IN THE SUPREME COURT OF FLORIDA

JASON TYRONE SPEIGHTS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 93,207

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS

PRELIMINARY STATEMENT

Respondent, the State of Florida, the Appellee in the District Court of Appeal (DCA) and the prosecuting authority in the trial court, will be referenced in this brief as Respondent, the prosecution, or the State. Petitioner, Jason Tyrone Speights, the Appellant in the DCA and the defendant in the trial court, will be referenced in this brief as Petitioner or by proper name.

The symbol "R" will refer to the record on appeal, and the symbol "T" will refer to the transcript of the trial court's proceedings; "IB" will designate the Initial Brief of Petitioner. Each symbol will be followed by the appropriate page number in parentheses.

STATEMENT OF THE CASE AND FACTS

The State agrees with petitioner's statement of the case and facts.

SUMMARY OF ARGUMENT

The certified question should be answered in the negative. Both this Court and the legislature have declared an intent, and established a requirement, that sentencing errors first be raised in the trial court. The petitioner has not filed a rule 3.800(b) motion to correct his sentence or filed a rule 3.850 motion claiming ineffective assistance of counsel but is instead seeking a direct appeal remedy which this Court and the legislature have prohibited. The State urges this Court to declare its approval of Judge Griffin's analysis in Maddox v. State, 708 So.2d 617 (Fla. 5th DCA 1998) and require that defendants raise all sentencing errors before the trial court.

ARGUMENT

ISSUE

WHEN A HABITUAL VIOLENT FELONY OFFENDER SENTENCE IS IMPOSED WITHOUT RECORD EVIDENCE OF A PRIOR CONVICTION OF AN ENUMERATED PREDICATE FELONY, BUT WITHOUT ANY OBJECTION BY THE DEFENDANT TO THE IMPOSITION OF SUCH A SENTENCE, AND THE RESULTING SENTENCE IS ABOVE THE STATUTORY MAXIMUM WITHOUT HABITUALIZATION BUT BELOW THE STATUTORY MAXIMUM PERIOD OF INCARCERATION AFTER HABITUALIZATION, IS THE SENTENCING ERROR ONE THAT MAY BE RAISED ON APPEAL FOR THE FIRST TIME, AND CORRECTED DESPITE THE LACK OF ANY MOTION IN THE TRIAL COURT TO CORRECT THE SENTENCE PURSUANT TO FLA.R.CRIM.P. 3.800(b)? (Certified Question)

Before trial, the State filed a notice of intent to sentence the petitioner as a habitual violent felony offender with the predicate offense being a 1995 attempted carjacking conviction. (R. 15). Petitioner was convicted of aggravated battery. (R. 50-57). At the sentencing hearing, the following exchange occurred:

> [Trial court]: Would the State please announce all of its priors its relying on in seeking habitualization in the case?
>
> [State]: Your honor, the State is relying on a conviction out of Tampa dated--
>
> [Trial court]: First of all give me the crime, please. Just the crime.
>
> [State]: Yes, sir. Attempted carjacking with a deadly weapon.
>
> [Trial court]: What degree felony is that, by the way?
>
> [State]: Your honor, it's a second degree felony.
>
> [Trial court]: What was the date of that conviction?
>
> [State]: Your honor, the date is July 4th, 1995.

(R. 73).

The trial court sentenced petitioner as a habitual violent felony offender. (R. 50-57, 87). The petitioner did not file a motion to correct his sentence pursuant to Florida Rule of Criminal Procedure 3.800(b).

On appeal, petitioner asserted that he was wrongly sentenced as a habitual violent felony offender because attempted carjacking is not listed as a predicate offense in the habitual violent felony offender statute. § 775.084(1)(b)(1), Fla. Stat. (1997). The State argued that the issue of whether the trial court properly imposed a habitual violent felony offender (HVFO) sentence on petitioner had not been preserved for review.

In affirming petitioner's sentence, the First District rejected petitioner's argument that petitioner's habitual violent felony offender sentence was illegal as a matter of law because carjacking is not a statutorily authorized predicate offense for an HVFO sentence and no proper predicate offense appears in the record. Speights v. State, 23 Fla.L.Weekly D1220 (Fla. 1st DCA May 13, 1998). The Court reiterated that an "illegal" sentence is one that exceeds the statutory maximum set forth by law and is correctable as a matter of law without any evidentiary proceeding. Citing Davis v. State, 661 So.2d 1193 (Fla. 1995) and State v. Callaway, 658 So.2d 983 (Fla. 1995). The Court noted that if the sentence was vacated for lack of a proper predicate offense, the state could present evidence on remand of additional prior convictions which might justify an HVFO sentence. The Court concluded that "reliance on an improper predicate offense does not render the sentence

'illegal' for purposes of determining whether the error may be raised for the first time on appeal". Id.

The Court also rejected petitioner's argument that petitioner's sentence was illegal because it exceeded the statutory maximum for the offense. Id. The statutory maximum for aggravated battery after habitualization is thirty years. Petitioner was sentenced to twenty-two years. The court concluded that "in the absence of any objection to habitualization, the trial court did not err in relying on the statutory maximum sentence for a habitual violent felony offender convicted of a second degree felony." Id.; see also Middleton v. State, 689 So. 2d 304 (Fla. 1st DCA 1997)(affirming defendant's habitual offender sentence for possession of cocaine even though habitual offender statute excludes from habitual offender sentencing the crime of possession of cocaine because the defendant failed to raise the issue either at sentencing or by filing a timely motion to correct).

The First District correctly found that the petitioner's sentence was not illegal. An illegal sentence is "one that exceeds the maximum period set forth by law for a particular offense without regard to the guidelines." Davis, 661 So.2d at 1196. The aggravated battery statute specifically provides for sentencing as a habitual felony offender. § 784.045, Fla. Stat. (1995). Thus, petitioner's sentence which is within the habitual offender statutory maximum does not exceed the maximum period set forth by law for petitioner's offense and is not illegal. § 775.084(4)(b), Fla. Stat. (1995); Harris v. State, 680 So.2d 469 (Fla. 1st DCA

1996)(affirming the trial court's denial of defendant's motion to correct illegal sentence and stating that 25-year sentence does not exceed the maximum sentence authorized by statute for persons convicted of a second degree felony and sentenced as a habitual felony offender).

POLICY CONSIDERATIONS

This is an appeal which should never have been initiated. Both the Florida Legislature and this Court have provided remedies for petitioner's claim which he has declined to exercise, seeking instead a direct appeal remedy which both this Court and the Florida Legislature have prohibited. The decision should be affirmed with instructions that will enlighten the legal community, and particularly the defense bar, on the correct way to raise such claims pursuant to law.

Both this Court and the legislature have declared an intent, and established a requirement, that sentencing errors first be raised in the trial court. In the Criminal Appeals Reform Act, the legislature provided that:

> [A] judgment or sentence may be reversed on appeal only when an appellate court determines upon 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.

§ 924.051(3), Fla. Stat. (1997).

> It is the intent of the Legislature that all terms and conditions of direct appeal and collateral review be strictly enforced, including the application of procedural bars, to ensure that all claims of error are raised and resolved at the first opportunity. It is also the Legislature's intent that all procedural bars to direct appeal and collateral review be fully enforced by the courts of this state.

§ 924.051(7), Fla. Stat. (1997).

After the passage of the Criminal Appeals Reform Act, this Court upheld the authority of the Florida Legislature to condition the right to appeal upon the preservation of claims in the trial court and amended various rules of criminal and appellate procedure to fully implement the Reform Act. Amendments to the Florida Rules of Appellate Procedure, 685 So.2d 773 (Fla. 1996). Specifically, as they apply here, Florida Rule of Criminal Procedure 3.800 was amended to provide a defendant with a newly created right to file a motion to correct a sentence within thirty days of the rendition of the sentence. Fla.R.Crim.P. 3.800(b). There had been no previous right to such remedy and, in the comments following the rule, this court stated the purpose of the new rule as follows:

> 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.

This Court also clarified that appellate review of sentencing errors is prohibited if the issue has not first been presented to the trial court by amending the appellate rules to state:

> (d) Sentencing Errors. A sentencing error may not be raised on appeal unless the alleged error has first been brought to the attention of the lower tribunal:
>
> (1) at the time of sentencing; or
>
> (2) by motion pursuant to Florida Rule of Criminal Procedure 3.800(b).

Fla.R.App.P. 9.140(d).

Thus, even if petitioner and his counsel were temporarily derelict in not recognizing that the predicate offense on which the trial court relied was not pursuant to the statute, both petitioner and his trial counsel had an additional thirty days in which to recognize the potential error and to seek a remedy in the trial court pursuant to statute and rule. This thirty day period is, of course, the same time period in which a notice of appeal should be filed to seek review of any preserved errors. They failed to do so and should not now be permitted to raise a claim of error which they are largely responsible for creating.

It may nevertheless be argued that we are faced with fundamental error or an illegal sentence and that these claims must be addressed on direct appeal. Not so. The state first points out that both terms, "fundamental error" and "illegal sentence" are historically notorious for their lack of certainty. The solution for this conundrum can be found in the perceptive analysis of Chief Judge Griffin in an **en banc** decision, Maddox v. State, 708 So.2d 617 (Fla. 5th DCA 1998). The state relies heavily on this analysis and urges this Court to declare its approval.

As it specifically applies here, Judge Griffin's analysis is not only simple and easy to apply, it furnishes a complete remedy to a criminal defendant who has been prejudiced by the inaction of a trial counsel in not contemporaneously objecting to an illegal or improper sentence or in not filing within thirty days a motion pursuant to rule 3.800(b). Such claims can be raised in the trial court, consistent with both statute, rule, and case law, as an

ineffective assistance of trial counsel claim. Obviously, as Judge Griffin points out, if a claim does involve fundamental prejudicial error there is not only incompetency of counsel in not preserving the issue, there is also obvious prejudice.

> Certainly, there is little risk that a defendant will suffer an injustice because of this new procedure; if any aspect of a sentencing is "fundamentally" erroneous and if counsel fails to object at sentencing or file a motion within thirty days in accordance with the rule, the remedy of ineffective assistance of counsel will be available. It is hard to imagine that the failure to preserve a sentencing error that would formerly have been characterized as "fundamental" would not support an "ineffective assistance" claim.

Maddox, 708 So.2d at 621.

The court explained why sentencing errors should be raised in front of the trial court as follows:

> At the intermediate appellate level, we are accustomed to simply correcting errors when we see them in criminal cases, especially in sentencing, because it seems both right and efficient to do so. The legislature and the supreme court have concluded, however, that the place for such errors to be corrected is at the trial level and that any defendant who does not bring a sentencing error to the attention of the sentencing judge within a reasonable time cannot expect relief on appeal. This is a policy decision that will relieve the workload of the appellate courts and will place correction of alleged errors in the hands of the judicial officer best able to investigate and to correct any error. **Eventually, trial counsel may even recognize the labor-saving and reputation-enhancing benefits of being adequately prepared for the sentencing hearing.**

Id. at 621.(emphasis supplied).

Requiring defendants to raise sentencing errors before the trial court, as both the legislature and this Court have mandated, promotes the efficiency of the criminal justice system. Judge

Warner, in a recent en banc opinion for the Fourth District adopted a position almost identical to that of the Maddox:

> Had appellant filed a motion to correct the sentence, within a very short time--far less than the year this appeal has been pending--the trial court could have corrected his sentence. It is for the benefit of the criminal judicial system as a whole, as well as the individual defendants, that this expeditious remedy of sentence correction has been made available. Our strict enforcement of Rule 9.140(d) should have the effect of alerting the criminal bar of the absolute necessity for reviewing the sentencing orders when received to determine whether correction is necessary. If they do not, relief will not be afforded on appeal. Thus, counsel's duties do not end with the pronouncement of the sentence. Trial counsel can no longer rely on appellate counsel to request correction of errors in the appellate court.

Hyden v. State, 23 Fla.L.Weekly D1342 (Fla. 4th DCA 1998)(en banc).

The holdings of Maddox and Hyden not only serve the interests of the judicial system. They also serve the interests of all involved in the system: the trial courts, the appellate courts, the criminal defendant/appellants, and the prosecuting authority. This appeal to the district court started in July 1997, has consumed more than a year of judicial time, required the attention, to date, of at least ten appellate judges and all their support personnel, an appellate public defender and an assistant attorney general. All this waste motion and effort, and consumption of scarce resources, could have been avoided and Speights claim speedily resolved, had trial counsel raised the issue in the trial court pursuant to rule and statute or, had appellate counsel, when the claim was first noted, simply dismissed the appeal for failure to preserve a cognizable issue, so that petitioner Speights could seek the authorized relief via a rule 3.850 motion. Here, there can be no doubt that trial

counsel failed to provide competent assistance of counsel in failing to note that the predicate offense on which the state relied was not pursuant to statute. The only issue, and the controlling issue, is whether Speights has suffered any prejudice by the incompetency. If there is no previous predicate offense on which the state may rely, and the record on this is silent to this point, then Speights has suffered prejudice and is entitled to resentencing because of ineffective assistance of trial counsel. Speights has an authorized remedy for his claim and this Court should require him to pursue it without prejudice. Again, see Judge Griffin's analysis in Maddox.

> Certainly, there is little risk that a defendant will suffer an injustice because of this new procedure; if any aspect of a sentencing is "fundamentally" erroneous and if counsel fails to object at sentencing or file a motion within thirty days in accordance with the rule, the remedy of ineffective assistance of counsel will be available. It is hard to imagine that the failure to preserve a sentencing error that would formerly have been characterized as "fundamental" would not support an "ineffective assistance" claim.

Maddox, 708 So.2d at 621.

This Court should answer the certified question in the negative for the reasons set forth above.

CONCLUSION

Based on the foregoing, the State respectfully submits the certified question should be answered in the negative.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONDENT'S ANSWER BRIEF ON THE MERITS has been furnished by U.S. Mail to Angela Shelley, Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, this 3rd day of August, 1998.

Trina Kramer
Attorney for the State of Florida

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