

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

EZEKIAS MIKE,

Respondent.

CASE NO. 93,163

PETITIONER'S INITIAL BRIEF ON THE MERITS

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ATTORNEY GENERAL

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FLORIDA BAR NO. 325791

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ISSUE

WHETHER THE WRONGFUL IMPOSITION OF A PUBLIC DEFENDER'S LIEN CONSTITUTES FUNDAMENTAL ERROR WHICH MAY BE CHALLENGED ON DIRECT APPEAL WITHOUT HAVING BEEN PRESENTED TO THE TRIAL COURT, IN LIGHT OF SECTION 924.051(3), FLORIDA STATUTES (SUPP. 1996), AND AMENDED RULE 3.800(B), FLORIDA RULES OF CRIMINAL PROCEDURE. . . . .	4
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PRELIMINARY STATEMENT

Petitioner, the State of Florida, the Appellee in the First District Court of Appeal and the prosecuting authority in the trial court, will be referenced in this brief as Petitioner, the prosecution, or the State. Respondent, Ezekias Mike, the Appellant in the First District Court of Appeal and the defendant in the trial court, will be referenced in this brief as Respondent or his proper name.

The record on appeal consists of three volumes. This brief will refer to a volume according to its respective designation within the Index to the Record on Appeal. A citation to a volume will be followed by any appropriate page number within the volume.

STATEMENT OF THE CASE AND FACTS

The State charged Respondent with attempted first degree murder and shooting into a building. (I, 1-2). Respondent was found guilty of both counts after a jury trial. (I, 16). At the sentencing hearing, the following took place:

The Court: Now, I'm moving to the attorney's fees, and, Mr. Mike, your attorney is asking for one thousand dollars, plus certain expenses, which he just outlined. Do you agree that his services to you were worth far more than that?

Respondent: Yes.

The Court: Frankly, I'm surprised that you would ask for so little, Mr. Scaff. I was ready to do more than that. Mr. Scaff did do a very good job your behalf, and he did a very good thorough preparation of

your trial. And at his request it's imposed upon you one thousand dollars in attorney's fees. What was the other amount?

Mr. Scaff: Forty-one dollars and seventy-six cents.

The Court: And the forty-one dollars and seventy-six cents is also imposed. (III, 17-18).

The trial court entered a written order imposing attorney fees and expenses on March 24, 1997. (I, 31). No motion to correct the sentence appears in the record.

Respondent appealed to the First District Court of Appeal and, on May 5, 1996, the District Court issued an opinion affirming Respondent's conviction. Mike v. State, 23 Fla. L. Weekly D1141 (Fla. 1st DCA May 5, 1998). The District Court reversed the imposition of the public defender fee and certified the following question as one of great public importance:

WHETHER THE WRONGFUL IMPOSITION OF A PUBLIC DEFENDER'S LIEN CONSTITUTES FUNDAMENTAL ERROR WHICH MAY BE CHALLENGED ON DIRECT APPEAL WITHOUT HAVING BEEN PRESENTED TO THE TRIAL COURT, IN LIGHT OF SECTION 924.051(3), FLORIDA STATUTES (SUPP. 1996), AND AMENDED RULE 3.800(B), FLORIDA RULES OF CRIMINAL PROCEDURE.

The opinion is attached as Appendix A.

SUMMARY OF ARGUMENT

There is no reason why the wrongful imposition of a public defender lien should be fundamental error that can be raised on direct appeal without preservation in the trial court. Florida Rule of Appellate Procedure 9.140(d) requires preservation of sentencing errors and Florida Rule of Criminal Procedure 3.800(b) gives criminals a chance to preserve such errors. Pronouncement of the sentence and rule 3.800(b) provide both notice and an opportunity to be heard. There has been no denial of due process. The certified question should be answered in the negative and Respondent's sentence entered in the trial court should be affirmed.

ARGUMENT

ISSUE

WHETHER THE WRONGFUL IMPOSITION OF A PUBLIC DEFENDER'S LIEN CONSTITUTES FUNDAMENTAL ERROR WHICH MAY BE CHALLENGED ON DIRECT APPEAL WITHOUT HAVING BEEN PRESENTED TO THE TRIAL COURT, IN LIGHT OF SECTION 924.051(3), FLORIDA STATUTES (SUPP. 1996), AND AMENDED RULE 3.800(B), FLORIDA RULES OF CRIMINAL PROCEDURE.

This issue presented by the certified question is presently pending before this Court in Matke v. State, 23 Fla. L. Weekly D469 (Fla. 1st DCA February 13, 1998), rev. pending, No. 92,476 (Fla. March 4, 1998). The State adopts and by reference incorporates its argument in Matke on this point and asks that this case be consolidated with Matke for purposes of appeal. The certified question is also before this Court in State v. Dodson, Case No. 93,077.

In addition to the arguments and authorities in Matke, Petitioner directs this Court to the Fourth District's en banc opinion in Hyden v. State, 23 Fla. L. Weekly D1342 (Fla. 4th DCA June 3, 1998). In Hyden, the court held that complaints regarding imposition of a public defender lien are "not correctable on appeal without preservation in the trial court." Hyden, 23 Fla. L. Weekly at D1342. Hyden acknowledged that this Court had said in Henriquez v. State, 545 So. 2d 1340 (Fla. 1989), and Wood v. State, 544 So. 2d 1004 (Fla. 1989), that imposition of the fee without notice was fundamental error but noted those cases were decided prior to the changes in Florida Rule of Criminal Procedure 3.800(b) and Florida Rule of Appellate

Procedure 9.140(d). Hyden, 23 Fla. L. Weekly at D1343. The court 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. 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. Id.

Hyden is particularly applicable to this case. Respondent was given notice of the exact amount of the fee and agreed with the trial court that his attorney's services were worth more than the fee. (III, 17-18). Respondent had thirty days after the entry of the sentencing order to file a motion to correct the sentence and failed to do so. As the Hyden court recognized, there has been both notice and an opportunity to be heard under the statute and the implementing rules of this Court. There has been no denial of due process. Indeed, Respondent has been given two opportunities to raise any claim of error.

There is no reason, given the Florida Rule of Appellate Procedure 9.140(d) requirement that sentencing errors be preserved and the Florida Rule of Criminal Procedure 3.800(b) vehicle to preserve sentencing errors, that imposition of a

public defender lien should be fundamental error that can be raised without preservation in the trial court. Both the Florida Legislature and this Court have determined that sentencing errors must be raised in the trial court and have put in place rules which provide a full remedy for every conceivable error. This Court should not condone and encourage the incompetent and negligent practice of law by permitting convicted criminals and their counsel to waive such claims in the trial court and then demand that the State of Florida provide them with an expensive remedy in appellate courts which nullifies elementary rules of law. This Court should answer the certified question in the negative, hold that any claim of a wrongful imposition of a public defender fee must be preserved in the trial court, disapprove the portion of the District Court's opinion reversing the imposition of the public defender lien, and affirm Respondent's sentence as entered in the trial court.

CONCLUSION

Based on the foregoing, the State respectfully submits the certified question should be answered in the negative, the portion of the decision of the District Court of Appeal reversing the imposition of the public defender lien should be disapproved, and the judgment and sentence entered in the trial court should be affirmed.

Respectfully submitted,

ROBERT A. BUTTERWORTH  
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[AGO# L98-1-6563]

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing PETITIONER'S INITIAL BRIEF ON THE MERITS has been furnished by U.S. Mail to Carol Ann Turner, Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, this 6th day of July, 1998.

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L. Michael Billmeier  
Attorney for the State of Florida

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