IN THE SUPREME COURT OF FLORIDA

CURTIS LEON HEGGS,	:	
Petitioner,	:	
vs.	:	Case No. 93,851
STATE OF FLORIDA,	:	
Respondent.	:	
	:	

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

SUPPLEMENTAL REPLY BRIEF OF PETITIONER ON THE MERITS

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ARGUMENT

Although asserting the Act is substantive, the state argues that it applies here because, by the time of Petitioner's trial and plea, he "ha[d] . . . notice of the terms of the Act . . . ." SAB, p. 6. However, the question of prospectivity does not hinge upon one's "notice" of the statute at issue.

A prospective law is defined as "[o]ne applicable only to cases which shall arise after its enactment." Black's Law Dictionary (4th ed., 1968). Although there are no Florida cases addressing this question in the context of a criminal statute, with civil statutes "prospective" is measured from the date the cause of action accrued, unless the action is founded on a contract, in which case the contract date controls. Gupton v. Village Key and Saw Shop, Inc., 656 So.2d 475, 477 (Fla. 1995) (substantive law "will not be applied retrospectively [but] statutes that relate only to procedure or remedy generally apply to all pending cases") (emphasis added); Arrow Air, Inc. v. Walsh, 645 So. 2d 422, 424 (Fla. 1994) ("'remedial' legislation . . . should be applied in pending cases") (emphasis added). If retrospective means "applied in pending cases", prospective must mean the opposite. Thus, the prospectivity of criminal statutes should be measured from the date

the crime was committed. Since the offenses in the present case occurred before the Act took effect, the Act does not apply.

The state does not address the question of whether the Act may be procedural in nature and thus infringe upon this Court's rule-making authority. In this regard, Petitioner notes the following:

> Jurisdiction has reference to the power of a court to adjudicate or determine any issue or cause submitted to it, while practice or procedure has reference to the manner in which the power to adjudicate or determine is exercised. If the statute in other words imposes on the court new and different matters to adjudicate, its jurisdiction has been affected, but, if it merely provides a new way for dealing with a function already within its justification, it is dealing solely with a matter of practice and procedure. . . .

Sheldon v. Powell, 128 So. 258, 263 (Fla. 1930).

Under this analysis, sections 924.051(3) and (4) of the Act are not valid legislative conditions imposed on appellate jurisdiction[1], but rather are impermissible forays into rule-making.[2]

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[1] Assuming the legislative imposition of reasonable conditions on the appellate courts' jurisdiction is constitutionally permissible. See Bain v. State, 24 Fla. Law Weekly D314, 315 (Fla. 2d DCA, Jan. 29,1999).

[2] If the Act is a valid legislative condition on appellate jurisdiction, then the Amended Rules cannot be read as being more restrictive than the Act. This Court is "powerless to promulgate a rule which ha[s] the effect of enacting or repealing a statute involving jurisdiction or substantive law." Petition of Florida Bar Association, 198 So. 57, 59 (Fla. 1940).

Although agreeing that the Amended Rules do not apply here[3], the state discusses the benefits the new rules will have. The state first asserts that the reforms "were critically needed, particularly in the area of sentencing and in guilty or nolo contendere pleas . . . ." SAB, p. 10. The state does not explain why these reforms were "critically needed".

The state further asserts that the reforms "benefit all concerned . . . , all of whom share a common interest in having claims of error first raised and ruled on in the trial court." SAB, p. 10-11. The state purports to be "mystified" as to why trial counsel do not take advantage of the new rules to raise issues in the trial court. SAB, p.11, fn 8. The answer to that concern is more mundane than mystical and it illustrates the problem with the state's argument: it overlooks the simple fact that these issues are not being raised at the trial level because trial counsel are overlooking them and will, given human frailty, continue to do so. The question to be addressed here is how do we correct such

[3] In State v. Mackey, 719 So. 2d 284 (Fla. 1998), this Court implicitly answered the question of whether Amendments II applies in the present case. The issue in Mackey concerned the use of the wrong sentencing guidelines scoresheet. In a footnote, the Court said that, since "the sentencing predated the enactment of both [the Act and amended rule 3.800(b)], these provisions are clearly inapplicable." Id. at 285, fn 1. In the present case, Petitioner's sentencing predated the enactment of Amendments II, so those amendments do not apply here.

mistakes when they are first noticed on appeal; lamenting the fact that the issue was not raised below, and pointing to a rule that could have been used below, do not answer this question.[4]

The state asserts the Amended Rules "provide a foolproof, fail-safe method of raising all claims of sentencing error in the trial court . . . ." SAB, p.14 (emphasis in original). Apparently recognizing the fundamental incompatibility of such terms as "foolproof" and "failsafe" when applied to human endeavors, the state goes on to suggest what should be done when the "foolproof" new rules do in fact fail: a rule 3.850 motion (alleging ineffective assistance of counsel) should be filed and, if that is denied, that can be appealed. SAB, p.14-15. As will be discussed below, this procedure is not an improvement on the procedure of simply correcting the mistake in the direct appeal.

This brings us back to the first question we need to answer here: what exactly were the perceived problems that the Act and the Amended Rules were intended to remedy?

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[4] The fact that new rule 3.800(b) gives trial counsel 30 days after sentencing to file a motion to correct sentence may be helpful with regard to sentencing errors that first arise after the sentencing hearing, e.g., errors in the written sentencing documents, etc. However, this rule is of little use for errors that occur at the sentencing hearing: if trial counsel failed to catch the error at that time, there is no reason to think he is going to automatically attain enlightenment within 30 days of that hearing.

In Amendments II, this Court noted that "scarce resources [are] being unnecessarily expended in appeals from guilty pleas and appeals relating to sentencing errors." 696 So. 2d at 1103. The Court did not amplify this assertion. With respect to the "sentencing errors", the Court was presumably referring to unpreserved sentencing errors. With respect to guilty plea appeals, the Court was presumably referring to the fact that the appeal was taken at all. The analysis that follows will assume that these were the problems the Act and the Amended Rules were meant to address.

To analyze the "sentencing errors" problem, we first need to recognize what types of unpreserved sentencing issues we are talking about. Clearly, sentencing issues that require factual determinations cannot be resolved on direct appeal. We are concerned here with sentencing issues for which the appellate record is as complete as it needs to be. We shall call such sentencing issues "obvious sentencing errors".

Obvious sentencing errors are generally obvious, not only in the sense that they are easy to spot, but also in the sense that they are easily addressed. The facts are simple and undisputed, and the applicable legal rule is well-known and easily applied to the facts. The significance of this is that the appellate resolution of such issues takes little time.

As used here, the phrase "obvious sentencing errors" includes two types of errors that the case law has been distinguishing: fundamental errors and "unpreserved, purely legal [but non-fundamental] sentencing errors that are apparent on the face of the record." Bain, supra, 24 Fla. Law Weekly at D317. The distinction between these two types of errors is unclear. There are no good definitions of fundamental error in the sentencing context. The "apparent on the face of the record" category of errors includes "a variety of comparatively less serious sentencing errors such as unauthorized costs and improper probation conditions."[5] Id.

The attempts to distinguish these two types of errors should be discontinued. The important distinguishing characteristic of an obvious sentencing error is not whether it is "fundamental" or not, but rather its obviousness. The question here is whether appellate courts are going to address these errors. Attempting to answer this

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[5] Another feature of many of these second category sentencing issues is that many of these issues do not arise at the sentencing hearing, but only become apparent after a written judgment or sentence is prepared (or, as in, e.g., State v. Rhoden, 448 So. 2d 1013 (Fla. 1984) a required written document does not get prepared). Application of the contemporaneous objection rule to such issues is problematic; there is nothing to object to at sentencing.

If the Amended Rules were meant to provide a procedure for resolving in the trial court those previously unpreservable sentencing issues, then they make sense. However, if the Amended Rules were meant to limit the appellate courts' ability to address obvious sentencing errors, they probably create more mischief than they remedy. This will be discussed further in the text.

question by subdividing it into two categories (i.e., "fundamental" errors will be addressed, but "non-fundamental" errors will not) is only going to muddy the waters. This should be an all-or-nothing proposition: either appellate courts will address obvious sentencing errors or they will not.

So what should the appellate court do when it encounters[6] an obvious sentencing error?

At this point we should divide criminal appeals into two categories: appeals in cases with pleas with no dispositive issue was preserved ("plea cases") and all other cases ("other cases").[7]

Addressing other cases first, it should be immediately recognized that appeals in these other cases are already virtually automatic and there is no reason to think that is going to significantly change just because appellate courts stop addressing obvious sentencing errors. Defendants want their appeals.

Other cases with obvious sentencing errors will fall into two categories: those with another viable appellate issue, and those

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[6] It should make no difference whether the obvious sentencing error is raised in the briefs or not. If the appellate court is going to correct the error even though the trial lawyer did not see it, it should not matter that the appellate lawyer also missed it.

[7] "Other cases" would include primarily trials, violations of probation and community control following an evidentiary hearing, and plea cases with properly reserved dispositive issues.

without such an issue. In cases with another issue, the case will be fully briefed and the appellate court will have to familiarize itself with the record sufficiently to decide the merits of the other issue(s); an opinion may be written on those other issue(s). Given this, how much more appellate time will be needed to address the obvious sentencing error? Not much, one would assume.

In other cases where the only appellate issue is an obvious sentencing error, an Anders brief would be filed if the obvious sentencing error is not raised. This would require the court to consider the possible merits of every potential error counsel identified; again, how much more appellate time will be used in addressing the obvious sentencing error? Further, if counsel files, not an Anders brief, but a merits brief raising only the obvious sentencing error, it will probably take less appellate time to address that brief than it would to address the Anders brief.

Thus, with respect to other cases, it would seem that the appellate courts' refusal to address obvious sentencing errors will not save a great deal of time and may actually cause the courts to spend more time on some cases.

Of course, it is sound policy to encourage the remedying of such issues at the trial level. In view of this, it could be argued that the appellate courts' refusal to address obvious sentencing

errors may encourage greater diligence at the trial level, which will ultimately make the whole system run smoother. Unfortunately, this approach (which was adopted by the Fifth District in Maddox) is fatally flawed because it fails to consider the realities of life in the criminal justice system.

First, the Maddox approach assumes that the trial lawyers that are failing to catch these obvious sentencing errors are a static pool of unchanging faces that will, collectively, quickly learn from their mistakes. This assumption is false. With every passing month, new faces appear in the criminal defense bar; given the complexity of sentencing in contemporary Florida jurisprudence, it is unrealistic to expect that newcomers will quickly grasp all the subtleties and nuances, regardless of how many times the more experienced practitioners have been embarrassed by their mistakes. One would hope that, eventually, the trial bar will become more diligent if the appellate courts refuse to correct their mistakes. But the trial bar will never be perfect; sentencing mistakes will continue to be made, albeit (hopefully) less often.

This brings us to the second problem with the Maddox approach. In declining to address obvious sentencing errors, the appellate courts are attempting to modify the behavior of the trial bar by inflicting pain on their clients. But one thing is clear:

although the blame for failing to catch the obvious sentencing error may be allotted, in varying degrees, to defense counsel, prosecutor, and trial judge, none of the blame should be laid on the defendant. He, alone among the trial level participants, is not expected to have any knowledge of the sentencing rules; and he, also alone, is the one who suffers the consequences of the sentencing mistake. Surely, there is no justice in making him pay for his lawyer's continuing legal education.

This brings us to another difficult point: if the appellate court is not going to address obvious sentencing errors, what exactly will it do? A per curiam affirmance is the easiest and obvious way to handle the problem, but what is the poor defendant to do at that point? He may not know of the potential for raising the issue in a post-conviction motion and thus could end up suffering the consequences unjustly. The appellate court could remedy this problem with a short opinion explaining its reason for declining to address the issue and advising the defendant of his options; but wouldn't an opinion addressing the merits be just as easy? Further, if Petitioner was correct (in his argument in the supplemental initial brief) that such cases should not be dismissed outright but rather transferred back to the trial court (see SIB,

p.38[8]), what efficiency is gained by not addressing the issue in the direct appeal? Finally, if the appellate courts stop addressing obvious sentencing errors, appellants' counsel will presumably stop raising such issues in their briefs; appellate courts will then have no way of knowing whether appellants' counsel is even aware of the issue, which in turn means the court will not know whether counsel has informed the client of the issue.

The Maddox approach also overlooks the "waterbed mattress" effect: when we poke at one part of the justice system, we send out ripples that cause bulges in other parts of the system. The suggestion that rule 3.850 should be used as the preferred remedy illustrates the point: that may cut down on appellate work, but it will increase the trial courts' work on post-conviction motions.

Further, the Maddox approach may increase the appellate courts' motion work. This Court has said "[i]f appellate counsel in a criminal proceeding honestly believes there is an issue of reasonably effective assistance of counsel in either the trial or the sentencing phase before the trial court, that issue should

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[8] With respect to the applicability of Article V, Section 2 of the Florida Constitution and rule 9.040(b) and (c), see Hallman v. State, 371 So. 2d 482 (Fla. 1979); Marsh v. State, 497 So. 2d 954 (Fla. 1st DCA 1986); Romano v. State, 491 So. 2d 1188 (Fla. 4th DCA 1986); Ceslow v. Board of County Commissioners, 428 So. 2d 701 (Fla. 4th DCA 1983); Pridgen v. Board of County Commissioners, 389 So. 2d 260 (Fla. 5th DCA 1980).

immediately be presented to the appellate court . . . so that it may be resolved in an expeditious manner by remand to the trial court and avoid unnecessary and duplicitous proceedings." Combs v. State, 403 So. 2d 418, 422 (Fla. 1981) (footnote omitted). But, since the trial court has no jurisdiction to hear a rule 3.850 motion while an appeal is pending[9], this means that appellate counsel will have to file a motion to relinquish jurisdiction, so that the ineffective assistance claim can be litigated in the trial court. This, presumably, will require reappointment of counsel in the trial court; and it would have to be new counsel, since we cannot expect the original trial counsel to file a motion attacking himself as being ineffective. But then the Act indicates defendants are not entitled to appointed counsel for such purposes. Section 924.051 (9). Does this mean appellate counsel must, in effect, cut the client loose in the trial court, to file his own motion as best he can? Or should counsel forego the opportunity for relinquishment of jurisdiction, proceed with the direct appeal (with the obvious sentencing error going unaddressed), and then cut the client adrift in the post-conviction sea after the appeal is concluded? Suppose the obvious sentencing error is such that, if it were corrected, the client would be released from custody during the pendency of

[9] State v. Meneses, 392 So. 2d 905 (Fla. 1981).

the appeal; must counsel then advise his client that his options include proceeding with his appeal (which will guarantee he will serve more time than he is supposed to), dismissing his appeal (thus surrendering his appellate rights) and filing a 3.850 motion, or filing a motion to relinquish which may require the client to prepare his own 3.850 motion while the appeal is put on hold?

This brings us to another problem with the Maddox approach. If no obvious sentencing errors will be addressed, then the doctrine of fundamental error will no longer exist in the sentencing context. But fundamental error is, not simply a judicial device for avoiding the contemporaneous objection rule, but an inherent element of judicial duty and authority, an element that cannot be renounced by the court or taken away by the legislature.

The contemporaneous objection rule is a functional procedural rule designed to achieve certain results; it is not to be blindly followed without regard to its purpose:

> The contemporaneous objection rule . . . was fashioned primarily for use in trial proceedings. The rule is intended to give trial judges an opportunity to address objections made by counsel in trial proceedings and correct errors. . . . The rule prohibits trial counsel from deliberately allowing known errors to go uncorrected as a defense tactic and as a hedge to provide a defendant with a second trial if the first trial decision is adverse to the defendant. The primary purpose of the contemporaneous objection rule is to

> ensure that objections are made when the recollections of witnesses are freshest and not years later in a subsequent trial or post-conviction relief proceeding. The purpose for the contemporaneous objection rule is not present in the sentencing process because any error can be corrected by a simple remand to the sentencing judge.

State v. Rhoden, supra, 448 So. 2d at 1016 (citations and internal quotes omitted); see also Williams v. State, 516 So. 2d 975, 976 (Fla. 5th DCA 1987).

The doctrine of fundamental error is an exception to the contemporaneous objection requirement. A fundamental error is an "error which goes to the foundation of the case", Clark v. State, 363 So. 2d 331, 333 (Fla. 1978), or "amount[s] to a denial of due process." Castor v. State, 365 So. 2d 701, 704 (Fla. 1978). "The doctrine of fundamental error should be applied . . . where the interests of justice present a compelling demand for its application". Smith v. State, 571 So. 2d 106, 108 (Fla. 1988). The doctrine "functions to preserve the public's confidence in the judicial system. Relief is granted for a fundamental error not because the party has preserved a right to relief from a harmful error, but because the public's confidence in our system of justice would be seriously weakened if the courts failed to give relief as a matter of grace for certain, very limited and serious mistakes." Hagan v. Sun Bank of Mid-Florida, N.A., 666 So. 2d 580, 584 (Fla.

2d 1996). The doctrine is to be used "when it appears necessary to do so in order to meet the ends of justice or to prevent the invasion or denial of essential rights." Bennett v. State, 173 So. 817, 819 (Fla. 1937) (citation omitted).

Thus, given the importance of the doctrine of fundamental error in insuring public confidence in the judicial system and providing a failsafe mechanism for the correction of obvious injustices, the Maddox approach is an abdication of judicial responsibility. See In Re Alkire's Estate, 198 So. 475, 482 (Fla. 1940) (constitutionally granted judicial power "cannot be abdicated in whole or in part by the courts"; "judicial appeals are not mere formalities; but are intended to aid in administering right and justice by due course of law . . . "). It is also an elevation of form over substance that has not been seen since the rigid days of common law pleading requirements. The Maddox approach cannot be squared with simple notions of simple justice: under it, the appellate court could not even correct the illegality of a sentence outside the statutory maximum.[10]

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[10] The Maddox approach is also underinclusive because it does not eliminate appellate consideration of all unpreserved trial level errors. If the rule 3.850 route is a viable alternative to appellate consideration of unpreserved sentencing errors, why not use it for all unpreserved issues? Indeed, appellate courts no doubt spend more time dealing with unpreserved non-sentencing issues than they do with unpreserved sentencing issues. As

The harshness of the Maddox approach could be softened by adopting an approach such as that suggested in Bain (i.e., some unpreserved issues will be considered in some circumstances, such as issues of "fundamental error" or issues of "patent sentencing error" that ride along with other legitimately preserved or fundamental issues). The Bain approach allows some flexibility to correct manifest injustices, but it suffers from definitional vagueness problems that threaten to bog down appellate courts in the same morass in which they now find themselves. Further, under this approach we can expect that appellate counsel will begin to file briefs that contain a "preserved" issue that has no realistic chance of succeeding, simply to provide the appellate court with the jurisdiction to address an obvious sentencing error. We can also expect that questions concerning whether such "jurisdiction-providing issues" were properly preserved will now be more fiercely litigated, in view of their now-crucial nature. Thus, a Bain-like approach has problems of its own.

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discussed earlier, sentencing issues tend to be quite simple and straightforward. Trial issues, on the other hand, tend to be more complicated; the case as a whole generally must be considered, the applicable law is murkier, and the effect of the error (i.e., was it prejudicial) is not always easy to determine. Thus, if we want to preserve scarce appellate resources, why not impose a blanket no-exceptions rule of preservation?

In sum, this should be an all-or-nothing proposition: either the appellate courts will correct these obvious sentencing errors or they will not. Petitioner believes that failure to do so will create more problems than doing so, at least for the system as a whole. Petitioner is unaware of any empirical data on the point, but it is hard to believe that the appellate courts are spending an inordinate amount of additional time addressing obvious sentencing errors. Granted, such things are a nuisance, particularly when the same mistakes are continually repeated. But we need to ask whether the cure is worse than the disease.

This same basic argument can be made with respect to the "plea appeal" problem. Under Robinson, defendants have the right to appeal certain issues in plea cases. The First District has held that, if there are no valid Robinson issues in a given case, the Anders procedure must be followed. Ford v. State, 575 So. 2d 1335 (Fla. 1st DCA 1991). Even under a more summary procedure, see Counts v. State, 376 So. 2d 59 (Fla. 2d DCA 1979), some degree of appellate court involvement is inevitable. Given this, the additional amount of time necessary to address obvious sentencing errors would appear to be minimal.

Of course, when the Court noted in Amendments II that "scarce resources [are] being expended in appeals from guilty pleas", 696

So. 2d at 1103, it is not clear if the Court was concerned only with the addressing of obvious sentencing errors in such cases. The Court may have been concerned about the filing of the appeal in the first place. Yet Robinson indicates the right to appeal in such cases is constitutionally protected, even though the types of issues that can be raised are limited. Given this, some type of summary procedure may be appropriate. See Counts, supra. But, given that some degree of judicial review will be required even in a summary proceeding, the correction of obvious sentencing errors in such cases could still be accomplished with a minimum of extra judicial labor.

In sum, the Act -- particularly as interpreted in Maddox -- is a remedy in search of a problem that has the potential to cause much mischief; indeed, it already has.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Assistant Attorney General James Rogers, PLO1, The Capitol, Tallahassee, FL 32399-1050, (850) 414-3300, on this _____ day of February, 2000.

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