IN THE SUPREME COURT OF FLORIDA

JOSEPH HODGE	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. 94,180
	)	
STATE OF FLORIDA,	)	DCA no. 97-4041
	)	
Repondent.	)	
_____	)	

PETITIONER'S BRIEF ON THE MERITS

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit

LOUIS G. CARRES
Assistant Public Defender
Attorney for
Criminal Justice Building
421 Third Street, 6th Floor
West Palm Beach, Florida 33401
(407) 355-7600
Florida Bar No. 114460

TABLE OF AUTHORITIES

Cases
Page

TABLE OF CONTENTS

PRELIMINARY STATEMENT

Petitioner was the appellant in the district court of appeal and was the defendant in the trial court. He will be referred to as petitioner and as Hodge herein.

Attached to this brief on jurisdiction is an Appendix containing the decision below and a copy of the pertinent portion of the sentencing proceeding in the trial court.

References to the trial court record, that is also before the Court, will be by use of the symbol "R- " for pages record proper and the symbol "Tr- " for pages of the transcript of proceedings, with the appropriate page number in parenthesis.

In accordance with the Florida Supreme Court Administrative Order, issued on July 13, 1998, and modeled after Rule 28-2(d), Rules of the United States Court of Appeals for the Eleventh Circuit, cousel petitioner hereby certifies that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately.

STATEMENT OF THE CASE AND FACTS

A. The History of the Case and Jurisdiction to Review the Decision.

Petitioner, Joseph Hodge (Hodge), filed an appeal timely invoking the jurisdiction of the Florida District Court of Appeal, Fourth District, which issued a citation "per curiam, affirmed" decision that relied solely upon the District Court's decision in Hyden v. State, 715 So. 2d 960 (Fla. 4th DCA 1998), en banc.

In Hyden the District Court of Appeal ruled held that the legality of imposition of a public defender's lien, imposed without notice of the right to contest the amount upon a criminal defendant, cannot be reviewed on appeal as fundamental error under new Florida Rule of Appellate Procedure 9.140(d). The court below ruled in Hyden that if the defendant wished to contest either the imposition of the fees or the amount, a motion pursuant to Rule 3.800(b) must be filed requesting a hearing.

The Court accepted jurisdiction to review the decision in Hyden v. State, and that case is now pending in the Court on the merits, in Case No. 93,966. The Court by an Order issued February 20, 1999, accepted jurisdiction to review the instant case. Jurisdiction is based upon Article V, section 3(b)(4),

of the Florida Constitution. Jollie v. State, 405 So. 2d 418 (Fla. 1981).

B. The Facts.

Hodge was convicted after jury trial of aggravated battery, conviction was entered, and a guideline sentence was imposed of 60 months imprisonment (R-23,29). At the sentencing hearing the trial court also imposed court costs of $261.00, and the court imposed a lien for public defender's fee of $1089.00 based upon the costs, hours and total amount reported by the assistant public defender in court representing Hodge (Tr-250-251). The trial court retained jurisdiction for imposition of restitution (Tr-251). The court did not advise Hodge of his right to contest the lien or the amount.

On appeal the District Court of Appeal, Hodge argued that the fee imposed under such circumstances was a fundamental error as had been decided in Louisgeste v. State, 706 So. 2d 29 (Fla. 4th DCA 1998). The District Court in Hyden v. State, 715 So. 2d 960 (Fla. 4th DCA 1998), en banc, receded from Louisgeste. In accordance with its view expressed in Hyden that new Rule of Appellate Procedure 9.140(d) prohibited review of the issue, the court below affirmed.

SUMMARY OF ARGUMENT

The Court should require express notice to a criminal defendant no later than at the sentencing hearing of the right to contest the amount or the lien or monetary judgment that will be entered for payment of the services of the public defender. The imposition of such lien or judgment, subject to enforcement as a civil judgment, without notice of the right to be heard as to the amount violates fundamental principles of due process of law.

ARGUMENT

ISSUE PRESENTED

WHETHER THE COURT SHOULD DISAPPROVE OF IMPOSITION OF A FEE FOR SERVICES OF THE PUBLIC DEFENDER AT SENTENCING IN A CRIMINAL CASE WHERE THE DEFENDANT HAS NOT BEEN GIVEN NOTICE OF THE RIGHT TO CONTEST THE AMOUNT OF THE FEE AND WHETHER THE IMPOSITION WITHOUT SUCH NOTICE CONSTITUTES A DENIAL OF DUE PROCESS AND IS A FUNDAMENTAL ERROR?

In this case, no objection was made on behalf of Hodge to the imposition of the fee for services of the public defender, nor did Hodge object to the amount. Hodge, however, was not given notice of his right to contest the imposition or amount of the fee. Counsel representing Hodge on the criminal charge affirmatively assisted the court in determining the amount to impose. Counsel was representing Hodge at the sentencing hearing, which is one of the most critical aspects of the judicial criminal process.

Many years ago this Court announced in Lewis v. State, 154 Fla. 825; 19 So. 2d 199 (1944), that "Of our own motion however we will consider the legality of the sentence because we will not approve a judgment which is patently erroneous."

This entire case depends upon what is meant by "patently erroneous" or fundamental error. The imposition of an unlawful penalty and matters directly connected therewith that are

apparent on the face of the record were considered fundamental and correctable on direct appeal without necessity of contemporaneous objection. State v. Montague, 682 So. 2d 1085 (Fla. 1996); State v. Rhoden, 448 So. 2d 1013 (Fla. 1984). The impetus for the new Rule of Appellate Procedure 9.140(d), was the Criminal Appeal Reform Act of 1996. See 1966 Court Commentary to Rule of Appellate Procedure 9.140(d). Davis v. state, 661 So. 2d 1193 (Fla. 1995), had provided a definition of an "illegal" sentence. The court in Bain v. state, 23 Fla. L. Weekly D314 (Fla. 2d DCA Jan 29, 1999), and followed in Evans v. State, 23 Fla. L. Weekly D___ (Fla. 2d DCA Mar. 3, 1999), held that a sentencing error is fundamental when it improperly extends the defendant's incarceration or supervision. However, the court decided that it could not define the precise limits of when a sentence even under that definition would not be fundamental. Moreover, the court recognized the constitutional right to appeal and indicated that an improper assessment of a public defender's lien "only in an extreme case" would qualify as fundamental.

The extent to which the new rule of appellate procedure determines the extent of the right to have unlawful sentencing matters corrected on direct appeal, regardless of whether the issue was raised in the trial court, depends upon the legisla-

ture's authority to eclipse the right to appeal that is guaranteed in the constitution. This Court has held that the legislature has authority to enact measures that "place reasonable conditions upon" the right to appeal "so long as they do not thwart the litigants' legitimate appellate rights." Amendments to the Florida Rules of Appellate Procedure, 696 So. 2d 1103 (Fla. 1996). Article V, section 4(b)(1) provides for district courts hearing appeals "that may be taken as a matter of right" from final judgments or orders of trial court. Whether or not that language begs the question of its meaning, this Court has determined that a right to appeal is constitutionally based in that section. Id.; Sparkman v. State ex rel. Scott, 58 So. 2d 431 (Fla. 1952).

The First District recently in Locke v. State,719 So. 2d 1249 (Fla. 1st DCA 1999), en banc, considered whether the failure to give notice of imposition of a lien for public defender fees should continue to be considered a fundamental error. The court receded from its earlier holding in Neal v. State, 688 So. 2d 392, 396 (Fla. 1st DCA) rev. denied, 698 So. 2d 543 (Fla. 1997), and held that it is no longer an issue that can be reviewed on direct appeal without having been raised in a trial court. Unlike the present case, the defendant in Locke indicated at the time that he had no objection to the amount.

This Court has previously disapproved of procedures for the repetitive litigation of matters following a direct appeal, as such repetitive consideration of issues makes a mockery of the judicial process and thwarts interests of finality and judicial economy. See. e.g., Arky v. Bowmar 537 So. 2d 561 (Fla. 1988); Dober v. Worrell, 401 So.2d 1322 (Fla. 1981).

There are sound reasons this Court should determine that matters such as excessive assessments, assessments imposed without the notice of the right to be heard as to the amount, or any other improper penalty attendant to a criminal judgment, should be reviewable on direct appeal without regard to whether the matter was objected to. Among them is that it is necessary to do justice while furthering the interests of finality in way that furthers the ends of equal justice. The criminal defendant has no right to counsel for post-conviction or ancillary proceedings. The criminal defendant, as is a matter of common understanding, frequently is incarcerated and a vast number of prisoners without counsel cannot litigate effectively in complex litigation. By requiring such matters as improper disposition orders related to sentencing to be split between illegal sentences, and other unlawful or improper sentencing matters, the trial courts would be unfairly burdened by successive requests for correction, often filed without legal

assistance, far beyond the time the judge may even be assigned to the division or court. This wastes valuable judicial resources, and burdens the trial courts to rehear matters that could be, if correctable as a part of or incident to review on direct appeal, in a more timely fashion when the court's records are more accessible and its recollection is fresher. Cutting off review to those who may not be competent, or sufficiently knowledgeable to successfully litigate pro se would simply foster unequal justice based upon ability to pay for counsel or result in the adventitious, randomness, associated with unfairly arbitrary outcomes. Requiring further litigation, renewed in the trial court, apart from either remand from an appellate court during pendency of the appeal, or as part of the decision on final review, burdens the judicial system and would ultimately cause extensive inconsistency. Such a procedure would further restrict relief to those able to successfully litigate such matters while denying equal justice to those who are unable to further litigate on their own.

This Court should not permit lower courts to deny relief to patently erroneous dispositions, either as matters relating to entry of the judgment or to matters of penalty or related to the criminal penalty The interests of justice, and the

policy of the State of Florida, as expressed in its constitution and by this Court do not permit it. The order below should be quashed and the cause remanded for the issue to be considered on its merits or for the District Court of Appeal to relinquish jurisdiction to the trial court to revisit the matter and then to dispose of the appeal according to established legal procedures.

CONCLUSION

WHEREFORE, the Court is respectfully requested to quash the decision below and remand for further proceedings.

Respectfully Submitted,

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit

_____
LOUIS G. CARRES
Assistant Public Defender
Attorney for Petitioner
Criminal Justice Building
421 Third Street, 6th Floor
West Palm Beach, Florida 33401
(407) 355-7600
Florida Bar No. 114460

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by courier, to Elaine L. Thompson, Assistant Attorney General, 1655 Palm Beach Lakes Boulevard, Third Floor, West Palm Beach, Florida 33401, this _____ day of _____, 1999.

_____
LOUIS G. CARRES
Assistant Public Defender

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT JULY TERM 1998

JOSEPH HODGE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 97-4041

Opinion filed July 29, 1998

Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Roger B. Colton, Judge; L.T. Case No. 97-3097 CFA02.

Richard L. Jorandby, Public Defender, and Louis G. Carres, Assistant Public Defender, West Palm Beach, for appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Barbra Amron Weisberg, Assistant Attorney General, West Palm Beach, for appellee.

PER CURIAM.

Affirmed. See Hyden v. State, 23 Fla. L. Weekly D1342 (Fla. 4th DCA June 3, 1998).

GUNTHER, POLEN, JJ., and WEINSTEIN, PETER, Associate Judge, concur.

NOT FINAL UNTIL THE DISPOSITION OF ANY TIMELY FILED MOTION FOR REHEARING.

State?

MR. LAWSON: Same recommendation that is in the P.S.I., Judge. State sentencing guidelines as adult. To prison.

THE COURT: Mr. Farres?

MR. FARRES: Well, Your Honor, as you read in the P.S.I., Mr. Hodge is from the Virgin Islands. Unfortunately that is where his family is and could not be here with us today.

Your Honor, I have gone over the P.S.I. and I have looked at the recommendation that they are making. We are going to ask for a departure, I am going to state some reasons for that, some legal reasons.

As Mr. Hodge said today and was brought up during the trial, at the time this that this occurred he had been sick for a while, he had drank some alcohol and used medication. He really does not really know what happened. Like he said he just sort of snapped when this occurred.

It's our position his capacity to appreciate the criminal nature of his conduct or to conform that conduct to

requirements of law were substantially impaired. Although Mr. Greenwood has not been able to tell us the actual amount of restitution owed to him, it is owed restitution, and the amount should be fifteen hundred or more, need for payment to him of that restitution would outweigh the need for a prison sentence on Mr. Hodge's part.

Also during the trial, it was that Mr. Greenwood initiated a physical confrontation with Mr. Hodge which led to this. And basically Mr. Hodge, this is his first time here. This offense really happened in an unsophisticated manner, isolated incident. He has apologized, he has shown remorse.

And those are my reasons.

Judge, as Mr. Hodge has stated, he came here seeking an education, he was going to college. That is where he was and, the only ties he really has to this community were going to school and the friends that he had there.

His family is in the Virgin Islands.

At this point he, even if he wanted, he could not return to Northwood University. We are requesting a departure sentence for him to be placed on probation with any conditions the Court would deem appropriate. He would return to the Virgin Islands and serve his probation there.

Should the Court not go along with it, we would ask that the Court sentence him to the bottom of the guidelines due to the fact that he is not very -- does not have a prior criminal record, and the other circumstances which I have discussed with the Court.

Mr. Hodge has stated he is here, he is alone, he does not know what happened. He snapped. He regrets it, he apologized to Mr. Greenwood. And he takes responsibility for any payments and debt that he may have to pay.

THE COURT: All right, sir. Thank you, Mr. Farres.

Mr. Hodge, I had sat through your trial, I listened very carefully to what the testimony was. I also listened to your testimony.

And I must say that the trial was very perplexing for a young man such as you to come over here and go to school, to be at Northwood, and have this confrontation with Mr. Greenwood over sitting in a chair. Fortunately for you Mr. Greenwood wasn't killed as soon as you hit him over the head with that baseball bat, or you would be facing far more serious charges than the charges for which you were found guilty.

Mr. Hodge, at this time I am going to adjudicate you guilty of this offense. I am assessing court costs against you in the amount of $261.00, fifty dollars drug trust fund, and public defender fees.

And Mr. Farres, I am sure you have more than one hour; if you share that with Mr. Lawson so that can be included on the order of lien. And I will order a lien judgment, let execution issue here.

He had forty and seventy-five dollars, but what costs do you have?

MR. FARRES: Costs are a hundred and fourteen dollars. At thirteen hours.

THE COURT: Which totals -- total?

MR. FARRES: A thousand eighty-nine.

THE COURT: 1,089.

All right, sir. At this time, Mr. Hodge, the jury having found you guilty, I hereby sentence you to the Department of Corrections for a period of sixty months with credit for whatever time you have served already.

I am going to retain jurisdiction for a period of sixty days to determine what, if any, restitution that there may be. If restitution is determined, I expect the lawyers will have the opportunity to consult with one another. And I would enter a civil restitution order for whatever amount, net amount there might be that has not been reimbursed or will not be reimbursed by insurance.

At this time, sir, you are to be fingerprinted. I further advise you you have thirty days to appeal this sentence. If you are indigent, a lawyer will be appointed to represent you on the appeal.

Thank you, Mr. Hodge. Good luck to you, sir.

MR. FARRES: Your Honor, Mr. Hodge has discussed with me, see if the Court would entertain a furlough in order for him to get all of his stuff and ship it to the Virgin Islands before he begins to serve his sentence.

THE COURT: Request denied. Remanded to the custody of the Palm Beach County for transportation to the Department of Corrections.

We will be in recess until 3:15.

(The proceedings were adjourned at 2:04 o'clock p.m.)