IN THE SUPREME COURT OF FLORIDA

DARRYLE T. COOK,

Petitioner,

v. CASE NO. 93,781
DCA case no.: 5D97-2923

STATE OF FLORIDA,

Respondent.
_____/

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

RESPONDENT'S SUPPLEMENTAL BRIEF ON THE MERITS

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CERTIFICATE OF TYPE SIZE AND STYLE

The type size and style used in this brief is 12 point Courier New.

SUMMARY OF ARGUMENT

The issue in this case - the stacking of minimum mandatory sentences - is a factual one which can not be determined from the face of the record. This Court has defined fundamental sentencing errors as one which are both patent and serious. The alleged error in the instant case is neither.

ARGUMENT

POINT OF LAW

WHETHER THE STACKING OF MINIMUM MANDATORY SENTENCES CONSTITUTES FUNDMENTAL ERROR.

This Court has ordered that the parties file supplemental briefs addressing whether the sentencing issue involved in this case is "fundamental" as defined in Maddox v. State, 25 Fla. L. Weekly S367 (Fla. May 11, 2000). The State's position is that the alleged error meet the definition of fundamental.

The issue before this Court is whether the alleged "sentencing error" in this case is fundamental which this Court recently defined as one which is both serious and patent. See, Maddox. Since the alleged error is not even clearly an error it is equally clearly not apparent from the face of the record.

Requiring objection to issues like in the present case actually predates Maddox and the 1996 Reform Act. As this Court noted in State v. Montague, 6582 So. 2d 1085 (Fla. 1996):

> We have repeatedly held that absent an illegal sentence or an unauthorized departure from the sentencing guidelines, only sentencing errors 'apparent on the face of the record do not require a contemporaneous objection in order to be preserved for review.' Taylor v. State, 601 So. 2d 540, 541 (Fla. 1992) (emphasis added); see also,...Forehand v. State, 537 So. 2d 103, 104 (Fla. 1989) ("absent a contemporaneous objection ... sentencing errors must be apparent on the face of the record to be cognizable on appeal") (emphasis added); Dailey v. State, 488 So. 2d 532, 534 (Fla. 1986) (alleged sentencing errors requiring an evidentiary

> determination may not be initially raised on appeal). This follows the general rule that "objections which are not timely made are waived." Charles W. Ehrhardt, Florida Evidence § 104.1 at 10 (1995 ed.)
>
> ...
>
> By our decision today, we again emphasize that the sentencing hearing is the appropriate time to object to alleged sentencing errors based upon disputed factual matters.

682 So. 2d at 1088-1089.[1]

This case illustrates why factual issues have long been required to be presented to the trial court. The Petitioner was found guilty after a trial by jury of count 1: robbery, count 2: attempted robbery, count 3: attempted robbery, count 5: robbery with a firearm, count 6: robbery with a firearm, count 7:, possession of a firearm in the commission of a felony, count 8: possession of a firearm by a minor, and count 9: resisting an officer without violense. The only issue raised on appeal was whether the the stacking of the minimum mandatory three year sentences in counts 5 and 6 was proper. (R 1-30, 25-27). The issue was never brought before the trial court in any manner.

Based upon these facts, it is the State's position that there

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[1] Additionally, case law has held that the issue of whether consecutive sentences are proper is a factual one to be made by the trial court. See, State v. Callaway, 658 So. 2d 983 (Fla. 1995) (the supreme court announced that collateral attacks had to be raised in Rule 3.850 motions - not Rule 3.800 motions - because of the necessity for the trial court to make the factual determinations of whether the offenses occurred during a single criminal episode).

was actually no sentencing error here at all. The record does not show that the offenses in this case were a "single criminal episode." See Palmer v. State, 438 So. 2d 1 (Fla. 1983). Ms. Crews (one of the victims) testified that the defendants came in and ordered her and her co-worker to the floor. (T 62-64). They took the co-worker's tip money from her apron and made her open the register. (T 62-66). They then took Ms. Crews to the back of the restaurant into the back office and forced her to open the safe. (T 67). Therefore, in the instant case there were separate, distinct acts as well as separate victims, and consecutive sentences would be proper. See State v. Thomas, 487 So. 2d 1043 (Fla. 1986), Bonaventure v. State, 637 So. 2d 55 (Fla. 5th DCA 1994), Permenter v. State, 635 So. 2d 1016 (Fla. 1st DCA 1994), Kelly v. State, 552 So. 2d 206 (Fla. 5th DCA 1989), rev. denied, 563 So. 2d 632.

At best from the defense's perspective, the record is unclear as to any reasons for the stacking of the two counts. Obviously, if the record is unclear, it is not patent. Therefore, the issue is not fundamental and should have been preserved. If the Petitioner maintains that his sentences are improper, he can file a Rule 3.850 motion **with the trial court** to address the factual issues he now attempts to raise without proper preservation.

In addition to the fact the alleged error is not patent, the State would also maintain that the error is not serious. The "qualitative effect on the sentence" is not such that it should rise to the level of being considered a fundamental error. The

Petitioner was given 160.8 month sentences on four of the counts. Whether the trial court properly ran the two three year minimum mandatories consecutively would have no effect on his final sentence served. Therefore, it is the State's position that the alleged error in this case is neither patent nor serious, and it is not fundamental.

CONCLUSION

Based on the arguments and authorities presented above, the State respectfully prays this Honorable Court affirm the judgments and sentences imposed by the trial court in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above Supplemental Brief has been furnished by delivery via the basket of the Office of the Public Defender at the Fifth District Court of Appeal to Lyle Hitchens, counsel for the Petitioner, 112 Orange Ave. Ste. A., Daytona Beach, FL 32114, this _____ day of June 2000.

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