

ORIGINAL

IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
APR 12 1999
CLERK SUPREME COURT
By *[Signature]*
Chief Deputy Clerk

DONNIE KEITH SASSNETT,

Petitioner,

v.

CASE NO. 94,812

STATE OF FLORIDA,

Respondent.

REPLY BRIEF OF PETITIONER

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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ARGUMENT

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WHETHER THE FAILURE OF THE TRIAL COURT TO ORALLY PRONOUNCE EACH STATUTORILY AUTHORIZED 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 (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 sentencing 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-6)) 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.

The state even claims the present system provides "comprehensive, **fail-safe** remedies" (AB-4 (emphasis added)). The state seems to have no sense of irony that a supposedly "fail-safe" system has resulted in dozens and potentially hundreds or even thousands of direct appeals and appeals to this court. If only the system were failsafe, this appeal and many like it would not be before the court.

Petitioner wishes to make three points. First, as noted above, the state is disingenuous in arguing this case as though in a vacuum. The state argues as though petitioner were in a unique position, while the state and this court know that this kind of claim has become common. This court probably has dozens or more 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, peti-

tioner 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, therefore, 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

¹As part of a revision in 1996, the Appellate Rules Committee of the Florida Bar proposed the following amendment to Rule 9.140:

(d) **Sentencing Errors.**

(1) A party may not raise a sentencing error on appeal unless the alleged error has first been brought to the attention of the lower tribunal:

(A) at the time of sentencing; or

(B) by motion pursuant to Florida Rule of Criminal Procedure 3.800(b); or

(C) pursuant to the procedure set forth in rule 9.140(e)

(e) **Notice of Sentencing Error.** Any sentencing error not previously brought to the attention of the trial court may be raised on appeal in the following manner:

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

(1) At any time prior to filing their initial brief, parties may file a notice of sentencing error with the court. The notice shall state that the error has not been previously brought to the attention of the trial court and shall specify with particularity the alleged error and the grounds therefor. A copy of relevant portions of the record shall be appended to the notice. Copies of the notice shall be served on the state attorney, the Attorney General, and trial and appellate counsel for defendants.

(2) When such notice has been filed, the court shall enter an order directing the lower tribunal to consider the alleged error. The court's order shall specify a time limit for the lower tribunal to act which shall not exceed 60 days from the date of the order.

(3) The lower tribunal's order on the alleged error shall be reviewable in the pending direct appeal.

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 12 day of April, 1999.

for K. Stover

CAROL ANN TURNER

FILED

SID J. WHITE

APR 19 1999

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

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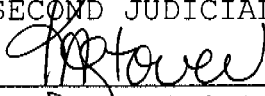
Respondent.

CERTIFICATE OF FONT AND TYPE SIZE

This brief was prepared using Courier New 12.

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, this 19 day of April, 1999.



KATHLEEN STOVER