IN THE SUPREME COURT OF FLORIDA

STEPHEN J. KLARICH, JR.,

Petitioner,

v. CASE NO.: 95,705

STATE OF FLORIDA, DCA case no.: 98-172

Respondent.

_____/

ON REVIEW FROM THE FIFTH DISTRICT COURT OF APPEAL

RESPONDENT'S BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

MISCELLANEOUS:

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SUMMARY OF ARGUMENT

The Petitioner submits that the imposition of special conditions of probation and costs are fundamental error which did not need to be presented to the trial court. It is the position of the State that "fundamental" sentencing errors have been eliminated by the current Reform Act, and the Rules of Appellate and Criminal Procedure should have been followed in presenting the claims to the trial court. Otherwise, these errors are not adequately preserved for appeal.

ARGUMENT

POINT OF LAW

WHETHER A DEFENDANT MUST PROPERLY OBJECT IN ORDER TO PRESERVE SENTENCING ERRORS RELATED TO SPECIAL CONDITIONS OF PROBATION AND COSTS.

This is another sentencing issue case which is before this Court based upon the ruling of the Fifth District Court of Appeal that only sentencing errors which have been preserved can be raised on direct appeal. See, Maddox v. State, 708 So. 2d 917 (Fla. 5th DCA 1998), rev. granted, 718 So. 2d 169 (Fla. 1998).[1] This includes any sentencing errors which previously may have been labeled "fundamental." It is the position of the State that

[1] The fact that Maddox was an Anders case (Anders v. California, 386 U.S. 738 (1967)) which the appellate court chose to review and evidently easily found sentencing errors illustrates the complexity and constant changing nature of our current sentencing process. This exact point was made by this Court in the recent changes to Florida Rule Criminal Procedure 3.800 when it wrote in regards to sentencing: "[w]hich once was a straightforward function for trial courts, has become increasingly complex as a result of multiple sentencing statutes that often change on a yearly basis." Amendment to Rule 3.800, 24 Fla. L. Weekly S531 (Fla. Nov. 12, 1999).

this is a correct interpretation of the changes to the appellate process (the new amendments to the rules will be discussed later in this brief). To understand how the Fifth District reached its conclusion, some background review of the previous law in this area is necessary.

First, an examination of case law prior to the Criminal Reform Act shows an inconsistent approach to whether an objection was needed to preserve a sentencing error. In the case Walcott v. State, 460 So. 2d 915, 917-921 (Fla. 5th DCA 1984), approved, 472 So. 2d 741 (Fla. 1985), Judge Cowart wrote a detailed analysis of the application of the contemporaneous objection rule to sentencing errors in his concurring opinion which pointed out many of the inconsistencies in the sentencing error cases. Adding to the inconsistencies of the necessity of a contemporaneous objection was the expansive definition of fundamental error when used in the sentencing context.[2] Case law held that an illegal sentencing error was fundamental error since it could cause a defendant to serve a sentence longer than is permitted by law; however, cases called sentencing errors fundamental which ranged from sentences in excess of the statutory maximum to jail credit

[2] The Second District Court recently wrote in a case which will be reviewed in more detail later in this brief that "It is no secret that the courts have struggled to establish a meaningful definition of 'fundamental error' that would be predictive as compared to descriptive." Denson v. State, 711 So. 2d 1225 (Fla. 2d DCA 1998).

to improper costs to conditions of probation. See, Larson v. State, 572 So. 2d 1368 (Fla. 1991) (illegal conditions of probation can be raised without preservation), Wood v. State, 544 So. 2d 1004 (Fla. 1989), receded from, State v. Beasley, 580 So. 2d 139 (Fla. 1991) (failure to provide defendant notice and opportunity to be heard as to costs imposed constitutes fundamental error), Vause v. State, 502 So. 2d 511 (Fla. 1st DCA 1987) (improper imposition of mandatory minimum sentence constituted fundamental error); Ellis v. State, 455 So. 2d 1065 (Fla. 1st DCA 1984) (error in jail credit fundamental since defendant may serve in excess of sentence), Jenkins v. State, 444 So. 2d 947 (Fla. 1984), receded from, State v. Beasley, 580 So. 2d 139 (Fla. 1991) (costs could not be imposed without notice).

Eventually it seems, case law evolved which provided that sentencing errors apparent from the record could be reviewed by the appellate court whether preserved or not. See, Taylor v. State, 601 So. 2d 540 (Fla. 1992), Dailey v. State, 488 So. 2d 532 (Fla. 1986), State v. Rhoden, 448 So. 2d 1013 (Fla. 1984). In Rhoden, the defendant was sentenced as an adult despite the fact he was seventeen years old. Id. at 1015. However, the trial court never addressed the requirements of the statute necessary to sentence a juvenile as an adult. There was no objection at the trial level. Id. The State's argument that the error was not fundamental and that an objection was needed was rejected by this Court which wrote

> If the state's argument is followed to its

> logical end, a defendant could be sentenced to a term of years greater than the legislature mandated and, if no objection was made **at the time of sentencing**, the defendant could not appeal the illegal sentence.

Id. at 1016, (emphasis added).

The appellate system became more and more clogged with sentencing errors which were either raised for the first time on direct appeal or were not even raised at all by appellate counsel but were simply apparent on the record. As Judge Cowart wrote in his concurrence in the previously referenced Walcott:

> Those who legislate substantive rights and who promulgate procedural rules should consider if the time has not arrived to take action to improve the present rules and statutes. The first step might be to eliminate these vexatious questions, perhaps by eliminating the right of direct appeal of sentencing errors with the injustice that necessarily attends application of the concept of implied waiver to the failure of counsel to timely, knowingly, and intelligently present appealable sentencing errors for direct appellate review. **Perhaps it would be better to have one simple procedure**, permitting and requiring, any legal error in sentencing that can result in any disadvantage to a defendant, to be presented once, specifically, explicitly, but at any time to the sentencing court for correction with the right to appeal from an adverse ruling.

460 So. 2d at 920, (emphasis added). More than a decade later, the better, simpler approach urged by Judge Cowart was attempted with an extensive overhaul of the appellate system in regards to criminal appeals. Included in this process was the Criminal

Reform Act (Reform Act) which was codified in section 924.051, Fla. Stat. (1997) as well as changes to the Rules of Criminal and Appellate Procedure.

It should be noted there is no right under the United States Constitution to an appeal in a non-capital criminal case. This point was specifically recognized by this Court when it recently wrote

> The United States Supreme Court has consistently pointed out that there is no federal constitutional right of criminal defendants to a direct appeal. Evitts v. Lucey, 469 U.S. 387, 393, 105 S.Ct. 830, 834, 83 L.Ed.2d 821 (1985) ("Almost a century ago the Court held that the Constitution does not require States to grant appeals as of right to criminal defendants seeking to review alleged trial court errors."). Accord, Abney v. United States, 431 U.S. 651, 656, 97 S.Ct. 2034, 2038-39, 52 L.Ed.2d 651 (1977); Ross v. Moffitt, 417 U.S. 600, 94 S.Ct. 2437, 41 L.Ed.2d 341 (1974).

See, Amendments to the Florida Rules of Appellate Procedure, 685 So. 2d 773, 774 (Fla. 1996). However, this Court also noted that article V, section 4(b) of the Florida Constitution was a constitutional protection of the right to appeal. Id. This Court wrote

> . . . we believe that the legislature may implement this constitutional right and place **reasonable conditions** upon it so long as they do not thwart the litigants' legitimate appellate rights. Of course, **this Court continues to have jurisdiction over the practice and procedure relating to appeals.**

Id. (emphasis added)(footnote omitted).

Immediately after the passage of section 924.051 which was the legislature implementing reasonable conditions upon the right to appeal, this Court exercised its jurisdiction over the appellate process and extensively amended Florida Rule Appellate Procedure 9.140 to work with the Reform Act. As applied to appeals after a plea of guilty or nolo contendere,[3] the amended Rule provided

> (2) Pleas. A defendant may not appeal from a guilty or nolo contendere plea except as follows:
>
> (A) A defendant who pleads guilty or nolo contendere may expressly reserve the right to appeal a prior dispositive order of the lower tribunal, identifying with particularity the point of law being reserved.
>
> (B) A defendant who pleads guilty or nolo contendere may otherwise directly appeal only
>
> (I) the lower tribunal's lack of subject matter jurisdiction;
>
> (ii) a violation of the plea agreement, if preserved by a motion to withdraw plea;
>
> (iii) an involuntary plea, if preserved by a motion to withdraw plea;
>
> (iv) **a sentencing error, if**

[3] Many of the appeals being taken occurred after a defendant had negotiated a plea and was sentenced pursuant to his agreement. It is not coincidental that the instant case as well as several of the cases which will be discussed later in this brief were written after defense counsel on appeal had filed and Anders brief.

preserved; or

(v) as otherwise provided by law.

(emphasis added). The Rule was also further changed in order to specifically refer to sentencing errors:

> (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).

The Rule 3.800(b) referred to above was itself completely rewritten 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."

It was these specific changes that led the Fifth District Court to find in the instant case that the concept of fundamental sentencing errors no longer exists.[4] As the court noted, only "preserved" errors can be appealed. Sentencing issues become much

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[4] As additional support for the fact that fundamental errors only apply to trial errors, the Fifth District Court relied on the case of Summers v. State, 684 So. 2d 729 (Fla. 1996). In Summers, this Court analyzed the issue whether failure to file written reasons to sentence a juvenile as an adult constitutes fundamental error. This Court wrote that:

> The trial court's failure to comply with the statutory mandate is a sentencing error, not fundamental error, which must be raised on direct appeal or it is waived.

Id.

more like other issues with there now being a specific requirement that they be preserved in order to be presented on appeal. See, section 90.104(1)(a), Fla. Stat. (1997) (requiring a specific objection to preserve an evidentiary issue); Fla. R. Crim. P. 3.390(d) (requiring an objection to preserve a jury instruction issue). Further, the situation that was of concern in Rhoden that the subject matter of the objection would not be known to the defendant until the moment of sentencing is solved by the fact that there is still a thirty (30) day window in which to present any sentencing issues to the trial court for remedy and for preservation.

As the Fifth District Court of Appeal noted

> 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 case law and will provide a much-needed clarity, certainty and finality.

Maddox, 708 So. 2d 617, 620 (Fla. 5th DCA 1998) (emphasis added).

With this as a background, we now turn to the instant case. The Petitioner submits that the sentencing errors in this case are fundamental in nature and need not be preserved to be corrected on appeal. The State respectfully disagrees.

The Petitioner in this case was sentenced to one year of community control followed by three years of probation after being

found guilty of the offense of resisting an officer with violence. (Vol. I, R 14-17, 36, 58-62). On appeal counsel for the Petitioner raised for the first time several points concerning the assessment of special conditions and costs[5] related to the community control and probation. The Fifth District Court of Appeal applied Maddox and found the issues were not preserved for appeal.

The Petitioner in this case admits that the issue before this Court was never presented to the trial court; however, the Petitioner's position is that any error in this case would be fundamental and would not have to be preserved. The Fifth District Court of Appeal held in its case of Maddox that all sentencing errors have to be preserved for appellate review. Such preservation could occur at the original sentencing, in a motion to correct sentence under Florida Rule Criminal Procedure 3.800, or in a motion for postconviction relief under Florida Rule Criminal Procedure 3.850. None of those was done in this case. The State has previously asked that this Court affirm the holding

[5] The $250 cost of prosecution and the $150 cost of investigation were both specifically orally imposed at sentencing with counsel for the Petitioner being asked if he had any questions and he stated he had none. (Vol. I, R 27). Clearly, counsel could have at this point voiced any concerns he had as to these costs.

in Maddox and again so requests in the instant case. Such a ruling would bar the Petitioner from raising the instant claim in his current appeal.

Under previous case law each of these costs would be found to be "fundamental" sentencing errors[6]. However, as previously noted, the Fifth District Court of Appeal found neither to be preserved, and each to be waived. Obviously, these are some of the exact types of errors that the reforms intended to be presented to the trial courts prior to them being reviewed by the appellate courts. No such preservation was done in this case, and the Fifth District Court of Appeal ruled that the issues could not be raised on direct appeal.

To repeat the point well made by the Fifth District Court as to the fact that only preserved sentencing errors can be raised on appeal:

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[6] In an *en banc* decision written by Judge Warner, the Fourth held

> We believe that the rule changes have *sub silentio* overruled Wood to the extent that it held that the imposition of fees and costs without notice and a hearing is "fundamental error" which may be raised for the first time on appeal without preservation. The fifth district has already held in Maddox that an appellant may not raise cost issues on direct appeal unless the issue has been preserved by contemporaneous objection or by motion to correct under Rule 3.800(b). See, 708 So.2d at 621. We too have indicated that cost issues must also be preserved. See, Harriel v. State, 710 So.2d 102, n.1, (Fla. 4th DCA 1998).

Hyden v. State, 715 So. 2d 960, 962 (Fla. 4th DCA 1998), rev. granted, 728 So. 2d 203 (Fla. 1999).

> Elimination of the concept of 'fundamental error' in sentencing will avoid the inconsistency and illogic that plagues the case law and will provide a much-needed clarity, certainty and finality.

Maddox, 708 So. 2d at 620. It is the State's position that this is the very reason that this Court amended the appellate rule specifically to address the appeal of sentencing errors. And to repeat the previously cited amendment of Rule 9.140(d) which specifically addresses the appeal of sentences:

> (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).**

(emphasis added).

Based upon this, it is the State's position that this Court has clearly limited appeals of sentencing errors to only those which are preserved by presentation to the trial court; thus, eliminating the previously expansive exception of so-called fundamental error.

As previously noted, the Respondent is aware of the very recent changes to the criminal and appellate rules of procedure by this Court. The thirty day period was found to be inadequate and has now been expanded up until the time briefs are filed on appeal. See, Amendments to Fla. Rules of Crim. Pro. 3.111(e) & 3.800 & Fla. Rules of App. Pro. 9.010(h) 9.140, & 9.600, 24 Fla.

L. Weekly S530 (Fla. Nov. 12, 1999). Additionally, the Clerk's office is now required to forward a copy of the judgment and sentence to the defense attorney within fifteen days of the sentencing. However, despite these implementation adjustments to the Reform Act, the overall point is the same - sentencing errors should be presented to the trial court in order to be preserved. With this added safety net for preservation, the goal of the Reform Act is strengthened even more. Furthermore, Rule 3.800(a) which allows a defendant to correct an illegal sentence and Rule 3.850 in which a defendant can prove ineffective assistance of counsel both still exist for errors not "caught" under the current system.

It has been said that there is no such thing as an error-free trial, and it is becoming more and more apparent that the same is true of sentencing. Clearly, no one should have to serve an illegal sentence; however, it is not unfair to require that sentencing errors should be presented to the trial courts in order to be preserved for appeal.

CONCLUSION

Based on the arguments and authorities presented above, the State respectfully prays this Honorable Court affirm the holding of the Fifth District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above Merits Brief has been furnished by delivery via the basket of the Office of the Public Defender at the Fifth District Court of Appeal to Susan A. Fagan, counsel for the Petitioner, 112 Orange Ave. Ste. A., Daytona Beach, FL 32114, this _____ day of November 1999.

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