

IN THE SUPREME COURT OF FLORIDA

ROBERT J. WRIGHT,

Petitioner,

vs.

CASE NO. 94,541

STATE OF FLORIDA,

Respondent.

_____ /

REPLY BRIEF OF PETITIONER

ARGUMENT

ISSUE PRESENTED

WHETHER THE FAILURE OF THE TRIAL COURT TO ORALLY PRONOUNCE EACH STATUTORILY AUTHOR-IZED COST INDIVIDUALLY AT THE TIME OF SENTENCING CONSTITUTES FUNDAMENTAL ERROR.

The answer brief filed by the state consists almost entirely of an argument against the right to appeal fundamental sentencing errors. The state argues that, because there is no precise definition of fundamental error ("indecipherably descriptive phrases" (Answer Brief (AB), p.5), the court should find no error to be fundamental. In response, petitioner argues as to the latter point that, while even in the senten-cing context it might not be possible to adopt a comprehensive definition of

fundamental error, it is probably an easier project than in the trial error context.

As to the state's first point, particularly with respect to *discretionary* costs and fees, the failure to give a criminal defendant notice and opportunity to be heard violates state and federal constitutional principles of due process, and is thus fundamental error, addressable for the first time on direct appeal.

Further, the state doth protest too much ("in the most emphatic terms" (AB-5)) that defendants do not need to raise facially apparent sentencing errors on direct appeal because they are already overflowing with due process to correct such errors. The state notes the "rights" to contemporaneous objection, to file a 3.800(b) motion within 30 days to correct a sentence, and to file a 3.850 motion claiming ineffective assistance of counsel within 2 years.

Petitioner wishes to make three points. First, the state is disingenuous in arguing this case as though in a vacuum. That is, the state argues as though petitioner were in a unique position, while the state and this court knows that this kind of claim has become common. This court probably has dozens of cases on related issues. Thus, any rule that the state urges and that

this court may create will have widespread consequences. Should the state's view prevail, petitioner contends the consequences could be potentially devastating.

This leads to the second and third points, which are difficult to argue discretely. Of course petitioner does not oppose contemporaneous objection or motions to correct sentence, although experience has shown that the 30-day time limit has not been successful in presenting the majority of sentencing errors to the trial courts. The problem is that a defendant such as petitioner has an attorney who missed the error at the imposition of sentence and in all likelihood never saw the written judgment and sentence within 30 days, or if he or she did, again failed to notice the error. The question then is what is to be done for the indigent defendant whose facially-apparent sentencing error passes unnoticed for more than 30 days? It appears that the Fifth District is content that the answer be "nothing." Maddox v. State, 708 So.2d 617 (Fla. 5th DCA 1998) (en banc), review granted, no. 92,805 (Fla. July 7, 1998). At least nothing is to be done on direct appeal.

That leaves potentially a 3.800 or a 3.850 motion, assuming that some errors will not be considered waived for not having been raised on direct appeal. The third point is that the problem with post-conviction motions, especially for indigent defendants, and undersigned believes this in fact is an ulterior motive of the state's, is that there is no right to counsel on

such motions. According to the state's plan, there-for, when the defendant **does** have counsel - on direct appeal - his attorney will be prohibited from raising facially-apparent sentencing errors which can be resolved by the written record and require no evidentiary hearing. Then after direct appeal is over, the poor, uncounseled, unadvised, perhaps uneducated or even illiterate defendant will be left to his own devices to file a post-conviction motion.

It is reasonable that sentencing errors should be raised first in the court that can correct them directly, and save the back and forth and record preparation that appeal requires. That goal can be accomplished without the misguided time limit of Rule 3.800(b). In 1996, the Appellate Rules Committee of the Florida Bar proposed a rule which would have permitted appellate counsel to raise sentencing errors in the circuit court before the initial brief was filed.¹ This court rejected that suggestion and adopted Rule 3.800(b) instead. Amendments to Florida Rule of Appellate Procedure 9.020(g) & Florida Rule of Criminal Procedure 3.800, 675 So.2d 1374 (Fla.1996); see also Amendments to the Florida Rules of Appellate Procedure, 696 So.2d 1103 (Fla. 1996) (noting time for filing motion extended from 10 to 30 days).

If sentencing errors should be raised first in the circuit

court, then let the circuit court have concurrent jurisdiction during the pendency of direct appeal, as the court presently does for motions under Rule 3.800(a). Rule 9.600, Fla.R.App.P. Moreover, conserving scarce resources, assuming arguendo that is the state's goal, cannot override a criminal defendant's right to procedural due process. Further, it would conserve judicial resources only if one assumes that post-conviction motions will not be filed. Unfortunately, since the typical defendant will be pro se, that assumption may be correct, but the result would be unfair and unjust.

CONCLUSION

Based on the facts of this case, the rules and statutes cited, the constitutional principles, case law and legal argument presented, petitioner respectfully requests that this Court answer the certified question in the affirmative, disapprove of the decision of the First District Court of Appeal, and remand this case to that court for further consideration.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to James W. Rogers, Assistant Attorney General, by delivery to The Capitol, Plaza Level, Tallahassee, Florida; and a copy has been mailed to petitioner, on this _____ day of February, 1999.

CAROL ANN TURNER
IN THE SUPREME COURT OF FLORIDA

ROBERT J. WRIGHT,

Petitioner,

v.

CASE NO. 94,541

STATE OF FLORIDA,

Respondent.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTEENTH JUDICIAL CIRCUIT,
IN AND FOR GULF COUNTY, FLORIDA

REPLY BRIEF OF PETITIONER

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