IN THE SUPREME COURT OF FLORIDA

MATTHEW THOGODE,

Petitioner/Appellant,

v. CASE NO. 95,665

STATE OF FLORIDA,

Respondent/Appellee
_____/

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

RESPONDENT'S MERIT BRIEF

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This brief is prepared using Courier 12-point non-proportionally spaced font.

SUMMARY OF ARGUMENT

POINT I: The alleged sentencing error was not raised in the trial court; therefore this issue is not preserved for review. Even if this case is remanded for resentencing, the trial court should be permitted to enter a departure sentence based upon unscoreable capital offenses.

POINT II: The District Court properly found no error in the admission of Appellant's statements to Ruth Owen. The trial court correctly found that Ms. Owen was not an agent of the State and nevertheless adequately informed Appellant that anything he said would be used against him in court and that he had a right to remain silent.

ARGUMENT

POINT I

THE SENTENCING ISSUE WAS NOT PRESERVED FOR REVIEW. IF REMANDED, THE TRIAL COURT SHOULD BE PERMITTED TO ENTER A DEPARTURE SENTENCE.

Appellant was convicted of three counts of capital sexual battery and three counts of non-capital sexual offenses. He claims that the trial court departed from the guidelines when sentencing him for the non-capital offenses. Appellant admits that this alleged sentencing error was not raised in the trial court. The opinion below correctly found that the sentencing issue was not preserved for review. No other issues were discussed in the decision. (Exhibit A)

This Court is well aware of the issue raised in Maddox v. State, 708 So.2d 617 (Fla. 5th DCA 1998), review granted, 718 So.2d 1696 (Fla. 1998). The Fifth District has held that sentencing issues must first be raised in the trial court before being considered on appeal. Recently, this Court amended Fla. R. Crim. P. 3.800 and certain related appellate rules in order to better implement the Maddox decision and to resolve the conflict between the Fifth District and the other Districts in the State. See In Re Amendment to Florida Rules of Criminal Procedure, Case No. 95,707 (Fla. November 12, 1999). The State adopts its previous arguments presented to this Court in the pending Maddox case and further suggests that the recent amendments to the rules adopted by this Court comport with the decision in Maddox.

Respondent is aware of the line of cases which hold that where

a trial court departs from the guidelines but does not enter the reasons for departure in writing, the defendant must be resentenced within the guidelines. These cases are applicable, however, only when the trial court is aware of the departure. There is no evidence in this case from which one could assume that the trial court was attempting to depart.

During the pronouncement of sentence, the trial court stated:

> As to counts four, five, and six, I'll adjudicate you guilty, I'll sentence you in count four, which is a first degree felony, to ***22.3 years, the maximum under the sentencing guidelines***, ...

(Exhibit B at 15)(emphasis supplied) Thus, the trial court erroneously believed that the guidelines maximum was 22.3 years, and sentenced Appellant to a 22.3 year sentence. The prosecutor subsequently corrected the trial court and noted that the maximum guidelines sentence was 25 years, not 22.3 years. (B 16) But the trial court declined to expand the term to 25 years. (Id.) The prosecutor and the court were focusing only upon the maximum sentence together with the fact that the trial court misspoke and could have given Appellant a 25 year sentence; they were not aware that the sentence was a departure, nor did the trial court evince an intent to do anything other than sentence Appellant to the maximum under the guidelines.

Therefore, it is clear that the trial court was not aware it was entering a departure sentence. The judge explicitly stated that the sentence was the maximum allowed under the guidelines. If

this case is remanded for resentencing, the trial court should be permitted to enter any legal sentence including a departure sentence based upon the unscoreable capital convictions.

It is well-settled that unscoreable capital offenses are sufficient to sustain a departure sentence. See Torres-Arboledo v. State, 524 So.2d 403, 414 (Fla.), cert. denied, 488 U.S. 901, 109 S.Ct. 250, 102 L.Ed.2d 239 (1988)(Where the trial court offers no written reasons for the departure, sentence upheld because it is permissible to depart based on an unscored capital crime). Thus, that case was remanded to allow the court to enter written reasons for departure. Shortridge v. State, 681 So.2d 729, 730(Fla. 2d DCA 1996).

In summary, the State submits that this Court should adopt the reasoning of the Fifth District in Maddox, supra. Sentencing errors should first be brought to the attention of the trial court before being considered on appeal. The requirement of preservation is not unconstitutional and does not prejudice an appellant. Maddox does not foreclose appellate review, it merely channels appellate review procedurally through the trial court. This would greatly relieve the appellate courts of a cumbersome burden without diminishing the right to appeal a sentencing issue. In light of the above arguments and the Court's recent amendments to the rules of criminal and appellate procedure, this Court should affirm both this case and Maddox.

POINT II

THE TRIAL COURT PROPERLY ADMITTED APPELLANT'S STATEMENTS TO AN INVESTIGATOR FROM AN ADMINISTRATIVE AGENCY. SUFFICIENT MIRANDA WARNINGS WERE GIVEN.

In this point Appellant argues that his statements to Ruth Owen, an investigator from the Department of Children and Families, should have been suppressed. However, Appellant admitted below that the case cited in support of his position, Woods v. State, 538 So.2d 122 (Fla. 1st DCA 1989) is easily distinguishable from the facts in this case. In Woods the suspect invoked his right to remain silent and his right to counsel. Nevertheless, the law enforcement officer sent or "directed" an HRS investigator to speak with the suspect. There was no dispute that the investigator was used by the police to elicit statements in violation of the suspect's request for counsel.

Here, Appellant's counsel was nearby at the time of the interview, and Appellant never invoked his right to remain silent or the presence of counsel. The trial court properly found that Ruth Owen was not

> a law enforcement officer as defined by any statute that exists here in the State of Florida. She's not a police officer, deputy sheriff, F.D.L.E. agent or any other police or any law enforcement officer and was not acting in that police officer capacity, for lack of a better descriptive term, at the time of this interview. ...
>
> This person was not conducting

> a custodial interrogation, was not a police officer for that purpose, and the reason for her interview was separate and apart.

(R4 278)

The evidence elicited during the hearing established that Ruth Owen was required by law to interview all parties to a child sexual abuse case. She interviewed Appellant at the jail, and Appellant pointed out his attorney who was present in the hallway while the interview was being conducted. (R4 271-272) Ruth Owen also "assumed" that Appellant was represented by an attorney and she told Appellant that whatever was said to her could be used against Appellant in his criminal trial. Owen told Appellant that Appellant did not have to speak with her and that she might be required to testify against him during his criminal trial. (R4 272) Appellant never requested that his readily available attorney be present during the interview nor did he refuse to talk with Owen. Additionally, it was undisputed that Appellant telephoned Owen two more times asking her to come back and speak with him. (R4 285)

Because there is no evidence in the record that Owen was acting as an agent for the police, the trial court properly refused to suppress the statements. See In re J.C., 591 So.2d 315 (Fla. 4th DCA 1991) (assistant principal's questioning of student in principal's office while sheriff's deputy present not custodial interrogation, as assistant principal was school official and not police official); W.B. v. State, 356 So.2d 884 (Fla. 3d DCA 1978)

(assistant principal who took statement of juvenile was acting as school official and not agent of police when juvenile confessed to him; Miranda warnings not required); State v. V.C., 600 So.2d 1280,1282 (Fla. 3d DCA 1992).

Finally, the trial court found that Appellant was given sufficient Miranda warnings. Appellant was told that he did not have to speak with Owen and that anything he said could be used against him during his criminal trial. Owen also explained that she could be required to testify against him at trial. Neither Florida nor federal courts have required a "talismanic incantation" of Miranda rights. See, e.g., State v. Delgado-Armenta, 429 So.2d 328, 329-31 (Fla. 3d DCA 1983); California v. Prysock, 453 U.S. 355, 359, 101 S.Ct. 2806, 2809, 69 L.Ed.2d 696 (1981). Instead, all that is necessary is that the accused be "adequately informed" of the Miranda warnings or their equivalent. See, Delgado-Armenta; Prysock, supra; Thompson v. State, 595 So.2d 16,17 (Fla. 1992).

Owen was not an agent for the police; her interview was conducted separate and distinct from the criminal charges pending against Appellant. She was acting upon a legislative mandate requiring her to attempt an interview of Appellant. Even if she were deemed an agent, she fully informed Appellant that he did not have to talk to her and that anything he said could be used against him in court. The trial court did not abuse its discretion in denying the motion to suppress.

CONCLUSION

Based on the argument and authorities presented herein, Respondent requests this Honorable Court to affirm the decision of the District Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Respondent's brief on the merits in case number 95,665 has been furnished by delivery to Kenneth Witts, Assistant Appellate Public Defender, Seventh Judicial Circuit, this _____ day of November, 1999.

_____
CARMEN F. CORRENTE
ASSISTANT ATTORNEY GENERAL

IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA, IN AND FOR HERNANDO COUNTY

STATE OF FLORIDA,

Plaintiff,

vs. CASE NO.: 96-1059-CF

MATTHEW THOGODE,

Defendant.

PROCEEDINGS: Sentencing

BEFORE: HONORABLE JACK SPRINGSTEAD

DATE: November 6, 1997

PLACE: Hernando County Courthouse
Brooksville, Florida

REPORTED BY: HOLLY L. KIRCHMAN, RPR; Notary Public, State of Florida at Large

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PROCEEDINGS

(Whereupon, the following proceedings were had in open court, in the presence of the Defendant, Matthew Thogode.)

MR. NORVILLE: Page 31, Matthew Thogode, case number 96-1059.

THE COURT: There's a motion pending, I believe, Mr. Fanter?

MR. FANTER: Yes, sir, there's a speaking motion for new trial that I filed with the Court.

THE COURT: Has the State had an opportunity to review the motion?

MS. KLAPKA: Yes, Your Honor. I believe it was a motion for retrial -- find it in my file. The State would ask that the Court rely on the discretion of the jury in finding that the facts that were before the jury were sufficient for the jury to find beyond a reasonable doubt that the Defendant had committed three counts of capital sexual battery as well as one count of attempted sexual battery and one count of or two counts of lewd and lascivious act upon a child under the age of 16.

Let's see what we have. Mr. Fanter is also alleging that the motion for direct, for JOA was in error. To the Court the State would argue that it's

up to the discretion of the Court to deny motions for judgment of acquittal.

The State did put on sufficient evidence to prove each and every element that was required to be proven at that time, Your Honor. The State would ask the motion be denied.

THE COURT: Mr. Fanter?

MR. FANTER: Judge, I don't have additional grounds other than what we argued at trial.

THE COURT: Very well; all right. The Court will deny the motion for new trial at this time. I do believe that the facts are plain in the record that the jury has made a determination based on the evidence presented and determined that the elements were met.

Accordingly, I deny the motion for new trial.

All right. I have received a copy of the presentence investigation. Has both the State and the Defense also received a copy of it?

MR. FANTER: Yes, sir.

MS. KLAPKA: Yes, Your Honor.

THE COURT: First let me clarify. It would be the Court's understanding that counts one, two, and three are convictions or sentences for offenses that the guidelines did not apply to.

MS. KLAPKA: That's right, Your Honor.

MR. FANTER: Correct.

THE COURT: And that there is only one sentence available to the Court on those three counts.

MS. KLAPKA: Yes, sir.

THE COURT: Now I'm somewhat confused by the recommendation of the Department on those counts. Did I miss something here?

(Off the record briefly due to a problem with the Defendant.)

(Whereupon, the following proceedings were had in open court, in the presence of the Defendant, Matthew Thogode.)

THE COURT: Are we ready then to proceed again with Mr. Thogode's case? All right. Mr. Fanter, I was in the midst of making inquiry with regard to the recommendation in the report which would reflect a 25-year sentence. And my belief is that that is not the statutory sentence that's provided by law.

MR. FANTER: That's consecutive to the life sentence, Judge, if you read carefully on the PSI. She has recommended three concurrent life sentences with mandatory 25 followed by a consecutive prison sentence on the lesser included offenses in counts four through six.

We also don't agree with her guidelines scoresheet --

THE COURT: I'm telling you, it says mandatory 25 one through three. It does not say a life sentence.

MR. FANTER: Oh, I'm sorry, Judge, I thought you were talking about the 25 consecutive --

THE COURT: No, I don't think that reflects the statutory sentence.

MS. KLAPKA: No, sir. What she may have been thinking is that it was a life sentence with parole after 25.

THE COURT: That doesn't apply either.

MS. KLAPKA: Right, that the law has changed. She apparently is not --

THE COURT: I think where we are is that the Court has one sentence available to it by operation of law, and that's a life sentence. And I just want to make sure that we're all in the same book and page.

That's where the legislature has put us. There's no mandatory minimum anymore and that 25-year recommendation is inconsistent with the statutory provisions under the law.

I mean, does the Department have anything they

want to say on this regard?

MR. GAGDUSEK: No, Your Honor. I guess, I believe she wasn't aware of --

THE COURT: Now I do believe that counts four, five, and six are offenses for which the guidelines would apply and the Court is obligated to sentence him under the guidelines on those counts.

And the recommendation, as I understand it, is that he scores out, I believe, 228 points.

MS. KLAPKA: Your Honor, in fact, the Defendant scores out 268 points. What they did is, they added 80 points for sex penetration. It's clear from the jury finding that they did not find penetration.

However, from the facts that were presented, the State would argue that there were three counts, the last three counts that there was evidence, there was facts in evidence in support of the three counts involving sexual contact.

THE COURT: Well, they've got 228.

MS. KLAPKA: Right. Well, what they did is, they added 80 points for sex penetration, which they cannot do because the jury did not find penetration in the last three counts.

However, from the facts that were brought out, the State believes that there are, there is enough to

prove three counts, three sex contacts which would add 120 points, not 80 points.

THE COURT: Okay. So, I see. The State is saying there was sexual contact times three counts for 120. So that means 268?

MS. KLAPKA: Yes, sir.

MR. FANTER: Judge, we would disagree with the assessment. We don't think the evidence shows three incidents of contact. I think there was one attempted where there would have been contact and should only be scored once.

MS. KLAPKA: I would disagree with that. I don't know what the jury found, but there was one count in which he attempted to make penetration, she said, "Ow." And that was evident that there was contact.

Therefore, in that case additionally, if I recall correctly, he did say he touched her underneath her panties as well as over top of her panties with his fingers every time.

THE COURT: All right. I do find that the evidence is sufficient to support the State's position that the scoresheet should reflect a total score of 268; that the penetration is in error, but that there were three incidents of sexual contact.

So that should be 40 times three.

Factoring in that modification, the total points are 268 and the Court will so find.

Okay. Mr. Fanter, are there any additions, deletions, or corrections to the PSI that you'd like to make at this time?

MR. FANTER: Judge, yes. I received a letter that was sent directly to your office and then forwarded to my office dated September 20th of '97. I was also provided with a packet of information from the Defendant's mother the other day that she attempted to give to our office. And I'd like to tender those to the Court.

THE COURT: Certainly; all right. The Court has reviewed the documentation submitted by the Defense. Anything further, Mr. Fanter?

MR. FANTER: Judge, Mr. Thogode would like to address the Court before you impose sentence.

THE COURT: All right. Let me inquire, does the State have anything further?

MS. KLAPKA: Yes, only a few things, Your Honor, in reference to the PSI. There's a statement by the Defendant in the PSI in which he indicates that, he's referring to the jobs, the different jobs. He indicated that he was working at Weeki Wachee Springs

as a laborer but that he left that job for a better job at Subway.

The State notes that the Defendant was terminated at that job for having touched two other young girls both, one of them age nine, the other age 11, on their buttocks.

Additionally, as far as the sentence, the recommendation, what the State would ask is that the sentence on the three final counts be consecutive. The Defendant himself admits to being a pedophile, he admits to being kicked out of two churches for getting too close to young girls.

He denies that he did anything wrong. He continues to deny any wrongdoing. He blames the young victim for asking him to continue his actions, for wanting it and for liking it.

And based on that, the State believes he is a big danger to society. He does not realize he's done anything wrong.

And that's all the State has, Your Honor.

THE COURT: All right. Mr. Fanter, you say your client wishes to address the Court before imposition of sentence?

MR. FANTER: Yes, sir.

THE COURT: All right. Mr. Thogode, what do you

have to say to the Court?

THE DEFENDANT: The words I'm going to express to you come from someone whose heart has been suffering from pain of guilt. My statements are real, they are sincere, and they are the truth in its entirety.

My purpose here today is not to give rise to deception for my own benefit but for justice that will rectify the whole situation. I did not have to confess to what I have done, but I did for I knew it was the proper thing to do.

And I cannot -- no matter what has happened here or whatever has been said in court before, I have been trying to rectify the situation, do what is needed properly, rely on the justice system. And then going through the justice system, I had to fight for my own behalf to prove who I really am, trying to prove things.

The letters I've written to Miss Diane are true. I do admit I was wrong in what I have done. I tried to do that. I take the risk in whatever I say today, and for the benefit I came forward to do, to get the help I needed, you know, and to pay the price that had to come, you know.

Since being incarcerated, the first time I have

looked over those records from school and medical, and I understand a lot of myself from there. I understand that I had a period of help where I was supposed to be schooled for mentally, but I had to move. It was not under my doing, but I had to move.

But I feel at that point that was the turning point in my life where I had, could have directed myself mentally, and it is all there in the record. I had -- Dr. Hogan has even stated in his evaluation that I had an impaired capacity, being very behind socially.

I come, I just want to do what's right. You know, if I could, I would take the pain away from her life. I didn't want to hurt no one. Yes, I did something that was wrong and I had to fight over different things. Yes, I got angry over the fact of trying to speak out about the evaluation which proved, because after I got the written document from Dr. Hogan, that it did explain a lot of things which I needed to bring up and the fact that I did search his background and he is not listed in Tallahassee as being licensed or even licensed for legal documents.

It was even looked through a directory from another psychiatrist that has a directory of all the psychiatrists who are listed in the book to give

authority in different laws and cases, and his name was not even in the books, all three of them of what he had.

I'm not -- I can't -- on that day I didn't hit Mr. Fanter. I wouldn't have swung at him. Yes, I did, I flew the file off the podium, but my intentions were never to hit him. You know, if I did, he would have had a bruise or whatever.

I'm not someone -- I've done something -- I've been put into a situation of my own doing, but it was more of I didn't, I knew it was wrong, but --

THE COURT: You couldn't help yourself.

THE DEFENDANT: Yes. And --

THE COURT: You understand why we're here today now, though, you understand.

THE DEFENDANT: Yes, sir. And I didn't force her into doing anything, you know. As it states in all the letters I've written, they've come from, you know, from me. I didn't want to hurt anyone emotionally through this, I didn't want to put anyone through this. I just wanted to do what was right.

And I've been frustrated so much with the fact that I had to fight to get my word out and to get things done and to, you know, and saying there was nothing that could be done, but that wasn't true

because of all the things --

THE COURT: Anything else?

THE DEFENDANT: No, sir.

THE COURT: All right. Mr. Thogode, first of all, let me tell you that your being here today and the sentence that the Court is about to impose in no way gives this Court any feeling of pleasure or is something that I enjoy doing. This is something that I don't enjoy doing. But this is the job that I chose and sometimes I have to do difficult things, and this is one of those times.

Based on everything that I heard during the course of these proceedings, further based on everything you have said in the presentence investigation, what you've said here today, what you've said in the letter that you sent to the Court, you obviously did not listen to the advise of your attorney.

You chose not to listen to the advice of your attorney. In fact, you filed a grievance against him -- I've got that information -- where he had to respond. But notwithstanding that, Mr. Fanter did an outstanding job of representing you, and I want the record to reflect that.

That you elected to exercise your right to trial

before a jury of your peers and have the evidence placed before them and let them determine your fate, in effect. That you did that freely and voluntarily with full knowledge of what you're doing and with full representation of very competent counsel.

And now that jury has spoken; you've heard what they said. They said that you committed three acts of sexual battery on a child less than 12 years of age. At the time you were 25 and this little girl was seven years old.

I don't purport to be able to look into your mind and see what type of twisted logic that led you to believe that you could have an appropriate sexual relationship with a seven-year-old little girl. But it's obvious that you did and that to this day, from your comments and your letters and from what you've said here today and what you have said throughout the course of these proceedings, you in your own mind and heart do not believe you've done anything wrong.

And I believe you will probably leave this earth with that belief. But that's very consistent with someone that has a twisted sexual perversion, and that's what you are. You are a sexual predator, no doubt about it. You are, and in the opinion of this Court, you always will be.

And because of that I have to find that you pose a danger to society and you always will pose a danger to society. So accordingly I'm going to sentence you as follows: I'm going to follow the law as required under the provisions of the statute for which you were convicted. You were convicted of three capital offenses, and accordingly under the law, the Court imposes the following sentence:

As to count one, I will adjudicate you guilty and sentence you to serve your natural life in prison. As to count two, I'll adjudicate you guilty and sentence you to serve a second consecutive natural life sentence in the State Department of Corrections.

As to count three, I'll adjudicate you guilty and sentence you to serve a third consecutive sentence of natural life in the Department of Corrections. As to counts four, five, and six, I'll adjudicate you guilty, I'll sentence you in count four, which is a first degree felony, to 22.3 years, the maximum under the sentencing guidelines, followed by a consecutive 15 years on count five in the Department of Corrections, and a consecutive 15 years on count six.

I'll also assess fines and courts costs of

$1000, I'll direct that you be tested appropriately under the statutory provisions for sexually transmittable diseases, which is a requirement of the law.

Are there any terms and conditions that the Court has overlooked or omitted?

MS. KLAPKA: No, Your Honor. The actual, the statutory maximum under the correct guidelines is 300 months which is 25 years.

THE COURT: I thought you said it was 268.

MS. KLAPKA: 268 minus the 28 which adds up to 240 times 1.25, which mine calculated out to 300.

THE COURT: All right; I see what you're saying. Well, I'll leave the sentence imposed as I imposed it.

MS. KLAPKA: Okay. And also the State has a proposed order declaring the Defendant a sexual predator for the Court to sign.

THE COURT: I'll enter that order in accordance with the statute. I have made that finding. Any other issues?

MS. KLAPKA: There was counseling for the victim; however, the Defendant --

THE COURT: Well, I don't think he's going to be in a position --

MS. KLAPKA: I know. The victim's parent informed me that that is being covered by Medicaid anyway.

THE COURT: All right.

MR. FANTER: Judge, we would ask that he be declared indigent for purposes of appeal.

THE COURT: That was my next point, I wanted to advise him of his rights. All right. Mr. Thogode, there's two things I need to do, first of all, at this point. Do you understand the sentence that the Court has imposed?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Okay. Do you also understand that you have the right to appeal the judgment and sentence on any issue that has been raised during the course of these proceedings? Mr. Fanter made a number of motions and objections during the course of your trial, any one of which if the appellate court were to choose, could reverse all these proceedings and send it back.

Do you understand that?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Okay. So you understand the sentence and also understand you have the right to appeal the judgment and sentence of this Court on any

issue that's been raised?

THE DEFENDANT: Yes, Your Honor.

THE COURT: All right. I'm going to appoint Mr. Fanter for purposes of advising you of your appellate rights. And, Mr. Fanter, I would assume at this juncture he would like to do that. I would like for you to advise him, file the list of judicial acts to be reviewed, notice of appeal, and at that point I will relieve your office and appoint the appellate attorneys' office over in Daytona Beach.

Are there any other issues we need to address?

MR. FANTER: No, sir.

THE COURT: All right.

(Whereupon, the hearing was concluded.)

COURT CERTIFICATE

STATE OF FLORIDA

COUNTY OF HERNANDO

I, HOLLY L. KIRCHMAN, Registered Professional Reporter; Notary Public, State of Florida at Large, certify that I was authorized to and did stenographically report the foregoing proceedings and that the transcript is a true and complete record of my stenographic notes.

DATED this 22nd day of December, 1997.

Holly L. Kirchman

HOLLY L. KIRCHMAN, RPR; Notary Public, State of Florida at Large