ORIGINAL

IN THE SUPREME COURT OF FLORIDA

RICO CARGLE,

Petitioner, :

v. : CASE NO. 92,031

STATE OF FLORIDA, :

Respondent. :

_____/

JURISDICTIONAL BRIEF OF PETITIONER

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IN THE SUPREME COURT OF FLORIDA

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

JURISDICTIONAL BRIEF OF PETITIONER

I PRELIMINARY STATEMENT

Petitioner is a juvenile who was sentenced as an adult without the trial court complying with the requirements of Chapter 39, Florida Statutes. This is an appeal from the First District Court's affirmance of that sentence. Cargle v. State, 22 Fla.L. Weekly D2215 (no. 96-2700) (Fla. 1st DCA Sept. 18, 1997). Rehearing was denied November 17, 1997.

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.

II STATEMENT OF THE CASE AND FACTS

Petitioner is a juvenile who was sentenced as an adult. In imposing sentence, the trial court did not comply with the requirements of 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. R.A.M. v. State, 695 So.2d 1308 (Fla. 1st DCA 1997)(question certified), review pending, no. 91,035 (Fla. 1997). The issue is currently pending before this court in R.A.M. and other cases.

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, 22 Fla.L. Weekly at D2215-16. at 6. The court noted that this was an issue of first impression in Florida. Id. at D2215.

III SUMMARY OF ARGUMENT

Petitioner is a juvenile who was sentenced as an adult without the trial court complying with the requirements of Chapter 39, Florida Statutes, for such a sentence. In Rhoden, infra, this court held that noncompliance with the statute was reversible error on appeal, even without a contemporaneous objection. Acknowledging the question to be one of first impression, the First District Court has held that the Rhoden exception has been abrogated sub silentio by the Criminal Appeal Reform Act of 1996. This court should review this case in order to clarify the status of Rhoden's exception after the Act.

IV ARGUMENT

ISSUE PRESENTED

THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL BELOW IS IN DIRECT AND EXPRESS CONFLICT WITH THIS COURT'S OPINIONS IN STATE V. RHODEN, 448 SO.2D 1013 (FLA. 1984) AND STATE V. MONTAGUE, 682 SO.2D 1085 (FLA. 1996).

Petitioner is a juvenile who was sentenced as an adult. In imposing sentence, the trial court did not comply with the requirements of 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 (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. R.A.M. v. State, 695 So.2d 1308 (Fla. 1st DCA) (question certified), review pending, no. 91,035 (Fla. 1997). The issue is currently pending before this court in R.A.M. and other cases.

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, 22 Fla.L. Weekly at D2215-16. The court noted that this was an issue of first impression in

Florida. Id., 22 Fla.L. Weekly at D2215.

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 [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."

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.

While the First District's opinion in Graddy v. State, 687 So.2d 1335 (Fla. 1st DCA 1997) gives little clue that it would

be the impetus for these issues, issues inter alia of both the constitutionality per se of section 924.051 and the continued viability of the Rhoden exception to the contemporaneous objection rule after the Act are presently pending before this court in Graddy, supra, *review pending*, State v. Graddy, no. 90,029 (Fla. 1997).

Because the question of the continued viability of the Rhoden exception to the contemporaneous objection rule is already pending before this court, and because the First District has acknowledged the more specific question here to be an issue of first impression in Florida, which concerns the procedure for appellate review of all similarly situated cases, this case should accept jurisdiction and review this case.

V CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, petitioner requests that this court accept review of this case to resolve the conflict with Rhoden and Montague, and clarify the status of Rhoden's exception to the contemporaneous objection rule after the Criminal Appeal Reform Act.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Kristina White, 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 16 day of December, 1997.

KATHLEEN STOVER

IN THE SUPREME COURT OF FLORIDA

RICO CARGLE,

Petitioner, :

v. : CASE NO.

STATE OF FLORIDA, :

Respondent. :

_____/

APPENDIX

The only previous acknowledgement in this court of *Johnson*'s holding that a double jeopardy violation constitutes fundamental error that permits review of such a claim on appeal as to both convictions and sentences appears in the concurring opinion in *Brown v. State*, 670 So. 2d 965, 966 (Fla. 1st DCA 1995), *disapproved on other grounds State v. Craft*, 685 So. 2d 1292 (Fla. 1996). In *Brown* the majority vacated two convictions on the ground of double jeopardy without reference to cases such as *Wright* and *Perrin*. In a concurring opinion, Judge Benton wrote that the double jeopardy question presented was cognizable not only as to appellant's sentences, but also as to his convictions because under *Novaton* "[b]y itself silence does not demonstrate a free and knowing waiver of a double jeopardy claim either as to conviction or as to sentence." We agree and recede from the line of cases from this court cited above to the extent this court failed to apply the fundamental error rule announced in *Johnson* to both a defendant's convictions and sentences. Accordingly, in the instant case we vacate appellant's conviction and sentence for assault as to Count II of the information.

On remand a scrivener's error also needs to be addressed. The record reflects that appellant was charged with and convicted of burglary while armed with a firearm on Counts IX and X of the information, not burglary with assault. The judgment, therefore, requires this correction. (MINER, ALLEN, WEBSTER, MICKLE, LAWRENCE and PADOVANO, JJ., CONCUR.)

* * *

Criminal law—Sentencing—Appeals—Imposition of adult sanctions pursuant to section 39.059(7) on a child prosecuted as an adult is not strictly a juvenile proceeding, but is in the nature of a hybrid procedure—Provisions of Criminal Appeal Reform Act, requiring preservation of issues for appeal, applies to sentencing of juveniles as adults—Application of act does not obviate right to appeal guaranteed in section 39.059(7), but requires that any such error be preserved—Juveniles sentenced as adult in criminal proceedings not only required to preserve error for review, but afforded opportunity to do so, pursuant to Rule 3.800(b)—Defendant's claim that trial court erred in imposing departure sentence not subject to appellate review where he was sentenced as adult after effective date of Criminal Appeal Reform Act, and had the opportunity to preserve error, but failed to do so

RICO L. CARGLE, Appellant, v. STATE OF FLORIDA, Appellee. 1st District. Case No. 96-2700. Opinion filed September 18, 1997. An appeal from the Circuit Court for Okaloosa County. Keith Brace, Judge. Counsel: Nancy A. Daniels, Public Defender; Faye A. Boyce, Assistant Public Defender, Tallahassee, for Appellant. Robert A. Butterworth, Attorney General; Giselle Lylen Rivera, Assistant Attorney General, Tallahassee, for Appellee.

(MINER, J.) Appellant, 17 years old at the time of his arrest, was charged as an adult with attempted armed robbery with a firearm and aggravated battery with a firearm. A jury found him guilty as charged, a presentence investigation (PSI) and a predisposition report (PDR) were ordered, and the sentencing hearing was set. Shortly before this hearing, appellant turned 18 years of age.

At the sentencing hearing, the trial judge announced his intention to depart from the sentencing guidelines. Appellant's attorney urged that while the PDR indicated that appellant met the criteria to be sentenced as an adult, it also stated that juvenile sanctions would protect the public and rehabilitate the appellant. Appellant's counsel did not argue at sentencing that appellant should be sentenced as a juvenile but only that he should be given a guideline sentence or a youthful offender sentence.

The trial court imposed a 15-year sentence for attempted robbery with a firearm and a concurrent 30-year sentence on the aggravated battery charge. The court made findings to support both a 3-year minimum mandatory term and the departure sentence it imposed. No motion to correct, reduce, or modify appellant's sentence was filed.

Claiming that the trial court erred in imposing a departure sentence, appellant argues that the trial court did not consider the criteria in section 39.059(7)(c), Florida Statutes (1995), and further that the trial court erred by not putting in writing the representation that those statutory criteria had been considered before imposing sentence, which is required by section 39.059(7)(d). Appellant contends that such errors require reversal, remand, and resentencing. The State counters that appellant did not object below to being sentenced as an adult and thus the issue was waived as a consequence of 1996 legislative revisions to chapter 924 (Criminal Appeal Reform Act). Alternatively, the State maintains that the record demonstrates that the trial court did, in fact, consider the chapter 39 criteria and, if required, remand should only be for the purpose of permitting the trial court to enter a nunc pro tunc written order containing a representation that these criteria were considered. For the reasons that follow, we affirm appellant's judgment and sentence.

At the outset, we note that appellant was sentenced on the very day the revisions to chapter 924[1] and an amendment to Fla. R. Crim. P. 3.800[2] took effect. So far as we have been able to determine, the precise question presented in this appeal has not been decided by any Florida court.

The substance of appellant's complaint at bar is that although the trial court listed its reasons in writing for imposing a departure sentence as required by Florida Rule of Criminal Procedure 3.702 (reasons supporting a departure sentence must be in writing), the written order made no reference to section 39.059(7)(c), which sets forth the criteria that must be considered before adult sanctions are imposed on a juvenile. The State candidly concedes that the order in question does not expressly indicate that the trial judge considered the (7)(c) criteria but argues that the record reflects that the judge did, in fact, consider such criteria. In view of our disposition of this appeal, however, we find it unnecessary to and do not address what the record reflects in this regard.

The appellant here was prosecuted as an adult and sanctions were imposed upon him under section 39.059(7), Florida Statutes (1995), which delineates the procedures for sentencing a juvenile prosecuted as an adult. Section 39.059(7)(d) provides that "[a]ny decision to impose adult sanctions must be in writing, but is presumed appropriate, and the court is not required to set forth specific findings or enumerate the criteria in this subsection as any basis for its decision to impose adult sanctions." The right to appeal the failure to meet this writing requirement is guaranteed by section 39.059(7).[3] Under cases decided before passage of the Criminal Appeal Reform Act of 1996 (Ch. 96-248, §4, at 954, Laws of Florida), a trial court's failure to commit the decision to impose adult sanctions to written order was reversible error. *Bridgewater v. State*, 668 So. 2d 1092 (Fla. 1st DCA 1996); *Nation v. State*, 668 So. 2d 284 (Fla. 1st DCA 1996)). Such error, however, was deemed ministerial in nature and did not require resentencing with the defendant present. *Nation v. State*, 669 So. 2d 284, 286 (Fla. 1st DCA 1996) (remanding "for the merely clerical or ministerial function" of entering a written nunc pro tunc order).

This court has stated that "[i]t is relatively well-settled that a juvenile's right to appeal is governed by chapter 39, Florida Statutes..., and that chapter 924 does not apply to juvenile proceedings." We have also held that there is "nothing in the 1996 amendments to chapter 924 (ch. 96-248, at 953, Laws of Fla.) to suggest a contrary intent on the part of the legislature." *T.M.B. v. State*, 689 So. 2d 1215 (Fla. 1st DCA 1997). *Accord J.M.J. v. State*, 22 Fla. L. Weekly D1673 (Fla. 1st DCA July 7, 1997); *R.A.M. v. State*, 695 So. 2d 1308 (Fla. 1st DCA 1997) (certifying question of whether section 924.051(4), Florida Statutes (Supp. 1996), applies in juvenile delinquency proceedings); *G.S.C. v. State*, 22 Fla. L. Weekly D1672 (Fla. 1st DCA July 7, 1997); *K.A.S. v. State*, 22 Fla. L. Weekly D1823 (July 22, 1997).

It is our view that the imposition of adult sanctions pursuant to 39.059(7) on a child prosecuted as an adult is not strictly a juvenile proceeding. It is in the nature of a hybrid procedure. Although the requirements of section 39.059(7) must still be met, it

must be remembered that the juvenile is being sentenced as an adult in criminal court. In *J.M.J. v. State*, 22 Fla. L. Weekly D1673 (Fla. 1st DCA 1997), this court noted that there are important procedural differences between juvenile delinquency proceedings and the procedures applicable in adult criminal matters. For example, juveniles sentenced as such in delinquency proceedings do not have the opportunity to correct sentencing errors in a procedure comparable to that in amended Florida Rule of Criminal Procedure 3.800(b), and there is no collateral review procedure afforded in delinquency proceedings similar to the procedure afforded adults under Florida Rule of Criminal Procedure 3.850. *Id.* Such is not the case for juveniles sentenced as adults. Accordingly, we hold that provisions of section 924.051, which require the preservation of issues for appeal, apply to the sentencing process by which juveniles are sentenced as adults. 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.

To afford criminal defendants an opportunity to preserve sentencing errors, such as the lower court's error in the instant case of failing to enter a written order, the supreme court amended Fla. R. Crim. P. 3.800, effective on the day appellant herein was sentenced as noted in footnote 2. *Amendments to Fla. R. App. P. 9.020(g) and Fla. R. Crim. P. 3.800*, 675 So. 2d 1374, 1375 (Fla. 1996). The Court Commentary accompanying this amendment states the following:

> Subdivision (b) was added and existing subdivision (b) was renumbered as subdivision (c) in order to authorize the filing of a motion to correct a sentence or order of probation, thereby providing a vehicle to correct sentencing errors in the trial court and to preserve the issue should the motion be denied. A motion filed under subdivision (b) is an authorized motion which tolls the time for filing the notice of appeal. The presence of a defendant who is represented by counsel would not be required at the hearing on the disposition of such motion if it only involved a question of law. Fla. R. Crim. P. 3.800.

As noted above, a juvenile sentenced as a juvenile in delinquency proceedings is not afforded this opportunity to preserve error, but a juvenile sentenced as an adult in criminal proceedings is not only required to preserve error for review under the Criminal Appeal Reform Act, but pursuant to Rule 3.800(b), he or she is afforded the opportunity to do so. Because appellant in the case at bar was sentenced as an adult after the July 1, 1996, effective date of the Criminal Appeal Reform Act, he had the opportunity pursuant to Rule 3.800(b) to preserve error on appeal here, but he did not. As a result, this issue is not subject to appellate review.

Affirmed. (ALLEN and LAWRENCE, JJ., CONCUR.)

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[1]Section 924.051, Florida Statutes (1996 Supp.) provides, in pertinent part:

(1) As used in this section:

***

(b) "Preserved" means that an issue, legal argument, or objection to evidence was timely raised before, and ruled on by, the trial court, and that the issue, legal argument, or objection to evidence was sufficiently precise that it fairly apprised the trial court of the relief sought and the grounds therefor.

***

(3) An appeal may not be taken from a judgment or order of a trial court unless a prejudicial error is alleged and is properly preserved or, if not properly preserved, would constitute fundamental error. A judgment or sentence may be reversed on appeal only when an appellate court determines after a review of the complete record that prejudicial error occurred and was properly preserved in the trial court or, if not properly preserved, would constitute fundamental error.

[2]On the same day the revisions to chapter 924 became effective, a revision to Fla. R. Crim. P. 3.800 took effect. New subsection (b) provides:

(b) Motion to Correct Sentencing Error. A defendant may file a motion to correct the sentence or order of probation within ten days after the rendition of the sentence.

Subsequently, the above rule was amended to give defendants 30 days to file such a motion. *Amendments to the Florida Rules of Criminal Procedure*, 685 So. 2d 1253, 1271 (Fla. 1996).

[3]"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."

* * *

Administrative law—Medicaid—Agency for Health Care Administration required to explicate emerging policy of requiring mental health services provider to have annual contract with Alcohol, Drug Abuse and Mental Health program office, rather than simply any form of contract with Department of Health and Rehabilitative Services, where it only began imposing requirement when it sent Medicaid cancellation letter to provider—Testimony of AHCA and HRS officials, and prior orders of agency which did not establish that AHCA consistently construed statute as requiring providers to have annual contracts with ADM, and which contained no acknowledgement that ADM requirement was incipient policy, did not provide means for AHCA to evade requirement that agency explicate incipient policy in hearing—Final order canceling Medicaid provider number reversed, and case remanded for purpose of permitting AHCA to explain its incipient policy, or for AHCA to remand for further proceedings

EXCLUSIVE INVESTMENT MANAGEMENT & CONSULTANTS, INC., d/b/a NEW DIRECTION COUNSELING, a Florida Corporation, Petitioner/Appellant, v. STATE OF FLORIDA, AGENCY FOR HEALTH CARE ADMINISTRATION, Respondent/Appellee. 1st District. Case No. 96-4473. Opinion filed September 18, 1997. An appeal from an order of the Agency for Health Care Administration. Counsel: James A. Burzee, Orlando, for Petitioner/Appellant. Gordon B. Scott, Senior Attorney, Agency for Health Care Administration, Tallahassee, for Respondent/Appellee.

(PER CURIAM.) This is an appeal by Exclusive Investment Management & Consultants (EIMC), d/b/a New Directions Counseling, a mental health services provider, from a final order entered by the Agency for Health Care Administration (AHCA) canceling EIMC's Medicaid provider numbers on the ground that EIMC, contrary to AHCA's interpretation of section 409.906(8), Florida Statutes (1995),[1] did not have an annual contract with the Alcohol, Drug Abuse and Mental Health (ADM) program office within the Department of Health and Rehabilitative Services (HRS). We reverse as to the issue asserting that AHCA erred in construing the statute to require that a mental health services provider have an annual contract with ADM, in that such interpretation constituted incipient, nonrule agency policy which AHCA did not explain during the formal hearing, but we affirm as to the remaining points.

Since August 3, 1994, as the administrative law judge (ALJ) found, EIMC had been under contract with HRS pursuant to short-term performance and rate contracts with ADM and Child Protective Services. Beginning in October 1995, AHCA sent Medicaid cancellation letters to EIMC and numerous other providers, stating that providers must have a contract with ADM, rather than simply any form of contract with HRS. Although AHCA's Medicaid handbook did not previously require providers even to have a contract with HRS, AHCA amended the handbook in December 1995 to require such contract, and thereafter construed the amendment to require an annual contract with ADM. Because AHCA only began imposing the annual ADM contract requirement in October 1995, when it sent the Medicaid cancellation letter to EIMC and the other providers, AHCA was required to explicate this emerging policy. *McDonald v. Department of Banking & Fin.*, 346 So. 2d 569, 582 (Fla. 1st DCA 1977) (any deviation from prior agency practice must be explained).

In its final order, AHCA contends that it has consistently construed the statute as requiring providers such as EIMC to have annual contracts with ADM, and in support of this position, it refers to the deposition testimony of AHCA and HRS officials, as well as "discoverable precedent." In regard to the testimony of agency officials, such evidence established only that the agency now requires mental health providers to have contracts with the ADM office. As to its reliance on discoverable precedent, AHCA cited three of its prior orders, which, similar to the testimony AHCA relied on, decided only that mental health providers must have a contract with ADM to be in compliance with section 409.906(8). *Southeastern Counseling Ctr., Inc. v. Agency for Health Care Admin.*, 18 F.A.L.R. 3520 (Fla. Agency for Health