IN THE SUPREME COURT OF FLORIDA

DAVID LEONARD,	:	
Petitioner,	:	
vs.	:	Case No. 93,332
STATE OF FLORIDA,	:	
Respondent.	:	
	:	

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

INITIAL BRIEF OF PETITIONER ON THE MERITS

JAMES MARION MOORMAN
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TENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE AND FACTS

On November 6, 1995, an affidavit of Violation of Probation was filed alleging that the Petitioner, DAVID LEONARD, violated his probation in case numbers 89-7782 and 89-9559 (R51). In case number 89-7782, the State Attorney for the Thirteenth Judicial Circuit in and for Hillsborough County filed an information on May 31, 1989, charging Mr. Leonard with one count of lewd and lascivious act on a child under the age of 16 years in violation of Section 800.04, Florida Statutes (1987) (Vol.1:R9-10). In case number 89-9559, the State Attorney filed an information charging Mr. Leonard with two counts of sexual battery on a child under the age of 12 years in violation of Section 794.011(2), Florida Statutes (1987) (Vol.1:R26-27). On September 8, 1989, Mr. Leonard pled guilty to the charges in both cases, and was sentenced in both cases according to a negotiated plea agreement (Vol.1:R11,30,45). In case number 89-7782, Mr. Leonard was placed on 15 years of probation on the count of lewd and lascivious act upon a child (Vol.1:R11-12). In case number 89-9559, Mr. Leonard was sentenced on two counts of sexual battery to 30 years of imprisonment that was to be suspended after 9 years followed by 21 years of probation. These sentences were to be served concurrently with each other and with the sentence imposed in case number 89-7782

(Vol.1:R30,31). On September 27, 1993, Mr. Leonard was released on probation (Vol.1:R51).

The affidavit of Violation of Probation alleged that Mr. Leonard had violated condition (5) which required Leonard to live without violating the law, and special condition (19) which prohibited him from having contact with any child until he completed the Outpatient Sex Offender Program. These allegations arose from events which allegedly took place on October 15, 1995 (Vol.1:R51). On August 30, 1996, Mr. Leonard pleaded no contest to violating condition (19) of probation (Vol.1:R69-70). The trial court adjudicated Mr. Leonard guilty of violating his probation (Vol.1:R72). In case number 89-7782, Mr. Leonard was sentenced to 30 years in prison (Vol.1:R13-14,72). In case number 89-9559, Mr. Leonard was sentenced to 30 years in prison to run concurrently with the sentence in case number 89-7782 (Vol.1:R37-39). Mr. Leonard timely filed his notice of appeal on September 20, 1996 (Vol.1:R58).

In his appeal, Mr. Leonard argued that his sentence of 30 years in prison for the offense of committing a lewd and lascivious act, a second-degree felony, was illegal. On June 10, 1998, the Second District Court of Appeal issued an opinion dismissing Mr. Leonard's direct appeal pursuant to Section 924.051(4), Florida

Statutes (Supp. 1996), since there was no contemporaneous objection to the illegal sentence and no filing of a post-conviction relief motion under Florida Rule of Criminal Procedure 3.800. An amended notice to invoke the discretionary jurisdiction was filed on June 22, 1998. On September 2, 1998, this Court granted jurisdiction.

SUMMARY OF THE ARGUMENT

In holding that Section 924.051(4), Florida Statutes (Supp. 1996) bars appellate review of a sentence exceeding the statutory maximum without a contemporaneous objection, the Second District Court of Appeal is in conflict with recent decisions from all the other districts which has held that § 924.051(4) does not prohibit review of such illegal sentences regardless of whether there is an objection. The decisions from this Court have held that a sentence exceeding the statutory maximum constitutes an illegal sentence. This Court has held such sentences constitute fundamental error. There is an exception to the requirement of a contemporaneous objection in § 924.051 for errors which are fundamental.

Moreover, the purposes of contemporaneous objection rule of preventing errors to stay undetected as a defense tactic, providing the trial judge the opportunity to address an objection, or promoting judicial economy are not fulfilled when the rule is applied to sentencing proceedings. Most likely, the case will be remanded to the same trial judge who imposed the illegal sentence to repeat the mistake. Then, the defendant will have file yet another appeal. By refusing to correct an illegal sentence based upon the absence of contemporaneous objection, the Second District Court of Appeal's application of the Criminal Appeal Reform Act

defeats the Act's purpose of reducing the appellate caseload. Therefore, Mr. Leonard was entitled to relief on direct appeal. This Court should follow its precedent and reverse the decision of the lower court.

ARGUMENT

ISSUE I

WHETHER THE DECISION IN LEONARD v. STATE, Case No. 96-4245 (Fla. 2d DCA June 10, 1998), CONFLICTS WITH THE FLORIDA SUPREME COURT AND DISTRICT COURT OF APPEAL OPINIONS AS TO WHETHER § 924.051(4), FLA. STAT. (SUPP. 1996) PROHIBITS REVIEW OF A SENTENCE EXCEEDING THE STATUTORY MAXIMUM ON DIRECT APPEAL WITHOUT A CONTEMPORANEOUS OBJECTION?

This Court has held that neither statute or any rule would take away the right to appeal conduct which would invalidate a defendant's plea. Robinson v. State, 373 So. 2d 898, 902 (Fla. 1979). Among those issues which may be properly appealed from a plea is the illegality of a sentence. Id. Subsequent decisions from this Court have sustained the defendant's right to appeal an illegal sentence imposed pursuant to a plea agreement. King v State, 681 So. 2d 1136 (Fla. 1996)(trial court can imposed a negotiated sentence not specifically authorized by statute, but it cannot imposed an illegal sentence); Larson v. State, 572 So. 2d 1368 (Fla. 1991)(contemporaneous objection rule is inapplicable to probation conditions which are illegal); Williams v. State, 500 So. 2d 501 (Fla. 1986)(appellate review is always available where court has imposed an illegal sentence, even if the judgment and sentence

resulted from a guilty plea). This Court defined an illegal sentence as "one that exceeds the maximum period set forth by law for a particular offense without regard to the guidelines." Davis v. State, 661 So. 2d 1193, 1196 (Fla. 1996).

Recent decisions from the other District Courts of Appeal have held that sentences which exceed the statutory maximum constitute fundamental error. See, Mizell v. State, 23 Fla. L. Weekly D1978 (Fla. 3d DCA August 26, 1998); Davey v. State, 23 Fla. L. Weekly D1931 (Fla. 4th DCA August 19, 1998); Moyer v. State, 23 Fla. L. Weekly D1931 (Fla. 5th DCA August 14, 1998); Orosco v. State, 710 So. 2d 1386 (Fla. 4th DCA 1998); Mason v. State, 710 So. 2d 82 (Fla. 4th DCA 1998); State v. Hewitt, 702 So. 2d 633 (Fla. 1st DCA 1997); Sanders v. State, 698 So. 2d 377 (Fla. 1st DCA 1997); Ortiz v. State, 696 So. 2d 916 (Fla. 5th DCA 1998). In Ortiz, the court held that § 924.051(4), Fla. Stat. (Supp. 1996), does not prohibit a defendant who enters a plea from appealing a sentence which exceeds the statutory maximum regardless of a contemporaneous objection. Id. Sentencing errors which are fundamental are exceptions to the requirement of preservation under § 924.051(3).

In Mizell, the court acknowledged that the error of the sentence exceeding the statutory maximum was not preserved. Even if the error was not deemed fundamental, the error would be appealable

because it constituted ineffective assistance of counsel apparent from the face of the record which would "inevitably" lead to a corrected sentence. The court noted:

> It is ironic that, although this amendment to the Florida Appellate Rules, and, more to the point, the Criminal Appeal Reform Act of 1996, [*citations omitted*], which engendered it, were largely meant to reduce a supposedly oppressive appellate caseload, they have had quite the opposite effect. In addition to creating an entirely new and difficult body of law of its own--including en banc consideration and certified questions of such arcane matters as whether an unpreserved error should result in affirmance or dismissal, [*citation omitted*]-- the Act has, as in this very case, required a resort to creative judging to achieve results which had been routinely and straightforwardly arrived at before. We will not resist the urge to refer to the relative merits of the cure and the disease or to observe that one should not repair something that is in no need thereof.

Mizell, 23 Fla. L. Weekly at D1979, fn. 1.

The reasoning of the court in Mizell applies to the instant case. Not only was Mr. Leonard's case appealable as an issue of an illegal sentence, but also as an issue of ineffective assistance of counsel on the face of the record. The Second District Court of Appeal's dismissal of Mr. Leonard's appeal only causes delay and possibly another appeal to correct his illegal sentence. Before the enactment of the Criminal Appeal Reform Act, there would be no

argument that his illegal sentence was an issue that should be heard on direct appeal. However, the strict adherence of the Second District Court of Appeal to the contemporaneous objection rule has defeated the purpose of the rule itself. Castor v. State, 365 So. 2d 701 (Fla. 1978)(the requirement of a contemporaneous objection is based on fairness and judicial economy).

Moreover, this Court has held that the contemporaneous rule does not apply to the sentencing process when the error is apparent on the face of the record. Taylor v. State, 601 So. 2d 540 (Fla. 1992); State v. Rhoden, 448 So. 2d 1013 (Fla. 1984). In Rhoden, the trial court failed to address the criteria pertaining to the suitability of adult sanctions before sentencing the juvenile defendant as an adult. Rhoden, 448 So. 2d at 1015. The state argued that the lack of a contemporaneous objection at the sentencing hearing precluded relief on appeal. This Court rejected the state's argument and stated:

> The purpose of the contemporaneous objection rule is not present in the sentencing process because any error can be corrected by a simple remand. If the state's argument is followed to its logical end, a defendant could be sentenced to a term of years greater than the legislature mandated and, if no objection was made at the time of sentencing, the defendant could not appeal the illegal sentence.

Rhoden, 448 So. 2d at 1016.

The holding in the instant case precluding review of Mr. Leonard's illegal sentence under § 924.051, Florida Statutes (Supp. 1996) ignores the fact that such errors have been found to be fundamental, the exception to the contemporaneous objection regarding fundamental error in § 924.051(3) Fla. Stat. (Supp. 1996), and the intent of the Act to reduce appeals. This Court should follow its precedent that sentences which exceed the statutory maximum constitute fundamental error, and reverse the dismissal of Mr. Leonard's appeal.

CONCLUSION

In light of the foregoing reasons, arguments, and authorities, Appellant respectfully asks this Court to reverse the decision of the lower court.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Helene S. Parnes, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on this _____ day of May, 2000.

Respectfully submitted,

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