

067

IN THE SUPREME COURT OF FLORIDA

FILED

SID J. WHITE

MAY 18 1998

CLERK, SUPREME COURT

By

Chief Deputy Clerk

CASE NO. 92,435

STATE OF FLORIDA,

Petitioner,

vs.

JASON EDWARD THOMPSON,

Respondent.

ON PETITION FOR CERTIORARI REVIEW

PETITIONER'S REPLY BRIEF

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STATEMENT OF THE CASE AND FACTS

Petitioner relies on the Statement of the Case and Facts in
Petitioner's Brief on the Merits.

SUMMARY OF ARGUMENT

The certified question should be answered in the affirmative. Section 924.051, Florida Statutes (Supp. 1996) conditions an appeal on the preservation of issues in the trial court, except in the case of fundamental error. Where the preservation condition has not been met, the appellate court lacks subject matter jurisdiction over an appeal. Hence, the court must dismiss the case because it may not exceed the boundaries of its authority.

ARGUMENT

UNDER SECTION 924.051(3), (4), FLORIDA STATUTES (SUPP. 1996) AND RULE OF APPELLATE PROCEDURE 9.140(b) (2) (B) (iv), IS THE FAILURE TO PRESERVE AN ALLEGED SENTENCING ERROR FOR APPEAL FOLLOWING A GUILTY PLEA A JURISDICTIONAL IMPEDIMENT TO AN APPEAL WHICH SHOULD RESULT IN A DISMISSAL OF THE APPEAL, OR IS IT A NON-JURISDICTIONAL BAR TO REVIEW WHICH SHOULD RESULT IN AN AFFIRMANCE?

Respondent points to this court's opinion in Amendments to the Florida Rules of Appellate Procedure, 696 So. 2d 1103 (Fla. 1996), and states that this Court protected a limited right to appeal certain issues following a plea of guilty (RB. 3-4). However, Respondent ignores the condition placed on this right which was approved by this Court, "a defendant who pleads guilty or nolo contendere without reserving a legally dispositive issue [can] nevertheless appeal a sentencing error, **providing it has been timely preserved by motion to correct the sentence.**" 696 So. 2d at 1105. (emphasis supplied). So, yes, just as Petitioner argued in the initial brief, a defendant may appeal a sentence after a guilty plea, but only if the alleged error has been properly preserved. This Court has stated, "we believe the legislature could reasonably condition the right to appeal upon the preservation of prejudicial error or the assertion of a fundamental error." Amendments to the Florida Rules of Appellate Procedure, 685 So. 2d 773, 775 (Fla. 1996). After all, the right

to appeal is purely a creature of statute so that one must come within the terms of the applicable statute to exercise the right. Abney v. United States, 431 U.S. 651, 656 (1977).

By citing to Florida Star v. B.J.F., 530 So. 2d 286 (Fla. 1988), Respondent attempts to treat section 924.051 as conferring discretionary power to the district courts. As argued in the initial brief, though, section 924.051 allows no room for discretion because it specifically requires either preservation or fundamental error. If neither of these conditions exist, then the appellate court lacks jurisdiction to hear the case, just as this Court would lack conflict jurisdiction from an opinion that does not establish a point of law. See Florida Star, 530 So. 2d at 288-289.

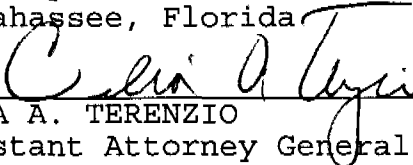
Respondent claims that a district court will have to hear an appeal to determine preservation or fundamental error (RB. 5). Petitioner replies that a preliminary review of a case for a determination of jurisdiction is not the same as hearing the case. Indeed, the remedy is different, dismissal instead of affirmance. See, e.g., Harriel v. State, 23 Fla. L. Weekly D967 (Fla. 4th DCA April 15, 1998) (en banc). Moreover, the amount of waste involved is distinct. Whereas dismissal can often be based on an initial brief and motion to dismiss, affirmance requires full briefing, a bench memo, and an opinion.

CONCLUSION

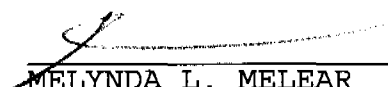
WHEREFORE, based on the foregoing arguments and authorities, the State of Florida respectfully submits that the certified question should be answered in the AFFIRMATIVE, and the decision of the district court should be QUASHED and the appeal be DISMISSED.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing "Brief of
Petitioner on the Merits" has been furnished by courier to: PAUL
PETILLO, Assistant Public Defender, 421 Third Street, Sixth
Floor, West Palm Beach, Florida 33401, on this 13th day of May,
1998.



Of Counsel