.087(1)(reclassification), and 775.087(2) (minimum mandatory for firearm), Florida Statutes (1995) (R 1-2). Section 784.045(1)(a), Florida Statutes (1995), provides:

> (1)(a) A person commits aggravated battery who, in committing battery:
>
> 1. Intentionally or knowingly causes great bodily harm, permanent disability, or permanent disfigurement; or
>
> 2. Uses a deadly weapon.
>
> (b) A person commits aggravated battery if. . .the victim was pregnant. . .
>
> (2) Whoever commits aggravated battery shall be guilty of a felony of the second degree, punishable as provided in s. 775.082, 775.083, or 775.084.

In Lareau, charging under the 1985 version of section 784.045(**1**)(**a**) distinguished between aggravated battery with great bodily harm and with a firearm. In the instant case, the present version of section 784.045(**1**)(**a**) does not distinguish the two charges, rather a further subparagraph designation would be needed, which the state did not make. Nor can merely citing to the reclassification statute save the reclassification where, as here, the information, and perhaps more importantly, the jury instructions and verdict form fail to make the crucial distinction to the jury.

The facts of this case are also similar in pertinent part to those in Montgomery v. State, 704 So.2d 548 (Fla. 1st DCA 1997). In Montgomery, the defendant was charged with attempted first-degree murder. The information alleged the crime was committed by touching or striking the victim without his consent, by shooting him with a firearm. Montgomery was convicted of the lesser-included offense of aggravated battery.

As in the instant case, the jury was instructed that the second element of aggravated battery was that the defendant a) caused great bodily harm, **or** b) used a deadly weapon. The verdict form provided the option of "aggravated battery" as a lesser, which the jury chose, and a special interrogatory asked if a firearm was used, which the jury answered "yes." Id. at 550.

The First District held that the verdict did not exclude the possibility that Montgomery was convicted of aggravated battery with an essential element of the deadly weapon, thus the offense could not be reclassified. Id. at 550-51. See also Moore v. State, 616 So.2d 168 (Fla. 4th DCA)(jury instructed on aggravated battery based both on great bodily harm and use of a deadly weapon; verdict of guilty of aggravated battery with a firearm; since firearm was an essential element, reclassification was improper), review denied, 629 So.2d 134 (Fla. 1993); see also McNeal v. State, 653 So.2d 1122 (Fla. 1st DCA 1995) (charged with aggravated battery by causing great bodily harm **and** using deadly weapon; jury instructed on element of

harm **or** weapon; verdict of guilty of attempted aggravated battery "with great bodily harm, with a deadly weapon"; reclassification improper); Randolph v. State, 591 So.2d 279 (Fla. 5th DCA 1991).

Undersigned counsel, who is successor appellate counsel, concedes that no objection was made in the trial court to reclassification, nor was the issue raised in the First District Court. The issue is being raised for the first time in this court, but petitioner relies on the provision of Rule 3.800(a), Florida Rules of Criminal Procedure, that an illegal sentence can be raised at any time. The error is apparent on the face of the record, as the information, the verdict, and the judgment and sentence provide all the information this court needs to find the 30-year sentence to be illegal.

V CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, petitioner requests that this court 1) hold the requirements of chapter 39, Florida Statutes, for sentencing a juvenile as an adult are mandatory, may not be waived silently, and are not subject to the state's preservation claims under section 924.051; 2) quash the contrary opinion of the First District Court of Appeal below, and 3) reverse his illegal sentence for aggravated battery, and order it reduced to 15 years.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

KATHLEEN STOVER
Fla. Bar No. 0513253
Assistant Public Defender
Leon County Courthouse
301 S. Monroe, Suite 401
Tallahassee, Florida 32301
(904) 488-2458

ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Giselle Lylen Rivera, Assistant Attorney General, by delivery to The Capitol, Plaza Level, Tallahassee, Florida, and a copy has been mailed to Mr. Rico Cargle, inmate no. 142378, Mayo Correctional Institution, P.O. Box 448, Mayo, Florida, 32066, this 15 day of April, 1998.

KATHLEEN STOVER