IN THE SUPREME COURT OF FLORIDA

ROBERT J. WRIGHT,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 94,541

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 referenced in this brief as Respondent, the prosecution, or the State. Petitioner Wright, the Appellant in the DCA and the defendant in the trial court, will be referenced in this brief as Petitioner or by proper name.

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

CERTIFICATE OF FONT AND TYPE SIZE

This brief uses Courier New 12.

STATEMENT OF THE CASE AND FACTS

The State accepts petitioner's statement of the case and facts adding that Wright's convictions were previously affirmed by the district court where the court held that the habitual offender sentences should be reversed and that he should be resentenced. Wright v. State, 691 So.2d 1140 (Fla. 1st DCA 1997). He was resentenced within the sentencing guidelines. Although no issues were raised in the trial court concerning the resentencing, and the district court mandate had been carried out, a notice of appeal was filed. The district court affirmed after conducting review pursuant to Anders v. California, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967) and certified to this Court the question previously certified in Locke v. State, 23 Fla. L. Weekly D2399 (Fla. 1st DCA 21 October 1998), review pending, case no. 94,396. The same certified question is also pending here in Heird v. State, case no. 94,348 and McCray v. State, case no. 94,640.

SUMMARY OF ARGUMENT

The district court decision should be approved and a negative answer given to the certified question. Claims of sentencing error which are not preserved in the trial court either contemporaneously by objection or by motion pursuant to Florida Rule of Criminal Procedure 3.800 are not cognizable on direct appeal pursuant to section 924.051(3), Florida Statutes (Supp 1996), Florida Rule of Appellate Procedure 9.140(d), Amendments to the Florida Rules of Appellate Procedure, 685 So.2d 773 (Fla. 1996), Maddox v. State, 708 So.2d 617 (Fla. 5th DCA 1998)(**en banc**), review pending, case no. 92,805, and Hyden v. State, 23 Fla. L. Weekly D1342 (Fla. 4th DCA 3 June 1998) (**en banc**), review pending, case no. 93,966.

Moreover, given the number of remedies provided in the trial court to challenge sentencing errors, it cannot be seriously suggested that **any** claims of sentencing error should be first raised in the appellate courts as fundamental error.

ARGUMENT

ISSUE

CERTIFIED QUESTION: DID 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 decision should be approved and a negative answer given to the certified question. Claims of sentencing error which are not preserved in the trial court either contemporaneously by objection or by motion pursuant to Florida Rule of Criminal Procedure 3.800 are not cognizable on direct appeal pursuant to section 924.051(3), Florida Statutes (Supp 1996), Florida Rule of Appellate Procedure 9.140(d), Amendments to the Florida Rules of Appellate Procedure, 685 So.2d 773 (Fla. 1996), Maddox v. State, 708 So.2d 617 (Fla. 5th DCA 1998)(**en banc**), review pending, case no. 92,805, and Hyden v. State, 23 Fla. L. Weekly D1342 (Fla. 4th DCA 3 June 1998)(**en banc**), review pending, case no. 93,966.

The state relies on its briefs in Locke, Heird, and McCray. The state urges the Court to adopt the reasoning in Maddox that claims of fundamental sentencing error are no longer cognizable on appeal because of the provisions of rules 3.800, 3.850, and 9.140(d).

There is no certain definition of fundamental error, this Court has described it in Archer v. State, 673 So.2d 17, 20 (Fla. 1996) as "'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.' State v. Delva, 575 So.2d 643, 644-45 (Fla. 1991) (quoting Brown v. State, 124 So.2d 481, 484 (Fla. 1960)" and in J.B. v. State, 705 So.2d 1376, 1378 (Fla. 1998) as error "which goes to the foundation of the case or the merits of the cause of action and is equivalent to the denial of due process. Johnson 616 So.2d [1] at 3."

The wisdom of Maddox is that it sweeps away the necessity to struggle with these indecipherably descriptive phrases by holding that there are now remedies for **all** prejudicial sentencing errors, not merely fundamental, through contemporaneous objection, motion pursuant to rule 3.800(b) to correct sentence[1], and motion pursuant to rule 3.850 to claim ineffective assistance of counsel if trial counsel overlooks any prejudicial error and fails to file a rule 3.800(b) motion within thirty days. The state urges in the most emphatic terms that no one can seriously suggest that defendants who are now provided with no less than three independent but mutually supportive due process remedies in the trial court to raise claims of sentencing error are

[1]It deserves noting that rule 3.800 now contains three methods of challenging or modifying sentences in the trial court: 3.800(a) provides for challenging an illegal sentence at any time; rule 3.800(b) permits challenging a legal but erroneous sentence within thirty days of rendition; and rule 3.800(c) permits reduction and modification of a legal sentence within sixty days of rendition or within sixty days of judgment becoming final. Significantly, these remedies are only available in the sentencing court, not the appellate.

nevertheless entitled, in the face of statutory and procedural law, to demand that the state also permit the claim to be raised for the first time on direct appeal. A right to a contemporaneous objection, a right to a motion to correct sentence within thirty days of rendition, and a right to claim ineffective assistance of counsel within two years of final judgment is due process to the ultimate degree. There is no denial of fundamental due process in requiring that defendants use trial court remedies readily available to them in raising claims of sentencing error. Maddox.

CONCLUSION

The decision of the district court should be affirmed and the certified question answered no.

Respectfully submitted,

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[AGO# L98-1-14569]

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a correct copy of the foregoing has been furnished by U.S. Mail to Carol Ann Turner, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301 this 10th day of February 1999.

_____
James W. Rogers
Attorney for the State of Florida

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IN THE SUPREME COURT OF FLORIDA

ROBERT J. WRIGHT,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 94,541

APPENDIX

Robert J. Wright v. State of Florida, November 17, 1998, (Fla. 1st DCA)

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

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

ROBERT J. WRIGHT,

Appellant,

v.

CASE NO. 97-2667

STATE OF FLORIDA,

Appellee.

_____/

Opinion filed November 17, 1998.

An appeal from the Circuit Court for Gulf County.
Robert Moore, Judge.

Nancy A. Daniels, Public Defender; Mark E. Walker, Assistant Public Defender, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General; James W. Rogers, Senior Assistant Attorney General, Tallahassee, for Appellee.

PER CURIAM.

Appellate counsel filed an Anders[1] brief in this appeal from Wright's resentencing that was required by our opinion in Wright v. State, 691 So. 2d 1140 (Fla. 1st DCA 1997). Appellant was afforded the opportunity but did not file a brief pro se. We affirm appellant's sentences and the imposition of costs and a public defender's lien based on our opinion in Locke v. State, No. 97-2431

[1] Anders v. California, 386 U.S. 738 (1967).

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(Fla. 1st DCA October 21, 1998), and certify the question certified in that case: DOES THE FAILURE OF THE TRIAL COURT TO ORALLY PRONOUNCE EACH STATUTORILY AUTHORIZED COST INDIVIDUALLY AT THE TIME OF SENTENCING CONSTITUTE FUNDAMENTAL ERROR?

MINER, ALLEN and KAHN, JJ., CONCUR.