IN THE SUPREME COURT OF FLORIDA

BRIAN MCLEAN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 95,949

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent State of Florida was the Appellee in the District Court of Appeal (DCA) and the prosecuting authority in the trial court and will be referred to as respondent, the prosecution, or the state. Petitioner BRIAN McLean was the Appellant in the DCA and the defendant in the trial court, and will be referred to as the petitioner, the defendant, or by proper name.

The record on appeal consists of four volumes. Pursuant to Rule 9.210(b), Fla. R. App. P. (1997), this brief will refer to a volume according to its respective designation within the Index to the Record on Appeal. A citation to a volume will be followed by any appropriate page number within the volume. "IB" will designate Petitioner's Initial Brief, followed by any appropriate page number.

All emphasis through bold lettering is supplied unless the contrary is indicated.

This brief was prepared using New Courier 12 font.

STATEMENT OF THE CASE AND FACTS

The State accepts petitioner’s statement of the case and facts but for clarity supplements with the following.

At the sentencing hearing on 23 January 1998, after informing petitioner of his right to appeal the sentence, the prosecutor stated:

MS. WRIGHT: Your Honor, the State has also provided for the Court the DNA Data Bank order to draw the defendant’s blood. And

I believe there is no objection. I also have two restitution orders for the victim's rape exam. In addition, in case 97-4555 CF-A, the state would announce a nolle pros code 30.

THE COURT: And obviously we'll give him credit for the time that he has already served on both of those counts.

(Whereupon, the proceedings in the above-mentioned matter were concluded.) I191.

There was no objection and the trial court then signed, on the same date, the three orders referred to by the prosecutor. I87-91. The first restitution order refers to section 775.089, Florida Statutes and requires petitioner to pay restitution costs of $90 for the sexual assault examination given to her. I88-89. The second order also refers to section 775.089 and requires petitioner to pay restitution of $150 to the Victim Compensation Trust Fund. I90-91.

The notice of appeal was filed on 19 February 1998. I94. The record on appeal does not contain a rule 3.800(b) motion challenging any sentencing error.

SUMMARY OF ARGUMENT

The district court decision should be approved on the authority of §924.051(3), Florida Statutes and Florida Rule of Appellate Procedure 9.140(d). Petitioner was afforded at least two opportunities and thirty days to challenge the two statutorily mandated restitution orders. He failed to do so, probably for the very good reason that both he and his trial counsel knew very well that the restitution orders were solidly grounded on statute and there was no error on which to object. There is no reason why a change in counsel from trial to appellate should justify starting over and raising claims which have been abandoned in the trial court.

In any event, the issue here is almost certainly controller by numerous cases which have been under review in this Court for a year or more.

ARGUMENT

ISSUE I

DID THE DISTRICT COURT ERR IN REFUSING TO ADDRESS A ROUTINE SENTENCING CLAIM WHICH WAS NOT RAISED IN THE TRIAL COURT? (Restated)

There was a colloquy in the court in the presence of the defendant and his trial counsel concerning the three routine orders which the prosecutor asked the trial court to sign. There was even an explicit reference by the prosecutor to there being no objection to the first order, which implicitly alerted the defendant and his counsel to the right to object to the other two orders. The trial court, without objection, proceeded to sign the three orders, including the two at issue here, on the same date as the sentencing proceeding. It is likely that the signature was done at the hearing itself.

Petitioner and his counsel not only had an opportunity to contemporaneously object at the sentencing hearing, they had an additional thirty day to challenge the restitution orders pursuant to Florida Rule of Criminal Procedure 3.800(b). They did not do so and should not be permitted to challenge the sentence on appeal contrary to Florida Rule of Appellate Procedure 9.140(d) which explicitly prohibits appeals of sentencing claims which have not been properly preserved in the trial court.

The two restitution orders themselves are pursuant to statute and petitioner has made no suggestion that they would not be immediately reimposed if this Court performed the useless action of reversing and remanding for resentencing. There is well

settled case law which, although it is often ignored[1], has not been overruled that no court is required to perform a useless act. State v. Strasser, 445 So.2d 322, 323 (Fla. 1983):

> On virtually identical facts, in Burney, the Second District refused to remand for new trial, noting, "We are not required to do a useless act nor are we required to act if it is impossible for us to grant effectual relief." 402 So.2d at 39. We agree. Strasser would gain nothing from a new trial. The only effect would be to increase the pressures on the already overburdened judicial system and, ultimately, on the taxpayer. We will not ignore the substance of justice in a blind adherence to its forms.

The state maintains that the district court did not err in refusing to address the untimely and non-meritorious claim of sentencing error. In any event, this and similar issues have been before this Court for sometime in various cases which will presumably resolve the issue here. See, e.g., Hyden v. State, 715 So.2d 960 (Fla. 4th DCA 1998) and Maddox v. State, 708 So.2d 617 (Fla. 5th DCA 1998), both of which are under review here as case numbers 93,966 and 92,805, respectively.

The state also notes that rule changes promulgated by this Court on 12 November 1999 as Amendments to Florida Rules of Criminal Procedure 3.111(e), 3.800 and Florida Rules of Appellate Procedure 9.010(h), 9.140, and 9.600, case no. 95,707 probably moot the issue in any event. Under the new rules, petitioner's appellate counsel here, assuming he believed in good faith there

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[1]Although not referring specifically to the judicial system, Harry S. Truman once cogently stated that there was not much new in the world, just a lot of ignorance about what had already happened.

was a prejudicial error, could have moved the trial court by rule 3.800(b), as amended, to challenge the alleged sentencing error. The state notes in fact that since 12 November 1999, counsel for such appellants have been filing rule 3.800(b) motions in the trial court.

CONCLUSION

The district court decision should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF has been furnished by U.S. Mail to Fred Parker Bingham, II, Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, this 29th day of November, 1999.

_____
James W. Rogers
Attorney for the State of Florida

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