IN THE SUPREME COURT OF FLORIDA

DAVID R. LEONARD,

Petitioner,

v.

Case No. 93,332

STATE OF FLORIDA,

Respondent.

_____/

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

BRIEF OF RESPONDENT ON THE MERITS

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SUMMARY OF THE ARGUMENT

Section 924.051, Florida Statutes (Supp. 1996) conditions an appeal on the preservation of issues in the trial court, except in the case of fundamental error. Where the preservation condition has not been met, the appellate court lacks subject matter jurisdiction over an appeal. Hence, the court must dismiss the case because it may not exceed the boundaries of its authority.

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) PROHIBITS THE STATUTORY MAXIMUM ON DIRECT APPEAL WITHOUT A CONTEMPORANEOUS OBJECTION?
>
> (As stated by Petitioner)

In the instant case, the Second District Court of Appeal held, as follows:

> Because Leonard pleaded guilty to the underlying offense and failed to bring this error the trial court's attention first, pursuant to section 924.051(4), Florida Statutes (Supp. 1996), we are without jurisdiction to entertain this issue on direct appeal. Therefore, we dismiss this appeal without prejudice to Leonard to seek correction of this possible error by filing a motion pursuant to Florida Rule of Criminal Procedure 3.800(a). (Appendix A)

Although the Fifth District Court of Appeal in Ortiz v. State, 696 So. 2d 916 (Fla. 5th DCA 1997) held that the legality of a sentence is an appealable issue even though the defendant plead guilty or no contest and failed to object to the sentence **nor filed a motion to correct it**, the Second District follows this Court's analysis in the Amendments to the Florida Rules of Appellate Procedure, 685 So.2d 773 (Fla. 1996), which clearly states that a defendant who pleads guilty or no contest without reserving a legally dispositive issue to "nevertheless appeal a sentencing

error, providing it has been timely preserved by motion to correct the sentence." Amendments, 685 So.2d at 774.

The Fourth District noted that neither the statutes, rules, nor this Court's opinions definitively answer whether preservation of a sentencing error is a jurisdictional hurdle to appellate review. Thompson v. State, 708 so. 2d 289 (Fla. 4th DCA 1998). Although it held that the preservation requirements of the Criminal Appeals Reform Act of 1996 were not jurisdictional in nature, the Fourth District recognized reasons militating toward treating the requirements as jurisdictional. Hence, it certified the following question as one of great public importance:

> UNDER SECTION 924.051(3),(4),FLORIDA STATUTES (SUPP. 1996) AND RULE OF APPELLATE PROCEDURE 9.140(b)(2)(B)(iv), IS THE FAILURE TO PRESERVE AN ALLEGED SENTENCING ERROR FOR APPEAL FOLLOWING A GUILTY PLEA A JURISDICTIONAL IMPEDIMENT TO AN APPEAL WHICH SHOULD RESULT IN A DISMISSAL OF THE APPEAL, OR IS IT A NON-JURISDICTIONAL BAR TO REVIEW WHICH SHOULD RESULT IN AN AFFIRMANCE?[1]

Section 924.051, Florida Statutes (Supp. 1996), reads in part:

> (3) An appeal may not be taken from a judgment 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 judgment 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.
>
> (4) If a defendant pleads nolo contendere without expressly reserving the right to appeal a legally dispositive issue, or if a defendant pleads guilty without expressly reserving the

[1]Thompson is pending before this Court, Case No. 92,435.

> right to appeal a legally dispositive issue, the defendant may not appeal the judgment or sentence.

(emphasis supplied).

Respondent maintains that on the face of these subsections, it is clear that an appeal may not be taken from an unpreserved sentencing error unless it constitutes fundamental error. Indeed, section 924.051(2) provides that "[the] right to direct appeal" may only be implemented in accordance with the terms and "conditions" of the statute.

Section 924.051(8) states:

> 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.

(emphasis supplied).

The legislature, therefore, intended to have alleged error first considered at the trial level, rather than in the appellate court. See Smith v. City of St. Petersburg, 302 So. 2d 756, 757 (Fla. 1974)(a statute is to be construed to give effect to the legislative purpose). To achieve this goal, it made preservation a "condition" of appeal.

In the Final Bill Analysis and Economic Impact Statement (Final Staff Analysis) regarding Chapter 924, the Committee recognized that the former sentencing error exception to the

contemporaneous objection rule had been criticized as leading to unnecessary appellate review of nonfundamental error. In an apparent effort to have claims of sentencing error considered at the trial level and to give a defendant the opportunity to raise sentencing errors on appeal, this Court amended rule 3.800(b), Florida Rules of Criminal Procedure, to permit a defendant to preserve error by filing a motion to correct sentencing error after the rendition of the sentence. See Amendments to Florida Rule of Appellate Procedure 9.020(g) and Florida Rule of Criminal Procedure 3.800, 675 So. 2d 1374 (Fla. 1996). If a defendant does not seize the opportunity to preserve a sentencing issue for review, however, he may not take an appeal.

The Final Staff Analysis states that the Criminal Appeal Reform Act of 1996 establishes "certain terms and conditions that must be met before taking direct and collateral appeals." H.R. Comm. on Criminal Justice, CS/HB 211 (1996) Final Bill Analysis and Economic Impact Statement 2 (hereinafter "Final Staff Analysis"). See State v. Pinder, 678 So. 2d 410, 414 (Fla. 4th DCA 1996)(legislative committee staff analyses are one touchstone of collective legislative will). With regard to section 924.051(3), Florida Statutes, this Court stated, "we believe the legislature could reasonably condition the right to appeal upon the preservation of prejudicial error or the assertion of a fundamental error." Amendments to the Florida Rules of Appellate Procedure, 685

So. 2d 773, 775 (Fla. 1996).(emphasis supplied). Accordingly, this Court amended rule 9.140(b)(2)(B)(iv), Florida Rules of Appellate Procedure, to allow a defendant who pleads guilty or nolo contendere to appeal only sentencing error "if preserved." Further, this court included rule 9.140(d) on sentencing error, which prohibits appeals alleging sentencing errors unless the alleged error was raised at the time of sentencing or in a 3.800(b) motion.

The potential appellate jurisdiction vested in courts by statutes must be invoked in particular cases in accordance with the statutes. See Dupree v. Elleman, 191 So. 65, 67 (Fla. 1939). Under section 924.051(3), then, where a nonfundamental error is not preserved, the subject matter jurisdiction of the appellate court cannot be invoked. See Hollywood v. Clark, 15 So. 175 (Fla. 1943)(subject matter jurisdiction means power of court to adjudicate class of cases to which particular case belongs). The court must take notice of the defect and enter an appropriate order. See West 132 Feet, etc. v. City of Orlando, 86 So. 197, 198-199 (Fla. 1920)(courts are bound to take notice of limits of their authority). See also Mendez v. Ortega , 134 So. 2d 247, 247 (Fla. 3d DCA 1961)(if want of jurisdiction appears at any stage, court must enter appropriate order); Mapoles v. Wilson, 122 So. 2d 249, 251 (Fla. 1st DCA 1960)(court must consider matter of jurisdiction sua sponte when any doubt exists).

When a party questions the subject matter jurisdiction, the court must carefully examine the question and make a determination of its jurisdiction. See Swad v. Swad, 363 So. 2d 18, 18 (Fla. 3d DCA 1978). Such an order might not be realized as necessary until after full briefing. See, e.g., Ford Motor Co. V. Averill, 335 So. 2d 220 (Fla. 1st DCA 1978). However, a lack of jurisdiction is likely to be readily apparent from a review of the initial brief or any response to a motion to dismiss. See Calhoun v. New Hampshire Ins. Co., 354 So. 2d 882, 883(Fla. 1978)(subject matter jurisdiction may be tested by good faith allegations); West 132 Feet, 86 So. at 198 (court looked for jurisdictional conditions on face of record).

The Final Staff Analysis states, "absent fundamental error, an appeal may not be taken from a judgment or order of the trial court either by direct appeal or collateral review, unless the appeal alleges that a 'prejudicial error' was made and that the error was 'properly preserved.'" Final Staff Analysis, supra (emphasis supplied). Thus, a party challenging a judgment has the burden of demonstrating prejudicial error. Section 924.051(7). This burden is similar to the one imposed on a defendant in establishing manifest injustice when he challenges a sentence entered on a guilty plea. See Robinson v. State, 373 So. 2d 898, 903 (Fla. 1979).

Absent a specific assertion of wrongdoing, a defendant is not

entitled to automatic review of a guilty plea to make sure that he was aware of his rights, either. Id. at 902. Such an assertion must first be presented to the trial court before it will be heard on appeal. Id. at 903. Courts will dismiss appeals for lack of jurisdiction where a defendant has not first raised an attack on the voluntariness of his plea in the trial court. See, e.g., Robinson, 373 So. 2d at 903; Norman v. State, 634 So. 2d 212, 213 (Fla. 4th DCA 1994); Keith v. State, 582 So. 2d 1200 (Fla. 1st DCA 1991); Duhart v. State, 548 So. 2d 302 (Fla. 5th DCA (1989).

The State contends that section 924.051 also contemplates dismissal where nonfundamental sentencing error is not asserted in the trial court. In practice, courts need do no more review of a case than that required in an appeal from a plea. If an alleged error has not been preserved and does not amount to fundamental error, then the appellate court lacks subject matter jurisdiction over the issue and must dismiss it. This analysis is the exact analysis that has been employed by the courts in affirming cases. See, e.g., Carson v. State, 23 Fla. L. Weekly D 601 (Fla. 5th DCA Mar. 6, 1998); State v. Mae, 23 Fla. L. Weekly D364 (Fla. 4th DCA Jan. 23, 1998); Pryor v. State, 23 Fla. L. Weekly D282 (Fla. 3d DCA Jan. 21, 1998); Hardman v. State, 701 So. 2d 1278 (Fla. 5th DCA 1997); Tobin v. State, 701 So. 2d 914 (Fla. 4th DCA 1997); Cowan v. State, 701 So. 2d 353 (Fla. 1st DCA 1997); Hunter v. State, 700 So. 2d 728 (Fla. 5th DCA 1997); Johnson v. State, 697 So. 2d 1245 (Fla.

1st DCA 1997); Middleton v. State, 689 So. 2d 304 (Fla. 1st DCA 1997); Neal v. State, 688 So. 2d 392 (Fla. 1st DCA 1997).

Of course, dismissal avoids the unnecessary waste of judicial resources that is involved in decisions affirming cases only after full briefing and consideration. As noted in the Final Staff Analysis, "Delay and unnecessary use of the appellate process result from a failure to cure early that which must be cured eventually." Final Staff Analysis, supra (quoting Castor v. State, 365 So. 2d 701, 703 (Fla. 1973)). See Neal v. State, 688 So. 2d 392, 396 (Fla. 1st DCA 1997)(court noted waste of time and expenditure associated with appeal taken from alleged sentencing error that was unpreserved). Hence, like in the case of unreserved error on a plea, dismissal of unpreserved sentencing errors achieves the goal of promoting "the efficient disposition of cases in appellate courts." See Final Staff Analysis, supra. Additionally, and significantly, the proper dismissal of cases for court of subject matter jurisdiction could promote the saving of tens of thousands of taxpayer's dollars because needless records and expensive transcripts should not be prepared.

In Ray v. State, 403 So. 2d 956, 960 (Fla. 1981), this Court stressed that an accused, like the State, must comply with established rules of procedure designed "to assure both fairness and reliability in the ascertainment of guilt and innocence." It stated that the failure to object is a strong indication that in

the trial court, the defendant did not regard the alleged error as harmful. 403 So. 2d at 960. Hence, this Court declared that the doctrine of fundamental error should be applied only in rare cases, and noted that even constitutional error might not necessarily be fundamental. Id. at 961.

This reluctance to apply the doctrine is in part because of the notion that it is only fair to give the trial court the opportunity to cure any error while the trial is in process. See Castor v. State, 365 So. 2d 701, 703 (Fla. 1978). To allow a defendant to assert a claim for the first time on appeal without being subject to dismissal would serve only to produce "the delay and systemic cost" which result from invoking the appellate structure "for the application of a legal principle which was known and unambiguous at the time of trial." Id. Clearly, reduction of unnecessary and wasteful appeals was a goal of the legislature in enacting sections 924.051(3) and (4), for the Final Staff Analysis pointed out that the number of appeals exceeded "the most efficient intermediate appellate court operations." Final Staff Analysis, supra.

The doctrine of fundamental error does not apply in the instant case. This Court should note that the sentence was legal. Petitioner's sentence constituted an upward departure sentence, and the trial court filed written reasons: "stipulated plea negotiated at request of victims' families - [defendant] avoids minimum

mandatory life sentence." An upward departure sentence is justified when a defendant voluntarily agrees to a negotiated plea. White v. State, 531 So. 2d 711 (Fla. 1988)(where defendant voluntarily pleads guilty, and agreed-to sentencing range constitutes an upward departure, sentence was properly imposed); Smith v. State, 529 So. 2d 1106 (Fla. 1988)(approving upward departure sentence based upon plea bargain, where bargain had been knowingly and voluntarily entered after consultation with counsel); Zimmerman v. State, 554 So. 2d 670 (Fla. 2d DCA 1990)(defendant's negotiated plea was a valid reason for departure).

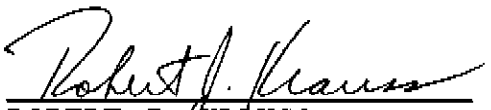
Based on the foregoing, the Second District properly stated that it was without jurisdiction to hear this case because Petitioner pleaded guilty and failed to bring the error to the trial court's attention. Thus, the Second District properly dismissed this appeal.

CONCLUSION

Based on the foregoing facts, argument, and citations of authority, Respondent respectfully requests that this Honorable Court affirm the decision of the Second District Court of Appeal.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to A. Victoria Wiggins, Assistant Public Defender, Public Defender's Office, Post Office Box 9000 -- Drawer PD, Bartow, Florida 33831, this 2nd day of October, 1998.

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COUNSEL FOR RESPONDENT

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

DAVID LEONARD,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 96-04245

Opinion filed June 10, 1998.

Appeal from the Circuit Court for Hillsborough County; Cynthia Holloway, Judge.

James Marion Moorman, Public Defender, and A. Victoria Wiggins, Assistant Public Defender, Bartow, for Appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Helene S. Parnes, Assistant Attorney General, Tampa, for Appellee.

PER CURIAM.

In this direct appeal, David Leonard challenges, as illegal, the thirty-year sentence he received when the probation he was serving on a second-degree felony was revoked. See §§ 775.082(3)(c), 800.04, Fla. Stat. (1987). No other issues are

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raised. Because Leonard pleaded guilty to the underlying offense and failed to bring this error to the trial court's attention first, pursuant to section 924.051(4), Florida Statutes (Supp. 1996), we are without jurisdiction to entertain this issue on direct appeal. Therefore, we dismiss this appeal without prejudice to Leonard to seek correction of this possible error by filing a motion pursuant to Florida Rule of Criminal Procedure 3.800(a).

Dismissed.

ALTENBERND, A.C.J., and FULMER and CASANUEVA, JJ., Concur.

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