ORIGINAL

IN THE SUPREME COURT OF FLORIDA

TOMMY THOMAS, :

Petitioner, :

vs. : Case No. 94,469

STATE OF FLORIDA, :

Respondent. :

_____ :

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

INITIAL BRIEF OF PETITIONER ON THE MERITS

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TENTH JUDICIAL CIRCUIT

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STATEMENT OF TYPE USED

I certify the size and style of type used in this brief is Courier 12 point, a font that is not proportionally spaced.

STATEMENT OF THE CASE AND FACTS

On January 9, 1995, the Petitioner, Tommy Thomas, pled guilty in lower case no. 94-9417 to sexual battery with slight force, a violation of section 794.011(3), Florida Statutes (1993), and was placed on three years probation. On November 14, 1996, the lower court found Mr. Thomas to have violated Condition (S) of his probation, failing to enroll and remain continuously enrolled in the Psychological Group. The court found him not guilty of violating the other conditions of his probation. However, the order of revocation lists Thomas in violation of conditions (2), (5), (J), (K), (N), (W), and (X) as well. The court revoked Thomas' probation and sentenced him to 60 months in prison to run concurrent with another 60 month habitual offender sentence. In his appeal, Mr. Thomas argued that the written order of revocation must conform to the court's oral pronouncement.

On November 6, 1998, the Second District Court of Appeal affirmed the lower court's revocation order, holding that "[b]ecause Thomas failed to seek correction of the scrivener's error in the trial court and because the error is not fundamental, he is precluded from raising this issue on appeal." See Thomas v. State, 23 Fla. L. Weekly D2483 (Fla. 2d DCA November 6, 1998). Mr. Thomas filed a notice of discretionary jurisdiction in the Second District Court of Appeal on November 24, 1998.

On February 11, 1999, this Court accepted jurisdiction, and ordered the Petitioner to file a brief on the merits on or before March 8, 1999.

SUMMARY OF THE ARGUMENT

Section 924.051, Florida Statutes (Supp. 1996), the Criminal Appeal Reform Act, did not abolish the concept of fundamental error in the context of sentencing. An appellate court still has the power to reverse an illegal sentence even where the issue was not preserved below. The sentencing error in the present case constituted fundamental error as it violated a right of fundamental due process.

ARGUMENT

ISSUE

THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL INCORRECTLY INTERPRETS THE CRIMINAL APPEAL REFORM ACT OF 1996 AS ABOLISHING THE CONCEPT OF FUNDAMENTAL ERROR WITH REGARD TO SENTENCING ISSUES.

The Petitioner asserts the Second District Court of Appeal erred below in holding that Section 924.051, Florida Statutes (Supp. 1996), the Criminal Appeal Reform Act, prevents courts from correcting unpreserved sentencing errors. The wording of the statute itself, as well as supporting case law, show the Criminal Appeal Reform Act has not eliminated the concept of fundamental error. Section 924.051(3), Florida Statutes (Supp. 1996), provides:

> An appeal may not be taken from a judgment or order of a trial court unless a prejudicial error is alleged and is properly preserved or, **if not properly preserved, would constitute fundamental error.** A judgment or sentence may be reversed on appeal only when an appellate court determines after a review of the complete record that prejudicial error occurred and was properly preserved in the trial court or, **if not properly preserved, would constitute fundamental error.** (Emphasis added)

Thus, the legislature in enacting the Criminal Appeal Reform Act, specifically recognized the continuing viability of the concept of fundamental error even in the sentencing context. Once the legislature has recognized this concept, an appellate court may not eliminate it as such would constitute judicial legislation and would be improper. See Wyche v. State, 619 So. 2d 231, 236 (Fla.

1993); Firestone v. News-Press Publishing Co., 538 So. 2d 457, 460 (Fla. 1989); Brown v. State, 358 So. 2d 1620 (Fla. 1978).

Other District Courts of Appeal have held that illegal sentences constituted fundamental error for which no objection was necessary prior to granting appellate relief. In Sanders v. State, 698 So. 2d 377 (Fla. 1st DCA 1997), the defendant received a sentence which exceeded the statutory maximum. Rejecting the state's contention that the issue had not been preserved for appeal by a proper objection, the First District held:

> [S]ection 924.051 does not preclude an appellate challenge to unpreserved sentencing error that constitutes fundamental error. Neal v. State, 688 So. 2d 392 (Fla. 1st DCA 1997). The error asserted by the appellate in the present case must be classified as fundamental. The sentence for sexual battery is in excess of the statutory maximum for the offense and is therefore "illegal." [citations omitted] An illegal sentence is regarded with such disdain by the law that it, unlike other trial court errors, may be challenged for the first time by way of collateral proceedings instituted even decades after such a sentence has been imposed...The extraordinary provision made for remedying illegal sentences evidences the utmost importance of correcting such errors even at the expense of legal principles that might preclude relief from the trial court errors of less consequence. In light of this, illegal sentences necessarily constitute fundamental error, and may therefore be challenged for the first time on direct appeal.

Sanders, 698 So. 2d at 378. In Harriel v. State, 710 So. 2d 102 (Fla. 4th DCA 1998), the Fourth District held that subsequent to the enactment of the Criminal Appeal Reform Act, a criminal defendant could still appeal, even from a guilty plea or nolo plea where no issue is specifically preserved, on two grounds--the

subject matter jurisdiction of the lower court and the illegality of the sentence. The court certified conflict with the Fifth District Court of Appeal on this issue.

It is insufficient for a court to say, as the Fifth District does in Maddox v. State, 708 So. 2d 617 (Fla. 5th DCA 1998), that there is little risk a defendant will suffer an injustice because if any of the sentencing was fundamentally erroneous and counsel failed to object or file a motion to correct the sentence, the remedy of the ineffective assistance of counsel would still be available. The Petitioner certainly agrees that failure of trial counsel to properly preserve a sentencing error which prior to the Criminal Appeal Reform Act would have resulted in a grant of relief by the appellate court, is per se ineffective assistance of counsel. However, the solution to this is not for the appellate court to deny relief and require the untrained defendant to proceed against his counsel on an ineffective assistance counsel claim, but to recognize the issue that is apparent on the fact of the record and grant relief as if it were a claim of ineffective assistance of counsel.

This Court ruled in Combs v. State, 403 So. 2d 418 (Fla. 1981) that if appellate counsel in a criminal proceeding honestly believes there is an issue of reasonably effective assistance of counsel in the trial or the sentencing phase before the trial court, that issue should be immediately presented to the appellate court that has jurisdiction of the proceeding so that it may be resolved in an expeditious manner by remand to the trial court and

avoid unnecessary and duplicitous proceedings. This admonition has renewed meaning in light of the Criminal Appeal Reform Act. Certainly, if the objective of the act was to promote efficiency in the appellate process, and indeed in the criminal justice system, then the approach to these errors, even though unpreserved, must not be to permit the appellate court to merely hide their heads in the sand and ignore them, but to grant the relief necessary to insure the integrity of the criminal justice system.

In addition to finding the sentencing error in the present case to be unpreserved, the Second District also found it was not fundamental. This is erroneous. Although the lower court found the Petitioner in violation of but one condition of his probation, the written order of revocation lists seven additional violations of probation which were never proven, and which never occurred. Since the Petitioner was found guilty of violating his probation, this might seem harmless on the surface. However, the written order becomes part of the Petitioner's record, while the oral pronouncement becomes lost to history. Given a future opportunity to be placed back on probation, the lengthy list of nonexistent violations is bound to give any judge pause before granting the Petitioner such a second chance. In any event, not only is it well-settled law that the written revocation order must follow the oral pronouncement, it is fundamental error.

Fundamental due process requires that a revocation of probation be based only on the violation alleged. See Towson v. State, 382 So. 2d 870, 871 (Fla. 5th DCA 1980); Frederick v. State,

339 So. 2d 251, 252 (Fla. 4th DCA 1976). Certainly that rule of law must apply only to those violations which were proven. As previously argued, the Criminal Appeal Reform Act does not abolish fundamental error. The incorrect order of revocation constituted an illegal sentence which harms the Petitioner. This illegal sentence need not have been preserved as it was fundamental error, which a court has the power to correct.

While the Criminal Appeal Reform Act requires most sentencing errors to be preserved before an appellate court may grant relief, the concept of fundamental error particularly as it concerns an illegal sentence continues to be a viable issue on appeal notwithstanding the lack of objection. Additionally, if an appellate court has jurisdiction over a case and is confronted with a patent sentencing error it must have the discretion to grant relief whether by simply remanding for correction or by considering the issue in the context of ineffective assistance of trial counsel for failing to preserve the issue. In either case, the appellate court has the discretion to grant relief. The Criminal Appeal Reform Act, if it is to be held constitutional, must be interpreted as permitting this discretion. This Court should reverse the decision of the Second District below, and remand with instructions to grant relief as to the sentencing issue.

CONCLUSION

In light of the foregoing reasons, arguments, and authorities, the Petitioner respectfully asks this Honorable Court to quash the decision of the Second District below and remand with instructions to correct the Petitioner's illegal sentence.

APPENDIX

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

TOMMY THOMAS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 96-05281

Opinion filed November 6, 1998.

Appeal from the Circuit Court for Hillsborough County; Diana M. Allen, Judge.

James Marion Moorman, Public Defender, and Robert D. Rosen, Assistant Public Defender, Bartow, for Appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and William I. Munsey, Jr., Assistant Attorney General, Tampa, for Appellee.

PER CURIAM.

Tommy Thomas appeals the trial court's revocation of his probation and also seeks correction of a scrivener's error in the revocation order. The evidence presented at the revocation hearing supports the trial court's determination that Thomas wilfully violated his probation and, therefore, we affirm the revocation order. Because

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Thomas failed to seek correction of the scrivener's error in the trial court and because the error is not fundamental, he is precluded from raising this issue on appeal. See § 924.051, Fla. Stat. (Supp. 1996).

Affirmed.

BLUE, A.C.J., and FULMER and CASANUEVA, JJ., Concur.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to William I. Munsey, Jr., Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on this 5th day of March, 1999.

Respectfully submitted,

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