ORIGINAL

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

TERRY McKNIGHT,

Respondent.

CASE NO. 94,256

PETITIONER'S INITIAL BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

SHERRI TOLAR ROLLISON
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 128635

JAMES W. ROGERS
TALLAHASSEE BUREAU CHIEF,
CRIMINAL APPEALS
FLORIDA BAR NO. 325791

OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(850) 414-3300 Ext. 4576

COUNSEL FOR PETITIONER

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES — PAGE(S)

FLORIDA CONSTITUTION

FLORIDA STATUTES

OTHER

PRELIMINARY STATEMENT

Petitioner, the State of Florida, the Appellee in the First District Court of Appeal and the prosecuting authority in the trial court, will be referenced in this brief as the State. Respondent, Terry McKnight, the Appellant in the First District Court of Appeal and the defendant in the trial court, will be referenced in this brief as Defendant.

The record on appeal consists of two volumes, which will be referenced according to the respective number designated in the Index to the Record on Appeal, followed by any appropriate page number.

All emphasis through bold lettering is supplied unless the contrary is indicated.

CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was typed using Courier New 12.

JURISDICTIONAL STATEMENT

Article V, § 3(b)4 of the Florida Constitution provides, in pertinent part, that the Florida Supreme Court

> [m]ay review any decision of a district court of appeal that passes upon a question certified by it to be of great public importance or that is certified by it to be in direct conflict with a decision of another district court.

Similarly, Fla. R. Appellant's P. 9.030(a)(2)(vi) provides that the discretionary jurisdiction of this Court may be sought to review decisions of a district court of appeal which "are certified to be in direct conflict with decisions of other district courts of appeals."

The district court below certified conflict with Maddox v. State, 708 So. 2d 617 (Fla. 5th DCA 1998).

STATEMENT OF THE CASE AND FACTS

1. On April 11, 1997, a jury found the defendant guilty on two counts:

a. The sale or delivery of cocaine, for which he was sentenced to 15 years as a habitual felony offender; and

b. Possession of cocaine, for which he was sentenced to 10 years as a habitual felony offender, to be served concurrently with the sentence for count one.

(I-37-38).

2. Concerning defendant's prior record: On November 12, 1996, defendant pled guilty to the sale or delivery of cocaine for which he was sentenced to 160 days incarceration. (I-46-50). On August 7, 1991, defendant pled to one count of grand theft for which he was sentenced to 24 months incarceration. (I-42-45).

3. The sentencing hearing was held on April 30, 1997. At no time during the hearing or prior to defendant's direct appeal, did defendant object to being habitualized and sentenced pursuant to § 775.084 Fla. Stat. (Supp. 1996). (IB-7/I-74-88).

4. Defendant's appointed counsel[1] initially filed a brief pursuant to Anders v. California, 386 U.S. 738 (1967) confessing that there were no arguably reversible errors and representing to the district court that the appeal was wholly frivolous pursuant to

---

[1]The State points out as a matter of information that appointed appellate counsel is Laura Anstead. The State does not seek recusal of Justice Anstead. The same or a similar broad issue is before this Court in numerous other cases and it is critical that these issues be dispositively resolved by the full Court. In any event, recusal on a single case would be pointless.

Anders and its progeny. Based on its independent review pursuant to Anders, the district court concluded that there was a potential issue of whether defendant's sentence to a ten-year habitual offender for possession of cocaine constituted fundamental error which could be raised for the first time on appeal and ordered briefing on the question.

5. Briefing was done and on 23 October 1998, the district court reversed defendant's ten-year habitual offender sentence for possession of cocaine, holding that the sentence constituted fundamental error and could be raised for the first time on appeal pursuant to its recent decision in Nelson v. State, 23 Fla. L. Weekly D2241 (Fla. 1st DCA 1 October 1998). However, the district court affirmed defendant's convictions for both offenses and his concurrent sentence of fifteen years as an habitual offender for the sale or delivery of cocaine.

6. The First District Court certified conflict with Maddox v. State, 708 So.2d 617 (Fla. 5th DCA 1998) which holds on the authority of Florida Rule of Appellate Procedure 9.140(d) that all claims of sentencing error, including claims of "fundamental" error, must be raised in the trial court either contemporaneously or pursuant to Florida Rules of Criminal Procedure 3.800(b) to be cognizable on direct appeal or, if not preserved in the trial court, raised by post-conviction motion pursuant to Florida Rule of Criminal Procedure 3.850 on the ground of ineffective assistance of counsel.

SUMMARY OF ARGUMENT

This case presents a simple, but highly important, policy question of whether claims of sentencing error, including so-called fundamental error, must be preserved in the trial court pursuant to rules 9.140(d) and 3.800(b) and chapter 924, Florida Statutes (Supp. 1996), as approved and adopted in Amendments to the Florida Rules of Appellate Procedure, 685 So.2d 773 (Fla. 1996) prior to direct appeal, or of whether such claims may be presented on appeal without having been raised and ruled on in the trial court.

There is no issue of whether there is a remedy for such claims either by preservation contemporaneously or pursuant to rule 3.800(b) prior to direct appeal or by post-conviction motion pursuant to rule 3.850 as set out by the Fifth District Court in its Maddox decision. The State has no desire or interest in preventing such claims from being properly raised pursuant to rules 3.800(b) and 3.850 in the trial court with subsequent appellate review. Amendments. If any defendant has a claim of **prejudicial** sentencing error, that claim, as explained in Maddox, is clearly cognizable either on direct appeal if preserved or by rule 3.850 if not preserved due to the ineffective assistance of trial. A claim of ineffective assistance of appellate counsel is also available by petition for writ of habeas corpus where appellate counsel fails to raise a cognizable, prejudicial sentencing error.

However, for the reasons set out in Maddox and Hyden v. State, 23 Fla. L. Weekly D1342 (Fla. 4th DCA 3 June 1998), and in the State's briefs in State v. Trowell, case no. 92,393, all currently

pending review in this Court, the State has a major interest in seeing that such claims are properly raised and disposed of in the most efficient manner possible, i.e., by being first raised in the trial court pursuant to rule, statute, and case law. Accordingly, the State urges this Court to approve the decision in Maddox and to require that claims of sentencing error be first raised in the trial court either contemporaneously or pursuant to rule 9.140(d) and 3.800(b) to be cognizable on direct appeal.

The State also points out that the instant case is an apt illustration of the wisdom of Maddox. The claim of fundamental error here, even if cognizable on appeal, is not in fact prejudicial in view of the uncontroverted, concurrent fifteen-year sentence for sale or delivery of cocaine. Regardless of the outcome here, defendant will still be serving a fifteen-year habitual offender sentence because he has failed to bring forth a record on appeal and a brief showing that prejudicial error occurred in the trial court. Sections 924.051(7), Florida Statutes (Supp. 1996); Lynn v. City of Fort Lauderdale, 81 So.2d 511 (Fla. 1955).

ARGUMENT

ISSUE I

SHOULD THIS COURT ENFORCE THE PROVISIONS OF FLORIDA RULE OF CRIMINAL PROCEDURE 3.800(b) AND FLORIDA RULE OF APPELLATE PROCEDURE 9.140(d) REQUIRING THAT CLAIMS OF SENTENCING ERROR BE FIRST RAISED IN THE TRIAL COURT, WHICH BECAME EFFECTIVE 1 JANUARY 1997, OR SHOULD IT REVISIT AND RECEDE FROM AMENDMENTS TO THE FLORIDA RULES OF APPELLATE PROCEDURE, 685 SO.2D 773 (FLA. 1996) BY REVISING RULE 9.140(d) TO PERMIT CLAIMS OF SENTENCING ERROR TO BE RAISED FOR THE FIRST TIME ON APPEAL?

Because of various abuses of the judicial system, which had arisen primarily from exceptions to the rule that claims of error were not cognizable on appeal unless first raised in the trial court, both this Court and the Florida Legislature undertook corrective action. See, Amendments to Florida Rules of Appellate Procedure 9.020(g) and 9.140(b) and Florida Rule of Criminal Procedure 3.800, 21 Fla. L. Weekly S5 (Fla. 21 December 1995)("It has come to our attention that scarce resources are being unnecessarily expended in appeals from guilty pleas and appeals relating to sentencing error."). These concerns, and remedies, were subsequently addressed in the Criminal Appeal Reform Act of 1996, codified as chapter 924, Florida Statutes (Supp 1996), as approved and implemented by this Court in Amendments to Florida Rules of Appellate Procedure, 685 So.2d 773 (Fla. 1996) and Amendments to Florida Rules of Criminal Procedure, 685 So.2d 1253 (Fla. 1996). See, also, Kalway v. Singletary, 708 So.2d 267 (Fla 1998) where this Court rejected a separation of powers challenge to the Reform Act and reiterated its approval of the legislature's adoption of

terms and conditions of appeal set out in the Reform Act: "[W]e believe that the legislature may implement this constitutional right [to appeal] and place reasonable conditions up on it so long as [it does] not thwart the litigant's legitimate appellate rights. Of course, this Court continues to have jurisdiction over the practice and procedure relating to appeals."

The State suggests that there is not, and cannot be, a legitimate constitutional right to forego the preservation of claimed errors in the trial court and to raise such claims for the first time on appeal. That is particularly true when, in fact, the statute and implementing rules provide ready remedies for every legitimate claim of error to be first raised in the trial court either contemporaneously, by post-sentencing motion, or by post-conviction motion.

The seminal significance of the Reform Act and the implementing rules of this Court was recognized by the Fifth District Court of Appeals in an en banc decision, Maddox. Because that decision and opinion by Chief Judge Griffin so clearly analyzes all the relevant factors, the State quotes portions of it at length and adopts the reasoning as its own.

> In a direct appeal from a conviction or sentence in a nonplea case, the Criminal Appeal Reform Act permits review of only those errors which are (1) fundamental or (2) have been preserved for review. §924.051(3), Fla. Stat. The word "preserved," as used in the statute, means that the issue has been presented to, and ruled on by the trial court. §924.051(1)(a), Fla. Stat.
>
> . . . .
>
> Recognizing that, in the sentencing arena, the new legislation would preclude the appeal of many sentencing errors which formerly were routinely corrected on direct appeal (such as nonfundamental sentencing errors apparent on the fact of the record)(FN5)(omitted) the supreme court set about creating a method for the criminal

defendant to obtain relief from sentencing errors not preserved at the time of sentencing. In essence, the court created a sort of post-hoc device for preserving such sentencing error for appeal. Fla. R.Crim.P. 3.800(b). Any error not complained of at the time of sentence could be complained of in the trial court after sentencing, if done in accordance with the new rule. Thus, at approximately the same time section 924.051 became effective, the Florida Supreme Court, by emergency amendment to Florida Rule of Criminal Procedure 3.800, permitted the filing of a motion to correct a sentence entered by the trial court, provided the motion was filed with ten days (now thirty) of the date of rendition of the sentence. See, Amendments to Florida Rule of Appellate Procedure 9.020(g) and Florida Rule of Criminal Procedure 3.800, 675 So.2d 1374 (Fla.1996). Only then, if not corrected by the trial court, could it be raised on appeal because it had been "preserved." Although rule 3.800 by its terms traditionally had been limited to illegal sentences, subsection (b) of the rule, as amended, more broadly applies to any sentencing error. 675 so.2d at 1375. (FN6)(omitted). The rule 3.800(a) procedure remains available to correct an illegal sentence at any time.

....

The net effect of the statute and the amended rules is that **no** sentencing error can be considered in a direct appeal unless the error has been "preserved" for review, i.e., the error has been presented to and ruled on by the trial court. This is true regardless of whether the error is apparent on the face of the record. And it applies across the board to defendants who plead and to those who go to trial. As for the "fundamental error" exception, it now appears clear, given the recent rule amendments, that "fundamental error" no longer exists in the sentencing context. The supreme court has recently distinguished sentencing error from trial error, and has found fundamental error only in the latter context. Summers v. State, 684 So.2d 729 (Fla. 1996)("The trial court's failure to comply with the statutory mandate is a sentencing error, not fundamental error, which must be raised on direct appeal or it is waived."); Archer v. State, 673 So.2d 17, 20 (Fla.)("Fundamental error is 'error which reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error.'"), cert. denied, ___ U.S. ____, 117 S.Ct. 197, 136 L.Ed.2d 134 (1996). It appears that the supreme court has concluded that the notion of "fundamental error" should be limited to trial errors, not sentencing errors. **The high court could have adopted a rule that paralleled the Criminal Appeal Reform Act, which would allow for review of fundamental errors in nonplea cases, but the court did not do so and made clear in its recent amendment to rule 9.140 that unpreserved sentencing errors cannot be raised on appeal.** (Emphasis by State).
Maddox, 708 So.2d 618-620.

The Fifth District Court's analysis of the policy considerations underlying the Reform Act, the implementing rules adopted by this Court, its own decision in Maddox, and the benefits to the judicial system is particularly penetrating.

> At the intermediate appellate level, we are accustomed to simply correcting errors when we see them in criminal cases, especially in sentencing, because it seems both right and efficient to do so. The legislature and the supreme court have concluded, however, that the place for such errors to be corrected is at the trial level and that any defendant who does not bring a sentencing error to the attention of the sentencing judge within a reasonable time cannot expect relief of appeal. This is a policy decision that will relieve the workload of the appellate courts and will place correction of alleged errors in the hands of the judicial officer best able to investigate and to correct any error. **Eventually, trial counsel may even recognize the labor-saving and reputation-enhancing benefits of being adequately prepared for the sentencing hearing. Certainly, there is little risk that a defendant will suffer an injustice because of this new procedure; if any aspect of a sentencing is "fundamentally" erroneous and if counsel fails to object at sentencing or file a motion with thirty days in accordance with the rule, the remedy of ineffective assistance of counsel will be available. It is hard to imagine that the failure to preserve a sentencing error that would formally have been characterized as "fundamental" would not support an "ineffective assistance" claim.** (Emphasis supplied by State).

The Fourth District Court of Appeal has taken a similar approach to sentencing errors. In an en banc decision now under review in this Court, Hyden v. State, 23 Fla. L. Weekly D1342 (Fla. 4th DCA 3 June 1998), Judge Warner for en banc unanimous court agreed with the policy benefits of Maddox and adopted a similar, almost identical, position on sentencing errors and the therapeutic effects of requiring that trial counsel effectively perform their responsibility by preparing for sentencing hearings and by properly presenting to the trial court any claims of error.

> We use this appeal to impress upon the criminal bar of this district the essential requirement of the new Florida Rule of Appellate Procedure 9.140(d). In order for a sentencing error to be

raised on direct appeal from a conviction and sentence, it must be preserved in the trial court either by objection at the time of sentencing or in a motion to correct sentence under Florida Rule of Criminal Procedure 3.800(b). In this district, we will no longer entertain on appeal the correction of sentencing errors which are not properly preserved.
Id.

This Court has, as both Maddox and Hyden recognize, provided ready and efficient remedies for claims of sentencing errors which, without any denial of rights, requires that sentencing errors be raised and ruled on in the trial court with a subsequent right to appeal. The State submits that there is simply no reason why defendants and their counsel cannot be required to preserve all sentencing issues in the trial court and to use the efficient and well-considered remedies which this Court has provided for such claims.

The practical wisdom of the above State position, and of Maddox, is aptly illustrated by this case. The State points out that not only were there no objections or motions preserving the sentencing issue in the trial court but that appellate counsel filed a brief pursuant to Anders, presumably recognizing that the case law of the First District, prior to its subsequent en banc decision in Nelson v. State, 23 Fla. L. Weekly D2241 (Fla. 1st DCA 1 October 1998), would not address the claim subsequently identified by the First District in its Anders review. Moreover, counsel probably recognized the home truth that if there are concurrent sentences of fifteen and ten years, there is no prejudice in the ten year sentence and no relief can be obtained. See, Jacobs v. State, 389 So.2d 1054 (Fla. 3d DCA 1980)(We apply the concurrent sentence

doctrine and decline to consider a non-prejudicial claim of sentencing error). See, also, the First District's own recent decision in Chambers v State, 23 Fla. L. Weekly D2283 (Fla. 1st DCA October 5, 1997)(Court's basis for finding harmful error was predicated on the fact that the improperly imposed concurrent sentence which was longer that the other properly imposed sentences, increased appellant's actual period of incarceration.)

Accordingly, the State urges the Court to disapprove the district court decision below, reiterate that all claims of sentencing error must be raised in the trial court as mandated by rule 9.140(d), and to adopt the position so persuasively set out by Chief Judge Griffin in Maddox.

CONCLUSION

The State urges the court to quash the decision below and resolve the conflict by approving the decision in Maddox.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

SHERRI TOLAR ROLLISON
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 128635

JAMES W. ROGERS
TALLAHASSEE BUREAU CHIEF,
CRIMINAL APPEALS
FLORIDA BAR NO. 325791
OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(850) 414-3300 Ext. 4576

COUNSEL FOR PETITIONER
[AGO# L98-1-12755]

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing PETITIONER'S INITIAL BRIEF ON THE MERITS has been furnished by U.S. Mail to Laura Anstead, Esq., Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, this 1st day of December, 1998.

Sherri Tolar Rollison
Attorney for the State of Florida

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

TERRY McKNIGHT,

Respondent.

CASE NO. 94,256

Appendix

Terry McKnight v. State of Florida, 1st DCA Opinion dated October 23, 1998.

[A:\98112755\MCKNGTBI.WPD --- 12/1/98,11:01 am]

L 97-1-6517
M

IN THE DISTRICT COURT OF APPEAL,

FIRST DISTRICT, STATE OF FLORIDA

TERRY McKNIGHT,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED.

CASE NO. 97-1845

DA

Docketed
10-28-98
Florida Attorney General

Opinion filed October 23, 1998. 96-14207 CFA

An appeal from the Circuit Court for Duval County.
William A. Wilkes, Judge.

Nancy A. Daniels, Public Defender; Laura Anstead, Assistant Public Defender, Tallahassee, for Appellant; Appellant pro se.

Robert A. Butterworth, Attorney General; James W. Rogers, Senior Assistant Attorney General; Sherri Tolar Rollison and Trisha E. Meggs, Assistant Attorneys General, Tallahassee, for Appellee.

WEBSTER, J.

In this direct criminal appeal, appellant's appointed counsel initially filed a brief pursuant to Anders v. California, 386 U.S. 738 (1967). Appellant also filed a brief in proper person. In her Anders brief, counsel noted that appellant had received a 10-year habitual offender sentence for possession of cocaine. Following our independent review of the record, we determined that a potential issue existed--whether, notwithstanding failure to object in the trial court, appellant's 10-year habitual offender sentence for possession of

cocaine constitutes fundamental error which may be raised for the first time on appeal because habitual offender sentencing is expressly prohibited for possession of cocaine, and the sentence exceeds the maximum permissible non-habitual offender sentence for that offense. See § 775.084(1)(a)3., Fla. Stat. (Supp. 1996) (prohibiting habitual offender sentencing for violations of section 893.13, Florida Statutes, "relating to the purchase or the possession of a controlled substance"); § 893.13(6)(a), Fla. Stat. (Supp. 1996) (making possession of a controlled substance a third-degree felony). Accordingly, we ordered the parties to brief that issue, pursuant to State v. Causey, 503 So. 2d 321 (Fla. 1987).

Based upon our recent decision in Nelson v. State, Case No. 97-3435 (Fla. 1st DCA Oct. 1, 1998) (general division en banc), we hold that appellant's 10-year habitual offender sentence for possession of cocaine constitutes fundamental error, which may be raised for the first time on appeal. Accordingly, we reverse appellant's sentence for possession of cocaine and remand for resentencing as to that offense. Also as in Nelson, we certify conflict with Maddox v. State, 708 So. 2d 617 (Fla. 5th DCA 1998). In all other respects, we affirm.

AFFIRMED IN PART; REVERSED IN PART; and REMANDED, with directions.

MINER, J. and SMITH, LARRY G., Senior Judge, CONCUR.