IN THE SUPREME COURT OF FLORIDA

MICHAEL WADE LOCKE,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 94,396

RESPONDENT'S ANSWER BRIEF

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PRELIMINARY STATEMENT

Respondent State of Florida, the Appellee in the District Court of Appeal (DCA) and the prosecuting authority in the trial court, will be referred to as Respondent or the State. Petitioner Locke, the Appellant in the DCA and the defendant in the trial court, will be referred to as Petitioner or as Locke.

The record on appeal consists of two volumes. Pursuant to Rule 9.210(b), Fla. R. App. P. (1997), this brief will refer to a volume according to its respective designation within the Index to the Record on Appeal. A citation to a volume will be followed by any appropriate page number within the volume. "IB" will designate Petitioner's Initial Brief, followed by any appropriate page number. “DCA” will be inserted where reference is to briefs in the lower court.

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

CERTIFICATE OF FONT AND TYPE SIZE

This brief was prepared using Courier New 12.

STATEMENT OF THE CASE AND FACTS

The State agrees with Petitioner’s statement of the case and facts but supplements with the following for clarity.

Locke was convicted by a jury of possession of a firearm by a felon on count I. That conviction and sentence are now before this Court. He concurrently pled no contest to possession of

cocaine, felony driving while license suspended, and possession of twenty grams of marijuana. I 90-91. At sentencing, the trial court orally imposed an aggregate amount of $449 in court costs for the four convictions and $750 as a public defender lien for representation on the jury trial count of possession of a firearm by a felon. There was no objection to these costs or the lien and, on the lien, the trial court specifically asked if there was any objection to the $750 as a reasonable fee. I 30-32. During this colloquy, the defendant asked if he could get a sentence modification and was advised that he could file a motion for such if he wished to do so. I 32.

On appeal, counsel for Locke filed a brief pursuant to Anders v. California, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967) confessing that the appeal was wholly frivolous and that no good faith argument could be made that reversible error occurred. The brief specifically referred to the costs at issue here and opined that this was not reversible error. DCA IB at 7-9. Locke sought and was granted permission to file a pro se brief but failed to do so. The state filed an answer brief which, among other items, pointed out that if the district court identified any arguably reversible error, that it should, pursuant to Anders and State v. Causey, 503 So.2d 321 (Fla. 1987), direct Locke's counsel to file an amended brief pertaining to any arguably reversible error. DCA AB at 5.

The district court, without ordering additional briefing, went partially **en banc** (**GENERAL DIVISION EN BANC**) and decided that the

trial court's failure to orally pronounce the individual statutory costs was not fundamental error because it did not deny Locke the due process rights to notice and an opportunity to be heard and, thus, was not cognizable on appeal when not raised in the trial court either contemporaneously or by motion pursuant to Florida Rule of Criminal Procedure 3.800(b). The district court also certified the following question of great public importance:

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

SUMMARY OF ARGUMENT

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

The analysis of the district court below is correct. The costs were statutorily authorized and defendant was on notice prior to the sentencing proceeding that such costs could be imposed. He was given two opportunities to object to the imposition of such costs, (1) contemporaneously at the sentencing hearing when they were orally pronounced in the aggregate of $449, and (2), following entry of the sentencing order which listed them individually, by filing a motion pursuant to rule 3.800(b) within thirty days of the written sentencing order challenging the sentencing order either in its entirety or in its specifics.

The obvious explanation for trial counsel not objecting either contemporaneously or by rule 3.800(b) motion to the costs is quite simply that trial counsel did not consider the imposition of the costs to be error because he understood very well that such costs were statutorily authorized and appropriate to the case. Thus, as an officer of the court, and in the absence of any prejudice to the client, trial counsel did not wish to waste the time of the court and the parties by demanding the useless oral recitation of uncontroverted matters, i.e., $449 in aggregate costs in increments of as little as $2 and $3. Even now, after **en banc** review in the district court and briefing here, neither petitioner nor the two dissenters below, have actually challenged the validity of the costs, they only argue that each cost should

have been orally recited as an increment, as they are in the written order. It is worth noting in this connection, that the professional responsibility of the trial counsel to the client and the trial court was to ensure that any prejudicial error was brought to the attention of the trial court for correction or for proper preservation on appeal if not corrected. It is **not** the function of a trial counsel to object to non-prejudicial trial court actions and to demand the performance of useless acts merely to preserve issues for appellate counsel and courts to elaborate upon.

The state respectfully suggests that non-prejudicial claims of error, as here, can be neither fundamental error nor reversible error. See, sections 924.051(1)(a), 924.051(3), 924.051(7), and 924.33, Florida Statutes (1997) and this Court's decision in Amendments to the Florida Rules of Appellate Procedure, 685 So.2d 773 (Fla. 1996) upholding the authority of the Florida Legislature to condition the right to appeal upon the preservation of prejudicial error or the assertion of fundamental error. Further, Amendments, as it applies to claims of sentencing error, was codified and expanded by the promulgation of Florida Rule of Appellate Procedure 9.140(d) which, without exception, requires that all claims of sentencing error be properly preserved in the trial court.

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?

The district court below correctly analyzed the relevant authorities and concluded that there was no due process requirement for a trial court to individually pronounce each increment of costs when there was no objection by either party to the aggregate pronouncement of such costs. The state adopts that analysis as its own and, for the convenience of the Court and all concerned, quotes that decision in its entirety. (Double spacing is used for the benefit of the reader.)

GENERAL DIVISION EN BANC

WOLF, J

Appointed counsel filed a brief *pursuant to* Anders V. California, 386 U.S. 738 (1967) in the instant case. Having reviewed the record, we find one issue which merits discussion: Whether the trial court's method of imposition of statutorily authorized discretionary costs violated appellant's due process rights and therefore, constituted fundamental error. We find that no due process violation occurred and recede from that portion of our opinion in Neal v. State, 688 So. 2d 392, 396 (Fla. 1st DCA) rev. denied, 698 So. 2d 543 (Fla. 1997), which holds that the failure to give notice to an individual defendant

of the potential imposition of statutorily authorized public defender's fees at the time of sentencing constitutes fundamental error. We also certify a question of great public importance concerning whether the failure to orally itemize individual costs at the time of sentencing constitutes fundamental error.

In the instant case, a public defender's lien of $750 was imposed on the defendant at the time of sentencing. The defendant indicated that he had no objection to that amount. The judge also announced an aggregate amount of court costs. The defense raised no objection. A written judgment contained an itemized breakdown of the costs and fees. The costs included an assessment of statutorily authorized discretionary costs pursuant to section 943.25(13), Florida Statutes (1995). No objection of any kind was raised in the trial court concerning the imposition of discretionary statutory costs. No motion was filed pursuant to rule 3.800(b), Florida Rules of Criminal Procedure, questioning the method of assessing costs. The question before us in this case is whether the manner in which the trial court imposed costs constitutes fundamental error and thus may be raised for the first time on appeal.

In Neal, the court held that the imposition of public defender fees without prior specific notice constituted fundamental error which may be raised for the first time on appeal. See Neal, supra at 396. A public defender's lien is a specific type of discretionary statutorily authorized fee. See § 27.56,

Fla. Stat. (1995). Thus, there is no valid reason to treat the discretionary costs assessed in this case differently than the assessment of public defender's liens. We are, therefore, faced squarely with the question concerning whether the holding in Neal as to fundamental error should continue to be followed by this court

The Neal panel felt that it was bound by the cases of Henriquez v State, 545 So. 2d 1340 (Fla 1989), which held that imposition of a discretionary attorney fee obligation without notice and an opportunity to be heard constituted fundamental error, and Wood v. State, 544 So. 2d 1004 (Fla. 1989), which held that imposition of costs without notice and an opportunity to be heard constituted fundamental error. We find that the panel was incorrect for two independent reasons: (1) The cases relied on by the Neal panel have been effectively overruled by subsequent decisions of the supreme court; and (2) the subsequent adoption of the amendment to rule 3.800(b), which provides a formal mechanism for a postjudgment hearing and an opportunity to be heard in the trial court on the imposition of costs, constitutes a change in the material facts relied on by the court in Henriquez and Wood thereby obviating the necessity of continuing to follow those cases.

Henriquez and Wood were based on the supreme court's decision in Jenkins v. State, 444 So. 2d 947 (Fla. 1984). In Jenkins, the court held that the assessment of certain statutorily mandated

costs at the time of sentencing without providing the defendant prior notice and an opportunity to be heard was a denial of due process. See id. at 950. Collectively, Jenkins, Wood, and Henriquez stand for the proposition that due process requires a trial judge to give a defendant actual notice at the time fees or costs are imposed, and that failure to give such actual notice constitutes fundamental error. In State v Beasley, 580 So. 2d 139 (Fla. 1991) however, the supreme court held that the defendant had constructive notice of the imposition of statutorily mandated costs as a result of their publication in the Laws of Florida or the Florida Statutes. See id. at 142. The court discussed its holding in light of Jenkins:

> Beasley also had an opportunity to be heard at the sentencing hearing and raise any pertinent objections. Having been given adequate notice and an opportunity to be heard, the assessment of costs complied with due process. Under Jenkins, therefore, the district court erred by holding that Beasley had been denied due process because the trial court failed to make a determination of his ability to pay before it assessed the mandatory costs. Any determination of Beasley's ability to pay need be made only when the state seeks to enforce collection of the costs.

Id. Similarly, in State v. Hart, 668 So. 2d 589 (Fla. 1996), the court, relying on Beasley, held that publication of the general conditions of probation in the Florida Rules of Criminal Procedure, like the publication of statutorily mandated costs in the Florida Statutes, provided a criminal defendant with constructive notice of those conditions which may be imposed; therefore, a trial court is not required to orally pronounce these general conditions at the time of sentencing. See id. at 592-593.

In A.B.C. v. State, 682 So. 2d 553 (Fla. 1996), the court, relying on Beasley and Hart, upheld a condition of community control imposing a curfew on a juvenile although it was not orally pronounced in court because it was statutorily authorized by Florida Statutes. See id. at 554-555. The court noted, "ti]n Hart, we stated that 'a condition of probation which is statutorily authorized or mandated ... may be imposed and included in a written order of probation even if not orally pronounced at sentencing.'" Id. at 554. Beasley, Hart, and A.B.C., stand for the proposition that a defendant is on notice of all statutorily authorized costs and conditions that may be imposed at the time of sentencing, and that a defendant is not required to be given a formal hearing on his ability to pay until the state seeks to enforce the costs which have been imposed. Under these decisions, the procedure utilized by the trial court in the instant case does not constitute error, much less fundamental error.

In Wood and Henriquez, the supreme court was responding to certified questions concerning whether a defendant must raise a contemporaneous objection, and the court held that fundamental error existed in those cases as a result of a denial of due process (no notice and opportunity to be heard). As previously noted in this opinion, the supreme court has since clarified its position concerning notice. In regard to providing opportunity to be heard, however, it is significant that Henriquez and Wood predate the adoption of section 924.051(3), Florida Statutes, and rule 3.800(b), Florida Rules of Criminal Procedure, which was added in

1996 specifically to address a defendant's opportunity to be heard on sentencing issues and preservation of such issues for appeal:

> Subdivision (b) was added ... in order to authorize the filing of a motion to correct a sentence or order of probation, thereby providing a vehicle to correct sentencing errors in the trial court and to preserve the issue should the motion be denied.

Fla. R. Crim. P. 3.800, court commentary (1996 amendments). The adoption of rule 3.800(b) ameliorates any remaining questions concerning opportunity to be heard. Absent due process considerations, clearly the failure to itemize statutorily authorized costs does not rise to the level of fundamental error. (Footnote. [1]We would note that at least two of our sister courts refused to address an alleged error involving costs and assessment of a public defender's fee if the issue has not preserved in the trial court. See Hyden v. State, 23 Fla. Weekly D1342 (Fla. 4th DCA June 3, 1998); Maddox v. State, So. 2d 617 (Fla. 5th DCA 1998) (en banc). End footnote).

In Dodson v. State, 710 So. 2d 159, 161 (Fla. 1st DCA 1998), we observed,

> Following the enactment of section 924.051 and amended rule 3.800(b), this court has issued several decisions on the issue of what constitutes fundamental error in the context of allegations of other various sentencing errors. See~ e.g., Howard v. State, 705 So. 2d 947, (Fla. 1st DCA 1998) (affirming as unpreserved the trial court's failure to award credit for time served); Cargle v. State, 701 So. 2d 359 (Fla. 1st DCA 1997) (affirming as unpreserved a claim that the trial court erred in sentencing juvenile as adult without considering statutory criteria in section 39.059(7)); Johnson v. State, 697 So. 2d 1245 (Fla. 1st

> DCA 1997) (affirming as unpreserved a claim that defendant received an improper upward departure sentence because the sole reason given for the departure had already been taken into account in computing his guidelines score); Williams v. State, 697 So. 2d 164 (Fla. 1st DCA 1997) (affirming as unpreserved an alleged scoresheet error). We fail to see how the wrongful imposition of a nominal discretionary attorney's fee lien can be deemed any more fundamental than wrongful incarceration.

We recede from Neal to the extent that it conflicts with our holding in this case. We also certify the following question to be one of great public importance:

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

Affirmed. End Quote

The state makes the following additional points.

Judges Joanos and Lawrence, who concurred in result only, would simply rely on Maddox v. State, 708 So.2d 617 (Fla. 5th DCA 1998)(en banc), review granted, No. 92,805 (Fla. July 7, 1998). This position is well-taken in that it most clearly recognizes that the Florida Legislature through the enactment of the Criminal Appeal Reform Act of 1996 and this Court through its approval and implementation of that Reform Act have created expanded and specified remedies to address sentencing errors. Those remedies are simple and efficient. Defendants are now given an additional thirty days after entry of a sentencing order to challenge that sentence pursuant to newly created Florida Rule of Criminal Procedure 3.800(b). That remedy is available regardless of whether the

sentence is challenged as simply erroneous or, at the other extreme, illegal. In support of the newly created rule 3.800(b), this Court also created two new mutually supporting Florida Rules of Appellate Procedure. Rule 9.020(h) protects the right of a criminal to eventually seek appellate review until a motion to correct a sentence has been ruled on in the trial court. This, along with rules 3.800(b) and 3.170(l), creates and preserves new remedies for criminal appellants challenging sentencing orders. Consistent with this new remedy for filing claims of sentencing error in the trial court, this Court also created rule 9.140(d) which unequivocally and without any reservation requires that all claims of sentencing error be first raised in the trial court. This Court was able to implement this unqualified requirement that all sentencing errors be first raised in the trial court because it has now furnished a remedy for such claims through rules 3.800(b) and 3.170(l) which, together with the existing right to raise ineffective assistance of trial counsel in the trial court through Florida Rule of Criminal Procedure 3.850, provide a comprehensive, fail-safe remedy for all claims of sentencing error.

These new rules of criminal and appellate procedure have been in effect for over two years, since 1 January 1997. If the criminal trial counsel of this state are not now familiar with them and do not use them to protect the interests of their indigent clients, then it is high time that they become familiar with these rules and start functioning as competent counsel at sentencing proceedings. See, Maddox, 708 So.2d at 621:

> 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 on 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.**
> Id. (Emphasis added).

In the same vein of its time to end this wasteful nonsense of trial counsel continually failing to raise claims of error in the trial court in the expectation that appellate courts will compensate for trial counsel incompetency, see Hyden v. State, 23 Fla. L. Weekly D1342 (Fla. 4th DCA 3 June 1998)(en banc):

> 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 interrelationship of the various rule changes is comprehensively and clearly set forth in Maddox, as Judges Joanos and Lawrence concluded below. The state urges this Court to recognize, as Maddox does, that there are remedies for all sentencing claims **in the trial court**, whether the claims be of simple prejudice or of fundamental error, and that there is now no basis for raising sentencing errors for the first time on appeal. Moreover, as Chief Judge Griffin points out in Maddox, there is a major benefit to the judicial system in eliminating the need to

determine whether a sentencing error is fundamental or non-fundamental. With these new rules and trial court remedies, it does not matter. **Any prejudicial error can be corrected in the trial court.**

The interrelationship of the Reform Act and the various new rules is also set forth also in Amendments to Florida Rules of Appellate Procedure, 685 So.2d 773 (Fla. 1996) and in the state's briefs in State v. Trowell, case no. 92,393 and State v. McKnight, case no. 94,256, currently pending review in this Court.

The state urges this Court to approve Maddox and the decision below by holding that all claims of prejudicial sentencing errors, including those involving so-called fundamental error, must be first raised in the trial court pursuant to rule 9.140(d) by one of the following approved remedies: (1) by contemporaneous objection at sentencing, or (2) by motion pursuant to rule 3.800(b), or (3) if trial counsel fails to note prejudicial sentencing error, and to either contemporaneously object at sentencing or file a rule 3.800(b) motion, then the approved, fail-safe remedy is a rule 3.850 motion in the trial court claiming ineffective assistance of trial counsel because of the failure to note prejudicial error. See, Maddox.

CONCLUSION

The certified question should be answered no and the decision below 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 Carol Ann Turner, Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida, this 5th day of January 1999.

James W. Rogers
Attorney for the State of Florida

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