IN THE SUPREME COURT OF FLORIDA

MARK CHARLES,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

_____/

CASE NO.: 95,753

DCA case no.: 98-871

ON REVIEW FROM THE FIFTH DISTRICT COURT OF APPEAL

RESPONDENT'S BRIEF ON THE MERITS

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STATEMENT OF CASE AND FACTS

In addition to the facts given by the Petitioner, the State offers the following:

1. In case 89-1910-CF-M, the Petitioner was originally charged with three counts of lewd or lascivious assault upon a child in violation of section 800.04(2), Fla. Stat. (1987). (R 47). The Petitioner pled guilty as charged, and on July 3, 1990, the trial court imposed three consecutive terms of fifteen year probations to be served consecutive to fifteen years of incarceration imposed for another lewd or lascivious charge in case 89-1569-CF-M. (R 50-58).

2. Upon being released from incarceration, the Petitioner committed a new law violation by exposing himself to his seven year old granddaughter. (R 42).

3. Based upon this violation, he pled no contest to the violation of probation. (R 69-79). During this plea hearing, the Petitioner stated that he had served six years of his fifteen year sentence. (R 72). Based upon this, his attorney told him that his maximum exposure was 39 years prison - 45 years on the three counts minus credit for the six years served. (R 72). Aware of this possible sentence, the Petitioner still pled no contest. (R 77).

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SUMMARY OF ARGUMENT

The issue presented is whether the Petitioner was properly awarded gain time credit and whether such issues have to be presented to the trial court prior to being raised on direct appeal. It is the position of the State that the Reform Act clearly requires such issues to be raised in the trial court before they are presented on appeal. It is the trial court with the records and other documents which would either support or refute such claims. Without initially seeking review by the trial court, these errors are not adequately preserved for direct appeal.

ARGUMENT

POINT OF LAW

WHETHER A DEFENDANT MUST OBJECT TO THE TRIAL COURT IN ORDER TO PRESERVE THE DIRECT APPEAL OF SENTENCING ISSUES RELATED TO THE AWARD OF PROPER GAIN TIME.

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 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

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[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).

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 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

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[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).

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

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[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

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 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).

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cases which will be discussed later in this brief were written after defense counsel on appeal had filed and Anders brief.

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 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

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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.

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 submitted on appeal that the trial court should have awarded him credit for the fifteen years of prison to which he was sentenced at the time his probation was imposed. See, Tripp v. State, 622 So. 2d 941 (Fla. 1993). The State's response was that the issue was not preserved since it was never presented to the trial court in any manner. The Fifth District Court of Appeal affirmed the judgment and sentence citing Maddox.

Now the Petitioner is asking this Court to remand for resentencing so that he can be awarded his proper Tripp credit. Obviously, this is the exact type of error that the reforms intended to be presented to the trial courts prior to them being reviewed by the appellate courts. It is the trial court with the records and documents that either support or refute jail time and gain time issues. The Petitioner in no way presented the current claim to the trial court, and this is the only issue now being

presented on appeal.

To overcome the failure to preserve, the Petitioner submits that this is an error apparent on the face of the record which shows ineffective assistance of trial counsel. See, Mizell v. State, 716 So. 2d 829 (Fla. 3d DCA 1998). There are two problems with the Petitioner's argument. First, to show ineffective assistance of counsel, the burden is on the petitioner to show deficient performance by that attorney and prejudice. See, Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The alleged deficient act is failure to object allegedly alleviating the need ever to present the issue to the trial court; however, the prejudice prong is never met in this case. The Petitioner upon completion of this appeal can file a Rule 3.800(a) motion to correct his sentence (which of course could be appealed if the trial court entered an order denying relief). See, State v. Mancino, 714 So. 2d 429 (Fla. 1998).

A second problem with the Petitioner's argument is that if this sentence is found to be improper quite arguably the trial court upon resentencing could restructure the three counts to achieve the trial court's original sentencing intent. See, Blackshear v. State, 531 So. 2d 956, 958 (Fla. 1988), Rubalcaba v. State, 729 So. 2d 994, 995 (Fla. 3d DCA 1999), Cerkella v. State, 687 So. 2d 367, 368 (Fla. 3d DCA 1997), Wright v. State, 429 So. 2d 836 (Fla. 3d DCA 1983). The trial court imposed a twenty year total sentence on the three counts (15 + 2-1/2 + 2-1/2). At sentencing during the discussion of what sentence would be imposed, the Petitioner himself stated that he

would take a 12 year sentence. (R 40-41). Obviously, there was no thought by any party that credit would be given for 15 years.[5]

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:

> 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 rules 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

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[5] Additionally, Tripp applied only to earned incentive gain time. Even under Tripp, defendants still do not receive credit for provisional credits, administrative gain time, or control release. See, Tripp, 622 So. 2d at 952, n. 2; see also, Gant v. State, 642 So. 2d 84, 86 (Fla. 2d DCA 1994).

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).[6] 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 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

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[6] It is the understanding of the undersigned that a motion for rehearing has been filed by the State seeking modification of some of the amended rules.

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 Rosemarie Farrell, counsel for the Petitioner, 112 Orange Ave. Ste. A., Daytona Beach, FL 32114, this 8th day of December 1999.

Wesley Heidt

WESLEY HEIDT
ASSISTANT ATTORNEY GENERAL

98-284 RF

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

FIFTH DISTRICT JANUARY TERM 1999

NOT FINAL UNTIL THE TIME EXPIRES TO FILE REHEARING MOTION, AND, IF FILED, DISPOSED OF.

MARK CHARLES,

Appellant,

v.

Case No. 98-871

STATE OF FLORIDA,

Appellee.

_____/

Opinion Filed April 30, 1999

Appeal from the Circuit Court
for Putnam County,
William Parsons, Judge.

James B. Gibson, Public Defender, and Rosemarie Farrell,
Assistant Public Defender, Daytona Beach, for Appellant.

Robert A. Butterworth, Attorney General, Tallahassee,
and Anthony J. Golden, Assistant Attorney General,
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PER CURIAM.

AFFIRMED. *Howard v. State*, 705 So. 2d 947, 948 (Fla. 1st DCA 1998); *see also Maddox v. State*, 708 So. 2d 617 (Fla. 5th DCA 1998), *rev. granted*, Table No. 92,805 (Fla. Feb. 17, 1999).

GRIFFIN, C.J., COBB and PETERSON, JJ., concur.