IN THE SUPREME COURT OF FLORIDA

ANTHONY H. JERRY,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

_____/

CASE NO.: 95,866

DCA case no.: 97-2638

ON REVIEW FROM THE FIFTH DISTRICT COURT OF APPEAL

RESPONDENT'S BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

KELLIE A. NIELAN
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR #618550

WESLEY HEIDT
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR #773026
FIFTH FLOOR
444 SEABREEZE BLVD.
DAYTONA BEACH, FL 32118
(904) 238-4990

COUNSEL FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

MISCELLANEOUS:

CERTIFICATE OF TYPE SIZE AND STYLE

The type size and style used in this brief is 12 point Courier New.

SUMMARY OF ARGUMENT

The Defendant's claim in Point I that the trial court erred in permitting Agent Mullins to testify about the conversation she heard over the wiretap is unfounded because a drug sale is a verbal act and statements made to complete the sale are not hearsay. The Defendant's additional claim that the court erred in permitting Agent Mullins and Deputy Appleby to testify regarding the description of the defendant and his car which Agent Phelan provided them must also fail because those statements were offered to explain the circumstances of the case. Further, even if the statements were hearsay the Defendant did not object when they were first offered and then opened the door to additional testimony regarding them. In addition, because the statements were initially admitted without objection by the Defendant, and because the Agent Phelan identified the Defendant at the trial, any error was harmless.

Finally, the Defendant's additional claim in Point I that the prosecutor made improper comments about the witnesses' credibility is without merit. The prosecutor was entitled to argue the evidence at trial and was entitled to respond to the Defendant's arguments; she did not express her personal beliefs or otherwise vouch for the witnesses.

The Defendant's Claim in Point II that he was improperly sentenced to five years in prison as a habitual offender on the count of possession of cocaine is not preserved for appeal.

ARGUMENT

POINT I

WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN FINDING THAT OBJECTED TO TESTIMONY WAS NOT HEARSAY AND THE PROSECUTOR'S COMMENTS WERE A FAIR COMMENT ON THE EVIDENCE.

In his first claim of error in this appeal the Petitioner asserts that the trial court erred in permitting an officer to testify about the conversation she heard over a wiretap when the Petitioner sold cocaine to an undercover officer. The Petitioner also asserts that the court erred in permitting that officer, and a subsequent officer, to testify regarding the description the undercover officer provided them, and claims that the prosecutor compounded this error through her comments in closing that the officers were telling the truth. Because the testimony the Petitioner claims was improper was not hearsay, and because the prosecutor merely stated that witnesses had testified truthfully, not that she personally believed they were telling the truth, the Petitioner's claim of error must be denied.

The admissibility of evidence is a matter within the trial court's discretion, and a reviewing court will not disturb a trial court's ruling unless an abuse of discretion is shown. Jent v. State, 408 So. 2d 1024 (Fla. 1981), cert. denied, 457 U.S. 1111, 102 S.Ct. 2916, 73 L.Ed.2d 1322 (1982). Where evidence of statements made during an illegal transaction are offered to prove that the transaction occurred, the statements are admissible as

"verbal acts" and are not hearsay. Chacon v. State, 102 So. 2d 578, 591 (Fla. 1957) (Telephone calls made to place bolita bets were "verbal acts" and not hearsay, and statements made in the conversation were admissible to prove that the conversation occurred); cf., Palmer v. State, 448 So. 2d 55, 56 (Fla. 5th DCA 1984)(giving of consent to search is a verbal act and is not hearsay).

Statements made during a drug sale are verbal acts because the statements are offered to prove that the sale in fact occurred, and not to prove that the person making the sale actually has a possessory interest in the contraband. Decile v. State, 516 So. 2d 1139, 1140 (Fla. 4th DCA 1987); State v. McPhadder, 452 So. 2d 1017 (Fla. 1st DCA 1984). Further, such statements are not rendered hearsay simply because the witness testifying to hearing the statements heard them from a remote location via a listening device. Decile, at 1140, (officer testified to contents of confidential informant's conversation with defendant during drug purchase monitored via wiretap); McPhadder, at 1018, (taped conversation between confidential informant and defendant charged with a narcotics violation were admissible even though informant was no longer available as a witness).

In the present case Agent David Phelan, an undercover officer with the Orange County Sheriff's Office, testified that he purchased cocaine from the Petitioner and identified the Petitioner in court. (T-74-75, 77-78). At the time he bought the cocaine, Agent Phelan was wearing a wiretap which was being monitored by

another agent, Dewana Mullins. (T-101). Following Phelan's testimony, Agent Mullins testified to the statements she heard over the wire during the transaction. (T-101-103). These statements were verbal acts and were properly admitted.

The Petitioner's further objection, on hearsay grounds, to the description of the Petitioner and his car which Agent Phelan provided was appropriately overruled because the testimony was not offered for the truth of the matter asserted. Where testimony regarding the contents of a radio dispatch is relevant to explain why a police investigation focused on a particular individual or to explain a sequence of events, the testimony is not offered for the truth of the matter asserted and is not hearsay. See, Kearse v. State, 662 So. 2d 677, 684 (Fla. 1995) (no error in the admission of a police dispatched tape where it was not offered to prove truth of matter asserted, but to establish sequence of events and to explain why police investigation focused on defendant as perpetrator); Crump v. State, 622 So. 2d 963, 969 (Fla. 1993) (detective's testimony that murder investigation focused on truck at scene of first victim's murder because of tire tracks found near body of second victim and witness' description of truck was properly admitted, despite objection to testimony as hearsay, where the state offered testimony to explain detective's focus on defendant's truck and not to prove truth of matter asserted); Collier v. State, 701 So. 2d 1197 (Fla. 3d DCA 1997) (contents of a BOLO were admissible where report contained a description of automobile provided by victim and was offered to explain why

officer's attention was drawn to car in which the defendant was riding).

In the instant case, Agent Phelan testified that he purchased cocaine from the Petitioner and identified the Petitioner in court. (T-74-75). Agent Phelan then testified, without objection from the Petitioner, that he discovered the Petitioner's name by providing a description of the Petitioner over the radio to another officer so that the officer could determine the Petitioner's name without exposing Agent Phelan as a police officer. (T-76, 79). In so testifying Agent Phelan testified to what the description he provided that night was, including the fact that he supplied a tag number for the car the Petitioner was using. (T-76, 79). Following this testimony, the Petitioner cross-examined Agent Phelan regarding his description and whether he provided certain details to the other officers. (T-83-85).

Agent Mullins and Deputy Silas Appleby later testified to being provided a particular description by Agent Phelan. (T-105-106, 109-110). Deputy Appleby further testified that he stopped an individual meeting that description, talked to him to learn his identity, and supplied this information to Agent Phelan. (T-109-110).

When offered initially, Agent Phelan's testimony about how he described the Petitioner to Agent Mullins was relevant to explain how the Petitioner was later identified. Kearse; Crump; Collier. At the time the testimony was offered, Agent Phelan had already identified the Petitioner as the individual who had sold him the

cocaine. Thus, the testimony was not hearsay because it was offered to show how the officers learned the Petitioner's name, not to prove that the Petitioner sold cocaine. Appropriately, this testimony was received without objection, and the other officer's testimony regarding the description they were provided was admissible for the same reason.

Even if Agent Mullins' and Deputy Appleby's testimony were hearsay, it would still be admissible because the Petitioner opened the door to the testimony by cross-examining Agent Phelan about whether he had provided certain details to these officers, and also because the identical testimony was first received from Agent Phelan without objection. Lucas v. State, 568 So. 2d 18, 22 (Fla. 1990) (otherwise inadmissible testimony properly admitted where the defendant opened the door to the testimony on cross-examination); Steinhorst v. State, 412 So. 2d 332 (Fla. 1982). Accordingly, the Petitioner's objection to the testimony was properly overruled.

Even if the testimony were admitted in error, because Agent Phelan identified the Petitioner in court and testified that he was familiar with the Petitioner from having seen him on other occasions, and because he had already testified without objection to the same information offered by Agent Mullins and Deputy Appleby, the testimony was harmless. *See* State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986); Kearse, at 684-85; Collier, at 1198.

Finally, the Petitioner claims that the prosecutor committed misconduct in her closing argument, compounding the alleged hearsay error. However, the comments were not improper, they were in fact

a fair comment on the evidence and response to the Petitioner's arguments.

The control of a prosecutor's argument to the jury is within the trial court's discretion, and the exercise of that discretion will not be disturbed absent a clear showing of abuse. Jones v. State, 666 So. 2d 995, 997 (Fla. 5th DCA 1996). Counsel is afforded wide latitude arguing to a jury, and a prosecutor may make legitimate arguments based on logical inferences drawn from the evidence and testimony presented at trial. Bertolotti v. State, 476 So. 2d 130 (Fla. 1985); Breedlove v. State, 413 So. 2d 1, 8 (Fla. 1982). Counsel is afforded particularly wide latitude in responding to comments made by opposing counsel. Hazelwood v. State, 658 So. 2d 1241, 1243 (Fla. 4th DCA 1995), citing, Ferguson v. State, 417 So. 2d 639 (Fla. 1982).

Counsel for the defense in his closing argument was explaining that the only evidence presented came in the form of testimony from law enforcement officers. Defense counsel continued stating as to these witnesses:

> [A]re they neutral and completely unattached from the case? No. They are very biased, and they have an outcome that they would like to see. And their testimony is shaped and molded based upon that outcome.

(T 128). Later, defense counsel stated that these officers were biased and that they wanted to be rewarded in their jobs by obtaining convictions. (T 134).

In response, the prosecutor explained to the jury:

> The defense is saying that basically the police come in here, they have some motive here. Motive to be less than truthful. They are out doing their job every day of the week. They are testifying to you and to other jurors with whatever evidence they happen to come across on that particular day. He is not lying to you. Neither is Silas Appleby. They are coming to you ---

(T-143), and

> If he just sold drugs, he would have run. Well, that's just not so. And in order for you to believe that, you would have to completely disregard everything Silas Appleby told you. And I suggest to you that he was telling it to you just how it is.

(T-144).

As to these statements, first it is the position of the State that the issue is not preserved. When the prosecutor's initial point was made, the defense objected and moved to strike. (T 143). In response the court told the jury to disregard any comments by the prosecutor as to her opinion of the truthfulness of the witnesses. When the defense objected to the second statements by the prosecutor, the motion was overruled. (T 144). Neither time did the defense move for a mistrial or a curative instruction. His failure to request such relief precludes him from raising the issue on appeal. See, Holton v. State, 573 So. 2d 284, 288 n.3 (Fla. 1990), cert. denied, 500 U.S. 960 (1991); Riechmann v. State, 581 So. 2d 133, 139 n.12 (Fla. 1991), cert. denied, 506 U.S. 952 (1992).

Furthermore, even if preserved, the prosecutor was merely

explaining to the jury in response to the Petitioner's argument otherwise that the witnesses had no motive to lie. The prosecutor does not say that she personally believed them, or otherwise indicate that she had information reflecting on their credibility which the jury was not permitted to hear. Compare, State v. Lewis, 543 So. 2d 760 (Fla. 2d DCA 1989) (prosecutor's use of the phrase, "I submit" does not reveal his personal beliefs)[1], to, May v. State, 600 So. 2d 1266 (Fla. 5th DCA 1992) (improper vouching occurs when the prosecution places the prestige of the government behind the witness or indicates that information not presented to the jury supports the witness's testimony).

The Petitioner's reliance on Stone v. State, 626 So. 2d 295 (Fla. 5th DCA 1993) and Clewis v. State, 605 So. 2d 974 (Fla. 3d DCA 1992) is misplaced. In Stone, the judge and the prosecutor both commented on a state witness's credibility during direct examination when the judge stated, "I don't know what you are afraid of," and the prosecutor responded by asking whether the witness was afraid of the defendant and also stated that the witness had looked at the defendant when the judge said 'what are you afraid of'. Stone, at 296. In Clewis, the prosecutor argued in closing that, "A reasonable doubt is something you can attach reason to. You have to believe his story over the story of those police officers that saw him that night to have reasonable doubt."

---

[1] The second comment by the prosecutor was almost identical: "I suggest to you that he was telling it to you just how it is." (T 144).

Clewis, at 975. Because the prosecutor misled the jury into believing that the burden of proof was simply a question of which story was more believable by a greater weight of the evidence, the comment was improper. Id. Thus, Stone and Clewis are not even remotely similar to the instant case.

Accordingly, the Petitioner has failed to show that the prosecutor's comments were improper or that they amount to reversible error. Burr v. State, 466 So. 2d 1051 (Fla. 1985). The prosecutor's argument was a fair comment on evidence which was properly admitted, and the Petitioner is not entitled to a new trial.

Lastly, even if the prosecutor's remarks are found to be in error, such error should be found to be harmless. See, State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). One officer testified that he had seen the Petitioner several times the day of the cocaine sale and identified him in court as the defendant. (T 74-75, 77-78, 92-94). No arrest was made immediately after the sale; however, the officer who made the buy stated that he recognized the Petitioner's face from seeing it previously, and after the sale, he gave a description of the Petitioner to other officers who were monitoring the transaction. (T 76, 79). The officer who monitored the transaction testified as to the acts she heard. (T 101-103). Additionally, shortly after the sale, a third officer took the description by the first officer of the Petitioner and the Petitioner's car, found the car with the Petitioner next to it, and conducted a voluntary encounter during which he completed a field

contact card. (T 110). This card contained Anthony Jerry's name, driver's license number, social security number, and his date of birth. (T 110). And this officer identified the Petitioner in court. (T 108). Given this overwhelming evidence, error if any should be found to be harmless.

POINT II

WHETHER A DEFENDANT MUST PROPERLY OBJECT IN ORDER TO PRESERVE SENTENCING ERRORS.

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).[2] 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 Reform Act shows an inconsistent approach to whether an objection

---

[2] 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).

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.[3] 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 constituted fundamental error); Ellis v. State, 455 So. 2d 1065

---

[3] 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).

(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,[4] the amended

---

[4] 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.

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).

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.[5] 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 preservation.

---

[5] 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.

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).

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 the 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 or in a motion to correct sentence under Florida Rule Criminal Procedure 3.800. Neither was done in this case. The State has previously asked that this Court affirm the holding 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.

He still could seek relief by filing a postconviction motion arguing that his sentence was erroneous or that his counsel was ineffective for failing to object to the sentence.

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 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 would be 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 would be 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.

---

[6] It is the understanding of the undersigned that a motion for rehearing has been filed as to the proposed amendments and that oral argument is set in January of 2000.

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,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

KEILLE A. NIBLAN
ASSISTANT ATTORNEY GENERAL
Fla. Bar #618550

WESLEY HEIDT
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR #773026
444 Seabreeze Boulevard
Fifth Floor
Daytona Beach, FL 32118
(904) 238-4990

COUNSEL FOR RESPONDENT

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 29th day of December 1999.

Wesley Heidt

WESLEY HEIDT
ASSISTANT ATTORNEY GENERAL