ORIGINAL

FILED
DEBBIE CAUSSEAUX
JUN 30 1999
CLERK, SUPREME COURT
By

IN THE SUPREME COURT OF FLORIDA

TOMMY TERRY,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 95,149

ON DISCRETIONARY REVIEW FROM THE FIFTH DISTRICT COURT OF APPEAL

PETITIONER'S MERIT BRIEF

BARBARA C. DAVIS
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 0410519
112 Orange Avenue, Suite A
Daytona Beach, FL 32114
(904) 252-3367
COUNSEL FOR PETITIONER

<u>TABLE OF CONTENTS</u>

	PAGE NO.
TABLE OF CONTENTS	i
TABLE OF CITATIONS	ii-iii
STATEMENT OF THE CASE AND FACTS	1
SUMMARY OF ARGUMENT	3
ARGUMENT THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL IN ***MADDOX v. STATE,*** 708 So. 2d 617 (Fla. 5th DCA 1998) rev. granted 718 So. 2d 169 (Fla. 1998) INCORRECTLY INTERPRETS THE CRIMINAL APPEAL REFORM ACT OF 1996 AS ABOLISHING THE CONCEPT OF FUNDAMENTAL ERROR WITH REGARD TO SENTENCING ISSUES.	4
CONCLUSION	15
CERTIFICATE OF SERVICE	16

TABLE OF CITATIONS

CASES CITED:	PAGE NO.
Anders v. California 386 U.S. 738 (Fla. 1996)	8
Brown v. State 358 So.2d 1620 (Fla. 1978)	6
Callins v. State 698 So.2d 883 (Fla. 4th DCA 1997)	5
Chojnowski v. State 705 So.2d 915 (Fla. 2nd DCA 1997)	5
Combs v. State 403 So.2d 418 (Fla. 1981)	13
Denson v. State 711 So. 2d 1225 (Fla. 2nd DCA 1998)	9, 10
Firestone v. News-Press Publishing Co. 538 So.2d 457, 460 (Fla. 1989)	6
Harriel v. State 710 So.2d 102 (Fla. 1998)	7
Maddox v. State 708 So.2d 617 (Fla. 5th DCA 1998) rev. granted 718 So.2d 169 (Fla. 1998)	2, 4, 5, 12
Pryor v. State 704 So.2d 217 (Fla. 3rd DCA 1998)	5

__Robinson v. State__
373 So.2d 898 (Fla. 1979) 8

__Sanders v. State__
698 So.2d 377 (Fla. 1st DCA 1997) 6

__State v. Hewitt__
702 So.2d 633 (Fla. 1st DCA 1977) 5

__Wyche v. State__
619 So.2d 231, 236 (Fla. 1993) 6

<u>OTHER AUTHORITIES CITED</u>:

Section 924.051 (3), Florida Statutes (1996) 5
Section 924.051, Florida Statutes (1996) 4

Florida Rule of Appellate Procedure 9.140 (b)(2)(B) 8
Florida Rule of Appellate Procedure 9.140 4

IN THE SUPREME COURT OF FLORIDA

TOMMY TERRY,)
)
Petitioner,)
)
vs.) CASE NO. 95,149
)
STATE OF FLORIDA,)
)
Respondent.)
)

STATEMENT OF CASE AND FACTS

The Petitioner was adjudicated guilty in Case No. 90-20131-CFA of burglary of a dwelling, petit theft, battery on a law enforcement officer, and resisting without violence (Vol. 2, R 282). He was sentenced to eight years imprisonment as a habitual offender on the burglary, sixty days jail on the petit theft, five years probation on the battery, and one year probation on the resisting charge. Petitioner was adjudged to be a habitual offender only on the burglary charge, Count I (Vol. 2, R 284-291).

After Petitioner completed his prison sentence and began serving his probationary sentence, he was charged with a new law offense which violated the

probation (Vol. 2, R 309). The new law offense was resisting an officer with violence, Case No. 97-10358. The state filed a notice to seek habitual offender penalties in the new law case (Vol. 2, R 304-305). Petitioner was found guilty of the violation of probation and sentenced to ten years probation (Vol. 1, 45, 134-135; Vol. 2, R 361-379).

The Office of the Public Defender was appointed on appeal and raised one issue: that the ten-year probationary sentence on a third degree felony was an illegal sentence which exceeds the statutory maximum for a third degree felony. The Fifth District Court of Appeal per curiam affirmed the conviction, citing ***Maddox v. State***, 708 So.2d 617 (Fla. 5th DCA 1998) rev. granted 718 So.2d 169 (Fla. 1998). ***Maddox*** is pending before this court and a copy of the Fifth District Court opinion is attached hereto.

SUMMARY OF ARGUMENT

The Criminal Appeal Reform Act of 1996 as codified in Section 924.051, Florida Statutes (1996) did not abolish the concept of fundamental error in the context of sentencing. Thus, although an appellate court can no longer routinely reverse issues that had heretofore been deemed fundamental, it nevertheless retains the inherent power and duty to reverse illegal sentences which continue to be fundamental. Additionally, if an appellate court already has jurisdiction over a case, it may in its discretion address unpreserved issues to effect the intent of the legislature in enacting the Criminal Appeal Reform Act.

ARGUMENT

THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL IN ***MADDOX v. STATE,*** 708 So. 2d 617 (Fla. 5th DCA 1998) rev. granted 718 So. 2d 169 (Fla. 1998) INCORRECTLY INTERPRETS THE CRIMINAL APPEAL REFORM ACT OF 1996 AS ABOLISHING THE CONCEPT OF FUNDAMENTAL ERROR WITH REGARD TO SENTENCING ISSUES.

The Fifth District Court of Appeal in an en banc opinion determined in ***Maddox v. State***, 708 So.2d 617 (Fla. 5th DCA 1998) that the Criminal Appeal Reform Act as codified in Section 924.051, Florida Statutes (1996) has abolished the concept of fundamental error in the sentencing context. The court further interpreted the Criminal Appeal Reform Act as eliminating the concept of fundamental error at least as it had been previously applied in the sentencing context. From the date of the opinion, the court gave notice that no sentencing issue will be addressed on appeal by the Fifth District Court of Appeal unless properly preserved by a timely objection or a motion to correct the sentence and denial thereof. In reaching this conclusion, the Fifth District Court of Appeal looked to the language of Florida Rule of Appellate Procedure 9.140 which purports to limit the scope of appeal in criminal cases solely to those sentencing issues which have been preserved for appeal. Since no exception in the appellate rules exists for the concept of fundamental error, the Fifth District Court of

Appeal concluded that such concept has effectively been abolished with regard to the sentencing issues. In this regard, the Fifth District Court of Appeal expressed its direct disagreement with all of the remaining district courts of appeal which continue to recognize the concept of fundamental error at least as regards illegal sentences. ***State v. Hewitt***, 702 So.2d 633 (Fla. 1st DCA 1977); ***Chojnowski v. State***, 705 So.2d 915 (Fla. 2nd DCA 1997); ***Pryor v. State***, 704 So.2d 217 (Fla. 3rd DCA 1998) and ***Callins v. State***, 698 So.2d 883 (Fla. 4th DCA 1997). Thus, this Court must resolve this conflict and determine once and for all the scope of the Criminal Appeal Reform Act.

Petitioner asserts that the Fifth District Court of Appeal erred in ***Maddox*** in the basic premise that the Criminal Appeal Reform Act has eliminated the concept of fundamental error. To support its conclusion, the ***Maddox*** court merely referred to the Rules of Appellate Procedure which were promulgated by this Court to implement the Criminal Appeal Reform Act. Petitioner contends that if the Fifth District Court of Appeal's interpretation of the rules of appellate procedure is correct, then the rules themselves are unconstitutional as eliminating a specifically recognized right that the legislature provided. In particular, Petitioner draws this Court's attention to Section 924.051 (3), Florida Statutes (1996) which provides:

> An appeal may not be taken from a judgment or order of a trial court unless a prejudicial error is alleged and is properly preserved or, **if not properly preserved, would constitute fundamental error**. A judgment or sentence may be reversed on appeal only when an appellate court determines after a review of the complete record that prejudicial error occurred and was properly preserved in the trial court or, **if not properly preserved, would constitute fundamental error**. (Emphasis added)

Thus, the legislature in enacting the Criminal Appeal Reform Act, specifically recognized the continuing viability of the concept of fundamental error even in the sentencing context. Once the legislature has recognized this concept, an appellate court may not eliminate it as such would constitute judicial legislation and would be improper. ***See***, ***Wyche v. State***, 619 So.2d 231, 236 (Fla. 1993); ***Firestone v. News-Press Publishing Co.***, 538 So.2d 457, 460 (Fla. 1989); ***Brown v. State***, 358 So.2d 1620 (Fla. 1978)

In considering the issue of fundamental error the First District Court of Appeal had little problem concluding that illegal sentences constituted fundamental error for which no objection was necessary prior to granting appellate relief. In ***Sanders v. State***, 698 So.2d 377 (Fla. 1st DCA 1997) the court was faced with an appeal from a defendant's conviction and sentence for the offense of sexual battery. The defendant had been sentenced to twenty years in

prison followed by fifteen years probation which exceeded the statutory maximum for the crime of which he had been convicted which was a second degree felony punishable by a term of imprisonment not exceeding fifteen years. Rejecting the state's contention that the issue had not been preserved for appeal by a proper objection, the court nevertheless granted relief. The court held:

> [S]ection 924.051 does not preclude an appellate challenge to unpreserved sentencing error that constitutes fundamental error. ***Neal v. State***, 688 So.2d 392 (Fla. 1st DCA 1997).
>
> The error asserted by the appellate in the present case must be classified as fundamental. The sentence for sexual battery is in excess of the statutory maximum for the offense and is therefore "illegal." [citations omitted] An illegal sentence is regarded with such disdain by the law that it, unlike other trial court errors, may be challenged *for the first time* by way of collateral proceedings instituted even decades after such a sentence has been imposed....The extraordinary provision made for remedying illegal sentences evidences the utmost importance of correcting such errors even at the expense of legal principles that might preclude relief from trial court errors of less consequence. In light of this, illegal sentences necessarily constitute fundamental error, and may therefore be challenged for the first time on direct appeal.

Id. at 378. Recently, the Fourth District Court of Appeal had an opportunity to consider the ramifications of the Criminal Appeal Reform Act. In ***Harriel v. State***, 710 So.2d 102 (Fla. 1998) the defendant pled guilty and appealed and the state moved to dismiss the appeal. The court initially denied the

motion to dismiss and Harriel's appointed counsel filed a brief in compliance with ***Anders v. California***, 386 U.S. 738 (Fla. 1996) asserting that he could point to no meritorious issues on appeal. The court reconsidered the state's motion to dismiss and granted the motion and wrote to establish the procedure for reviewing motions to dismiss appeals where no issues have been reserved. Noting that the Criminal Appeal Reform Act attempted to limit the issues which could be raised on appeal to those which have been preserved for appeal, the Fourth District Court of Appeal noted that this Court attempted to harmonize the new rules with its previous ruling in ***Robinson v. State***, 373 So.2d 898 (Fla. 1979). ***Robinson*** held that in an appeal from a guilty plea or nolo plea without reserving any particular issue for appeal the scope of appeal was limited to four distinct areas: (1)subject matter jurisdiction, (2) illegality of the sentence, (3)failure of the government to abide by a plea agreement, and (4) the voluntary intelligent character of the plea. In an attempt to harmonize the Criminal Appeal Reform Act with the previous ruling in ***Robinson*** the court noted that the violation of the plea agreement and the intelligent voluntary character of the plea are issues which could continue to be raised on appeal if properly preserved by a motion to withdraw the plea. Additionally, a sentencing error could still be appealed if preserved or as otherwise provided by law. Fla. R. App. P. 9.140 (b)(2)(B).

Thus, the Fourth District Court of Appeal concluded that subsequent to the enactment of the Criminal Appeal Reform Act, a criminal defendant could still appeal, even from a guilty plea or nolo plea where no issue is specifically preserved, on two grounds--the subject matter jurisdiction of the lower court and the illegality of the sentence. The court certified conflict with the Fifth District Court of Appeal on this issue.

More recently, the Second District Court of Appeal considered the scope of review under the Criminal Appeal Reform Act in ***Denson v. State***, 711 So. 2d 1225 (Fla. 2nd DCA , 1998) ***Denson*** faced sentencing on four cases. Certain issues were preserved for appeal while other issues were not. In particular, trial counsel preserved the issue of whether on several of the cases the defendant had a qualifying offense for purposes of the habitual offender statute. On this preserved issue, the district court of appeal ruled against Mr. Denson. The court then noted that appellate counsel had raised two serious issues that were not preserved--the defendant had been sentenced as an habitual offender for the offenses of possession of cocaine for which the law did not provide habitualization and that the written sentence purported to increase sentence that had orally been pronounced. Noting that these issues had traditionally been allowed to be raised on appeal and addressed by appellate courts, the second district had to determine

the effect of the Criminal Appeal Reform Act on its ability to consider these arguably unpreserved errors. Noting that the intent and the goals of the Criminal Appeal Reform Act had been to minimize frivolous appeals, to maximize the efficiency of the appellate system, and to place the task of correcting most sentencing errors in the lap of the circuit court, the court nevertheless held that the legislature could not constitutionally restrict the scope or standards of review of an appellate court when due process and the orderly administration of justice require that the appellate court review certain issues. Without resorting to deciding whether there is any fundamental error in the sentencing context, the Second District Court of Appeal adopted a common sense approach to the Criminal Appeal Reform Act. The court held that so long as the appellate court has jurisdiction to hear an appeal, i.e., it has before it consideration of an issue that is properly preserved, the appellate court has discretion to consider all issues whether preserved for appeal or not but which are apparent from the record. If, on the other hand, there is no preserved issue so as to give the appellate court jurisdiction over the case, then the appellate court cannot reach any unpreserved issues. Thus, in ***Denson***, noting that it had jurisdiction over the case by way of the preserved issue concerning the qualifying offenses for habitualization, the court chose to grant relief on the two obvious though arguably unpreserved

sentencing errors. From both a practical standpoint as well as a sense of fairness and due process, this approach offers a reasonable interpretation of the Criminal Appeal Reform Act. As the court noted:

> If a goal of criminal appeal reform is efficiency, we are hard pressed to argue that this court should not order correction of an illegal sentence or a facial conflict between oral and written sentences on a direct appeal when we had jurisdiction over other issues. Although it is preferable for the trial courts to correct their own sentencing errors, little is gained if the appellate courts require prisoners to file, and trial courts to process, more post conviction motions to correct errors that can be safely identified on direct appeal. Both Mr. Denson and the Department of Corrections need legal written sentences that accurately reflect the trial court's oral ruling. We conclude that our scope and standard of review in a criminal case authorizes us to order correction of such a patent error.
>
> Efficiency aside, appellate judges take an oath to uphold the law and the constitution of this state. The citizens of this state properly expect these judges to protect their rights. When reviewing an appeal with a preserved issue, if we discover that a person has been subjected to a patently illegal sentence to which no objection was lodged in the trial court, neither the constitution nor our own consciences will allow us to remain silent and hope that the prisoner, untrained in the law, will somehow discover the error and request its correction. If three appellate judges, like a statue of the "see no evil, hear no evil, speak no evil" monkeys, decline to consider such serious, patent errors, we would jeopardize the public's trust and confidence in the institution of courts of law. Under separation of powers, we conclude that the legislature is not

> authorized to restrict our scope or standard of review in an unreasonable manner that eliminates our judicial discretion to order the correction of illegal sentences and other serious, patent sentencing errors.

Id. at 1229-1230. Petitioner contends that this common sense approach adopted by the Second District Court of Appeal is the proper way to interpret the Criminal Appeal Reform Act.

Although the Fifth District in *Maddox* observed that the court was accustomed to simply correcting errors on appeal because it seemed "both right and efficient to do so", it concluded that the legislature has in effect prevented them from doing this. The court observed that in its opinion there was little risk that a defendant would suffer an injustice because of this new procedure because if any of the sentencing was fundamentally erroneous and counsel failed to object or file a motion to correct the sentence the remedy of ineffective assistance of counsel would still be available. The court then noted:

> It is hard to imagine that the failure to preserve a sentencing error that would formally have been characterized as "fundamental" would not support an "ineffective assistance" claim.

Maddox, 708 So.2d at 621. Petitioner certainly agrees that failure of trial counsel to properly preserve a sentencing error which prior to the Criminal Appeal Reform Act would have resulted in a grant of relief by the appellate

court, is per se ineffective assistance of counsel. However, the solution to this is not for the appellate court to deny relief and require the untrained defendant to proceed against his counsel on an ineffective assistance counsel claim, but to recognize the issue that is apparent on the face of the record and grant relief as if it were a claim of ineffective assistance of counsel. This Court has ruled in ***Combs v. State***, 403 So.2d 418 (Fla. 1981) that if appellate counsel in a criminal proceeding honestly believes there is an issue of reasonably effective assistance of counsel in the trial or the sentencing phase before the trial court, that issue should be immediately presented to the appellate court that has jurisdiction of the proceeding so that it may be resolved in an expeditious manner by remand to the trial court and avoid unnecessary and duplicitous proceedings. This admonition has renewed meaning in light of the Criminal Appeal Reform Act. Certainly, if the objective of the act was to promote efficiency in the appellate process, and indeed in the criminal justice system, then the approach to these errors even though unpreserved, must not be to permit the appellate court to merely hide their heads in the sand and ignore them but to grant the relief necessary to insure the integrity of the criminal justice system.

From a legal standpoint as well as from a policy standpoint, the decision of the fifth district below is incorrect. While the Criminal Appeal Reform Act

requires most sentencing errors to be preserved before an appellate court may grant relief, the concept of fundamental error particularly as it concerns an illegal sentence continues to be a viable issue on appeal notwithstanding the lack of objection. Additionally, if an appellate court has jurisdiction over a case and is confronted with a patent sentencing error it must have the discretion to grant relief whether by simply remanding for correction or by considering the issue in the context of ineffective assistance of trial counsel for failing to preserve the issue. In either case, the appellate court has the discretion to grant relief. The Criminal Appeal Reform Act if it is to be held constitutional, must be interpreted as permitting this discretion. This Court should reverse the decision of the Fifth District below, and remand with instructions to remand for resentencing.

CONCLUSION

Based on the foregoing reasons and authorities, Petitioner respectfully requests this Honorable Court to quash the decision of the fifth district below and remand with instructions to remand for resentencing.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

Barbara Davis

BARBARA C. DAVIS
ASSISTANT PUBLIC DEFENDER
Florida Bar No. 0410519
112 Orange Avenue, Suite A
Daytona Beach, FL 32114
(904) 252-3367

COUNSEL FOR PETITIONER

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 Boulevard, 5th Floor, Daytona Beach, FL 32118 via his basket at the Fifth District Court of Appeal and mailed to Tommy Terry, DC#701689, D 2145-S, Jackson Correctional Institution, 5563 10th Street, Malone, Florida, 32445-3144, on this 29th day of June, 1999.

Barbara Davis
BARBARA C. DAVIS
ASSISTANT PUBLIC DEFENDER

CERTIFICATE OF FONT

I hereby certify that the size and style of type used in this brief is point proportionally spaced CG Times, 14 pt.

Barbara Davis

BARBARA C. DAVIS
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF FLORIDA

TOMMY TERRY,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. 95,149
	)	
STATE OF FLORIDA,	)	
	)	
Respondent.	)	
	)	

Appendix

Maddox v. State
708 So.2d 617 (Fla. 5th DCA 1998)

validity of a rule under section 120.56(1). Accordingly, we affirm the dismissal. Our affirmance, however, is without prejudice to appellant seeking appropriate relief in proceedings under sections 120.56(4) and 120.569, Florida Statutes (1995).

AFFIRMED.

ERVIN and VAN NORTWICK, JJ., concur.

BENTON, J., concurs in result.

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, 1044.1(1)

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, 1045

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* [1] 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,[2] preserving his right to appeal the trial court's order denying his motion to suppress. He preserved no other issues for appeal.[3] He was sentenced

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

2. § 810.02, Fla. Stat. (1995).

3. 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).

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).[4]

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),[5] 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

4. 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.

5. 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).

entered,
ally dis-
rved for
to this
.e Court
.atute to
ued "to
or nolo
ally dis-
l a sen-
n timely
ntence."
Rules of
775 (Fla.
errors"
awful, as
pite the
inion to
a.1979).[4]

g arena,
e appeal
formerly
; appeal
g errors
d),[5] the
method
lief from
the time
created
ing such
R.Crim.
ied of at
ained of
done in
s, at ap-
924.051
Supreme
, Florida

n the face
on direct
mporane-
the error
errors the
ction rule
Montague,
t contem-
ly to sen-
cord, and
ie on ap-
1197; *cf.*
92) (sen-
of factual
generally

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.[6] 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 c nolo contendere may otherwise directly aj peal only
>
> (i) the lower tribunal's lack of subje matter jurisdiction;
>
> (ii) a violation of the plea agreement, preserved by a motion to withdraw ple:
>
> (iii) an involuntary plea, if preserved t a motion to withdraw plea;
>
> (iv) a sentencing error, if preserved; c
>
> (v) as otherwise provided by law.

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

[2] The net effect of the statute and tl amended rules is that *no* sentencing err can be considered in a direct appeal unle the error has been "preserved" for revie *i.e.* the error has been presented to and rul on by the trial court. This is true regardle of whether the error is apparent on the fa of the record. And it applies across tl board to defendants who plead and to tho who go to trial. As for the "fundament error" exception, it now appears clear, giv the recent rule amendments, that "fund mental error" no longer exists in the senten ing context. The supreme court has recent distinguished sentencing error from trial e ror, and has found fundamental error only the latter context. *Summers v. State,* 6 So.2d 729, 729 (Fla.1996) ("The trial cour failure to comply with the statutory manda is a sentencing error, not fundamental err which must be raised on direct appeal or it waived."); *Archer v. State,* 673 So.2d 17, (Fla.) ("Fundamental error is 'error whi reaches down into the validity of the *tr* itself to the extent that a verdict of guil could not have been obtained without t assistance of the alleged error.' "), *cert. c nied,* — U.S. —, 117 S.Ct. 197, 1 L.Ed.2d 134 (1996). It appears that t supreme court has concluded that the noti of "fundamental error" should be limited trial errors, not sentencing errors. The hi court could have adopted a rule that par leled the Criminal Appeal Reform Act, wh would allow for review of fundamental err in nonplea cases, but the court did not do and made clear in its recent amendment

6. 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 c motion to correct a sentence or order of prc tion. 675 So.2d at 1375.

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),[7] 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 [8] and various cost assessments,[9] 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

7. 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.

8. *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).

9. *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).

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 th labor-saving and reputation-enhancing bene fits of being adequately prepared for th sentencing hearing. Certainly, there is littl risk that a defendant will suffer an injustic because of this new procedure; if any aspe of a sentencing is "fundamentally" erroneou and if counsel fails to object at sentencing file a motion within thirty days in accordanc with the rule, the remedy of ineffective assis tance of counsel will be available. It is har to imagine that the failure to preserve sentencing error that would formerly hav been characterized as "fundamental" woul not support an "ineffective assistance" clair

The defendant in this case was sentence on December 3, 1996 after entering a plea no contest. He did not contest the asses ment of costs at sentencing, and he did no file a motion to correct his sentence unde rule 3.800(b). Thus, neither cost issue ha been preserved for review and neither issu 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, concurs.

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

To the extent that the decision reced from prior opinions of this court, I agree wi the majority that cost assessments cannot reviewed as fundamental error. *See Medbe ry; Rangel; Ortiz; Bisson.* However, I not agree there is support for the statemen which I consider to be dictum, that the Flo da Supreme Court has eliminated "func mental error" in the sentencing conte This court cites *Summers* and *Archer* support of this statement, but the cas stand for different principles.

In *Summers,* the supreme court answer a certified question dealing with juvenile se tencing. The issue before the court w whether a trial court's failure to consider t criteria of section 39.05(7)(c), Florida St utes (1991) and contemporaneously reduce

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.

Keith BAREIS, Appellant,

v.

STATE of Florida, Appellee.

No. 97–946.

District Court of Appeal of Florida,
Fifth District.

March 13, 1998.

Rehearing Denied April 28, 1998.

Defendant entered no contest pleas to possession of burglary tools and resisting an officer without violence. The Circuit Court, Seminole County, O.H. Eaton, Jr., J., entered upward departure sentence for failure to appear for initial sentencing. Defendant appealed. The District Court of Appeal, Goshorn, J., held that departure sentence for