025

IN THE SUPREME COURT OF FLORIDA

STANLEY RIDER,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent,

DCA CASE NO. 98-850
CASE NO. 95,060

ON DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT

PETITIONER'S JURISDICTIONAL BRIEF

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

ROSEMARIE FARRELL
ASSISTANT PUBLIC DEFENDER
Florida Bar Number 0101907
112 Orange Avenue, Suite A
Daytona Beach, Florida 32114
Phone: (904) 252-3367

ATTORNEY FOR PETITIONER

TABLE OF CONTENTS

TABLE OF CITATIONS

PAGE NO.

CASES CITED:

OTHER AUTHORITIES:

STATEMENT OF THE CASE AND FACTS

Based upon a jury verdict, the Petitioner was adjudicated guilty of violation of probation, and of two counts of lewd and lascivious assault on a child. (T 238) On March 17, 1998, at sentencing before Judge William C. Johnson, Jr., the Petitioner's probation was revoked in 96-33513 and he was sentenced to twenty four months in prison with credit for three hundred eighty three days time served. (R 1-17, 4-5; 42-43). The Petitioner was also adjudicated guilty in 97-32215 of two counts of lewd and lascivious assault upon a child, second degree felony violations of Section 800.04, Florida Statutes (1997). (R 5, 90-91)

In mitigation of sentence, defense counsel explained that although the State had offered the Petitioner a plea bargain of nine and one half years, the Petitioner could not accept the offer. Rather, because he had maintained his innocence, the Petitioner had gone to trial. (R 5-6) Counsel referred to the less-than compelling case against his client, which had been full of inconsistencies, and noted that the presentencing investigation report recommendation had been for a concurrent sentence of ten years in prison to be followed by probation. (R 5-6)

The Petitioner was sentenced to fifteen years in prison with

credit for three hundred and eighty three days time served on count one (concurrent to 96-33513), to be followed by fifteen years probation on count two. (R 7, 92-95; 96-100) New standard conditions of probation requiring registration as a sex offender, imposing a mandatory curfew, and restricting where the Petitioner might live and work following his release from prison, were read. (R 8-10; 98-99)

As required by Section 948.03(5)a)7, Florida Statutes, the following was among the conditions of probation:

> (15) (g) You shall not view or possess any obscene, pornographic or sexually stimulating visual or auditory material, including telephone, electronic media, computer programs or computer services that are relevant to deviant behavior patterns.

(R 10, 11, 98)

Timely appeal was taken raising issues of sufficiency of the evidence, violation of state and federal constitutional rights of the accused at trial, and the unconstitutionality of the statutory condition of probation, due to its overly broad proscriptions upon the exercise of activities protected by the First Amendment of the United States Constitution. In an opinion issued on December 23, 1998, the Fifth District Court of Appeal affirmed the judgment and sentence of the trial judge.

Rider v. State, 24 Fla. L. Weekly D50 (Fla. 5th DCA December 23, 1998). The opinion rejected the arguments and authorities by the Petitioner that the referenced statutory condition of probation was overly broad, finding that since no objection to the condition was made below, it was not preserved for appellate review. ***Id.***, ***citing Maddox v. state***, 708 So.2d 617 (Fla. 5th DCA 1998), ***rev. granted***, 718 So.2d 169 (Fla. 1998); ***Maxlow v. State***, 636 So.2d 548 (Fla. 2d DCA 1994). ***Maddox*** holds that the Criminal Appeal Reform Act as codified in Section 924.051, Florida Statutes (1996) has eliminated the concept of fundamental error at least as it had been previously applied to the sentencing context. **Id** at 619. ***Maxlow*** held that a vagueness challenge to a condition requiring no contact with the victim had been waived since it had not been raised with the trial court when it had originally been imposed, or through a motion to strike. ***Id***. at 549. Petitioner's motion for rehearing, rehearing en banc, and certification was denied on February 3, 1999.

The Petitioner, relying upon ***Thornhill v. Alabama***, 310 U.S. 88 (1940); ***State v. Barnes***, 686 So.2d 633 (Fla. 2d DCA 1996) ***rev. denied***, 695 So.2d 698 (Fla.), ***cert. denied***, 118 S.Ct. 257 (1997); ***Ladd v. State***, 23 Fla. L. Weekly D1726 (Fla. 1st DCA July 20,

1998); ***Trushin v. State***, 425 So.2d 1126 (Fla. 1982); and ***Jollie v. State***, 405 So.2d 418 (Fla. 1981), filed his Notice to Invoke the Discretionary Jurisdiction of this Court on March 5, 1999. This brief on jurisdiction follows.

SUMMARY OF ARGUMENT

The decision of the district court, by citing as controlling authority a case pending review in this Court, directly and expressly conflicts with decisions of this Court or other district courts of appeal on the same issue of law. This express conflict concerns the issue of whether or not fundamental sentencing error must be preserved in order to be subject to appellate review. As the merits of the instant appeal concern the facially unconstitutional prohibitions within the statutory condition of probation, upon freedom of speech protected by the First Amendment of the United States Constitution, the District Court of Appeal opinion in the case ***sub judice*** directly conflicts with other federal, state, and district court of appeal authority.

ARGUMENT

THE DECISION OF THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT, IN ***RIDER V. STATE***, 24 Fla. L. Weekly D50(Fla. 5th DCA December 23, 1998), EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF THE UNITED STATES SUPREME COURT, THE SUPREME COURT OF FLORIDA, AND OTHER DISTRICT COURTS OF APPEAL.

On appeal, the Petitioner challenged the statutory condition of probation which prohibited the viewing, owning, or possessing of "any obscene, pornographic, or sexually stimulating visual or auditory material, including telephone, electronic media, computer programs or computer services that are relevant to deviant behavior pattern," as overly broad restriction of constitutionally protected behavior, and therefore unconstitutional "on its face." Fla. Stat. Section 948.03(5)(a)7 (1997).

The opinion of the Fifth District in the instant case cited two cases as controlling authority for its holding that the overly broad prohibitions on speech required by Fla. Stat. Section 948.03(5)(a)7 are not preserved for review on appeal: ***Maddox v. State***, 708 So.2d 617 (Fla. 5th DCA 1998), which case is currently pending review by this Court, and ***Maxlow v. State***, 636 So.2d 548 (Fla. 2d DCA 1994), which case deals with an

inapposite, unpreserved non-facial challenge to a condition of probation. ***See Ladd v. State***, 23 Fla. L. Weekly D1726 (Fla. 1st DCA July 20, 1998) (while the constitutionality of a statute on its face may be raised for the first time on appeal, the constitutional application of a statute to a particular set of facts must first be raised in trial court).

In ***Maddox***, in an ***en banc*** opinion, the Fifth District Court of Appeal held that The Criminal Appeal Reform Act abolished the concept of fundamental error in the sentencing context. ***Id.***; Fla. Stat. Section 924.051 (1996).

The issue in the instant case concerns a challenge to the facial validity of a statute due to its unconstitutional overbreadth, which federal and State authority holds can be raised for the first time on appeal. ***See Trushin v. State***, 425 So.2d 1126 (Fla. 1982) (the facial validity of a statute, including an assertion that the statute is infirm because of overbreadth, can be raised for the first time on appeal); ***State v. Barnes***, 686 So.2d 633 (Fla. 2d DCA 1996) (the doctrine of overbreadth applies only to legislation which is susceptible of application to conduct protected by the First Amendment of the United States Constitution); ***Thornhill v. Alabama***, 310 U.S. 88

(1940) (the existence of a penal statute which sweeps within its ambit activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press, and which readily lends itself to harsh and discriminatory enforcement...results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview).

By affirming on the authority of ***Maddox***, the Fifth District Court of Appeal has applied its holding that there is so longer any fundamental error in the sentencing context, to intrusions upon first amendment rights safeguarded by the United States Constitution, and is in direct conflict with corresponding federal and state authority. ***Ladd v. State., supra; Trushin v. State***, ***supra.; State v. Barnes, supra.; and Thornhill v. Alabama. supra.***

Maddox v. State, supra, is currently pending review by this Court. Therein, the petitioner has argued that that decision conflicts with ***State v. Hewitt***, 702 So.2d 633 (Fla. 1st DCA 1977); ***Chojnowski v. State***, 705 So.2d 915 (Fla. 2d DCA 1997); ***Pryor v. State***, 704 So.2d 217 (Fla. 3d DCA 1998) and ***Callins v. State***, 698 So.2d 883 (Fla. 4th DCA 1997). More recently, the case also conflicts with ***Mizell v. State***, 23 Fla. L. Weekly D1978

(Fla. 3d DCA August 26, 1998).

Pursuant to ***Jollie v. State***, 405 So.2d 418 (Fla. 1981), where a case is cited by the district Court as controlling authority and that case is currently pending review by the Supreme Court, conflict jurisdiction will lie.

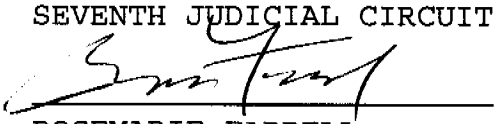
Thus, this Court's discretionary review should be exercised and the decision of the Fifth District Court of Appeal reversed.

CONCLUSION

BASED UPON the cases, authorities, and policies cited herein, the petitioner requests that this Honorable Court accept jurisdiction of this cause, vacate the decision of the District Court of Appeal, Fifth District, and decide the appeal on the merits.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT



ROSEMARIE FARRELL
ASSISTANT PUBLIC DEFENDER
Florida Bar No. 0101907
112 Orange Avenue - Suite A
Daytona Beach, Florida 32114
(904) 252-3367

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to: The Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Blvd., Fifth Floor, Daytona Beach, FL 32118, via his basket at the Fifth District Court of Appeal, and mailed to: Stanley Rider, this 15th day of March, 1999.

ROSEMARIE FARRELL
ASSISTANT PUBLIC DEFENDER

STATEMENT CERTIFYING FONT

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

ROSEMARIE FARRELL
Assistant Public Defender

IN THE SUPREME COURT OF FLORIDA

STANLEY RIDER,	)	
	)	
Petitioner,	)	
	)	
vs.	)	DCA CASE NO. 98-850
	)	CASE NO.
STATE OF FLORIDA,	)	
	)	
Respondent,	)	
	)	

APPENDIX

Criminal law—Lewd and lascivious assault on child—No error in denial of motion for judgment of acquittal where there was substantial, competent evidence which identified defendant as the assailant and which addressed the fact that the assault had taken place—Sequestration of witnesses—No showing of prejudice as result of allowing victim's mother, who was exempt from rule of sequestration, to testify after hearing testimony of victim—Claim that condition of probation was overly broad not preserved for appellate review by objection in trial court

STANLEY RIDER, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 98-850. Opinion filed December 23, 1998. Appeal from the Circuit Court for Volusia County, William C. Johnson, Jr., Judge. Counsel: James B. Gibson, Public Defender, and Rosemarie Farrell, Assistant Public Defender, Daytona Beach, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Steven J. Guardiano, Assistant Attorney General, Daytona Beach, for Appellee.

(ORFINGER, M., Senior Judge.) Appellant was charged with two counts of lewd and lascivious assault on a child and convicted after a jury trial. An earlier probation was revoked, and he was sentenced to fifteen years in state prison followed by fifteen years of probation. He appeals, raising four points, two of which involve the issue of witness sequestration, which we consider together. Finding no error, we affirm.

(a) Sufficiency of the Evidence

Appellant was visiting in the home of Andrew Nichols, a friend. Residing with Nichols at the time was a woman and her two children, and another male houseguest. The adults spent the evening visiting some bars and drinking, then returned home and drank some more. The children had been in bed and asleep when the adults returned home. The twelve year old child victim testified that appellant came into her room, got into her bed and started touching her. She stated that he took off his pants and underwear, took off her clothes, laid on top of her and put his penis in her vagina. He then left the room, but shortly returned, and as the child was trying to get up, made her get back into the bed, rolled her over onto her stomach and "put his penis into [her] butt." The child told no one about this until the next day when she told it to Nichols' other friend who convinced her to tell her mother.

Appellant admitted to "crashing" in the bed in which the child slept, but testified that he was fully clothed and never touched the child. A physician who examined the child the day the alleged attack was reported, testified that there was a two inch tear in the child's vagina, the area was bloody and tender, and there was evidence of dried secretions. The outside area of the thighs and buttocks showed a lot of redness and irritation. The doctor testified that these findings were of rather recent origin, within the past twenty-four hours.

Appellant contends that the trial court erred in not granting his motion for judgment of acquittal. He asserts that "[e]ven in a light most favorable to the state, the conflict-laden testimony of a twelve year old child, unsupported by any other evidence, and contradicted by other facts, is too flimsy a basis upon which to submit a case to a jury." However, there was substantial, competent evidence admitted which identified appellant as the assailant and which addressed the fact that the assault had taken place. As was said in *Hufham v. State*, 400 So. 2d 133 (Fla. 5th DCA 1981):

> "Appellant says that the testimony of the victim is conflicting and is not credible. . . but he addresses this issue to the wrong tribunal. It was for the jury to determine the credibility of the witnesses and the victim, as well as the defendant who testified here. Once competent substantial evidence has been submitted on each element of the crime, it is for the jury to evaluate the evidence and the credibility of the witnesses . . . (citations omitted).

400 So. 2d at 135, 136.

(b) Sequestration of Witnesses

At the commencement of the trial, the court granted appellant's request and invoked the rule of sequestration of witnesses. Although appellant acknowledged the child's mother to be exempt from the rule, Sec. 90.616(2)(d), Fla. Stat. (1997), appellant nevertheless requested that the court require the mother to testify prior to the child's testimony, but when the state objected, the court denied the request. Therefore, says appellant, he was prejudiced by the mother's ability to hear the child's testimony before she, the mother, testified. Although appellant makes this bold assertion of prejudice, none is demonstrated.

A trial court has broad discretion to determine the order of presentation of evidence and witnesses. *Quarrells v. State*, 641 So. 2d 490 (Fla. 5th DCA 1994). Appellant contends that it was legal error to deny his sequestration request, but the rule of sequestration of witnesses is not to be applied as a strict or absolute rule of law, and the trial court has discretion to determine whether a particular witness should be excluded from the courtroom during the trial. *Burns v. State*, 609 So. 2d 600 (Fla. 1992). No abuse of the court's discretion is shown.

(c) Condition of Probation

As required by sec. 948.03(5)(a)7, Fla. Stat. (1997), the court imposed the following condition of probation:

> "You shall not view, own or possess any obscene, pornographic, or sexually stimulating visual or auditory material including telephone, electronic media, computer programs or computer services that are relevant to deviant behavior pattern."

Appellant contends that this provision is overly broad and could result in violation of probation for nonsubstantial and unintentional activities. Nonetheless, no objection to this condition was made below, thus it was not preserved for appellate review. *See Maddox v. State*, 708 So. 2d 617 (Fla. 5th DCA 1998), *rev. granted*, 718 So. 2d 169 (Fla. 1998); *Maxlow v. State*, 636 So. 2d 548 (Fla. 2d DCA 1994) (claim that condition of probation was invalid because too vague was waived by not raising it in trial court either when condition was imposed or by motion to strike).

AFFIRMED. (DAUKSCH and THOMPSON, JJ., concur.)

* * *

Torts—Contracts—Securities—Action by receiver for insolvent life insurance company alleging that defendants misrepresented or failed to mention nature and riskiness of collateralized mortgage obligations and their suitability as investments for life insurance company—Error to dismiss tort claims against defendants with whom plaintiff did not have a contractual relationship on ground that claims were barred by economic loss rule—Error to dismiss unjust enrichment claims against parties with whom plaintiff had no contract on ground that plaintiff had adequate legal remedy—Court properly entered summary judgment on breach of contract and breach of warranty claims in favor of defendant with whom plaintiff was not in privity of contract—Error to dismiss fraud claims on ground that plaintiff did not adequately plead fraud—Fraud claim can be based on misrepresentations as to past experience or promises of future action where at the time the statement was made the maker had no intent to perform—Error to dismiss Florida Securities Act claim as barred by statute of limitations—Issue as to statute of limitations is not resolvable on motion to dismiss unless from the face of the complaint the application of the defense is apparent

DONNA LEE WILLIAMS, etc., Appellant, v. BEAR STEARNS & CO., etc., et al., Appellees. 5th District. Case Nos. 97-2404 & 97-2405. Opinion filed December 23, 1998. Appeal from the Circuit Court for Orange County, Walter Komanski, Judge. Counsel: Peter N. Smith and Leon Handley and Ronald L. Harrop of Gurney & Handley, P.A., Orlando, for Appellant. Peter Carr and Bernard H. Dempsey, Jr. of Dempsey & Sasso, Orlando, and Gary G. Staab and Scott S. Balber of Morgan, Lewis & Bockius, New York, for Appellees Charles Ramsey and Frank R. Ramirez. Michael R. Levin and Suzanne M. Barto of Rumberger, Kirk & Caldwell, P.A., Orlando, for Appellee Franklin Resources Incorporated. No Appearance for Appellee Bear Stearns & Co., Inc.

(GOSHORN, J.) In this consolidated appeal, Donna Lee Williams ("Appellant"), in her capacity as the insurance commissioner for the State of Delaware and the appointed receiver for National Heritage Life Insurance Company ("NHL"), appeals several orders disposing of NHL's claims against Appellees Charles Ramsey, Frank Ramirez, and Franklin Resources, Inc. ("Franklin"). We affirm in part and reverse in part.

NHL, an Orlando-based insurance company, hired various entities to manage its investment portfolio in the early 1990s, beginning with Bear Stearns and Company, Inc. ("Bear Stearns") in 1991. While Bear Stearns was its advisor, NHL first acquired in its portfolio investments known as "collateralized mortgage obligations" or "CMOs."[1] During 1992, NHL sought investment advice from MMAR Group, for whom Ramsey and Ramirez worked. Allegedly, Ramsey and Ramirez recommended CMOs for

*617 708 So.2d 617

23 Fla. L. Weekly D720

David Lavern MADDOX, Appellant,
v.
STATE of Florida, Appellee.

No. 96-3590.

District Court of Appeal of Florida,

Fifth District.

March 13, 1998.

After entering plea of nolo contendere to burglary charge, defendant was sentenced in the Circuit Court, St. Johns County, Peggy E. Ready, Acting Circuit Judge, to five years' probation and was assessed costs. Defendant appealed, challenging certain costs imposed without statutory authority. The District Court of Appeal, Griffin, C.J., held that defendant failed to preserve challenge of such costs for review on direct appeal.

Affirmed.

Thompson, J., concurred in part and dissented in part with separate opinion in which Dauksch, J., concurred.

1. CRIMINAL LAW ⚖1042
110 ----
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1042 Sentence or judgment.

[See headnote text below]

1. CRIMINAL LAW ⚖1044.1(1)
110 ----
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1044 Motion Presenting Objection
110k1044.1 In General; Necessity of Motion
110k1044.1(1) In general.

Fla.App. 5 Dist. 1998.

Defendant who did not contest assessment of unauthorized costs at sentencing on plea of nolo contendere or in motion to correct sentence failed to preserve challenge of such costs for review on direct appeal. West's F.S.A. § 924.051; West's F.S.A. RCrP Rule 3.800(b).

2. CRIMINAL LAW ⚖1042
110 ----
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1042 Sentence or judgment.

[See headnote text below]

2. CRIMINAL LAW ⚖1045
110 ----
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1045 Necessity of ruling on objection or motion.

Fla.App. 5 Dist. 1998.

No sentencing error may be considered in direct appeal unless such error has been preserved for review, that is, presented to and ruled on by trial court, regardless of whether error is apparent on face of the record or whether defendant went to trial or entered a plea. West's F.S.A. § 924.051; West's F.S.A. RCrP Rule 3.800(b); West's F.S.A. R.App.P.Rule 9.140(b)(2)(B)(iv).

James B. Gibson, Public Defender, and Andrea J. Surette, Assistant Public Defender, Daytona Beach, for Appellant.

No Appearance for Appellee.

EN BANC

GRIFFIN, Chief Judge.

We have elected to hear this *Anders* (FN1) case en banc to clarify the scope of section 924.051, Florida Statutes (1996), which was enacted as part of the Criminal Appeal Reform Act. *See* Ch. 96-248, Laws of Florida. At issue is whether, in a direct appeal, this court may strike costs imposed without statutory authority where the cost issues have never

been presented to the trial court. For the reasons which follow, we find the cost issues have not been preserved for review, and we affirm Maddox's sentence.

Maddox entered a plea of nolo contendere to burglary of a structure, (FN2) preserving his right to appeal the trial court's order denying his motion to suppress. He preserved no other issues for appeal. (FN3) He was sentenced ***618** on December 3, 1996 to five years' probation, with the special condition that he serve 364 days in the county jail. He was also assessed a number of costs, including $1.00 for the police academy and $205 in court costs. Maddox did not contest the assessment of costs at the time he entered his plea, and he did not file a motion to correct his sentence under rule 3.800(b), although the latter two charges are improper. The $1.00 assessment for the police academy is no longer authorized by statute. *See Laughlin v. State,* 664 So.2d 61 (Fla. 5th DCA 1995); *see generally Miller v. City of Indian Harbour Beach,* 453 So.2d 107 (Fla. 5th DCA 1984) (explaining the history of the assessment). Additionally, section 27.3455, Florida Statutes (Supp.1996) limits to $200 the "additional court costs" which can be imposed by the trial court.

[1] In *Bisson v. State,* 696 So.2d 504 (Fla. 5th DCA 1997), this court addressed an analogous cost issue, despite the failure to file a rule 3.800(b) motion or otherwise preserve the issue for review, on the basis that the cost assessment was illegal and the error therefore "fundamental." We now conclude, however, that these issues are not reviewable on appeal unless the error is preserved.

In a direct appeal from a conviction or sentence in a nonplea case, the Criminal Appeal Reform Act permits review of only those errors which are (1) fundamental or (2) have been *preserved* for review. § 924.051(3), Fla. Stat. The word "preserved," as used in the statute, means that the issue has been presented to, and ruled on by the trial court. § 924.051(1)(a), Fla. Stat. Where a plea of guilty or nolo contendere has been entered, the right of appeal is limited to legally dispositive issues which have been *reserved* for appeal. § 924.051(4), Fla. Stat. As to this latter category, the Florida Supreme Court quickly held that, in order for this statute to be constitutional, it must be construed "to permit a defendant who pleads guilty or nolo contendere without *reserving* a legally dispositive issue to nevertheless appeal a sentencing error, providing it has been timely *preserved* by motion to correct the sentence." *See Amendments to the Florida Rules of Appellate Procedure,* 685 So.2d 773, 775 (Fla.1996) . The reference to "sentencing errors" appears to include those that are unlawful, as well as those that are illegal, despite the Supreme Court's reference in its opinion to *Robinson v. State,* 373 So.2d 898 (Fla.1979). (FN4)

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 (such as nonfundamental sentencing errors apparent on the face of the record), (FN5) 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. In essence, the court created a sort of post-hoc device for preserving such sentencing errors for appeal. Fla. R.Crim. P. 3.800(b). Any error not complained of at the time of sentence could be complained of in the trial court after sentencing, if done in accordance with the new rule. Thus, at approximately the same time section 924.051 became effective, the Florida Supreme Court, by emergency amendment to Florida ***619** Rule of Criminal Procedure 3.800, permitted the filing of a motion to correct a sentence entered by the trial court, provided the motion was filed within ten days (now thirty) of the date of rendition of the sentence. *See Amendments to Florida Rule of Appellate Procedure 9.020(g) and Florida Rule of Criminal Procedure 3.800,* 675 So.2d 1374 (Fla.1996). Only then, if not corrected by the trial court, could it be raised on appeal because it had been "preserved." Although rule 3.800 by its terms traditionally had been limited to illegal sentences, subsection (b) of the rule, as amended, more broadly applies to any sentencing error. 675 So.2d at 1375. (FN6) The Rule 3.800(a) procedure remains available to correct an illegal sentence at any time.

The court also clarified in the amendments to the Florida Rules of Appellate Procedure that direct appellate review of any sentencing error in a nonplea case is prohibited if the issue has not first been presented to the trial court. 685 So.2d at 801. The amendments, which became effective January 1, 1997, provide:

(d) Sentencing Errors. A sentencing error may not be raised on appeal unless the alleged error has

first been brought to the attention of the lower tribunal:

(1) at the time of sentencing; or

(2) by motion pursuant to Florida Rule of Criminal Procedure 3.800(b).

Fla. R.App. P. 9.140(d). The amended appellate rules applicable to pleas of guilty or no contest similarly now limit the right of appeal to those sentencing errors which have been preserved for review. 685 So.2d at 799-800.

(2) Pleas. A defendant may not appeal from a guilty or nolo contendere plea except as follows:

(A) A defendant who pleads guilty or nolo contendere may expressly reserve the right to appeal a prior dispositive order of the lower tribunal, identifying with particularity the point of law being reserved.

(B) A defendant who pleads guilty or nolo contendere may otherwise directly appeal only

(i) the lower tribunal's lack of subject matter jurisdiction;

(ii) a violation of the plea agreement, if preserved by a motion to withdraw plea;

(iii) an involuntary plea, if preserved by a motion to withdraw plea;

(iv) a sentencing error, if preserved; or

(v) as otherwise provided by law.

Fla. R.App. P. 9.140(b)(2).

[2] The net effect of the statute and the amended rules is that *no* sentencing error can be considered in a direct appeal unless the error has been "preserved" for review, *i.e.* the error has been presented to and ruled on by the trial court. This is true regardless of whether the error is apparent on the face of the record. And it applies across the board to defendants who plead and to those who go to trial. As for the "fundamental error" exception, it now appears clear, given the recent rule amendments, that "fundamental error" no longer exists in the sentencing context. The supreme court has recently distinguished sentencing error from trial error, and has found fundamental error only in the latter context. *Summers v. State,* 684 So.2d 729, 729 (Fla.1996) ("The trial court's failure to comply with the statutory mandate is a sentencing error, not fundamental error, which must be raised on direct appeal or it is waived."); *Archer v. State,* 673 So.2d 17, 20 (Fla.) ("Fundamental error is '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.' "), *cert. denied,* --- U.S. ----, 117 S.Ct. 197, 136 L.Ed.2d 134 (1996). It appears that the supreme court has concluded that the notion of "fundamental error" should be limited to trial errors, not sentencing errors. The high court could have adopted a rule that paralleled the Criminal Appeal Reform Act, which would allow for review of fundamental errors in nonplea cases, but the court did not do so and made clear in its recent amendment to ***620** rule 9.140 that unpreserved sentencing errors cannot be raised on appeal.

The language of Rule 9.140(b)(2)(B)(iv) could not be clearer. And why should there be "fundamental" error where the courts have created a "failsafe" procedural device to correct any sentencing error or omission at the trial court level? Elimination of the concept of "fundamental error" in sentencing will avoid the inconsistency and illogic that plagues the caselaw and will provide a much-needed measure of clarity, certainty and finality. Even those who remain committed to the concept of "fundamental error" in the sentencing context would be hard pressed to identify errors at sentencing that are serious enough to require correction in the absence of objection at the trial level. The supreme court has concluded that the only type of sentencing error that is even "illegal" is a sentence that exceeds the statutory maximum. *Davis v. State,* 661 So.2d 1193, 1196. Yet, under the current statutory sentencing scheme, a sentence can exceed the maximum if warranted by the guidelines score. § 921.0014(1)(a), Fla. Stat. (1996). Here we are dealing with a $1 assessment and a $5 overcharge. If an improper $1 cost assessment is "fundamental error," then any sentencing error, no matter how minor, would be fundamental.

We recognize that the scope of our opinion will be affected by the definition given to the term "sentencing errors." Some errors which occur at sentencing might be categorized as due process

violations, *see Richardson v. State,* 694 So.2d 147 (Fla. 1st DCA 1997), a violation of the plea agreement, *see Green v. State,* 700 So.2d 384 (Fla. 1st DCA 1997), (FN7) or even clerical error. *See Johnson v. State,* 701 So.2d 382 (Fla. 1st DCA 1997); *Massey v. State,* 698 So.2d 607 (Fla. 5th DCA 1997). Additionally, fines and penalties are not always imposed as part of a defendant's sentence, but may constitute a civil penalty. *See, e.g., Bull v. State,* 548 So.2d 1103 (Fla.1989). All such errors, however, are properly regarded as "sentencing errors" within the meaning of section 924.051. Creating such multiple categories of errors which occur at sentencing also would result in the anomalies already seen in the current case law, wherein the courts (including this court) have reviewed minimal attorneys fees (FN8) and various cost assessments, (FN9) but refuse to review the wrongful imposition of a departure sentence or illegal habitualization without compliance with the dictates of section 924.051. *See Colligan v. State,* 701 So.2d 910 (Fla. 4th DCA 1997) (habitualization); *Cowan v. State,* 701 So.2d 353 (Fla. 1st DCA 1997) (departure sentence); *Johnson v. State,* 697 So.2d 1245 (Fla. 1st DCA 1997) (departure sentence); *Middleton v. State,* 689 So.2d 304 (Fla. 1st DCA 1997) (habitualization).

In view of our holding today, we must recede from several of our earlier opinions. As indicated, this court will no longer recognize fundamental error in the sentencing context, contrary to the statements made in *Medberry v. State,* 699 So.2d 857 (Fla. 5th DCA 1997), *Saldana v. State,* 698 So.2d 338 (Fla. 5th DCA 1997), *Rangel v. State,* 692 So.2d 277 (Fla. 5th DCA 1997), *Ortiz v. State,* 696 So.2d 916 (Fla. 5th DCA 1997) and *Bisson v. State,* 696 So.2d 504 (Fla. 5th DCA 1997). Nor will this court address illegal ***621** sentences on direct appeal, unless the issue has been preserved for review either by objection in the trial court or by means of a 3.800(b) motion for post-conviction relief. *Cf. Ortiz.* We stress, however, that rule 3.800(a) is always available to obtain collateral review of an illegal sentence. Moreover, where properly preserved for review, both unlawful and illegal sentences can be addressed on direct appeal, regardless of whether a plea is involved. *Cf. Robinson* (limiting right of appeal to illegal sentences); *Miller v. State,* 697 So.2d 586 (Fla. 1st DCA 1997); *Stone v. State,* 688 So.2d 1006, 1007-08 (Fla. 1st DCA 1997).

Given our interpretation of section 924.051, we necessarily disagree with contrary results reached by other district courts of appeal, particularly insofar as these courts have continued to recognize fundamental error in the sentencing context. *See, e.g., Chojnowski v. State,* 705 So.2d 915 (Fla. 2d DCA 1997); *Pryor v. State,* 22 Fla. L. Weekly D2500 (Fla. 3d DCA Oct.29, 1997); *Johnson,* 701 So.2d at 382-383; *Cowan,* 701 So.2d at 353; *Callins v. State,* 698 So.2d 883 (Fla. 4th DCA 1997). We also disagree that sentencing errors can be raised on direct appeal without preservation, simply because the sentence that results is illegal. *See, e.g., State v. Hewitt,* 702 So.2d 633 (Fla. 1st DCA 1997); *Sanders v. State,* 698 So.2d 377 (Fla. 1st DCA 1997). Finally, it seems clear that review under section 924.051 is broader than that permitted under *Robinson,* in that it extends to unlawful sentences, if properly preserved.

At the intermediate appellate level, we are accustomed to simply correcting errors when we see them in criminal cases, especially in sentencing, because it seems both right and efficient to do so. The legislature and the supreme court have concluded, however, that the place for such errors to be corrected is at the trial level and that any defendant who does not bring a sentencing error to the attention of the sentencing judge within a reasonable time cannot expect relief on appeal. This is a policy decision that will relieve the workload of the appellate courts and will place correction of alleged errors in the hands of the judicial officer best able to investigate and to correct any error. Eventually, trial counsel may even recognize the labor-saving and reputation-enhancing benefits of being adequately prepared for the sentencing hearing. Certainly, there is little risk that a defendant will suffer an injustice because of this new procedure; if any aspect of a sentencing is "fundamentally" erroneous and if counsel fails to object at sentencing or file a motion within thirty days in accordance with the rule, the remedy of ineffective assistance of counsel will be available. It is hard to imagine that the failure to preserve a sentencing error that would formerly have been characterized as "fundamental" would not support an "ineffective assistance" claim.

The defendant in this case was sentenced on December 3, 1996 after entering a plea of no contest. He did not contest the assessment of costs at sentencing, and he did not file a motion to correct

his sentence under rule 3.800(b). Thus, neither cost issue has been preserved for review and neither issue can be addressed on appeal.

AFFIRMED.

DAUKSCH, COBB, W. SHARP, GOSHORN, HARRIS, PETERSON and ANTOON, JJ., concur.

THOMPSON, J., concurs and dissents in part, with opinion, in which DAUKSCH, J., concurs.

THOMPSON, Judge, concurring in part, dissenting in part.

To the extent that the decision recedes from prior opinions of this court, I agree with the majority that cost assessments cannot be reviewed as fundamental error. *See Medberry; Rangel; Ortiz; Bisson.* However, I do not agree there is support for the statement, which I consider to be dictum, that the Florida Supreme Court has eliminated "fundamental error" in the sentencing context. This court cites *Summers* and *Archer* in support of this statement, but the cases stand for different principles.

In *Summers,* the supreme court answered a certified question dealing with juvenile sentencing. The issue before the court was whether a trial court's failure to consider the criteria of section 39.05(7)(c), Florida Statutes (1991) and contemporaneously reduce its ***622.** evaluations and findings to writing could be raised collaterally. The court, relying on its decision in *Davis v. State,* 661 So.2d 1193 (Fla.1995), held that absent a contemporaneous objection, "[T]he trial court's failure to comply with the statutory mandate is a sentencing error, not fundamental error, which must be raised on direct appeal or it is waived." *Summers,* at 729. *Davis* stands first for the principle that the failure of the trial court to file contemporaneous written reasons for a departure sentence which is within the statutory maximum is not an illegal sentence. *Id.* at 1196. Second, it stands for the principle that the failure of the trial court to file contemporaneous written reasons is not fundamental error if the sentence is within the statutory maximum. *Id.* at 1197.

Archer was a death penalty resentencing case. The issue on appeal relevant to this case was fundamental error as related to the failure of the trial court to give the reasonable doubt instruction to the resentencing jury. The defendant did not make a contemporaneous objection at trial and attempted to raise the issue for the first time on appeal. The supreme court held that the failure of the trial court to give a jury instruction defining reasonable doubt at the resentencing was not fundamental error. *Id.* at 20. Since the defendant did not object, review could only be granted if there was fundamental error. Repeating the definition of fundamental error from *State v. Delva,* 575 So.2d 643, 644-645 (Fla.1991) (quoting *Brown v. State,* 124 So.2d 481, 484 (Fla.1960)), the supreme court found no fundamental error because there is no constitutional requirement that a trial court define reasonable doubt. The definition of fundamental error is accurate, but in no manner supports the conclusion that the supreme court has done away with fundamental error in sentencing.

I agree the supreme court is narrowing the idea of fundamental error. *See e.g. J.B. v. State,* 705 So.2d 1376 (Fla.1998); *Davis.* In *J.B.,* the court held that there was no fundamental error at trial in the admission of a confession although there was no independent proof of corpus delicti. Although *J.B.* did not involve a sentencing error, it is obvious the supreme court is reexamining the fundamental error doctrine in Florida and is narrowing its application. However, I believe it is left to be seen whether the court will adopt, as does the majority, the rule that "no sentencing error can be considered in a direct appeal unless the error has been 'preserved' for review i.e. the error has been presented to and ruled on by the trial court. This is true regardless of whether the error is apparent on the face of the record." At this juncture, I do not think we can say that the supreme court has definitively eliminated fundamental sentencing error or direct review thereof. That statement must be made by the supreme court and must be unequivocal. Therefore, I agree with the holding on costs, but disagree with the statement that fundamental error no longer exists in the sentencing context. I would also certify this issue to the supreme court.

DAUKSCH, J., concurs.

FN1. *See Anders v. California,* 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967).

FN2. § 810.02, Fla. Stat. (1995).

FN3. As to the motion to suppress, we find no

error. *See Florida v. Bostick,* 501 U.S. 429, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991); *see also Popple v. State,* 626 So.2d 185 (Fla.1993); *Hosey v. State,* 627 So.2d 1289 (Fla. 5th DCA 1993), *review denied,* 639 So.2d 978 (Fla.1994).

FN4. It is likely that when *Robinson v. State,* 373 So.2d 898 (Fla.1979) was decided, the term "illegal sentence" was understood to have a somewhat broader meaning than later explained in *Davis v. State,* 661 So.2d 1193 (Fla.1995). In *Robinson,* the court held that a defendant who pleads guilty is permitted to appeal the *unreserved* issues of illegality of his sentence, subject-matter jurisdiction, the failure of the government to abide by a plea agreement, and the voluntary and intelligent character of the plea. The supreme court has now said that the statute must be construed to permit an appeal of all "sentencing errors," assuming those errors have been preserved for review. 685 So.2d at 775.

FN5. Under the court's prior decisions, an exception to the requirement of preservation of error was made for sentencing errors apparent on the face of the record, which were reviewable on direct appeal, even in the absence of a contemporaneous objection and regardless of whether the error was fundamental, since as to these errors the purpose of the contemporaneous objection rule was not present. *See generally State v. Montague,* 682 So.2d 1085 (Fla.1996) (stating that contemporaneous objection rule does not apply to sentencing errors apparent on face of record, and such errors may be raised for first time on appeal); *Davis v. State,* 661 So.2d at 1197; *cf. Taylor v. State,* 601 So.2d 540 (Fla.1992) (sentencing errors requiring resolution of factual matters not contained in record cannot generally be raised for first time on appeal).

***622** FN6. At the same time it amended rule 3.800 , the Florida Supreme Court also amended Florida Rule of Appellate Procedure 9.020(g) to toll the time for taking an appeal upon the filing of a motion to correct a sentence or order of probation. 675 So.2d at 1375.

FN7. The problem addressed in *Green* has now been corrected by the promulgation of Florida Rule of Criminal Procedure 3.170(*l*), which requires a motion to withdraw a plea where there has been a failure to abide by the terms of the plea.

FN8. *See, e.g., Louisgeste v. State,* 706 So.2d 29 (Fla. 4th DCA 1998), *Strickland v. State,* 693 So.2d 1142 (Fla. 1st DCA 1997), *Beasley v. State,* 695 So.2d 1313 (Fla. 1st DCA 1997), *Neal v. State,* 688 So.2d 392 (Fla. 1st DCA), *review denied,* 698 So.2d 543 (Fla.1997).

FN9. *Bowen v. State,* 702 So.2d 298 (Fla. 1st DCA 1997) (striking payment of $100 to the Drug Abuse Trust Fund and $100 to the Florida Crime Lab because order failed to cite statutory authority for these costs); *Jones v. State,* 700 So.2d 776 (Fla. 2d DCA 1997) (striking imposition of discretionary costs where costs were not orally pronounced at sentencing and the statutory bases for such were not otherwise indicated); *Fisher v. State,* 697 So.2d 1291 (Fla. 1st DCA 1997) (striking costs and fines which were imposed against defendant, but for which no statutory authority was cited); *Hopkins v. State,* 697 So.2d 1009 (Fla. 4th DCA 1997) (striking imposition of costs not orally announced at sentencing); *James v. State,* 696 So.2d 1268 (Fla. 2d DCA 1997) (striking investigative costs because they were imposed without request and without appropriate supporting documentation).

***548** 636 So.2d 548

19 Fla. L. Weekly D1031

Richard MAXLOW, Appellant,
v.
STATE of Florida, Appellee.

No. 93-00761.
District Court of Appeal of Florida,
Second District.

May 6, 1994.

Defendant appealed from order entered in the Circuit Court for Pinellas County, Claire K. Luten, J., revoking his probation. The District Court of Appeal held that: (1) evidence supported finding that defendant willfully and substantially violated probation condition that he have no contact with victim, but (2) trial court should not have revoked probation without entering written order setting forth specific violations found by court at revocation hearing.

Affirmed and remanded with directions.

1. CRIMINAL LAW ⇐1042
110 ----
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1042 Sentence or judgment.

[See headnote text below]

1. CRIMINAL LAW ⇐1044.1(1)
110 ----
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1044 Motion Presenting Objection
110k1044.1 In General; Necessity of Motion
110k1044.1(1) In general.
Fla.App. 2 Dist. 1994.
Claim that probation condition was invalid because it was too vague was waived by defendant as result of his failure to raise it with trial court either when condition was originally imposed or through motion to strike.

2. CRIMINAL LAW ⇐982.9(5)
110 ----
110XXIII Judgment, Sentence, and Final Commitment
110k982 Probation and Suspension of Sentence
110k982.9 Revocation
110k982.9(5) Evidence.
Fla.App. 2 Dist. 1994.
Evidence supported finding that defendant willfully and substantially violated probation condition that he have no contact with victim; both victim and her mother testified that they saw defendant drive down dead-end street on which their house was located and that defendant did not know anybody else who lived on street.

3. CRIMINAL LAW ⇐982.9(6)
110 ----
110XXIII Judgment, Sentence, and Final Commitment
110k982 Probation and Suspension of Sentence
110k982.9 Revocation
110k982.9(6) Notice and hearing.
Fla.App. 2 Dist. 1994.
In revoking defendant's probation, trial court should have entered written order setting forth specific violations found by court at revocation hearing.

4. CRIMINAL LAW ⇐982.9(6)
110 ----
110XXIII Judgment, Sentence, and Final Commitment
110k982 Probation and Suspension of Sentence
110k982.9 Revocation
110k982.9(6) Notice and hearing.
Fla.App. 2 Dist. 1994.
Where defendant entered plea of not guilty to violation of probation, order revoking probation had to reflect such plea.

***549.** Gregory L. Olney, III, of Meros, Smith & Olney, P.A., St. Petersburg, for appellant.

Robert A. Butterworth, Atty. Gen., Tallahassee, and Brenda S. Taylor, Asst. Atty. Gen., Tampa, for appellee.

PER CURIAM.

Richard Maxlow appeals the revocation of his probation. He raises several contentions, two of which we find to have merit.

[1] First, Maxlow contends the condition he was found to have violated--that he have no contact with the victim--is invalid because it is too vague. We hold that Maxlow waived this issue by not raising it with the trial court either when the condition was originally imposed or through a motion to strike. Medina v. State, 604 So.2d 30 (Fla. 2d DCA 1992).

[2] Second, Maxlow contends in the alternative that his actions did not constitute a willful and substantial violation of the condition. We disagree. The victim and her mother testified that they saw Maxlow drive down the dead-end street on which their house is located and that he does not know anybody else who lives on that street. Although Maxlow testified that he did not drive down the street, the veracity of the witnesses' testimony was for the trial court to determine, and we hold that the court did not abuse its discretion in this regard.

[3] Third, Maxlow contends, and the state agrees, that the trial court erred in revoking his probation without entering a written order setting forth the specific violations the court found he had committed. Clark v. State, 510 So.2d 1202 (Fla. 2d DCA 1987). We agree and remand for entry of a written order conforming to the court's pronouncements at the revocation hearing.

[4] Finally, Maxlow notes that his order of probation mistakenly indicates that he pled guilty to the violation charges. The record contains a plea of not guilty entered by Maxlow subsequent to the entry of the original affidavit of violation of probation. Thus, upon remand, we direct the trial court to correct the order of probation to reflect that Maxlow entered a plea of not guilty to the violation charges.

We affirm the revocation of probation but remand with the directions specified above.

FRANK, C.J., and PARKER and LAZZARA, JJ., concur.