IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 93, 966

TERRY HYDEN,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

****

ON REVIEW FROM A CERTIFIED CONFLICT OF DECISIONS

****

RESPONDENT'S BRIEF ON THE MERITS

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TABLE OF CONTENTS

CERTIFICATE OF TYPE SIZE AND STYLE

In accordance with the Florida Supreme Court Administrative Order, issued on July 13, 1998, Respondent hereby certifies that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately.

TABLE OF AUTHORITIES

STATE CASES

MISCELLANEOUS

PRELIMINARY STATEMENT

Petitioner was the Defendant and Respondent was the prosecution in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida. Respondent was the Appellee and Petitioner was the Appellant in the Fourth District Court of Appeal. In this brief, the parties shall be referred to as they appear before this Honorable Court except that Respondent may also be referred to as the State.

In this brief, the symbol "TR" will be used to denote the transcripts of the hearing, and "R" will be used to denote the record on appeal to the Fourth District.

All emphasis in this brief is supplied by Respondent unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Petitioner entered a plea of nolo contendere at the trial court to charges of possession of cocaine in open court. (TR 8). The conduct which gave rise to the charges occurred on September 27, 1996. (R 1). As a part of that plea agreement, petitioner reserved the right to contest the denial of his motion to suppress evidence. (TR 4-5). No other issues were preserved for review.

In the district court, Petitioner raised two sentencing issues in addition to the suppression issue. In refusing to consider the merits of his sentencing issues, the Fourth District, *en banc*, held that it is no longer appropriate to review sentencing errors which were not preserved in the trial court and are not fundamental. The Fourth District held that petitioner's alleged errors in the imposition of fees and costs as conditions of probation were not preserved and were not fundamental. In its opinion, the Fourth District certified conflict with Neal v. State, 688 So. 2d 392 (Fla. 1st DCA 1997), review denied, 698 So. 2d 543 (Fla. 1997).

After Petitioner filed the instant petition, the First District receded from Neal. Respondent, therefore, moved to dismiss this petition for lack of jurisdiction. By order issued December 5, 1998, this Court postponed its decision on jurisdiction and ordered that Respondent file its Merits brief by December 30, 1998. Respondent's Brief on the Merits follows.

SUMMARY OF THE ARGUMENT

This case should be dismissed because there is no longer a conflict between the districts. In the alternative, respondent contends the Fourth District correctly held that unpreserved sentencing errors which are not fundamental are not reviewable by the appellate court. Petitioner's alleged sentencing errors are not fundamental, and thus his failure to preserve them in the trial court rendered them procedurally barred.

While the changes in the Criminal Appeal Reform Act and the rules changed the definition of fundamental error in the sentencing context, those changes are not unconstitutional. First, for sentencing errors to be preserved, a defendant must present them to the trial court for review prior to raising them on direct appeal. Next, a defendant has other available remedies regarding review of an illegal sentence under the rules of criminal procedure. Thus, the restriction prescribed by the Criminal Appeal Reform Act on the appeal of sentencing errors is both efficient and constitutional.

ARGUMENT

POINTS I & II

WHETHER THE DISTRICT COURT OF APPEAL, FOURTH DISTRICT ERRED, IN HOLDING THAT A DEFENDANT WHO FAILS TO OBJECT TO THE IMPOSITION OF COSTS AND ATTORNEYS FEES IN THE TRIAL COURT MAY NOT RAISE THOSE SENTENCING ISSUES ON APPEAL.

Respondent, the State of Florida, submits that the issue was properly decided in Hyden v. State, 715 So. 2d 960 (Fla. 4th DCA 1998), Maddox v. State, 708 So. 2d 617 (Fla. 5th DCA 1998), Denson v. State, 711 So. 2d 1225 (Fla. 2d DCA 1998), and Locke v. State, 719 So. 2d 1249 (Fla. 1st DCA 1998). Those decisions all held that a defendant who fails to challenge the imposition of costs, fees, and conditions of probation in the trial court may not seek review of such issues on appeal. Petitioner in this case failed to challenge the imposition of costs and fees as conditions of probation in the trial court. Hence, those issues are not preserved for appellate review.

At the outset, respondent reasserts that this case should be dismissed because no conflict exists between the district courts regarding the issue brought by petitioner for review. The Fourth District's opinion in Hyden reflects the correct rule of law, and the conflicting, incorrect cases have been eliminated and do not have any precedential effect. Wainwright v. Taylor, 476 So. 2d 669, 670 (Fla. 1985). See also Bailey v. Hough, 441 So. 2d 614 (Fla. 1983)(court lacked jurisdiction where conflicting case

receded from in subsequent decision); Wackenhut Corp. v. Judges of District Court of Appeal, 297 So. 2d 300 (Fla. 1974) (conflicting case reversed).[1]

Alternatively, if this court determines that it has jurisdiction, respondent contends that the Fourth District's opinion should be upheld. The record on appeal shows that on February 12, 1997, petitioner entered a plea of nolo contendere to charges of possession of cocaine in open court. The conduct which gave rise to the charges occurred on September 27, 1996. (R 1). As a part of that plea agreement, petitioner reserved the right to contest the denial of his motion to suppress evidence. (TR 4-5). No other issues were preserved for review.

While the trial court was discussing conditions of probation during the sentencing hearing on March 10, 1997, petitioner's counsel, an Assistant Public Defender, tendered to the court a final judgment for public defender fees of $200 and costs of $42. (TR 11). The court notified petitioner that he had the right to contest those fees. (TR 11). When the court informed petitioner that he had the right to contest the public defender fees of $200, he stated, "No, sir. I waive that right." (TR 12). When the

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[1]The majority of petitioner's argument is moot. The certification of conflict was with the First District's decision in Neal v. State, 688 So. 2d 392 (Fla. 1st DCA), rev. denied, 698 So. 2d 543 (Fla. 1997). However, the First District receded from its holding in Neal in the case of Locke, 719 So. 2d 1249, and therefore, no conflict exists.

Assistant Public Defender informed the court that there were additional costs of $42, petitioner remarked, "I waive my right." (TR 12). The court found that petitioner waived the right to a hearing on the public defender fees and costs. (TR 12). The trial court entered an order of probation which included the costs and fees as discussed in open court. (R 35). Petitioner did not file any pleading in the trial court challenging the imposition of those fees and costs.

Petitioner alleged in the district court that he did not receive notice that the fees and costs would be conditions of probation, and that the oral pronouncement did not conform to the written sentence. Petitioner argued that the sentence was illegal. Respondent asserted that petitioner had actual notice by virtue of the trial court's announcement in open court, when the trial court explicitly informed him of the right to contest them. Respondent also maintained that petitioner expressly waived the right to contest them, and that petitioner had constructive notice by virtue of their publication in the Florida Statutes. See Section 27.56, Fla. Stat. (1995); Locke v. State, 719 So. 2d 1249, and cases cited therein. Respondent also argued that petitioner's claim was not preserved for appellate review because petitioner failed to raise this issue in the trial court.

The Fourth District did not reach the merits of petitioner's sentencing issues because it held that it will "no longer entertain

on appeal the correction of sentencing errors which are not properly preserved" by objection at the time of sentencing or in a motion to correct sentence under Florida Rule of Criminal Procedure 3.800.

Assuming *arguendo* that the oral pronouncement did not conform to the written order, i.e., that the costs were not conditions of probation, petitioner still failed to preserve the alleged error. In order to be preserved, the issue had to be presented to, and ruled on by the trial court. § 924.051(1)(a), Fla. Stat. (1997); Fla. R. App. P. 9.140(b)(2)(B)(iv); and Fla. R. App. P. 9.140(d). Because petitioner failed to file a Rule 3.800(b) motion in the trial court, petitioner must demonstrate that the alleged error was fundamental. Petitioner has not shown so.

The Criminal Appeal Reform Act of 1996 changed petitioner's right to appeal an unpreserved sentencing error in a direct appeal. Before the amendments to the statute and to the rules, courts took inconsistent approaches to whether an objection was needed to preserve a sentencing error, and there were various abuses of the judicial system, which had arisen primarily from exceptions to the rule requiring sentencing errors to be presented first in the trial court. Then, case law evolved which provided that sentencing errors apparent from the record could be reviewed by the appellate court whether preserved or not. See Taylor v. State, 601 So. 2d 540 (Fla. 1992); Dailey v. State, 488 So. 2d 532 (Fla. 1986); and

State v. Rhoden, 448 So. 2d 1013 (Fla. 1984); State v. Montague, 682 So. 2d 1085 (Fla. 1996) (stating that contemporaneous objection rule does not apply to sentencing errors apparent on face of record, and such errors may be raised for first time on appeal).

The appellate system became clogged with sentencing errors which were raised for the first time on direct appeal. To alleviate this problem, both this Court and the Florida Legislature undertook corrective action. It was achieved by the Criminal Appeal Reform Act of 1996, and by amendments to the rules of criminal and the appellate procedure. The Criminal Appeal Reform Act of 1996, codified as chapter 924, Florida Statutes (Supp. 1996), was approved and implemented by this Court in Amendments to Florida Rules of Appellate Procedure, 685 So. 2d 773 (Fla. 1996), and Amendments to Florida Rules of Criminal Procedure, 685 So. 2d 1253 (Fla. 1996); Amendments to Fla.R.App.P. 9.020(g) and Fla.R.Crim.P. 3.800, 675 So. 2d 1374 (Fla. 1996).

After the passage of Section 924.051, this court amended Florida Rule Appellate Procedure 9.140 to work with the Criminal Appeal Reform Act. As applied to appeals after a plea of guilty or nolo contendere, the amended Rule provides the following:

Rule 9.140(b):

...

> (2) Pleas. A defendant may not appeal *from a guilty or nolo contendere plea* except as follows:

> (A) A defendant who pleads guilty or nolo contendere may expressly reserve the right to appeal a prior dispositive order of the lower tribunal, identifying with particularity the point of law being reserved.
>
> (B) A defendant who pleads guilty or nolo contendere may otherwise directly appeal only
>
> (I) the lower tribunal's lack of subject matter jurisdiction;
>
> (ii) a violation of the plea agreement, if preserved by a motion to withdraw plea;
>
> (iii) an involuntary plea, if preserved by a motion to withdraw plea;
>
> (iv) **a sentencing error, if preserved;** or
>
> (v) as otherwise provided by law [e.s.].

Rule 9.140 was also further changed to specifically refer to sentencing errors:

> (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).

Specifically, Rule 3.800 was amended to provide a remedy for the type of problem petitioner is raising in this case. Rule 3.800(b), as amended, provides that a "defendant may file a motion to correct

the sentence or order of probation within thirty days after the rendition of the sentence."

These specific changes led the First, Second, Fourth and Fifth District Courts to find that the concept of fundamental errors regarding fees and costs no longer exist. As noted by the district courts, only "preserved" errors can be appealed.

There is not, and cannot be, a legitimate constitutional right to forego the preservation of claimed errors in the trial court. That is particularly true when the statute and implementing rules provide ready remedies for every legitimate claim of error to be first raised in the trial court. Errors can be raised in the trial court contemporaneously, by a post-sentencing motion, or by a post-conviction motion. It should be noted that the definition of "rendition" of an order was amended to provide that a timely filed motion to correct the sentence stays rendition of the judgment of conviction and sentence for purposes of appeal. See Hyden; Fla. R. App. P. 9.020(h). Thus, the amendments make it clear that a timely motion to correct a sentence preserves the defendant's appellate rights. The defendant loses his or her appellate rights only when he or she does not observe the provisions of Rule 3.800(b) and Rule 9.140(d); Hyden.[2] In sum, in amending the Florida Rules of

[2]Furthermore, the Florida Supreme Court created Rule 9.600(d), which provides the trial court with concurrent jurisdiction to review sentencing errors pursuant to Rule 3.800(a) while the appellate court reviews trial claims and other preserved error on direct appeal.

Appellate and Criminal Procedure, the Florida Supreme Court has provided numerous vehicles for defendants to raise sentencing errors in the trial court, regardless of the "fundamentalness" of the error alleged, and in a manner that continues to promote fairness.

A defendant then has the following remedies to challenge his sentencing errors in the trial court. A defendant may file a motion to correct an illegal sentence under Rule 3.800(a) at any time. A defendant may raise a contemporaneous objection regarding a sentencing error during sentencing or file a motion under Rule 3.800(b) within thirty days of the rendition of the sentence. Additionally, a defendant may bring a sentencing error to the trial court's attention by filing a Rule 3.850 motion within two years of the rendition of the final judgment of conviction and sentence. Under each of these scenarios listed above, the defendant is entitled to appeal a trial court's adverse ruling on the motion or objection.

In the instant case, since petitioner's alleged errors were not preserved, he urges this court to consider the alleged errors fundamental. Hyden correctly held they are not.

Generally, fundamental error is defined as error that goes to the "foundation of the case" or the "merits of the cause of action." Denson, at 1230. However, recently courts have distinguished between sentencing and trial errors and have found

fundamental error exists **only** in the latter context. Maddox, 708 So. 2d at 619. In Denson, the court described fundamental error, pursuant to section 924.051(3), Florida Statutes, as an error that is "...so egregious and without alternative remedy that it warrants the appellate courts exercising **jurisdiction** in the case solely for the purpose of correcting that error. [e.s.]" Denson, 711 So. 2d at 1229. The Denson court further stated that "there is little question that 'fundamental error' for purposes of the Criminal Appeal Reform Act is a narrower species of error than some of the errors previously described as fundamental in case law." Id. The district courts in Maddox, Hyden, Denson, and Locke, all agree that error in the imposition of fees and costs is not fundamental. A review of what each of these district courts said is illuminating.

The Fifth District in Maddox, explaining that sentencing errors are never fundamental, said:

> As for the "fundamental error" exception, it now appears clear, given the recent rule amendments, that "fundamental error" no longer exists in the sentencing context.
>
> ...
>
> It appears that the supreme court has concluded that the notion of "fundamental error" should be limited to trial errors, not sentencing errors.
>
> ...
>
> The language of Rule 9.140(b)(2)(B)(iv) could not be clearer. And why should there be "fundamental" error where the courts have created a "failsafe" procedural device to correct any sentencing error or omission at the trial court level? Elimination of the concept of "fundamental error" in sentencing will avoid the inconsistency and illogic that plagues the case law and will provide a much-needed measure of clarity, certainty and finality. .

...

If an improper $1 cost assessment is "fundamental error," then any sentencing error, no matter how minor, would be fundamental [e.s.].

Maddox, supra, 708 So. 2d at 620.

Likewise in Hyden, the Fourth District while agreeing with the Fifth District's analysis, wrote:

> The addition of Rule 3.800(b) and Rule 9.140(d) has changed the legal landscape with respect to whether it remains fundamental error to impose a public defender's fee or costs where the defendant failed to move to correct the sentence or order of probation.
>
> ...
>
> Assuming that prior to the sentence a defendant is not given notice of the state's intent to impose costs and a public defenders' fee, once the fees are imposed in the sentence, the defendant surely has notice of them. If the defendant contests either the ability to pay such fees or the amount, he or she can file a motion to correct the sentence, pursuant to Rule 3.800(b), contesting the imposition and requesting a hearing.
>
> ...
>
> It makes little sense to characterize significantly less important issues of costs and attorney's fees fundamental and thereby permit them to be raised for the first time on appeal, when Rule 9.140(d) cuts off the right to bring far more serious matters involving deprivation of liberty, such as issues of habitualization, without proper preservation.[e.s.]

Hyden, 715 So. 2d at 961-962.

The Second District in Denson stated:

> the intent and the goals of this collective effort have been to minimize frivolous appeals, to maximize the efficiency of the appellate system, and to place the task of correcting most sentencing errors in the lap of the circuit court.
>
> ...
>
> The error which the legislature is describing in

> section 924.051(3) is an error that is not merely correctable on direct appeal without preservation, but it is an error that is so egregious and without alternative remedy that it warrants the appellate court exercising jurisdiction in the case solely for the purpose of correcting that error. So defined, there is little question that "fundamental error" for purposes of the Criminal Appeal Reform Act is a narrower species of error than some of the errors previously described as fundamental in case law. Because the sentencing errors in this case could have been challenged by a motion pursuant to Florida Rule of Criminal Procedure 3.800(b) prior to appeal and because they may still be challenged by postconviction motions, neither of the sentencing errors in this case fits within this definition of fundamental error. [footnote omitted]

711 So. 2d at 1228-1229. See also Locke v. State, 719 So. 2d 1249("The adoption of rule 3.800(b) ameliorates any remaining questions concerning opportunity to be heard. Absent due process considerations, clearly the failure to itemize statutorily authorized costs does not rise to the level of fundamental error."). The First, Second, Fourth, and Fifth district courts all agree that *sentencing errors regarding fees and costs are no longer "fundamental"* because a defendant is not foreclosed from seeking a remedy for sentencing error by filing a Rule 3.800 motion, and then review by the appellate court if not corrected by the trial courts. Maddox, 708 So. 2d at 618-619. Therefore, "there is little risk that a defendant will suffer an injustice because of this new procedure," because if counsel fails to preserve the error the remedy of ineffective assistance of counsel will be available. Maddox v. State, 708 So. 2d at 621. The court in Hyden agreed with

this assertion.

Petitioner is correct that under the *previous* case law each of these errors in the imposition of fees and costs would be found to be "fundamental." However, the Criminal Appeal Reform Act was designed to eliminate review of sentencing error for the first time on appeal. Because the amended rule 3.800(b) provides an opportunity to be heard in the trial court on the imposition of costs, the district courts receded from the cases which predate the newly adopted rule 3.800(b) and Section 924.051(3), Florida Statutes (Supp. 1996). E.g. Dodson v. State, 710 So. 2d 159, 161 (Fla. 1st DCA 1998)(where the court summarized some cases on what constitutes "fundamental" sentencing error after the enactment of the statute and the amendment of the rule). Since petitioner failed to preserve his challenges sub judice and these errors are not fundamental, the Fourth District correctly held that they cannot be reviewed on appeal.

Petitioner also alleges that when a sentencing error is apparent on the face of the record, the error should be considered fundamental. Formerly these errors were corrected by the reviewing court without preservation. Maddox v. State, 708 So. 2d at 622, n. 5. However, the new legislation precludes the appeal of these sentencing errors. Id. Because *after* adoption of the amended rules, a defendant can obtain relief from sentencing error by filing a motion under Rule 3.800(b), this correction on appeal is

no longer necessary. Id.

Petitioner also relies upon State v. Mancino, 714 So. 2d 429 (Fla. 1998). Mancino, however, is distinguishable and does not provide any meaningful guidance in this case. In Mancino, the defendant filed a post conviction motion seeking jail credit which was not given. There, the failure to give the credit was a violation of a statute. The issue presented to the court, however, was whether such a request should be made by a motion under Rule 3.800 or 3.850. The Court held that under the facts presented, the appropriate avenue was a 3.800 motion. There was no mention of any issues regarding preservation of sentencing errors which do not constitute illegal sentences. More importantly, the opinion is completely silent as to whether the case arose under the amendments to the Rules of Appellate Procedure promulgated in November 1996 or the Criminal Appeal Reform Act. Consequently, Mancino does not shed any light on the issues involved in this case.

Petitioner also raises for the first time in this brief a challenge to the constitutionality of the statute. This argument is not preserved for review by this court. See Tillman v. State, 471 So. 2d 32, 35 (Fla. 1985)(in order to be preserved for further review by a higher court, an issue must be presented to the lower court and the specific legal argument or ground to be argued on appeal must be part of the presentation); § 924.051(3), Fla. Stat. (Supp. 1996). Alternatively, the claim is meritless. In Kalway v.

Singletary, 708 So. 2d 267, 269 (Fla 1998), this Court rejected a separation of powers challenge to the Reform Act and reiterated its approval of the legislature's adoption of terms and conditions of appeal set out in the Reform Act, saying: "[W]e believe that the legislature may implement this constitutional right [to appeal] and place reasonable conditions up on it so long as [it does] not thwart the litigant's legitimate appellate rights. Of course, this Court continues to have jurisdiction over the practice and procedure relating to appeals." Thus, any concern regarding the abrogation of a defendant's right to appeal should cease to exist as the legislature and the Florida Supreme Court have provided defendants with access to both the trial and appellate courts.

The enactment of the Criminal Appeal Reform Act and the recent amendments to the Florida Rules of Appellate and Criminal Procedure indicate that both the legislature and the Florida Supreme Court view the trial court as the best judicial body to investigate and determine whether a sentencing error has occurred and, if so, to correct the error. Now the amendments to the statute and the rules provide ready and efficient remedies for claims of sentencing errors which without any denial of rights, require that sentencing errors be raised and ruled upon in the trial court while yet preserving a subsequent right to appeal. Thus, because petitioner has remedies to correct his sentencing errors, the statute is not unconstitutional. Therefore, this case should be dismissed for

lack of jurisdiction, or in the alternative, the well reasoned analysis in Hyden should be adopted.

CONCLUSION

WHEREFORE, based on the above and foregoing arguments and authorities cited therein, the State of Florida respectfully submits that the decision of the district court should be **UPHELD** and the judgment and sentence imposed by the trial court should be **AFFIRMED.**

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing respondent's brief on the merits by Courier to: SUE CLINE, Assistant Public Defender, Criminal Justice Building/6th Floor, 421 Third Street, West Palm Beach, FL 33401, this 30th day of December, 1998.

Ettie Feitumann

Of Counsel

IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 93, 966

STATE OF FLORIDA,

Petitioner,

vs.

TERRY HYDEN,

Respondent.

APPENDIX

Terry **HYDEN**, Appellant,
v.
STATE of Florida, Appellee.

No. 97-0935.

District Court of Appeal of Florida,

Fourth District.

June 3, 1998.

Appeal from the Circuit Court for the Nineteenth Judicial Circuit, Indian River County; Robert A. Hawley, Judge; L.T. Case No. 96-1002CF.

Richard L. Jorandby, Public Defender, and Susan D. Cline, Assistant Public Defender, West Palm Beach, for appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Elaine L. Thompson, Assistant Attorney General, West Palm Beach, for appellee.

EN BANC

WARNER, Judge.

**1 We withdraw our prior opinion and substitute the following in its place.

We use this appeal to impress upon the criminal bar of this district the essential requirement of the new Florida Rule of Appellate Procedure 9.140(d). In order for a sentencing error to be raised on direct appeal from a conviction and sentence, it must be preserved in the trial court either by objection at the time of sentencing or in a motion to correct sentence under Florida Rule of Criminal Procedure 3.800(b). In this district, we will no longer entertain on appeal the correction of sentencing errors which are not properly preserved.

In this case, the appellant challenges two aspects of his sentence. First, he alleges that the order of probation requires him to submit to "random urinalysis, breath and blood testing" which condition was not orally pronounced. Although in the past we have corrected such deviations from the oral pronouncement of sentences, *see, e.g., Ramos v. State,* 696 So.2d 461 (Fla. 4th DCA 1997); *Williamson v. State,* 569 So.2d 1368 (Fla. 4th DCA 1990), we will do so no more. Rule 9.140 provides in pertinent part:

> (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).

While no objection can be made at the time of sentencing that the written judgment does not conform to the oral pronouncement, a defendant has thirty days *from the rendition of the written sentence to make a* motion to correct the sentence or order of probation under Rule 3.800(b). In addition, the definition of "rendition" of an order for purposes of appeal was amended to provide that a timely filed motion to correct the sentence suspends rendition of the judgment of conviction and sentence for purposes of appeal. *See* Fla.R.App.P. 9.020(h). Thus, the amendments make it clear that a timely motion to correct a sentence preserves the defendant's appellate rights. The defendant loses his or her appellate rights only when he or she does not observe the provisions of Rule 3.800(b) and Rule 9.140(d).

Had appellant filed a motion to correct the sentence, within a very short period of 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.

**2 For the same reason, we hold that appellant's second issue alleging error in the assessment against appellant of public defender fees and costs to the

Board of County Commissioners is not correctable on appeal without preservation in the trial court. On this we agree with our sister court which held in *Maddox v. State*, 708 So.2d 617 (Fla. 5th DCA 1998), that errors in the assessment of costs and fees are also subject to the requirement of preservation, as these too are easily correctable in the trial court pursuant to Rule 3.800(b).

In *Louisgeste v. State*, 706 So.2d 29, 31-32 (Fla. 4th DCA 1998), we held that the appellate court may consider the imposition of a public defender's fee without preservation of the issue in the trial court. *Louisgeste* cited *Neal v. State*, 688 So.2d 392, 395 (Fla. 1st DCA), *rev. denied*, 698 So.2d 543 (Fla.1997), which permitted a fee issue to be raised without preservation on the ground that the supreme court had determined that imposition of a fee without notice was a denial of due process and thus a fundamental error. *See Henriquez v. State*, 545 So.2d 1340, 1341 (Fla.1989); *Wood v. State*, 544 So.2d 1004, 1006 (Fla.1989). Both of these cases were decided prior to the change of the rules which permit a motion to correct a sentence pursuant to Rule 3.800(b) and require preservation of a sentencing error pursuant to Rule 9.140(d).

The addition of Rule 3.800(b) and Rule 9.140(d) has changed the legal landscape with respect to whether it remains fundamental error to impose a public defender's fee or costs where the defendant failed to move to correct the sentence or order of probation. *Wood* explains that without adequate notice and a meaningful hearing, the requirements of due process are not met in imposing costs upon a defendant who may be indigent. *See* 544 So.2d at 1006. Assuming that prior to the sentence a defendant is not given notice of the state's intent to impose costs and a public defenders' fee, once the fees are imposed in the sentence, the defendant surely has notice of them. If the defendant contests either the ability to pay such fees or the amount, he or she can file a motion to correct the sentence, pursuant to Rule 3.800(b), contesting the imposition and requesting a hearing. This gives the defendant, the trial court, and the state an expeditious manner for correcting the problem by holding a hearing on the matter. Judicial efficiency is sacrificed if we allow a defendant to utilize all of the resources of the appellate system--a brief filed by a public defender, the services of the clerk and court, and the review of the case by three judges--in order to correct such mistakes which frequently involve nominal sums. It makes little sense to characterize significantly less important issues of costs and attorney's fees fundamental and thereby permit them to be raised for the first time on appeal, when Rule 9.140(d) cuts off the right to bring far more serious matters involving deprivation of liberty, such as issues of habitualization, without proper preservation.

**3, We believe that the rule changes have *sub silentio* overruled *Wood* to the extent that it held that the imposition of fees and costs without notice and a hearing is "fundamental error" which may be raised for the first time on appeal without preservation. The fifth district has already held in *Maddox* that an appellant may not raise cost issues on direct appeal unless the issue has been preserved by contemporaneous objection or by motion to correct under Rule 3.800(b). *See* 708 So.2d at ----. We too have indicated that cost issues must also be preserved. *See Harriel v. State*, --- So.2d ----, ----, n.1, 23 Fla. L. Weekly D967, n. 1 (Fla. 4th DCA Apr.15, 1998).

We agree with the sentiments expressed by Chief Judge Griffin in *Maddox*, writing for the en banc majority of the fifth district, when she stated:

> 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. 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. (FN1)

708 So.2d at ---- - ----.

We therefore recede from *Louisgeste,* certify conflict with *Neal,* and affirm the conviction and sentence of appellant.

STONE, C.J., GLICKSTEIN, DELL, GUNTHER, POLEN, FARMER, KLEIN, STEVENSON, SHAHOOD, GROSS and TAYLOR, JJ., concur.

FN1. Our only disagreement with *Maddox* is as to whether a defendant can raise the illegality of a sentence, as defined in *Davis v. State,* 661 So.2d 1193, 1196-97 (Fla.1995), without preservation. We held in *Harriel* that a defendant can raise this one issue without preservation. *See* 708 So.2d at ---- - ----.

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Ms. Barbara Maxwell
Florida Supreme Court
Tallahassee, Florida

RE: Terry Hyden vs. State of Florida
FSC Case No. 93,966

Dear Barbara:

Per your conversation with Ettie Feistmann, please find the cover pages for the brief on the merits in the above styled case.

Thank you.

Ruby Booth

Ruby Booth