047

IN THE SUPREME COURT OF FLORIDA

SHAWN FITZGERALD,	)	
	)	
Petitioner/Appellant,	)	
	)	
versus	)	S.CT. CASE NO. 93,097
	)	
STATE OF FLORIDA,	)	DCA CASE NO. 97-1890
	)	
Respondent/Appellee.	)	
	)	

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

MERIT BRIEF OF PETITIONER

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE AND FACTS

Petitioner, Shawn Fitzgerald, was placed on thirty months probation on November 7, 1995 for grand theft (R88-96). Following a violation of probation, Petitioner was placed on two years community control on June 20, 1996 (R123-129). On March 27, 1997, Petitioner was charged with violating his community control by quitting his job without permission, failing to call his community control office, being absent from his approved residence on three occasions and failing to remain gainfully employed (R154-156).

At a hearing in Brevard County Circuit Court on June 26, 1997, Petitioner was found to have violated community control by quitting his job and being away from home three times (R41-46). Petitioner's original guideline scoresheet totaled ten points (R81-83). Appellant was sentenced to 48 months imprisonment (R55-56, 178-180). The sentencing court said that Petitioner's recommended sentence was thirty to fifty months imprisonment (R52-53).

Petitioner appealed to the Fifth District Court of Appeal, arguing that his sentence was a guideline departure without reasons. The State argued that there was no sentencing error, and also argued that the issue was not preserved for appeal pursuant to Fla. Stat. §924.051(3) (1995). The Fifth District Court issued

a per curiam decision, which consisted of a citation to Maddox v. State, 23 Fla.L.Weekly D720 (Fla. 5th DCA March 13, 1998). Maddox was a decision holding that imposition of costs may not be raised on appeal when it was not raised pursuant to Fla.R.Crim.P. 3.800(b) at trial. Maddox was an interpretation of the Criminal Appeal Reform Act.

This Court granted discretionary review.

SUMMARY OF THE ARGUMENT

The Criminal Appeal Reform Act did not abolish the concept of fundamental error. The Fifth District Court of Appeal was incorrect in making this finding. Appellate courts continue to have jurisdiction to reverse certain sentencing errors.

POINT

THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL INCORRECTLY READS THE CRIMINAL APPEAL REFORM ACT OF 1996 AS ABOLISHING FUNDAMENTAL ERROR WITH REGARD TO SENTENCING.

The en banc decision Of the Fifth District Court of Appeal in this case does not deal with whether the sentence imposed by the Circuit Court was legal or proper. The Fifth District, instead, cites to Maddox v. State, 708 So.2d 617 (Fla. 5th DCA 1998), implying that the issue was not properly preserved for appeal in the trial court. In Maddox the Fifth ruled that the Criminal Appeal Reform Act, codified as Section 924.051, Florida Statutes (1996) has abolished the concept of fundamental error in the context of sentencing.

It is true that there was no objection made to Mr. Fitzgerald's sentence when it was imposed (R55-56). From the date of the Maddox opinion the Fifth District gave notice that no sentencing issue will be addressed by the Court of Appeal unless properly reserved by timely objection or a motion to correct sentence which had been denied. The Fifth District reached its conclusion by looking at Florida Rule of Appellate procedure 9.140 which purports to limit the scope of

appeal in criminal cases solely to the sentencing issues which have been preserved for appeal. Since no exception in the appellate rules exists for the concept of fundamental error, the Fifth concluded that such a concept has been abolished with regard to sentencing issues. In so finding, the Fifth District Court of Appeal expressed direct disagreement with all of the remaining District Court's of Appeal which continue to recognize the concept of fundamental error at least with regard to illegal sentences, State v. Hewitt, 702 So.2d 633 (Fla. 1st DCA 1997), Chojnowski v. State, 705 So.2d 915 (Fla. 2d DCA 1997), Pryor v. State, 704 So.2d 217 (Fla. 3d DCA 1998) and Collins v. State, 698 So.2d 883 (Fla. 4th DCA 1997). This Court must resolve this conflict and determine the scope of the Criminal Appeal Reform Act.

The Fifth District Court was mistaken in its premise that the Criminal Appeal Reform Act has eliminated the concept of fundamental error. Section 924.051(3), Florida Statutes (1996) reads:

> An appeal may not be taken from a judgement 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 judgement 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**.

(Emphasis added)

Thus, the legislature in enacting the Criminal Appeal Reform Act, specifically recognized the continuing viability of the concept of fundamental error even in the sentencing context. Once the legislature has recognized this concept, an appellate court may not eliminate it since this would constitute judicial legislation and would be improper, Wyche v. State, 619 So.2d 231, 236 (Fla. 1993), Firestone v. News-Press Publishing Co., 538 So.2d 457, 460 (Fla. 1989), Brown v. State, 358 So.2d 1520 (Fla. 1978).

In considering the issue of fundamental error the First District Court of Appeal found that an illegal sentence was fundamental error for which no objection was needed. In Sanders v. State, 698 So.2d 377 (Fla. 1st. DCA 1997) the court dealt with a sentence that exceeded the statutory maximum. The State argued that the issue was not preserved. The court found that the Criminal Appeal Reform Act does not prevent such an issue from being raised for the first time on appeal.

The Fourth District Court of Appeal in Harriel v. State, 710 So.2d 102 (Fla. 1998), held that fundamental error in sentencing may be raised for the first time on appeal under the Criminal Appeal Reform Act. This is true even in guilty or nolo contendere plea issues where the issues are not specifically reserved.

The Second District Court in Denson v. State, 23 Fla. L. Weekly D1216 (Fla. 2d DCA May 13, 1998) considered the scope of appellate review under the Criminal Appeal Reform Act. In that case some issues were preserved and some were not. The court held that the appellate court has discretion to consider all issues all issues, whether preserved for appeal or not, which are apparent from the record. The court did not consider whether fundamental error exists in sentencing cases, but adopted a common sense approach. The court decided that as long are there preserved issues an appellate court may consider unpreserved issues. If no issues are preserved no issues are considered.

The Fifth District Court in Maddox held that it was not denying relief to defendants, because a defendant could seek post-conviction relief under Rule 3.850 of the Florida Rules of Criminal Procedure if his or her attorney did not raise an issue. This puts the burden upon an untrained defendant, while the appellate court could grant relief as if a 3.850 motion had been filed. This Court has ruled in Combs v. State, 403 So.2d 413 (Fla. 1981) that if an appellate counsel believes there is an issue of reasonably effective assistance of trial counsel in the trial or sentencing phase before the trial court, that issue should be presented to the appellate court that has jurisdiction so that it may be resolved in an expeditious manner by remand to the trial court and avoid unnecessary

procedures.

The issue of fundamental error remains a viable concept under the Criminal Appeal Reform Act. The reasoning of the Fifth District Court in Maddox denies Appellant's a means of relief of which they should not be deprived.

It should be noted that the State in this case has argued that the sentence imposed was not a departure. The only guideline scoresheet included in the record on appeal indicates that a departure sentence was imposed. This Court should reverse the decision of the Fifth District Court of Appeal and remand for resentencing within the guidelines.

CONCLUSION

BASED UPON the argument and authorities contained herein, Petitioner respectfully requests that this Honorable Court reverse the decision of the Fifth District Court of Appeal and remand this case for resentencing within the guidelines.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon the Honorable Robert E. Butterworth, Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, in his basket at the Fifth District Court of Appeal, and mailed to Shawn Fitzgerald, Inmate No. 999636, Hernando Correctional Institution, 16415 Springhill Drive, Brooksville, Florida 34609, on this 18th day of August, 1998.

Kenneth Witts

KENNETH WITTS
ASSISTANT PUBLIC DEFENDER

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Petitioner/Appellant,	)	
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vs.	)	S.CT. CASE NO. 93,097
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STATE OF FLORIDA,	)	DCA CASE NO. 97-1890
	)	
Respondent/Appellee.	)	
	)	

APPENDIX

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT JANUARY TERM 1998

97-676
KW

NOT FINAL UNTIL THE TIME EXPIRES TO FILE REHEARING MOTION, AND, IF FILED, DISPOSED OF.

SHAWN FITZGERALD,

Appellant,

v.

CASE NO.: 97-1890

STATE OF FLORIDA,

Appellee.

Opinion filed April 24, 1998

Appeal from the Circuit Court
for Brevard County,
Edward J. Richardson, Judge.

James B. Gibson, Public Defender, and
Kenneth Witts, Assistant Public Defender,
Daytona Beach, for Appellant.

Robert A. Butterworth, Attorney General,
Tallahassee, and Simone P. Firley, Assistant
Attorney General, Daytona Beach, for
Appellee.

PER CURIAM.

AFFIRMED. See Maddox v. State, 23 Fla. L. Weekly D720 (Fla. 5th DCA March 13, 1998).

COBB, THOMPSON and ANTOON, JJ., concur.

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CERTIFICATE

I hereby certify that the size and style of type used in this extension is 14 point proportionally spaced CG Times.

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