IN THE SUPREME COURT OF FLORIDA

MICHAEL JEROME MCCRAY,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 94,640

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, Michael Jerome McCray, 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", “III”, and “IV” will refer to the transcript of the trial court's proceedings as designated on the front cover of each volume; "IB" will designate the Initial Brief of Petitioner. Each symbol will be followed by the appropriate page number in parentheses.

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?

Petitioner was convicted of possession of cocaine, and the trial court imposed costs in the amount of $100.00 to the crime laboratory without citing the statutory basis, and a $200.00 lien for the services of the public defender. Because the failure to individually pronounce each costs is not fundamental error, petitioner's failure to object to the costs 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] Petitioner was sentenced on December 12, 1996, (IV.192-196), and therefore the Reform Act applies to petitioner'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

[1] In Locke v. State, 719 So.2d 429 (Fla. 1st DCA 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.

> direct appeal and collateral review be fully enforced by the courts of this state.

§ 924.051(8), Fla. Stat. (Supp.1996).

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. (Supp.1996). 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. (Supp.1996).

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 lien was not preserved for appellate review. Petitioner did not object to the imposition of the "CLTF" cost at the sentencing hearing, (IV.195-196), nor did petitioner file a Rule 3.800(b) motion in the trial court to appraise the trial court of the alleged error in his sentence. Section 893.13(8)(b), Florida Statute (1995), authorizes the assessment of fees for the crime laboratory trust fund. Therefore, had appellant objected in the trial court or filed a Rule 3.800(b) motion to correct his sentence, the trial court could have amended the judgment and sentence and cited Section 893.013(8)(b), which is the statute authorizing the $100.00 "CLTF" cost. However, appellant failed to do so.

Petitioner also had notice that the public defender's lien could be imposed because the affidavit of insolvency which he signed on July 10, 1996, stated that:

> Affiant further says that he has been informed that a lien (a charge) for the value of the services rendered him by the Public Defender, may be imposed by law on any property he now has, or may hereafter have, in the State of Florida.

(I.5). At the sentencing hearing the trial court asked defense counsel what type of lien was he requesting, and defense counsel responded that he was asking for a $200.00 lien. (IV.196). Therefore, the trial court imposed a $200.00 lien. (IV.196). However, petitioner did not object or request that he be given a

hearing to contest the amount of the lien, nor did petitioner file a Rule 3.800(b) motion. Thus, petitioner failed to preserve these issues for appellate review.

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

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[2]This 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).

defendant has not preserved the issue for appellate review and will not be entitled to reversal of the costs. See Maddox at 621 (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; Gains v. State, 23 Fla. L. Weekly D2645 (Fla. 2d DCA Dec. 2, 1998)(holding that it "will not treat erroneous costs, conditions of probation, or public defender liens as fundamental error now that counsel has an additional thirty days in which to object and preserve any error within the written sentencing documents."). 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 which the trial court imposed in the case at bar were statutory authorized. Section 893.13(8)(b), Florida Statute (1995), provides that:

> **The court may assess** any defendant who pleads guilty or nolo contendere to, or is convicted of, a violation of any provision of this section, without regard to whether adjudication was withheld, in addition to any fine and other penalty provided or authorized by law, **an amount of $100, to be paid to the clerk of the court, who shall forward it to the Operating Trust Fund of the Department of Law Enforcement to be used by the statewide criminal analysis laboratory system for the purposes specified in Sec. 943.361**.

(Emphasis added.) Section 27.56, Fla. Stat. (Supp.1996), authorizes the court to impose a public defender lien. Thus, the costs and fines imposed in this 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, 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, 714 So.2d 429 (Fla. 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 in this case was not fundamental error. Therefore, petitioner did not preserve 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 February, 1999.

Trisha E. Meggs
Attorney for the State of Florida

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IN THE SUPREME COURT OF FLORIDA

MICHAEL JEROME MCCRAY,
Petitioner,
v.
STATE OF FLORIDA,
Respondent.

CASE NO. 94,640

APPENDIX

McCray v. State, Case No. 96-04950 (Fla. 1st DCA Dec. 28, 1998)

L 97-1-1176
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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.

MICHAEL JEROME McCRAY,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 96-4950

Opinion filed December 28, 1998.

An appeal from the Circuit Court for Duval County. Judge John D. Southwood.

Nancy A. Daniels, Public Defender and Fred Parker Bingham II, Assistant Public Defender, Tallahassee, for Appellant.

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

PER CURIAM.

AFFIRMED. We certify to the Florida Supreme Court, as a matter of great public importance, the same question that was certified in Locke v. State, 23 Fla. L. Weekly D2399 (Oct. 21, 1998).

BARFIELD, C.J., JOANOS and ALLEN, JJ., CONCUR.