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IN THE SUPREME COURT OF FLORIDA

SHAWN DAVID SPENCER,	)	
	)	
Petitioner/Appellant,	)	
	)	
versus	)	S.CT. CASE NO. 93,430
	)	
STATE OF FLORIDA,	)	DCA CASE NO. 97-2064
	)	
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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TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS

STATEMENT OF THE CASE AND FACTS

Petitioner, Shawn David Spencer, also hereinafter referred to as appellant, was charged in case number 96-1246(B) with lewd act upon a child (F2-L7). (Volume 1, page 3) In case number 96-2056, appellant was charged with three counts of lewd act upon a child. (Volume 1, pages 102,103)

Appellant plead guilty to the one charge in case number 96-1246(B), and nolo contendere to Count II in case number 96-2056. The state nolle prossed Counts I and III in case number 96-2056. The plea in case number 96-1246(B) was to be in exchange for four years youthful offender treatment in the Department of Corrections, followed by two years probation. In case number 96-2056, the agreed-upon sentence was to be 10 years probation, with both sentences running concurrent. (Volume 1, pages 59, 104)

The court abided by the terms of the plea bargain and in case number 96-2056, imposed 10 years supervised probation plus an adjudication of guilt. In case number 96-1246(B), the court imposed a four-year

youthful offender sentence with the Department of Corrections, followed by two years probation. The sentences were to be concurrent and both were to start on June 27, 1997, the date of sentencing. (Volume 1, pages 38-48)

Petitioner appealed to the Fifth District Court of Appeal, arguing that the court erred when imposing simultaneous incarceration and probation. The State argued that there was no sentencing error preserved for appeal. The Fifth District Court issued a per curiam decision, which included a citation to Maddox v. State, 23 Fla. Law 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.

Petitioner now seeks discretionary review by this Court.

SUMMARY OF THE ARGUMENT

The Criminal Appeal Reform Act of 1996 did not abolish appellate courts' ability to review fundamental, serious sentencing errors that are obvious from and supported by the record. If an appellate court has jurisdiction over a case, it has the discretion to address unpreserved issues in order to effect that portion of the Criminal Appeal Reform Act which permits appeals from fundamental errors whether preserved or not. The Fifth District Court of Appeal included two citations in its decision in this case, Maddox v. State, 23 Fla.Law Weekly D720 (Fla. 5th DCA March 13, 1998), and further included the reference "but see" Harriel v. State, 23 Fla Law Weekly D967 (Fla. 4th DCA April 15, 1998).

In Maddox the Fifth District acknowledged it was in conflict with every other District Court of Appeal.

This Court accepted jurisdiction pursuant to its Order dated Tuesday, December 29, 1998.

ARGUMENT

THE CRIMINAL APPEAL REFORM ACT OF 1996 DID NOT ABOLISH THE CONCEPT OF FUNDAMENTAL ERROR WITH REGARD TO SENTENCING ISSUES.

Petitioner appealed his convictions and sentences in the Osceola County, Circuit Court to the Fifth District Court of Appeal, arguing the court erred when imposing simultaneous incarceration and probation, to wit:

> THE INCARCERATIVE PORTION OF ALL SENTENCES MUST BE COMPLETED PRIOR TO SERVING ANY PART OF THE PROBATIONARY TERM.

In the case at bar, the record read in part:

> THE CLERK: Do you want the 10 years probation to start with the D.O.C. time?
>
> THE COURT: They'll both start today.
>
> (Volume 1, page 48)

But see, Hatton v. State, 689 So. 2d 1195 (Fla. 4th DCA 1997), where

> [The Court] affirm[ed] appellant's convictions for possession and sale of cocaine but reverse[d] his sentences to the extent that they impose[d] simultaneous periods of incarceration and probation and remand[ed] for correction.
>
> Appellant was sentenced to three months in the county jail followed by two years probation on Count I, and one year in the county jail followed by three years probation on Count II. The sentences were to run concurrently; therefore, nine months of the probation on Count I was to be served simultaneously with the incarcerative portion of Count II. The second and fifth districts have held that it is error to order probation on one count to be served simultaneously with incarceration on another count. Dewitt v. State, 639 So. 2d 694 (Fla. 5th DCA 1994); Hill v. State, 624 So. 2d 417 (Fla. 2d DCA 1993). See also Barr v. State, 474 So. 2d 417 (Fla. 2d DCA 1985)(holding it is reversible error to impose concurrent terms of imprisonment and probation).
>
> Th[is] Florida Supreme Court has also held that section 948.01(6), Florida Statutes (1995), requires the incarcerative portions of a sentence to be completed before the non-incarcerative portions begin. Horner v. State, 617 So. 2d 311 (Fla. 1993).

The Fifth District Court of Appeal, per curiam, affirmed the convictions and sentences on June 12,

1998, citing Maddox v. State, 708 So. 2d 617 (Fla. 5th DCA 1998), review pending, Florida Supreme Court Case Number 92,805.

In Maddox, the Fifth District Court of Appeal interpreted the Criminal Appeal Reform Act of 1996 and the 1996 amendments to the appellate and criminal rules as eliminating the concept of fundamental error as it had been previously recognized and applied in the context of sentencing. Section 924.051, Fla. Stat. (1996);Rule 9.140(d), Fla. R. App. P.;Amendments to Florida Rule of Appellate Procedure 9.020(g) and Florida Rule of Criminal Procedure 3.800,675 So. 2d 1374 (Fla. 1996). The Maddox decision "served notice" that unless properly preserved by a timely objection or a denied motion to correct a sentence, no issue would be addressed on appeal by the Fifth District. The en banc Maddox Court expressly disagreed with the contrary rulings in their respective districts of the courts in 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);

Johnson v. State, 701 So. 2d 382 (Fla. 1st DCA 1997); Cowan v. State, 701 So. 2d 353 (Fla. 1st DCA 1997); Sanders v. State, 698 So. 2d 377 (Fla. 1st DCA 1997); and Collins v. State, 698 So. 2d 883 (Fla. 4th DCA 1997).

Petitioner asserts that the Criminal Appeal Reform Act did not eliminate the concept of fundamental error. Section 924.051(3) provides:

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. §924.051(3), Fla. Stat. (1996). (Emphasis supplied.) The Legislature thus specifically recognizes the continued viability of the concept of fundamental error, including sentencing errors. Although the

Maddox Court concludes that the 1996 appellate- and criminal-rule amendments eliminated appellate review of fundamental sentencing errors, giving such effect would render them improper as "judicial legislation," rewriting a specific legislative enactment. See, e. g., Wyche v. State, 619 So. 2d 231, 236 (Fla. 1993) ("Courts may not go so far in their narrowing constructions so as to effectively rewrite legislative enactments").

Petitioner urges this Honorable Court to follow the reasoning and conclusion of Denson v. State, 23 Fla. L. Weekly D1216 (Fla. 2d DCA May 13, 1998), that chose to address two serious sentencing issues that were addressed on appeal but not preserved in the trial court, i. e., that the defendant had been sentenced, as an habitual offender for possession of cocaine and that the written sentence increased the sentence that had been orally pronounced. The Denson Court wrote that in some respects the Criminal Appeal Reform Act codified the appellate courts' own restrictions on their standard of review; but the

Denson Judges recognized that:

> . . . When this court already has jurisdiction over a criminal appeal because of a properly preserved issue, we do not avoid a frivolous appeal or achieve efficiency by ignoring serious, patent sentencing errors. Limiting our scope or standard of review in these circumstances is not only inefficient and dilatory, but also risks the possibility that a defendant will be punished in clear violation of the law.
>
> * * *
>
> If the goal of criminal appeal reform is efficiency, we are hard pressed to argue that this court should not order correction of an illegal sentence or a facial conflict between oral and written sentences on a direct appeal when we have jurisdiction over other issues. Although it is preferable for the trial courts to correct their own sentencing errors, little is gained if the appellate courts require prisoners to file, and trial courts to process, more postconviction motions to correct errors that can be safely identified on direct appeal. Both Mr. Denson and the Department of Corrections need legal written sentences that accurately reflect the trial court's oral ruling. We conclude that the scope and standard of review in a criminal case authorizes us to order correction of such a patent error.

> Efficiency aside, appellate judges take an oath to uphold the law and the constitution of this state. The citizens of this state properly expect these judges to protect their rights. When reviewing an appeal with a preserved issue, if we discover that a person has been subjected to a patently illegal sentence to which no objection was lodged in the trial court, neither the constitution nor our own consciences will allow us to remain silent and hope that the prisoner, untrained in the law, will somehow discover the error and request its correction. If three appellate judges, like a statue of the "see no evil, hear no evil, speak no evil" monkeys, declined to consider such serious, patent errors, we would jeopardize the public's trust and confidence in the institution of courts of law. Under separation of powers, we conclude that the legislature is not authorized to restrict our scope or standard of review in an unreasonable manner that eliminates our judicial discretion to order the correction of illegal sentences and other serious, patent sentencing errors.

Id., 23 Fla. L. Weekly at 1217-1218.

By contrast, the Fifth District Court of Appeal finds "little risk" of injustice in the new procedures as interpreted by Maddox: if any aspect of a sentencing is "fundamentally" erroneous and if counsel

fails to object at sentencing or file a motion within thirty days in accordance with the rule, the Court wrote, the remedy of ineffective assistance of counsel will be available. Id., 708 So.2d at 621. That is, the Maddox Court finds acceptable an appellate system which requires judges to ignore obvious, demonstrable errors and then leave it to a "prisoner, untrained in the law, [to] somehow discover the error and request its correction." See Denson, supra.

For the Criminal Appeal Reform Act to be constitutional and just, it must be, and Petitioner asks that it be, declared to preserve appellate courts' discretion to grant relief in cases presenting fundamental or obvious sentencing errors supported by the record. The decisions of the Fifth District Court of Appeal in Maddox, supra, and in the instant case should be reversed and this cause remanded with instructions to consider and grant relief on the grounds presented in this appeal.

CONCLUSION

For the reasons expressed herein, Petitioner respectfully requests that this Honorable Court quash the decision of the Fifth District Court of Appeal in Maddox v. State, 708 So. 2d 617 (Fla. 5th DCA 1998), review pending, Florida Supreme Court Case Number 92,805; and, direct the Fifth District Court of Appeal to vacate Petitioner's sentence and remand this cause for resentencing with instructions to **reduce** the 10 years probation, by the 4 year D.O.C. sentence, for a sum total of 6 years probation. This will have the same effect as intended by the plea agreement, to wit: Appellant to remain on probation for the balance of the ten years not spent in prison. (Volume 1, page 48, lines 19-21).

Respectfully submitted,

JAMES B. GIBSON
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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 D. Spencer, Inmate No. X-04618, #A-1122L, Mayo Correctional Institution, Post Office Box 1805, Mayo, Florida 32066-1805, on this 22nd day of January, 1999.

LYLE HITCHENS
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF FLORIDA

SHAWN D. SPENCER,	
Petitioner/Appellant,	
vs.	S.CT. CASE NO. 93,430
STATE OF FLORIDA,	DCA CASE NO. 97-2064
Respondent/Appellee.	

A P P E N D I X

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

SHAWN D. SPENCER,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 97-2064

97-843 C/C

Opinion filed June 12, 1998

Appeal from the Circuit Court
for Osceola County,
Anthony H. Johnson, Senior Judge.

James B. Gibson, Public Defender,
and Lyle Hitchens, Assistant Public
Defender, Daytona Beach, for Appellant.

Robert A. Butterworth, Attorney
General, Tallahassee, and Jennifer
Meek, Assistant Attorney General,
Daytona Beach, for Appellee.

PER CURIAM.

AFFIRMED on the authority of Maddox v. State, 23 Fla. L. Weekly D720 (Fla. 5th DCA March 13, 1998), but see Harriel v. State, 23 Fla. L. Weekly D967 (Fla. 4th DCA April 15, 1998).

DAUKSCH, HARRIS and PETERSON, JJ., concur.

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JAMES R. WULCHAK
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January 22, 1999

Honorable Sid J. White
Clerk, Supreme Court of Florida
500 South Duval Street
Tallahassee, Florida 32399-1927

Re: Shawn D. Spencer v. State, Our file No. 98-597, DCA Case No. 97-2064, S.Ct. Case No. 93,430

Dear Mr. White:

Enclosed please find the original and seven copies of the merit brief of the Petitioner. Attached as an appendix is a copy of the Fifth District Court of Appeal opinion dated June 12, 1998.

If you have any suggestions or questions, please do not hesitate to let me know.

Sincerely yours,

LYLE HITCHENS
Assistant Public Defender

LH/lbh

Enclosures