IN THE SUPREME COURT OF FLORIDA

WAVELL HEIRD,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 94,348

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent, the State of Florida, the Appellee in the District Court of Appeal (DCA) and the prosecuting authority in the trial court, will be referenced in this brief as Respondent, the prosecution, or the State. Petitioner, Wavell Heird, the Appellant in the DCA and the defendant in the trial court, will be referenced in this brief as Petitioner or by proper name.

The symbol "I" will refer to the record on appeal and the symbol "II" will refer to the transcript of trial court proceedings; "IB" will designate the Initial Brief of Petitioner. Each symbol will be followed by the appropriate page number in parentheses.

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.

STATEMENT OF THE CASE AND FACTS

The State agrees with Petitioner's statement of the case and facts.

SUMMARY OF ARGUMENT

The failure of the trial court to orally pronounce each statutorily authorized cost individually at the time of sentencing does not constitute fundamental error. Because the costs are authorized by statute, petitioner has constructive notice. Furthermore, petitioner has an opportunity to object at the hearing or in the form of a Florida Rule of Criminal Procedure 3.800(b) motion to correct his sentence. Therefore, proper preservation of an issue regarding the imposition of costs and fees is necessary for appellate review.

ARGUMENT

ISSUE I

DOES THE FAILURE OF THE TRIAL COURT TO ORALLY PRONOUNCE EACH STATUTORILY AUTHORIZED COST INDIVIDUALLY AT THE TIME OF SENTENCING CONSTITUTE FUNDAMENTAL ERROR? (Restated)

Petitioner was convicted of resisting an officer with violence, and the trial court imposed $500 in costs and fines at the sentencing hearing. The costs included $40 application fee pursuant to section 27.52(1)(c), Florida Statutes (Supp.1996), $2 for Criminal Justice Education pursuant to the section 943.25(13), Florida Statute (1997), and a $385 fine pursuant to Section 775.083, Florida Statutes (1997), plus $20 as the 5% surcharge required by section 960.25, Florida Statutes (1997). Because the failure to individually pronounce each costs is not fundamental error, petitioner's failure to object to the costs and fine at the sentencing hearing or file a Florida Rule of Criminal Procedure 3.800(b) motion, precluded petitioner from raising this issue on appeal.

The Criminal Appeal Reform Act (hereinafter Reform Act) became effective on July 1, 1996. Neal v. State, 688 So.2d 392, 394 (Fla. 1st DCA 1997), rev. den, 698 So.2d 543 (Fla. 1997).[1] Appellant was sentenced on March 7, 1997, (I.22), and therefore the Reform Act

[1] In Locke v. State, Fla. L. Weekly D 2399 (Fla. 1st DCA October 21, 1998), rev. pending, Case No. 94,396, the First District receded from the portion of Neal, which held that the failure to give notice of public defender's fees was fundamental error.

applies to appellant's case. Neal at 395. In regards to the Reform Act, the Legislature stated that:

> It is the intent of the Legislature that all terms and conditions of direct appeal and collateral review be strictly enforced, including the application of procedural bars, to ensure that all claims of error are raised and resolved at the first opportunity. It is also the Legislature's intent that all procedural bars to direct appeal and collateral review be fully enforced by the courts of this state.

§ 924.051(8), Fla. Stat. (1997).

Under the Reform Act, with a single exception of fundamental error which is not present here, an appeal may not be taken from a judgment or sentence unless a prejudicial error has been properly preserved in the trial court. § 924.051(3), Fla. Stat. (1997). In Maddox v. State, 708 So.2d 617 (Fla. 5th DCA 1998), rev. pending, Case No. 92,805, the court held that "[a]s for the 'fundamental error' exception, it now appears clear, given the recent rule amendments, that '**fundamental error' no longer exists in the sentencing contest**." Id. at 619 (emphasis added). Proper preservation requires that the issue, legal argument, or objection be timely raised and ruled on by the trial court, and that the issue, legal argument, or objection be sufficiently precise to fairly apprise the trial court of the relief sought and the grounds therefor. § 924.051(1)(b), Fla. Stat. (1997).

In order to preserve a sentencing error, the defendant must either voice a contemporaneous objection at sentencing or file a motion to correct the sentence within ten days after its imposition. See Fla.R.Crim.P. 3.800(b); Neal v. State, at 396 ("Any error in appellant's sentence might easily have been

corrected, thereby avoiding expenditure of the time and money associated with this appeal, had he simply brought it to the trial court's attention pursuant to Florida Rule of Criminal Procedure 3.800(b)[.]"). Furthermore, the preservation requirement applies to sentencing errors that are apparent from the face of the record. Middleton v. State, 689 So.2d 304 (Fla. 1st DCA 1997).

In present case, the record clearly establishes that the issue of the costs and fees was not preserved for appellate review. Petitioner did not object to the imposition of the costs at the sentencing hearing, and in fact, the following occurred:

> THE COURT: In that case we'll order that there will be no restitution. There will be charges, costs and fees in the amount of $500. You have the right to appeal this matter and if you choose to do so you need to file your notice of appeal within 30 days. **Do you understand that?**
>
> **THE DEFENDANT: Yes.**
>
> THE COURT: Do you have any questions?
>
> MR. MERCER [prosecutor]: No, sir.
>
> **THE COURT: Anything else for the court in this matter?**
>
> **MR. CLARK [defense counsel]: No, Your Honor.**
>
> MR. MERCER: No, sir.
>
> THE COURT: Mr. Heird, don't come back here again.
>
> THE DEFENDANT: What did you just say, sir?
>
> THE COURT: Don't come back here again.
>
> THE DEFENDANT: Not until I appeal.

(I.48)(Emphasis added). Moreover, petitioner did not file a Rule 3.800(b) motion in the trial court to appraise the trial court of the alleged error in his sentence.

Prior to the Reform Act, this Court had held that when imposing cost on indigent defendants, "[t]he state must, however, provide adequate notice of such assessment to the defendant with full opportunity to object to the assessment of those costs." Jenkins v. State, 444 So. 2d 947, 950 (Fla. 1984). Henriquez v. State, 545 So.2d 1340 (Fla. 1989); Wood v. State, 544 So.2d 1004 (Fla.1989)(holding that a defendant must be given notice before costs are assessed and a contemporaneous objection is not necessary to preserve the issue for appeal). "[P]ublication in the Laws of Florida or the Florida Statutes gives all citizens constructive notice of the consequences of their actions." State v. Beasley, 580 So. 2d 139, 142 (Fla. 1991). Hence, defendants have adequate notice of statutorily authorized fees or costs. Beasley, at 142. See also State v. Hart, 668 So. 2d 589 (Fla. 1996)(holding that publication of the general conditions of probation in the Florida Rule of Criminal Procedure provides a defendant with constructive notice and therefore the trial court does not have to orally pronounce the conditions at sentencing); A.B.C. v. State, 682 So. 2d 553 (Fla. 1996)(upholding a curfew placed on a juvenile as a condition of community control, although it was not orally pronounced because it was statutorily authorized).

However, prior to the Reform Act, courts were concerned with a defendant's opportunity to object to the imposition of costs and fees. Therefore, to alleviate this concern and in response to the Reform Act, this Court amended Florida Rule of Criminal Procedure

3.800(b), to provide that:

> (b) Motion to Correct Sentencing Error. A defendant may file a motion to correct the sentence or order of probation within ten[2] days after the rendition of the sentence.

See Amendments to Florida Rule of Appellate Procedure 9.020(g) & Florida Rule of Criminal Procedure 3.800, 675 So.2d 1374 (Fla.1996). "The purpose of the[ ] amendment[ ][was] to ensure that a defendant will have the opportunity to raise sentencing errors on appeal." Amendments to Florida Rule of Appellate Procedure 9.020(g) and Florida Rule of Criminal Procedure 3.800, at 1375 (Fla.1996). See Maddox v. State at 618("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 . . . the supreme court set about creating a method for a criminal defendant to obtain relief from sentencing errors not preserved at the time of sentencing.").

Hence, unlike the defendants in Jenkins and Beasley, defendants now have an opportunity to object to a sentencing error and preserve it for appellate review by filing a Rule 3.800(b) motion. Consequently, when a defendant fails to object or file a Rule 3.800(b) motion to challenge the costs or fees imposed, the defendant has not preserved the issue for appellate review and will not be entitled to reversal of the costs. See Maddox at 621

[2]The Court subsequently amended Rule 3.800(b) to provide thirty days rather than ten to file a motion. Amendments to the Florida Rules of Appellate Procedure, 696 So.2d 1103, 1105 (Fla. 1996).

(finding that Maddox failed to preserve the trial court's imposition of costs for appellate review); Louisgeste v. State, 706 So.2d 29, 31-32 (Fla. 4th DCA 1998)(holding that because no objections to the imposition of $195 in interpreter fees and the $2 special assessment fee were made at the sentencing hearing, these issues were not preserved); Mason v. State, 698 So.2d 914 (Fla. 4th DCA 1997)(finding that Mason did not preserve for appellate review as required by the Criminal Appeal Reform Act the issue of the trial court's imposition of a $1000.00 assessment to the animal control trust fund); Hyden v. State, 715 So. 2d 960 (Fla. 4th DCA 1998)(holding that public defender fees and costs are not correctable on appeal without proper preservation), rev. pending, Case No. 93,966. But see, Matke v. State, 23 Fla. L. Weekly D469 (Fla. 1st DCA 1998)(striking the public defender lien) rev. pending, Case No. 92,476; Mike v. State, 708 So.2d 1042 (Fla. 1st DCA 1998)(reversing the imposition of the public defender's lien), rev. pending, Case No. 93,163.

The costs and fees which the trial court imposed in the case at bar were statutorily authorized. A portion of the $500 costs consisted of a $40 application fee to the Indigent Criminal Defense Trust Fund. (I.22). Section 27.52(1), Florida Statutes (Supp.1996), set forth the procedures to determine indigency, and provides that:

> (c) A fee of $40.00 shall be paid into the county depository at the time the affidavit is filed. However, the affidavit shall be accepted without the fee if the court finds, after reviewing the financial information contained in the affidavit, that the fee should be reduced, waived, or assessed at the disposition.

> (d) If the court finds that the accused person applying for representation appears to be indigent based on the factual information provided, the court shall appoint the public defender to provide representation. If the fee is not paid prior to the disposition of the case, the sentencing judge shall be advised of this fact and may:
>
> 1. Assess the fee as part of the sentence or as a condition of probation; or
>
> 2. Assess the fee pursuant to s.27.56.

The trial court imposed the $40 fee pursuant to this statute.[3] (I.22). Because petitioner was sentenced on March 17, 1997, this statue applies. The trial court also imposed $2 cost for Criminal Justice Education pursuant to section 943.25(13), Florida Statute (1997), and a fine of $385 and $20 as a 5% surcharge upon appellant at sentencing.[4] (I.22). Thus, the costs and fines imposed in this

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[3]Section 27.52(1)(c), was amended to provide that if the application fee is not paid within seven days of filing the financial affidavit "the application fee shall be assessed at sentencing or at the final disposition of the case" and Section 27.52(1)(d), was amended to provide that "If the application fee is not paid prior to the disposition of the case, the clerk shall advise the sentencing judge ~~shall be advised~~ of this fact and the court shall ~~may~~:

1. Assess the application fee as part of the sentence or as a condition of probation; or

2. Assess the application fee pursuant to s. 27.56."

The amendments took effect on May 24, 1997. Ch. 97-107, § 4, at 2408, Laws of Fla. See also § 27.52(1), Fla. Stat. (1997).

[4] Because the fine is a penalty imposed as a part of petitioner's sentence pursuant to Section 775.083, Florida Statutes (1997), the trial court did not have to provide petitioner with notice and an opportunity to be heard. Ottney v. State, 571 So.2d 20, 21 (Fla. 2d DCA 1990)("[W]e would note that while a trial court cannot impose costs on an indigent defendant without prior notice and an opportunity to be heard . . . it may impose a fine on the defendant as part of the defendant's sentence."). Therefore, the trial court did not err by imposing

case were authorized by the statute, and petitioner had constructive notice. Moreover, petitioner had the opportunity to object in a motion pursuant to Florida Rule of Criminal Procedure 3.800(b). Therefore, petitioner did not preserve this issue, and was not entitled to appellate review.

Furthermore, contrary to petitioner's argument the imposing of a discretionary cost without orally pronouncing the cost, does not create an illegal sentence. "[A]n illegal sentence is one that exceeds the maximum period set forth by law for a particular offense." Davis v. State, 661 So.2d 1193, 1196 (Fla. 1995); State v. Callaway, 658 So.2d 983 (Fla. 1995). In State v. Mancino, 23 Fla. L. Weekly S301 (Fla. June 11, 1998), this Court allowed Mancino to file a Florida Rule of Criminal Procedure 3.800(a) motion seeking additional jail credit. This Court held that "a sentence that does not mandate credit for time served would be illegal since a trial court has no discretion to impose a sentence without crediting a defendant with time served." Id. Sentencing within the statutory maximum and credit for time served in jail are mandatory and the trial court has no discretion; however, the imposition of statutory authorized costs and fees is not an illegal sentence.

Accordingly, the imposition of the costs and fees in this case was not fundamental error. Therefore, petitioner did not preserve

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the fine.

the issue for appellate review, and the decision of the First District should be affirmed.

CONCLUSION

Based on the foregoing, the State respectfully submits the certified question should be answered in the negative, the decision of the District Court of Appeal should be approved.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONDENT'S ANSWER BRIEF ON THE MERITS has been furnished by U.S. Mail to Fred Parker Bingham, II, Esq., Assistant Public Defender,

Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, this ____ day of December, 1998.

_____
Trisha E. Meggs
Attorney for the State of Florida

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APPENDIX

Heird v. State, Case NO. 97-1385 (Fla. 1st DCA Nov. 12, 1998)