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IN THE SUPREME COURT OF FLORIDA

CASE NO. 95,325

DCA NO. 97-2002

WILLIAM SHAUN JORDAN,

Petitioners,

-vs-

STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW
CONFLICT JURISDICTION

PETITIONERS' BRIEF ON JURISDICTION

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INTRODUCTION

This is the brief of the petitioner/defendant William Shaun Jordan on petition for discretionary review based on express and direct conflict jurisdiction from the decision of the Third District Court of Appeal. Citations are to the appendix attached hereto.

I hereby certify that the style of type used in this brief is Times New Roman and the size is 14 point.

STATEMENT OF THE CASE AND FACTS

The defendant was tried and found guilty by a jury of attempted second degree murder with a firearm and two counts of aggravated assault with a firearm. (A: 6) During the sentencing hearing on June 4, 1997, the trial judge imposed a guidelines departure sentence and orally announced his reasons for departure on the record. (A: 7) The judge stated that a written order would be typed by the judicial assistant "this evening and tomorrow it will become part of the court file." (A: 7) Although dated the same day - June 4 - the departure order was not filed in the clerk's office, according to the clerk's stamp, until June 26, 1997, twenty-two days later. (A: 7)

On appeal to the Third District Court of Appeal, the defendant argued the applicable statute, §921.0016(1)(c), Florida Statutes (1995), required a departure order to be filed within 7 days after the date of sentencing, and since the defendant's departure order was not filed in the clerk's office until the 22nd day, it was untimely and invalid and must be reversed. (A: 7) The Third District affirmed the departure sentence and held the defendant did not preserve the issue for appeal because he did not file a Rule 3.800(b) motion to correct the sentencing error within 30 days of the sentencing. (A: 7) The Third District also held that although sentencing errors can be fundamental error and the appellate courts still could entertain fundamental sentencing errors, the issue in this case was not fundamental error, acknowledging conflict with the Fifth District's decision in Maddox v. State, 708 So.2d 617 (Fla. 5th DCA 1998) (en banc). (A: 3, 8)

The defendant filed a motion for rehearing and certification. (A: 1) The Third District denied the motion for rehearing and certification and again acknowledged that its decision was in conflict with the decision of the Fifth District Court of Appeal in Maddox v. State, 708 So.2d 617 (Fla. 5th DCA 1998) (en banc), rev. grt, 718 So.2d 169 (Fla. July 7, 1998, Case No: 92,805), on the issue of whether a sentencing error can be treated as fundamental and entertained by the appellate court. (A: 3)

SUMMARY OF ARGUMENT

The decision of the Third District in this case directly and expressly conflicts with the decision of the Fifth District in Maddox v. State, 708 So.2d 617 (Fla. 5th DCA 1998) (en banc), rev. grt, 718 So.2d 169 (Fla. July 7, 1998, Case No: 92,805), on the issue of whether a sentencing error can be treated as fundamental and entertained by the appellate court. In Maddox, the Fifth District stated that an unobjected-to sentencing error can never be fundamental error, whereas in the instant case, the Third District recognizes that a sentencing error can be treated as fundamental and entertained by the appellate court. The Third District acknowledges that it is in conflict with Maddox. The conflict between the Fifth and Third District regarding this issue of fundamental error warrants the exercise of this Court's jurisdiction.

ARGUMENT

THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THE FIFTH DISTRICT IN MADDOX v. STATE, 708 So.2d 617 (FLA. 5th DCA 1998) (EN BANC), REV. GRT., FLA. CASE NO: 92,805, ON THE ISSUE OF WHETHER A SENTENCING ERROR CAN BE TREATED AS FUNDAMENTAL AND ENTERTAINED BY THE APPELLATE COURT.

The defendant alleged on appeal to the Third District that the trial court's untimely filing of the sentencing guidelines departure order was reversible error and that even though the defendant did not file a motion to correct sentence below, the error was a fundamental sentencing error that should be addressed on appeal. In its decision in this case, the Third District recognized that a sentencing error can be treated as fundamental error that could be addressed on appeal despite the absence of objection below. In Maddox v. State, 708 So.2d 617 (Fla. 5th DCA 1998) (en banc), rev. grt, 718 So.2d 169 (Fla. July 7, 1998, Case No: 92,805), the Fifth District reached the opposite conclusion and held that an unobjected-to sentencing error can never be fundamental error. The Third District acknowledged that its decision was in conflict with Maddox on this issue.

It is clear that a conflict exists between the Fifth and Third District courts regarding this issue. This conflict warrants the exercise of this Court's discretionary jurisdiction since uniformity must exist regarding the ability of the appellate court to address this issue of unpreserved sentencing errors, an issue which occurs with undisputed regularity. Consequently, express and direct conflict exists and this Court should accept jurisdiction in this case.

CONCLUSION

Based upon the foregoing, the petitioner/defendant requests that this Court exercise its discretionary jurisdiction and take review of this case.

Respectfully submitted,

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By: Marti Rothenberg
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed to Wendy Benner-Leon, Office of the Attorney General, Criminal Division, 444 Brickell Ave., #950, Miami, Florida 33131, this 16th day of April, 1999.

By: Marti Rothenberg
MARTI ROTHENBERG
Assistant Public Defender

CERTIFICATE OF FONT

Undersigned counsel certifies that the type used in this brief is 14 point proportionately spaced Times Roman.

Marti Rothenberg
MARTI ROTHENBERG
Assistant Public Defender

APPENDIX

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JANUARY TERM, A.D. 1999

WILLIAM SHAUN JORDAN,	**	
Appellant,	**	
vs.	**	CASE NO. 97-2002
THE STATE OF FLORIDA,	**	LOWER TRIBUNAL NO. 96-5184
Appellee.	**	

Opinion filed March 10, 1999.

An appeal from the Circuit Court for Dade County, Manuel A. Crespo, Judge.

Bennett H. Brummer, Public Defender, and Marti Rothenberg, Assistant Public Defender, for appellant.

Robert A. Butterworth, Attorney General, and Wendy Benner-Leon, Assistant Attorney General, for appellee.

Before COPE, FLETCHER, and SORONDO, JJ.

ON MOTION FOR REHEARING AND CERTIFICATION

COPE, J.

Defendant-appellant Jordan moves for rehearing, contending that the decision in this case is in conflict with Pierre v. State, 708 So. 2d 1037 (Fla. 3d DCA 1998). In Pierre, this court reversed an upward departure sentence and remanded for sentencing within the guidelines, because the trial court did not file written reasons within seven days. See id. at 1037-38. We distinguish Pierre, because the opinion nowhere considered the effect of the Criminal Appeal Reform Act,[1] as well as recently-adopted Florida Rule of Appellate Procedure 9.140(d) and Florida Rule of Criminal Procedure 3.800(b). The Reform Act and the cited rules dictate denial of relief in this case. See also Weiss v. State, 720 So. 2d 1113, 1115 (Fla. 3d DCA 1998).[2]

Defendant also argues that the opinion in the present case is in conflict with Mizell v. State, 716 So. 2d 829 (Fla. 3d DCA 1998). We disagree. In Mizell, the defendant had been sentenced to a fourteen-year term on count IV, a misdemeanor which carried a maximum penalty of one year. See id. at 829-30. Declining to reach the question whether, under the Reform Act, this should be treated as fundamental error, see id. at 830, the court found this to be one of the exceptional cases in which ineffectiveness of trial counsel could be considered on direct appeal. See id. The panel found that trial counsel had been ineffective for failing to raise this point in the trial court, and directed that the sentence on count IV be reduced to the one-year maximum. See id.

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[1] § 924.051, Fla. Stat. (Supp. 1996).

[2] Although it does not have an impact in this case, Weiss held that the time interval for filing written departure reasons runs from the date that the sentencing judgment is filed, not the date the sentence is orally pronounced. See id. at 1114-15 & n.2. Weiss receded, to that extent, from Pierre. See id. at 1115 n.2.

In the present case the sentencing judgment was filed June 12 and the written departure reasons were filed June 26, which is still beyond the seven-day statutory interval.

In the present case, by contrast, the Mizell decision does not apply. As explained in parts IV and V of the opinion in the present case, the failure to raise this issue in the trial court has prevented the development of a proper record. Further, based on the existing record, the delay in filing the departure order must be treated as harmless. See also Weiss v. State, 720 So. 2d 1113 (Fla. 3d DCA 1998); § 924.051(1)(a), Fla. Stat. (Supp. 1996).

Defendant argues, and we acknowledge, that the decision in this case is in conflict with Maddox v. State, 708 So. 2d 617 (Fla. 5th DCA 1998) (en banc), review granted, number 92,805 (Fla. July 7, 1998). As explained in part IV of the panel opinion and footnote 6, this court recognizes that a sentencing error can be treated as fundamental, while the Fifth District takes the position that no sentencing error will be recognized as fundamental. See Maddox, 708 So. 2d at 619.

We decline, however, to certify direct conflict with Maddox. Resolution of that conflict would not affect the outcome of this appeal. Under the Fifth District rule in Maddox, an unobjected-to sentencing error can never be fundamental error, id., and if this case were pending in the Fifth District, the judgment would be affirmed. Thus, under either district's rule, the defendant is entitled to no relief.

Under the Florida Supreme Court's procedures, when a district court of appeal certifies a decision as being in direct conflict or of great public importance, and the litigant timely files a notice to invoke Florida Supreme Court jurisdiction, the case proceeds to briefing on the merits and the decision whether to exercise discretionary review is postponed until consideration of the merits. See Fla. S. Ct. Internal Operating Procedures § IIA(2); Fla. R. App. P. 9.120. Because resolution of the Maddox conflict would not make a difference in this case, we decline to invoke the certification procedure. See State v. Oisorio, 657 So. 2d 4, 5-6 (Fla. 3d DCA 1995), approved, 676 So. 2d 1363 (Fla. 1996).[3]

Motion for rehearing and certification denied.

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[3] This ruling is, of course, without prejudice to defendant to petition for discretionary review under article V, section 3(b)(3) of the Florida Constitution.

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT
JANUARY TERM, A.D. 1999
MARCH 16, 1999

WILLIAM SHAUN JORDAN,	**	CASE NO. 97-02002
Appellant(s),	**	
vs.	**	
THE STATE OF FLORIDA,	**	LOWER TRIBUNAL NO. 96-5184
Appellee(s).	**	

On the Court's own motion, the Court on page (4) of the opinion dated March 10, 1999, corrects the citation of State v. Oisorio, so that it reads: State v. Oisorio, 657 So. 2d 4, 5-6 (Fla. 3d DCA 1995), approved on other grounds, 676 So. 2d 1363 (Fla. 1996).

A True Copy
ATTEST:
MARY CAY BLANKS
Clerk District Court of Appeal, Third District

By: ______________________
Deputy Clerk

cc: Marti Rothenberg
/AG

Wendy Benner-Leon

inal law—Habeas corpus—Belated appeal—Defendant who d guilty plea, explicitly waived right to appeal, did not e a dispositive issue for appeal, and did not move to with- plea prior to sentencing, is not entitled to appeal—Conflict ified

N DARNELL BATTIE, Petitioner, v. HARRY SINGLETARY, of the Florida Dept. of Corrections, Respondent. 3rd District. Case No. L.T. Case No. 94-7634. Opinion filed September 16, 1998. A Case of al Jurisdiction - Habeas Corpus. Counsel: Keithan Darnell Battie, in proper n. Robert A. Butterworth, Attorney General and Doquyen T. Nguyen, t Attorney General, for respondent.

e COPE, FLETCHER, and SHEVIN, JJ.)

PE, J.) Keithan Darnell Battie has filed a petition for writ of s corpus, which we treat as a petition for belated appeal under a Rules of Appellate Procedure 9.140(j). We deny the n.

i exchange for waiver of the death penalty, defendant-petitioner pled guilty to one count of first-degree murder and one count nd-degree murder. Pursuant to the plea agreement, defendant ntenced to life imprisonment with a mandatory minimum ence of twenty-five years on the first-degree murder charge, and ecutive life sentence on the second-degree murder charge. dant explicitly waived the right to appeal, and did not reserve sitive issue for appeal. Defendant did not move to withdraw lea prior to sentencing.

May 1998, defendant filed a petition for belated appeal, ding that he asked his trial counsel to appeal the conviction ntence, and that trial counsel did not do so. Defendant does not what the basis of the belated appeal might be.

conclude that the petition for belated appeal must be denied. ive January 1, 1997, Florida Rule of Appellate Procedure provides, in part:

(2) Pleas. A defendant may not appeal from a guilty or nolo tendere 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 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.

R. App. P. 9.140(b)(2)(A)-(B).

imilarly, effective July 1, 1996, the Criminal Appeal Reform f 1996 provides, "if a defendant pleads guilty without ex- y reserving the right to appeal a legally dispositive issue, the dant may not appeal the judgment or sentence." § 924.051(4), Stat. (1997).

he petition must be denied. First, the defendant expressly d the right to appeal. Second, even if that were not so, the on does not make a showing that his conviction and sentencing r fall within any of the exceptions provided for in Rule 9.140. *Gonzalez v. State*, 685 So. 2d 975 (Fla. 3d DCA 1996); *Loadholt te*, 683 So. 2d 596 (Fla. 3d DCA 1996); *Zduniak v. State*, 620 d 1083 (Fla. 2d DCA 1993); *Bridges v. Dugger*, 518 So. 2d 298 1. 2d DCA 1987). We certify direct conflict with *Trowell v. e*, 706 So. 2d 332 (Fla. 1st DCA 1998) (en banc).

tition denied.*

*We reject the State's argument of time bar. *See* Fla. R. App. P. 0(j)(3)(C).

* * *

inal law—Sentencing—Appeals—Attempted second-degree der of police officer—Aggravated assault on police officers— rror in using law enforcement multiplier in calculating guidelines score although proper statute was not cited in information, where incorrect citation was not challenged, and there was no showing that incorrect citation prejudiced defendant—No merit to claim that defendant is required to be sentenced within guidelines for offense of attempted second-degree murder of law enforcement officer—Appellate court may entertain unpreserved sentencing error which would constitute fundamental error—Claim that departure sentence must be reversed because trial court failed to timely file written reasons for departure not preserved for appellate review by objection at sentencing or timely filing of motion to correct sentence—Error in late filing of departure reasons was not prejudicial—Claim that invalid reason was given for departure sentence not preserved for appellate review—Trial court properly departed from guidelines on ground that defendant's actions created a substantial risk of death or bodily harm to many persons where defendant carried on running gun battle with police in residential neighborhood

WILLIAM SHAUN JORDAN, Appellant, v. THE STATE OF FLORIDA, Appellee. 3rd District. Case No. 97-2002. L.T. Case No. 96-5184. Opinion filed September 16, 1998. An appeal from the Circuit Court for Dade County, Manuel A. Crespo, Judge. Counsel: Bennett H. Brummer, Public Defender, and Marti Rothenberg, Assistant Public Defender, for appellant. Robert A. Butterworth, Attorney General, and Wendy Benner-Leon, Assistant Attorney General, for appellee.

(Before COPE, FLETCHER, and SORONDO, JJ.)

(COPE, J.) William Shaun Jordan appeals the sentences imposed after his conviction of attempted second-degree murder of Police Officer Macken, and aggravated assault on Officers Gallagher and Guerrier. Of the four claimed sentencing errors, we reject two for lack of preservation, and the other two on the merits.

I.

At approximately 8:00 a.m. on January 26, 1996, defendant was standing with three other men in a residential area in the southern part of Dade County. Several plainclothes police officers were patrolling the area for drug transactions. The officers approached the defendant's group because they noticed that one of the men was holding a marijuana cigarette. Defendant ran away and Officer Macken chased him on foot. A running gun battle ensued, in which Officer Macken was wounded. Defendant also pointed the firearm at officers Gallagher and Guerrier, but did not fire at them.

The jury convicted the defendant of attempted second-degree murder of a law enforcement officer with a firearm as to Officer Macken, and aggravated assault with a firearm as to Officers Gallagher and Guerrier. Insofar as pertinent here, the court through consecutive sentencing imposed a departure sentence of forty years. Defendant has appealed, claiming multiple sentencing errors.

II.

At sentencing, defendant objected to the use of the 2.0 law enforcement multiplier in calculating his guidelines score. The statute creating the law enforcement multiplier provides, in part, "If the primary offense is a violation of s. 775.0823(3), (4), (5), (6), (7), or (8), the subtotal sentence points are multiplied by 2.0." § 921.0014, Fla. Stat. (1995). The defendant correctly points out that the information did not charge him with a violation of section 775.0823, Florida Statutes. Defendant argues that since section 775.0823 was not cited in the information, it follows that the law enforcement multiplier must be stricken. *See Thornton v. State*, 679 So. 2d 871, 871 (Fla. 4th DCA 1996).[1]

The charging document alleged that defendant committed attempted first-degree murder of a law enforcement officer, with a firearm, "in violation of s. 782.04(1) and s. 784.07 and s. 775.0825 and s. 777.04, [Florida Statutes]." Of interest here is the citation to section 775.0825, Florida Statutes, which formerly provided a twenty-five-year mandatory minimum penalty for attempted murder of a law enforcement officer.

When the State filed the information in early 1996, section 775.0825 had recently been repealed. *See* ch. 95-184, § 18, at 1708, Laws of Fla.[2] The mandatory minimum sentence was eliminated, and a successor provision governing attempted murder of a law enforcement officer was amended into already-existing section

A:6

775.0823, Florida Statutes. *See* ch. 95-184, § 17, at 1707-08, Laws of Fla.

Florida Rule of Criminal Procedure 3.140(d)(1) states, "Error in or omission of the citation [to the statute that the defendant is alleged to have violated] shall not be ground for dismissing the count or for a reversal of a conviction based thereon if the error or omission did not mislead the defendant to the defendant's prejudice." *See also id.* R. 3.140(o). Here, the text of the information clearly advised the defendant that he was charged with attempted murder of a law enforcement officer. The statutory citation was in error, but section 775.0823 is the correct statutory successor provision. The incorrect citation was never challenged by motion by the defendant, and there is no showing that the incorrect citation prejudiced the defendant in the defense of the case. The case proceeded to the jury on proper instructions, and the jury returned an interrogatory verdict finding the defendant guilty of the lesser included offense of attempted second-degree murder of a law enforcement officer, with a firearm.[3] The violation of section 775.0823 was sufficiently shown. *See B.H. v. State*, 645 So. 2d 987, 996 (Fla. 1994); *Mosely v. State*, 688 So. 2d 999, 999-1000 (Fla. 2d DCA 1997); *Sanders v. State*, 386 So. 2d 256, 257 (Fla. 5th DCA 1980); *Wood v. State*, 354 So. 2d 134, 135 (Fla. 1st DCA 1978); *Tukes v. State*, 346 So. 2d 1056, 1056 (Fla. 1st DCA 1977); *King v. State*, 336 So. 2d 1200, 1202 (Fla. 2d DCA 1976).[4] The fact that there was a nonprejudicial error in the statutory citation, rather than an entire absence of an appropriate charge, distinguishes the present case from *Thornton v. State*, 679 So. 2d 871 (Fla. 4th DCA 1996).

III.

Defendant argues alternatively that under section 775.0823, Florida Statutes, he is required to be sentenced within the guidelines. This argument must be rejected on the merits.

For attempted second-degree murder of a law enforcement officer, the penalty is "a sentence pursuant to sentencing guidelines." § 775.0823(4), Fla. Stat. (1995). Defendant reads "pursuant to the sentencing guidelines" as requiring that he be sentenced *within* the sentencing guidelines. He argues, in other words, that under this statute, the guidelines maximum is the statutory maximum. Since the guidelines range was nineteen to thirty-two years, he is arguing that his statutory maximum for this offense is thirty-two years.

Defendant's argument was never made in the trial court. However, this court may entertain an unpreserved sentencing error which would constitute fundamental error. *See* § 924.051, Fla. Stat. (Supp. 1996); *Pryor v. State*, 704 So. 2d 217, 217 (Fla. 3d DCA 1998); *Thompson v. State*, 708 So. 2d 289, 289-90 (Fla. 4th DCA 1998); *Stone v. State*, 688 So. 2d 1006, 1007 (Fla. 1st DCA), *review denied*, 697 So. 2d 512 (Fla. 1997). A sentence in excess of the statutory maximum is fundamental error. *See Hyden v. State*, 23 Fla. L. Weekly D1342, D1343 n.1 (Fla. 4th DCA June 3, 1998) (en banc); *Harriel v. State*, 710 So. 2d 102, 104 (Fla. 4th DCA 1998) (en banc). Since defendant's argument amounts to a claim of fundamental error, we may entertain it.

On the merits, however, defendant is not entitled to relief. Section 775.0823 mandates a sentence "pursuant to the sentencing guidelines," § 775.0823(4), Fla Stat., not a sentence *within* the guidelines. The phrase "pursuant to the sentencing guidelines" is a generic reference to all of the provisions of the guidelines—which allow upward departures where statutory or case law criteria are met. *See id.* § 921.0016. Section 775.0823 does not preclude a departure sentence.

IV.

Defendant argues that the departure sentence must be reversed, and the cause remanded for sentencing within the guidelines, because the trial court failed to timely file its written departure reasons. This point must be rejected because it is not preserved for appellate review.

The trial court orally announced its sentencing reasons on June 4, 1997, and said that a written order would be typed by the judicial assistant "this evening and tomorrow it will become part of the court file." The applicable statute requires a departure order to be "filed within 7 days after the date of sentencing." *Id.* § 921.0016(1)(c).

Although dated the same day—June 4—the departure order was not filed in the clerk's office, according to the clerk's stamp, until June 26, 1997—twenty-two days later. Since that was beyond seven days, defendant argues that the departure order is invalid and must be reversed. *See State v. Colbert*, 660 So. 2d 701 (Fla. 1995). However, the defendant never presented this claim to the trial court, and seeks to raise it for the first time on appeal.

As part of the Criminal Appeal Reform Act of 1996 (the "Reform Act"),[5] the Legislature enacted section 924.051, Florida Statutes, which provides, "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." § 924.051(3), Fla. Stat. (Supp. 1996). A "prejudicial error" is "an error in the trial court that harmfully affected the judgment or sentence." *Id.* § 924.051(1)(a). An error is "preserved" if "an issue, legal argument, or objection to evidence was timely raised before, and ruled on by, the trial court, and . . . the issue, legal argument, or objection to the evidence was sufficiently precise that it fairly apprised the trial court of the relief sought and the grounds therefor." *Id.* § 924.051(1)(b).

Even before the Legislature passed the Reform Act, the Florida Supreme Court had "issued an opinion suggesting that scarce resources were being unnecessarily expended in . . . appeals relating to sentencing errors." *Amendments to the Florida Rules of Appellate Procedure*, 685 So. 2d 773, 773 (Fla. 1996) (citation omitted). The court proposed rule amendments "designed . . . to require that sentencing issues first be raised in the trial court." *Id.*

After the Reform Act was enacted, the Florida Supreme Court amended Florida Rule of Appellate Procedure 9.140 to 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).

Id. R. 9.140(d) (effective Jan. 1, 1997). The purpose was to harmonize the rule with the Reform Act. *See id.* 1996 court commentary.

In order to assure that each defendant would have adequate time to call sentencing errors to the attention of the trial court, the Florida Supreme Court amended Rule 3.800(b) to provide that "[a] defendant may file a motion to correct the sentence or order of probation within thirty days after the rendition of the sentence." *Amendments to the Florida Rules of Criminal Procedure*, 685 So. 2d 1253, 1254, 1271 (Fla. 1996) (effective Jan. 1, 1997); *Amendments to the Florida Rules of Appellate Procedure*, 685 So. 2d at 775. So long as the Rule 3.800(b) motion is filed within thirty days, this tolls the time for taking an appeal until the motion is disposed of. *See* Fla. R. App. P. 9.020(h).

Thus, the Florida Supreme Court and the Legislature have both concluded that sentencing errors should be treated the same as other trial errors. As this court squarely held in *Pryor*, a claimed sentencing error cannot be raised on appeal where "it was not properly preserved for review and does not show fundamental error on the part of the sentencing court." 704 So. 2d at 217; *see also Perry v. State*, 23 Fla. L. Weekly D1569 (Fla. 1st DCA June 26, 1998) (same); *Hyden v. State*, 23 Fla. L. Weekly at D1343 (same).[6]

In this case, the defendant had a total of thirty days in which to file a Rule 3.800(b) motion to correct the sentencing error. This means that, beginning on the eighth day after sentencing, the defendant could have filed a Rule 3.800(b) motion raising the claim that the order had not been filed within seven days. He did not do so. Under this court's *Pryor* decision, the appeal is barred because the point was not preserved, nor is it a matter of fundamental error. *See* 704 So. 2d at 217; § 924.051(1)(b), Fla. Stat. (Supp. 1996). "The statute on its face does not make exception for sentencing errors

,n the face of the record." *Middleton v. State*, 689 So. 2d .5 (Fla. 1st DCA 1997).

the en banc Fifth District has said:

> At the intermediate appellate level, we are accustomed to simply :orrecting errors when we see them in criminal cases, especially in ntencing, because it seems both right and efficient to do so. The islature and the supreme court have concluded, however, that the ce for such errors to be corrected is at the trial level and that any lefendant who does not bring a sentencing error to the attention of he sentencing judge within a reasonable time cannot expect relief on beal. This is a policy decision that will relieve the workload of the pellate courts and will place correction of alleged errors in the ıands of the judicial officer best able to investigate and to correct ıny error. Eventually, trial counsel may even recognize the labor-ving and reputation-enhancing benefits of being adequately epared for the sentencing hearing.

ddox v. State, 708 So. 2d 617, 621 (Fla. 5th DCA) (en banc),[7] ew granted, No. 92,805 (Fla. July 7, 1998). The entire point of atutory and rule changes was to require this type of claim to be nted in the first instance in the trial court.

If defendant had filed a Rule 3.800(b) motion, then a proper ord would have been developed, disclosing the reason for the in the filing of the written departure order. Depending on the nstances, prior case law has sometimes excused a late filing. *tate v. Lyles*, 576 So. 2d 706 (Fla. 1991), the then-existing law uired the oral statement of departure reasons to be reduced to ng, and filed with the clerk, the same day. In *Lyles*, the judge's en order was dated the same day, but was not filed until the next iness day. The Florida Supreme Court ruled that the then-sting requirement of law had been satisfied "when express oral ngs of fact and articulated reasons for the departure are made the bench and then reduced to writing without substantive nge on the same date .... The ministerial act of filing the written sons with the clerk on the next business day does not, in our view, dice the defendant in any respect." *Id.* at 708-09.[8]

ere, the record is silent on the reason for the delay, as well as ether there was any prejudice to the defendant in the prosecution he appeal.[9] The record is silent on when the parties received the ce copies of the departure order. *Lyles* holds that a nonprejudi-lerical snafu should not be the basis for reversal of a departure er. More important, the Legislature has now said in the Reform that a judgment or sentence cannot be reversed on appeal unless has been a prejudicial error, that is, "an error in the trial court armfully affected the judgment or sentence." § 924.051(1)(a), , Fla. Stat. (Supp. 1996).

The proper procedure to follow in this case was to file a motion to ct sentence under Rule 3.800(b), and make the argument to the court that defendant was entitled to be resentenced by reason of late filing of departure reasons. At that point, a record could have n developed regarding the circumstances of the late filing, and rejudice to defendant, if any. The trial court could then make an med ruling on the matter, subject to review in this court. Since filing of the Rule 3.800(b) motion would toll the time for appeal, re would be ample time to schedule a hearing and resolve the er in an orderly way.

V.

Assuming arguendo that this court may entertain defendant's preserved claim of error, we would nonetheless be obliged to m because there is no showing in this record that the error—the filing of the departure order—was prejudicial. As already ted, under the Reform Act a "sentence may be reversed on appeal ly when an appellate court determines after a complete review of record that *prejudicial error* occurred and was properly pre-ved . . . or, if not properly preserved, would constitute funda-ntal error." § 924.051(3). "Prejudicial error" is "error in the l court that harmfully affected the judgment or sentence." 4.051(1)(a), Fla. Stat.

he theory of requiring the entry of written reasons was to allow written reasons to be available to the defendant in deciding to take an appeal. *See Lyles*, 576 So. 2d at 708.[10] Here the oral reasons were pronounced on the date of sentencing. The nearly verbatim typed order was filed twenty-two days later. The notice of appeal was filed one week after that. The appeal attacks both the timeliness and substance of the departure order. This record reveals no prejudice to the defendant: the defendant filed a timely appeal, and in his appeal he challenges the departure order. The delay in the filing of the departure order must be treated as harmless error.[11]

VI.

Defendant next contends that the departure reason given by the trial court was not valid. The trial court stated that the defendant's "actions created a substantial risk of death or bodily harm to many persons[,] that you discharged your gun in backyards, down residential streets and in the patios and in backyards of dwellings and also shot in the direction of other homes as well." The guidelines allow an upward departure for an offense which "created a substantial risk of death or great bodily harm to many persons or to one or more small children." § 921.0016(3)(i), Fla. Stat. (1995). Defendant contends that the trial court's departure reason is not supported by competent substantial evidence.

This argument was never presented in the trial court, and thus is not preserved for appellate review. *See* § 924.051(3), Fla. Stat. (Supp. 1996). Assuming arguendo that the point had been preserved, it is without merit. This was a running gun battle in a residential neighborhood, when the houses were occupied and several individuals, including a child, came outside and had to be ordered back indoors. The departure reason was proper under the facts of this case. *See id.*; *Green v. State*, 545 So. 2d 359, 360 (Fla. 2d DCA 1989); *Moreira v. State*, 500 So. 2d 343, 344 (Fla. 3d DCA 1987).

Affirmed.

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[1] Although the trial court in this case imposed a departure sentence, that does not moot the claim of scoresheet error. "A trial court must have the benefit of a properly prepared scoresheet before it can make a fully informed decision on whether to depart from the recommended sentence." *Davis v. State*, 493 So. 2d 82, 83 (Fla. 1st DCA 1986). "This is because the trial court may well not wish to depart, or to depart so extensively, from a guidelines sentence which is presumably substantially lower than the one which it previously considered . . . ." *Moore v. State*, 519 So. 2d 22, 23 (Fla. 3d DCA 1987); *see also Mackey v. State*, 703 So. 2d 1183, 1185 (Fla. 3d DCA 1997), *review granted*, No. 92,179 (Fla. May 19, 1998); *Rubin v. State*, 697 So. 2d 161, 162 (Fla. 3d DCA 1997), *review granted*, No. 91,270 (Fla. Mar. 17, 1998); *Smith v. State*, 678 So. 2d 1374, 1376 (Fla. 4th DCA 1996).

[2] This was evidently in response to the problem identified by *Iacovone v. State*, 639 So. 2d 1108 (Fla. 2d DCA 1994), *approved on other grounds*, 660 So. 2d 1371 (Fla. 1995).

[3] On the verdict form, the jury checked three boxes indicating (1) "attempted second degree murder," (2) "on a law enforcement officer," (3) "with a firearm."

[4] The foregoing analysis accepts the parties' assumption that in order to invoke the law enforcement multiplier, there must be a jury finding that a defendant's primary offense is a violation of section 775.0823. It could be argued, however, that the section 921.0014 factual determination (that the primary offense is a violation of section 775.0823) is for the court to decide as a sentencing issue, similar to the factual determinations the court makes in assessing, for example, victim inquiry points, *see* § 921.004(1), Fla. Stat., or adjudicating disputes over legal status or prior record. *See id.*

[5] Ch. 96-248, Laws of Fla.

[6] This court, the First District, and the Fourth District have indicated that the appellate court may entertain preserved errors and fundamental errors. *See Pryor*, 704 So. 2d at 217; *Mason v. State*, 710 So. 2d 82, 82-83 (Fla. 1st DCA 1998); *Perry*, 23 Fla. L. Weekly at D1570; *Hyden*, 23 Fla. L. Weekly at D1343.

While avoiding the term "fundamental error," the Second District takes the position that it may correct (in addition to preserved errors) "illegal sentences and other serious, patent sentencing errors." *Denson v. State*, 711 So. 2d 1225, 1230 (Fla. 2d DCA 1998) (footnote omitted).

The Fifth District has held that because of the availability of Rule 3.800(b) to correct sentencing errors, it will no longer recognize any sentencing error as fundamental. *See Maddox v. State*, 708 So. 2d 617, 619 (Fla. 5th DCA), *review granted*, No. 92,805 (Fla. July 7, 1998).

[7] The court also explained that if trial counsel failed to object at sentencing, or file a Rule 3.800(b) motion, and the client suffered harm from a material sentencing error, postconviction relief would be available for ineffective assistance of counsel. *See id.*

[8] As pointed out in *State v. Colbert*, [illegible] So. 2d [illegible] (Fla. [illegible]), the time window for filing the written departure order was later enlarged by the Legislature.

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See id. at 702.

[9]The rationale for requiring written departure reasons is that, without them, "the decision to appeal may have to be made without the benefit of those written reasons because the time for appeal begins to run from the date the sentencing judgment is filed, not written reasons." *Lyles*, 576 So. 2d at 708.

With the recent adoption of Rule 3.800(b), the legal landscape has changed. Since the timely filing of a Rule 3.800(b) motion tolls the time for appeal, this means that the defendant can file the motion, and take whatever time is necessary to obtain the written order, prior to having to file the notice of appeal. *See also infra* section V.

[10]This reasoning is flawed. In criminal cases, it is the responsibility of trial counsel to file a timely notice of appeal in order to preserve the defendant's appellate rights. *See Short v. State*, 596 So. 2d 502, 503 (Fla. 1st DCA 1992); *Thames v. State*, 549 So. 2d 1198, 1199 (Fla. 1st DCA 1989), *see also State v. District Court of Appeal, First District*, 569 So. 2d 439, 441 (Fla. 1990); *State v. Meyer*, 430 So. 2d 440, 443 (Fla. 1983); *Viqueira v. Roth*, 591 So. 2d 1147, 1148-49 (Fla. 3d DCA 1992). This allows time for the record to be prepared and appellate counsel to review it, to determine if there is a viable issue for appeal. If there is not, then in appointed cases (the vast majority), appellate counsel will move to withdraw under *Anders v. California*, 386 U.S. 738 (1967), while in privately retained cases, the appeal can be voluntarily dismissed. The point is that the filing of a written upward departure order has no effect on a defendant's decision to file a notice of appeal.

[11]Effective for crimes committed on or after October 1, 1998, there will no longer be a requirement for upward departure reasons, *see* §§ 921.002(1)(g), .0027, Fla. Stat. (1997), but the seven-day rule will continue to exist for downward departure sentences. *See* ch. 98-204, § 9, Laws of Fla. (to be codified at § 921.00265, Fla. Stat.) The failure to file timely written reasons for a downward departure is not held against the defendant in a criminal case. *See Pease v. State*, 22 Fla. L. Weekly S624 (Fla. Oct. 9, 1997).

* * *

Criminal law—Sentencing—Attempted second degree murder of police officer

TERRY JAMES, Appellant, v. THE STATE OF FLORIDA, Appellee. 3rd District. Case No. 97-1104. L.T. Case No. 88-44617. Opinion filed September 16, 1998. An Appeal from the Circuit Court for Dade County, Thomas M. Carney, Judge. Counsel: Bennett H. Brummer, Public Defender, and Robert Kalter, Assistant Public Defender, for appellant. Robert A. Butterworth, Attorney General, and Maya Saxena, Assistant Attorney General, for appellee.

(Before NESBITT, JORGENSON and SORONDO, JJ.)

(PER CURIAM.) We affirm the appellant's convictions for attempted second degree murder of a police officer and robbery. However, the state correctly concedes that pursuant to the supreme court's decision in *State v. Iacovone*, 660 So. 2d 1371 (Fla. 1995), sections 784.07(3) and 775.0825 apply only to convictions for attempted first degree murder of a law enforcement officer. As such, we must vacate the sentence imposed and remand for resentencing.

Affirmed in part, reversed in part, and remanded.

* * *

Civil procedure—Summary judgment—Order granting motion for summary judgment and summary declaratory judgment reversed where no hearing was held on cross motion for summary judgment

AMERICAN HARDWARE MUTUAL INSURANCE CO., Appellant, v. METRO EXTERMINATORS, INC. and ROYAL SPECIAL RISKS INS. CO., Appellees. 3rd District. Case No. 98-1715. L.T. Case No. 96-11015. Opinion filed September 16, 1998. An Appeal from the Circuit Court for Dade County, Juan Ramirez, Jr., Judge. Counsel: Walton Lantaff Schroeder & Carson and Robert L. Teitler and Thomas J. Caldwell, for appellant. David R. Howland and Philip Glatzer, for appellees.

(Before JORGENSON, COPE, SORONDO, JJ.)

(PER CURIAM.) American Hardware Mutual Insurance Company (American) appeals the trial court's June 4, 1998 Order granting Metro Exterminators, Inc. (Metro) and Royal Special Risks Insurance Company's (Royal) Motion for Summary Judgment. American also appeals the trial court's June 19, 1998 Summary Declaratory Judgment which reiterates the findings of the June 4, 1998 Order. Metro and Royal concede that the Order and Summary Declaratory Judgment should be reversed and the case remanded because no hearing was held on the cross motions for Summary Judgment.

We reverse the trial court's June 14, 1998 Order and Summary Declaratory Judgment and remand the case so that a hearing can be held on all parties' Summary Judgment motions.

Reversed and Remanded.

* * *

Criminal law—Post conviction relief—Evidentiary hearing required where record does not conclusively refute claim that plea was induced by erroneous information provided by counsel regarding amount of time defendant would actually serve

JOSE R. FLORES, Appellant, v. THE STATE OF FLORIDA, Appellee. 3rd District. Case No. 98-133. L.T. Case No. 94-14926. Opinion filed September 16, 1998. An Appeal under Fla. R. App. P. 9.140(i) from the Circuit Court for Dade County, Richard V. Margolius, Judge. Counsel: Jose R. Flores, in proper person. Robert A. Butterworth, Attorney General, for appellee.

(Before COPE, GERSTEN, and SHEVIN, JJ.)

(PER CURIAM.) Appellant, Jose R. Flores ("defendant"), challenges an order summarily denying his motion for post conviction relief, pursuant to Florida Rule of Criminal Procedure 3.850. We are constrained by the Florida Supreme Court's decision in *State v. Leroux*, 689 So. 2d 235 (Fla. 1996) to reverse.

The record, which includes the transcript of the plea hearing, does not conclusively refute the defendant's allegation that his plea was induced by erroneous information regarding the amount of time he would actually serve, provided by his attorney. Accordingly, we reverse the order denying the defendant's motion for postconviction relief as to this issue only, and remand for an evidentiary hearing on this matter. *See State v. Leroux*, 689 So. 2d at 235 (misrepresentation by counsel as to the length of a sentence can be the basis for postconviction relief; defendant's negative response to question whether anything was promised him to induce plea did not conclusively refute postconviction ineffective assistance claim based on counsel's misrepresentations regarding sentence).

Reversed and remanded for an evidentiary hearing.

* * *

Criminal law—Second degree murder—Attempted second degree murder—Evidence—No error in admission of autopsy photograph which was not unfairly prejudicial—No error in instructing jury on attempted second degree murder

RICARDO OLIVERA, Appellant, vs. THE STATE OF FLORIDA, Appellee. 3rd District. Case No. 97-2801. L.T. Case No. F95-32871B. Opinion filed September 16, 1998. An appeal from the Circuit Court for Dade County, Robert Scola, Judge. Counsel: Bennett H. Brummer, Public Defender, and Sheryl J. Lowenthal, Assistant Public Defender, for appellant. Robert A. Butterworth, Attorney General, and Lara J. Edelstein, Assistant Attorney General, for appellee.

(Before COPE, GERSTEN, and SHEVIN, JJ.)

(PER CURIAM.) Defendant-appellant Ricardo Olivera appeals his conviction for second-degree murder and attempted second-degree murder. We affirm.

First, we conclude that the admission of the disputed autopsy photograph into evidence was within the discretion of the trial judge and that the photograph was not unfairly prejudicial. *See* Kirby v. State, 625 So. 2d 51, 54 (Fla. 3d DCA 1993). The photograph at issue was not of the same graphic nature as those erroneously admitted in *Hoffert v. State*, 559 So. 2d 1246, 1249 (Fla. 4th DCA 1990). We also conclude that the evidence on the charge of second-degree murder was sufficient to be presented to the jury.

Defendant's final claim is that the trial court erred in instructing the jury on attempted second-degree murder because the standard jury instructions do not require the state to prove that the defendant intended to kill. We reject that claim on the authority of Gentry v. State, 437 So. 2d 1097, 1099 (Fla. 1983); *Pitts v. State*, 710 So. 2d 62, 63 (Fla. 3d DCA 1998); and *Galdamez v. State*, 23 Fla. L. Weekly D1749 (Fla. 3d DCA July 29, 1998).

Affirmed.

* * *

Criminal law—Judgment—Correction—Degree of offense

JOHNATHAN MAYFIELD, Appellant, vs. THE STATE OF FLORIDA, Appellee. 3rd District. Case No. [illegible]-2273. L.T. Case No. [illegible]. Opinion filed September 16, 1998. An Appeal from the Circuit Court of Dade County, Stanford Blake, Judge. Counsel: Bennett H. Brummer, Public Defender, and Lisa Walsh,

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