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IN THE SUPREME COURT OF FLORIDA

SALIM KAMAU LATIF,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 93,385

PETITIONER'S MERIT BRIEF

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

M. A. LUCAS
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ATTORNEY FOR PETITIONER

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TA RJ .E OF CITATIONS

IN THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT
OF THE STATE OF FLORIDA

SALIM KAMAU LATIF,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. 93,385
	)	
STATE OF FLORIDA,	)	
	)	
Respondent.	)	
	)	

STATEMENT OF THE CASE AND FACTS

Petitioner pled guilty in Count I, to possession of cocaine with intent to sell, a second degree felony and in Count II, to use or possession of drug paraphernalia, a first degree misdemeanor. (R 23-24, 44)

Petitioner's sentencing guidelines scoresheet indicated a minimum prison months of 24 and a maximum of 40 months. (R 3 1) Defense counsel disputed Petitioner's prior convictions for battery on a law enforcement officer and criminal mischief. (R 58) In Count I, Petitioner was sentenced to the maximum under the guidelines of 40 months incarceration with credit for 293 days time served. (R 25-26) As to Count II, Petitioner was sentenced to 293 with credit for 293 days time served. (R 27-28, 61) Petitioner appealed to the Fifth District Court of Appeal. On appeal to the Fifth District Court of Appeal, Petitioner argued that the trial

court erred in sentencing petitioner to the maximum of 40 months incarceration where he objected to his prior record score on the scoresheet. On May 29, 1998, the Fifth District issued its opinion affirming petitioner's sentence. See Latif v. State, 711 So. 2d 241 (Fla. 5th DCA 1998). (Appendix) In rejecting Petitioner's argument, the District Court held that defense counsel had abandoned his objection and cited Maddox v. State, 708 So. 2d 617(Fla. 5th DCA 1998) which is currently pending for review with this Court in case number 92,805 (filed April 23, 1998).

A timely notice to invoke this Court's discretionary jurisdiction was filed on June 26, 1998. This Court accepted jurisdiction on September 28, 1998.

SUMMARY OF THE ARGUMENT

The Fifth District Court of Appeal erred in finding petitioner abandoned his objection to the scoring of his disputed prior convictions and that the issue was not preserved for appeal. Petitioner maintains that the trial court erred in failing to require the State to present additional proof of petitioner's convictions which were disputed. The error is not harmless because petitioner was sentenced to the maximum of 40 months incarceration and if the scoresheet was corrected the most petitioner could be sentenced to is 36 months incarceration.

ARGUMENT

THE FIFTH DISTRICT COURT OF APPEAL ERRED BY FINDING DEFENSE COUNSEL ABANDONED HIS OBJECTION TO SCORING PETITIONER'S PRIOR RECORD AND IN RELYING UPON ITS DECISION IN MADDOX V. STATE, 708 SO. 2D 6 17 (FLA. 5TH DCA 1998) TO HOLD THAT THE ISSUE WAS NOT PRESERVED FOR APPEAL,

In the instant case, petitioner's sentencing guidelines scoresheet total indicated a minimum state prison months of 24 and a maximum of 40 months incarceration. (R 3 1) Appellant was sentenced by Judge Johnson to the maximum of 40 months incarceration, At petitioner's sentencing hearing on September 24, 1996, defense counsel objected to scoring as petitioner's prior record, alleged convictions for battery on a law enforcement officer and criminal mischief. (R 58) This shifted the burden of proving each and every offense relied on in the prior record to the State. The State, however, offered nothing to disprove petitioner's assertions and the trial court erred by failing to require the State to produce corroborating evidence. Brown v. State, 632 So.2d 1052 (Fla. 5th DCA 1994); Vandenynden v. State, 478 So.2d 429 (Fla. 5th DCA 1985) If these offenses were removed from petitioner's scoresheet, the maximum petitioner could be sentenced to is 36 months incarceration. Therefore, this error cannot be considered harmless. See, Poe, 689 So. 2d 333 (Fla. 5th DCA 1997).

The following transpired at petitioner's sentencing hearing:

> **Mr. Zenter** [defense counsel]: Mr. Latif also advises me in the PSI prior record they had him down for battery on a LEO, which he claims he was never convicted of, so there's an error there. He also claims that they had him down as being convicted on a criminal mischief charge resulting in three day sentence, which he denies that ever occurred.
>
> **The Court:** Has he filed any of these in writing?
>
> **Mr. Zenter: No,** he has not.
>
> **The Court:** Is this the first time he has notified you in writing?
>
> **Mr. Zenter:** Yes, your honor.
>
> **The Court:** Don't the rules say they have to be filed in writing?
>
> **Mr. Zenter:** If either of those offenses, your honor, were deleted, the points, I think, would only be 2.6 points. I don't know that it would have any significant effect on the ultimate sentence. (R 58-59)

The trial court immediately switched gears and began to question whether there was any plea agreement as to the sentence to be imposed. (R 59) Petitioner maintains that the Fifth District Court of Appeal erred in finding that defense counsel had abandoned his objection by stating that deleting the points would not have a "significant" effect on the ultimate sentence. This was not an abandonment, defense counsel was just commenting on a fact. Deletion of these points reduces petitioner's sentence by four months which is not a significant amount of time. It is apparent on the face of the record that petitioner objected to the scoring

of these additional points. Furthermore, although it does not significantly increase petitioner's sentence, petitioner was sentenced to four months beyond the maximum sentence that would have been allowed if these convictions had been removed. Defense counsel alerted the State and the court to petitioner's objection. It was incumbent upon the State at that time to prove that pPetitioner was indeed convicted of the offenses included in his scoresheet. The trial court, instead of ignoring the objections, should have requested the State to prove these convictions and make a ruling. Here, the trial court had an opportunity to make a ruling but chose not too. Petitioner maintains that the objection was never abandoned by defense counsel's comments that the discrepancy with the scoresheet as to the amount of time involved was not "significant".

If this Court finds that the objection was somehow abandoned, petitioner respectfully requests this Court not to follow the decision of the Fifth District Court of Appeal in Maddox v. State, 708 So.2d 617 (Fla. 5th DCA 1998), which is currently pending review with this Court. In Maddox, the Fifth District Court of Appeal held that no sentencing errors would be heard on appeal unless it was preserved by an objection down below. Petitioner maintains that to follow the Fifth District Court of Appeals decision will only result in an increase of the "legal churning." Therefore, Petitioner maintains that Court should follow the decision

of the Third District Court of Appeal in Mizell v. State, 23 Fla. L. Weekly D 1978 (Fla. 3rd DCA August 26, 1998) The Third District Court acknowledged the Fifth District Court's opinion in Maddox, but found that not to be an impediment to granting relief:

> It is apparent that, even if arguendo Maddox is correct, the defense counsel's failure to present the point precludes reversal, that very holding requires the concomitant conclusion that Mizell received ineffective assistance of counsel in failing to preserve a right which would have otherwise inevitably resulted in a correction of sentence. Applying a limited, but controlling, exception to the rule that ineffectiveness claims may not be reached on direct appeal which applies when, as here, "the facts give rise to such a claim are apparent on the fact of the record," [citations omitted], we simply ordered the amendment of the sentence after remand.
>
> While this resolution of the case may not satisfy some of the more rabid of the judicial Thomists among us we think it is easily more consistent with our duty to avoid the legal churnings. See, State v. Rucker, 6 13 So.2d 460 (Fla. 1993), which would be required if we make the parties and lower courts do the long what we ourselves should do the short. Thus, we agree with Maddox, 707 So. 2d at 62 1, that the lack of preservation in the sentencing area necessarily involves ineffective assistance of counsel, but strongly disagree that anything is accomplished by not dealing with the matter at once.

Thus, the Third District has adopted a common sense approach to dealing with arguably unpreserved yet clearly improper sentencings. In the instant case, if this Court finds defense counsel had abandoned his objection, then this Court should find that the abandonment constituted ineffective assistance of counsel on

the face of the record and petitioner's sentence should be vacated and the cause remanded for a new sentencing hearing.

CONCLUSION

Based on the foregoing reasons and authorities, petitioner respectfully requests this Honorable Court to quash the decision of the Fifth district Court of Appeal below.

Respectfully submitted,

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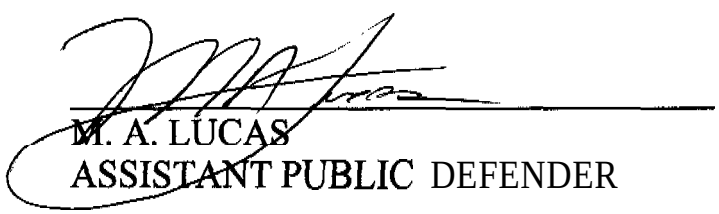
CERTIFICATE OF SERVICE

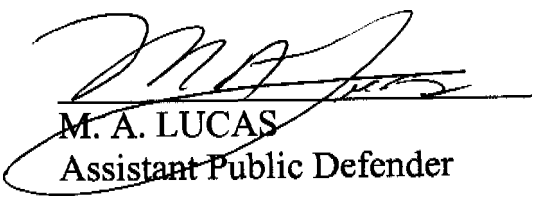
I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to: The Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Blvd., Fifth Floor, Daytona Beach, FL 32118 via his basket at the Fifth District Court of Appeal and mailed to: Salim Kamau Latif, Inmate #6 13 165, Tallahassee Road Prison,2628 A Springhill Road, Tallahassee, FL 323 10, this 23rd day of October, 1998.



M. A. LUCAS
ASSISTANT PUBLIC DEFENDER

CERTIFICATE OF FONT

I HEREBY CERTIFY that the size and style of type used in the brief is 14 point proportionally spaced Times New Roman.



M. A. LUCAS
Assistant Public Defender

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APPENDIX

Latif v. State, 7 11 So. 2d 241 (Fla. 5th DCA 1998)

JAMES B. GIBSON
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ment emanated. *Id* Accordingly, the trial court properly enforced the mediation agreement entered by the parties' in the instant case even though it was executed while the litigation was pending in county court and the county court's jurisdiction to consider Metro's noncompete claim was subject to challenge.

AFFIRMED.

COBB and W. SHARP, JJ., concur.

Salim Kamau LATIIF, Appellant,

v.

STATE of Florida, Appellee.

No. 96-2992.

District Court of Appeal of Florida, Fifth District.

May 29, 1998.

After defendant pled guilty to possession of cocaine with intent to sell and possession of drug paraphernalia, defendant was sentenced in the Circuit Court, Volusia County, William C. Johnson, Jr., J. Defendant appealed. The District Court of Appeal, Antoon, J., held that claim that trial court erred in calculating defendant's prior record score in completing sentencing guideline scoresheet was not preserved for appellate review.

Affirmed.

1. CriminalLaw ⇐1028,1045

Issue is preserved for appellate review when the issue has been presented to, and ruled on, by the trial court.

2. CriminalLaw ⇐1045

Claim of error with respect to calculations contained in sentencing guideline scoresheet of defendant who pled guilty was abandoned before trial court had opportunity to rule on it, and thus could not be raised on direct appeal. West's F.S.A. § 924.051(3, 4); West's F.S.A. RCrP Rule 3.800(b).

James B. Gibson, Public Defender, and M. A Lucas, Assistant Public Defender, Daytona Beach, for Appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and David H. Foxman, Assistant Attorney General, Daytona Beach, for Appellee.

ANTOON, Judge.

Salim Kamau Latiif (defendant) appeals his sentences which were imposed by the trial court after he pled guilty to the charges of possession of cocaine with intent to sell and possession of drug paraphernalia.[1] The defendant argues the trial court erred in calculating his prior record score in completing his sentencing guideline scoresheet. We affirm because this issue was not preserved for appellate review.

At the sentencing hearing, defense counsel advised the trial court that the defendant claimed that his prior record, which included convictions for battery on a law enforcement officer and criminal mischief, was erroneously scored on the guideline scoresheet. However, after bringing the matter to the court's attention, defense counsel abandoned his objection stating that "[i]f either of those offenses . . . were deleted, the points, I think, would only be 2.6 points. I don't know if it would have any significant effect on the ultimate sentence."

[1,2] Subsections 924.051(3) and (4), Florida Statutes (Supp.1996), and amended Florida Rule of Criminal Procedure 3.800(b) provide that a defendant who pleads guilty without expressly reserving his or her right to appeal the sentence either by raising the issue at the sentencing hearing, or by filing a motion to correct sentence within thirty days after the rendition of the sentence has failed to preserve the issue for purposes of appeal.

1. §§ 893.13(1)(a)1; 893.147(1), Fla. Stat. (1995).

See Saldana v. State, 698 So.2d 338 (Fla. 6th DCA 1997). An issue is preserved for appellate review when "the issue has been presented to, and ruled on by the trial court." *Maddox* v. State, 708 So.2d -617 (Fla. 6th DCA 1998). Here, although the defense counsel refuted the calculations contained in the defendant's guideline scoresheet, the scoring issue was abandoned before the trial court had an opportunity to rule upon it. As a result, this claim of error cannot be raised on direct appeal. See *also Rodriguez v. State*, 650 So.2d 1111, 1112 (Fla. 2d DCA 1995), *rev. denied*, 699 So.2d 1375 (Fla.1997).

AFFIRMED.

DAUKSCH and HARRIS, JJ., concur.

Theresa MUMMERY and John Howard Wickham, etc., Appellants,

v.

ST. AUGUSTINE HUMANE SOCIETY, INC., Appellee.

No. 97-1471.

District Court of Appeal of Florida, Fifth District.

May 29, 1998.

Rehearing Denied June 11, 1998.

Parents of child bitten by dog owned by another sued humane society, and default judgment was entered. The Circuit Court, St. Johns County, Robert K. Mathis, J., vacated default judgment and granted summary judgment to humane society. Parents appealed. The District Court of Appeal, Peterson, J., held that: (1) humane society could not be liable for releasing dog early from quarantine, and (2) humane society could not be liable for having released dog to person other than its owner.

Affirmed.

1. Animals ⇐68

Humane society could not be liable to parents of child bitten by dog for releasing dog from quarantine prior to expiration of quarantine period, as humane society's sole function in placing dog in quarantine was to observe dog to assure that it was not contaminated with rabies or other contagious diseases, and' it was undisputed that dog was not infected.

2. Animals ⇐68

Humane society could not be liable to parents of child bitten by dog for having releaaed dog from quarantine to person other than its owner after dog had bitten different child, as person was listed as owner or co-owner on both dog bite incident reports, and dog was in her possession arid control on day child was bitten.

David B. Sacks, PA, Jacksonville, for Appellants.

Luke G. Galant, Jacksonville, for Appellee.

PETERSON, Judge.

The trial court's grant of summary judgment in favor of St. Augustine Humane Society, Inc., is challenged by appellants; whose minor son, John Howard Wickham, was injured as a result of a dog bite. The appellants also claim that the trial court erred in vacating an earlier entered default against the Humane Society after it failed to answer the appellants initial complaint.

Appellants alleged in their initial complaint against the Humane Society that a Chow dog, owned by Mary W. Morris, was placed into quarantine by St. Johns County with the Humane Society after it had bitten a child on August 11, 1993. The appellants further alleged that the dog was released prior to the expiration of the ten day quarantine period without determining whether the dog showed signs of rabies or other infectious disease. A few days after the dog's release, the dog bit a second child, this time, the appellants' child.