In The Supreme Court of Florida

CASE NO. 95,949

BRIAN McLEAN,

Petitioner/Appellant **,**

v.

THE STATE OF FLORIDA,

Respondent/Appellee **.**

ON DISCRETIONARY REVIEW OF A DECISION
OF THE FIRST DISTRICT COURT OF APPEAL

INITIAL MERIT BRIEF OF APPELLANT

NANCY A. DANIELS
Public Defender
Second Judicial Circuit

FRED PARKER BINGHAM II
Assistant Public Defender
Florida Bar No. 0869058

301 South Monroe Street, Suite 401
Tallahassee, Florida 32301
(904) 488-2458

COUNSEL FOR PETITIONER

IN THE SUPREME COURT OF FLORIDA

CASE NO. 95,949

BRIAN McLEAN,

Petitioner/Appellant,

v.

THE STATE OF FLORIDA,

Respondent/Appellee.
_____/

PRELIMINARY STATEMENT

Citations in this brief to designate record references are as follows:

"R. __" — Record on Appeal (documents), Vol. I, including transcript of sentencing (R. 178-192);

"T. __" — Transcript of trial proceedings, Vols. II through IV.

All cited references will be followed by the relevant page number(s). All other citations will be self-explanatory or will otherwise be explained. Appellee, State of Florida, was the plaintiff below, and will be referred to as "appellee," "respondent," or the "state." Appellant was the defendant below, and will be referred to as "appellant," "petitioner," or as the "defendant" or by his name.

Pursuant to an Administrative Order of the Supreme Court dated July 13, 1998, counsel certifies this brief is printed in 14 point Times Roman, a proportionately-spaced, computer-generated font.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (Continued)

STATEMENT OF THE CASE AND THE FACTS

1. History of the Case

On May 8, 1997, the state charged Mr. McLean by Information with two counts of sexual battery and one count of aggravated battery on a pregnant female, all of the offenses allegedly occurring on April 16, 1997, on the same victim. Count III was alleged under § 784.045(1)(b), Fla. Stat. [R. 8].

On January 8, 1998, a jury rendered verdicts finding Mr. McLean guilty of sexual battery (Counts I and II), and not guilty of aggravated battery (Count III). [R. 73-75].

On February 19, 1998, the defendant filed a timely Notice of Appeal [R. 94].

2. Statement of the Relevant Facts

On January 23, 1998, the court entered a judgment adjudicating Mr. McLean guilty of two counts of sexual battery, each a violation of § 794.011(5), a second degree felony, and sentencing him on each count to 10 years incarceration with a credit for 283 days in custody, the sentence on Count II to be served consecutive to Count I (for a total of 20 years or 240 months imprisonment) [R. 78-84].

The court also entered a written cost order imposing $50 pursuant to § 960.20; $3 pursuant to § 943.25(3); and $200 pursuant to § 27.3455; and "restitution in accordance with an attached order." [R. 81].

On the same day, Judgments and Restitution Orders in the sum of $90 to the Sexual Assault Treatment Center and $150 to the Victim Compensation Trust Fund were also rendered. [R. 88-91].

At sentencing, the court orally imposed a sentence of 10 years on each count, count

II to be consecutive to Count I. The court also announced the imposition of a total of $253 in mandatory costs and credit for time in custody. [R. 191].

The prosecutor advised the court he had prepared two restitution orders. However, the court did not announce that it was imposing or intending to impose restitution nor did the court refer to restitution as part of the sentences it pronounced. [R. 191].

The sentencing transcript further shows that court did not elicit from the defendant or his counsel any comments on whether the defendant wished a hearing to determine whether restitution was appropriate or the amount of restitution that should be imposed, and the court did not inform the defendant that he had a right to an adversarial hearing to determine the amount of restitution. Further, the court further did not expressly reserve jurisdiction at the time of sentencing to later determine whether restitution should be imposed or the amount thereof. Except for the brief comment by the prosecutor he had two restitution orders prepared, the transcript record is otherwise entirely silent on the question of restitution.

However, the court thereafter render two judgments of restitution [R. 88-91].

The record also fails to established that the defendant filed a Motion to Correct Sentence pursuant to Fla. R. Crim. P. 3.800(b) relative to the imposition of restitution or in any other manner interposed an objection to the restitution imposed.

On appeal to the First District Court of Appeal, petitioner argued that it was fundamental error to impose restitution under such circumstances in the absence of notice at sentencing of the right to object to restitution and to a hearing thereon, and that "the failure of the court altogether to announce the imposition of restitution and the amount

thereof constituted a due process violation when the court then entered restitution judgments against the defendant." [*See* Issue IV]. Based upon its decision in *Locke v. State*, 717 So. 2d 1349 (Fla. 1st DCA 1998) , *rev. granted*, Case No. 94,396, and *Lorenzana v. State*, 717 So. 2d 119 (Fla. 4th DCA 1998), the district court concluded that the restitution issue was not preserved for appeal.

On October 19, 1999, this court accepted jurisdiction.

SUMMARY OF ARGUMENT

The imposition of restitution without (1) a notice of the right to hearing on the question of restitution, and (2) without conducting a hearing mandated by the statute, was an illegal sentence in that it patently failed to comport with the statutory limitations under *Mancino*. Furthermore, the imposition of restitution in this manner constituted a denial of due process, and thus was fundamental error. The district court's conclusion that the issue was not preserved by objection or motion, even if correct, does not bar addressing either an illegal sentence or fundamental error on direct appeal.

ARGUMENT

WHETHER THE FAILURE TO ANNOUNCE THE IMPOSITION OF RESTITUTION AT SENTENCING IN THE ABSENCE OF NOTICE TO THE DEFENDANT OF THE INTENT TO DO SO AND IN THE FURTHER ABSENCE OF NOTICE TO THE DEFENDANT OF THE RIGHT TO CONTEST THE AMOUNT OF RESTITUTION AND TO HAVE AN ADVERSARIAL HEARING ON RESTITUTION, AND WITHOUT SUCH HEARING, CONSTITUTES FUNDAMENT ERROR THAT MAY BE RAISED FOR THE FIRST TIME ON DIRECT APPEAL.

Section 775.089, Fla. Stat., governs the imposition and determination of restitution in criminal cases. The statute provides, "The court, in determining whether to order restitution and the amount of such restitution, shall consider the amount of the loss sustained by any victim as a result of the offense." § 775.089(6)(a), Fla. Stat. It then provides in § 775.089(7):

> (7) Any dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by the victim as a result of the offense is on the State attorney. The burden of demonstrating the present financial resources and the absence of potential future financial resources of the defendant and the financial needs of the defendant and his or her dependents is on the defendant. . . .

The statute clearly envisions that the two questions involved, whether to impose restitution in the first place, and the amount of restitution, in the second, will be determined by an adversarial hearing in the event the defendant has not stipulated to the amount of restitution and waived a hearing on the issues. Facially, the statute does not expressly require the court to inform or advise the defendant at sentencing that he or she is entitled to such an adversarial hearing and determination. However, particularly with respect to adversarial determinations, due process of law under both the Federal and State

constitutions mandates that the defendant be given notice of the intention of seek imposition of restitution and the right to such an adversarial hearing to determine the issues of restitution at the time of sentencing. Moreover, the court is required to announce or give notice its intention to impose restitution at sentencing and the defendant's right to a hearing and, either reserved jurisdiction to determine restitution at a later time if the right to a hearing is not waived by the defendant, or the amount of restitution is agreed to or stipulated to by the defendant. In this case, the court did none of these things at sentencing, but summarily rendered judgments determining the right to restitution and the amount thereof.

Because there was no announcement of restitution at sentencing, there was no basis or opportunity for a contemporaneous objection to restitution by the defendant. However, thereafter, defendant's counsel did not file a Motion to Correct Sentence under Rule 3.800(b) to challenge the imposition of restitution without a hearing as required by the statute. The procedure employed by the court in this case patently failed to comport with the requirements and limitations of § 775.089, and is thus an "illegal sentence." *State v. Mancino*, 714 So. 2d 429 (Fla. 1998)("A sentence that patently fails to comport with statutory or constitutional limitations is by definition 'illegal.'").

An "illegal" sentence constitutes fundamental error. Thus, this error may be addressed for the first time on direct appeal even under the terms of the Criminal Appeals Reform Act, § 924.051(3), Fla. Stat., which limits appeals in criminal cases from a judgment or order of the court to those "properly preserved," or if not preserved, to those

that "would constitute fundamental error."[1]

In enacting this statute, the Legislature, when incorporating the term "fundamental error," did not seek to define what it meant by "fundamental error," not did it seek to redefine, limit or alter the circumstances in which the courts of Florida had found to constitute fundamental error. Indeed, the legislature must be presumed to have known what constituted fundamental error under the decisions of this state's courts when it employed the same term in the statute. In short, what constituted "fundamental error" as a matter of law before the enactment, remains "fundamental error" after the effective date of the new statute (July 1, 1996), including sentencing errors which had been declared to result in an "illegal sentence" or "fundamental error."

Moreover, this error constitutes fundamental error as a denial of due process. What constitutes fundamental error has numerous formulations and expressions in the cases. It has been said that fundamental error is "error which goes to the foundation of the case or goes to the merits of the cause of action." *Sanford v. Rubin*, 237 So.2d 134, 137 (Fla.1970). "If a procedural defect is declared fundamental error, then the error can be considered on appeal even though no objection was raised in the lower court." *Id*.; *Ray v. State*, 403 So. 2d 956, 960 (Fla. 1981). The most pervasive express of fundamental error, however, is in terms of denial of procedural due process: "[F]or an error to be so fundamental that it can be raised for the first time on appeal, the error must

[1]"Preserved," for the purpose of the statute, means "an issue, legal argument, or objection to evidence that was timely raised before, and ruled on by, the trial court, and that the issue, legal argument, or objection to evidence was sufficiently precise that it fairly apprised the trial court of the relief sought and the grounds therefor." § 924.051(1)(b), Fla. Stat.

be basic to the judicial decision under review and equivalent to a denial of due process." *State v. Johnson*, 616 So. 2d 1, 3 (Fla. 1993). *See also*, *Hopkins v. State*, 632 So. 2d 1372, 1374 (Fla. 1994); *Jenkins v. State*, 444 So. 2d 947 (Fla. 1984).

This Court has previous addressed the question of imposition of monetary obligations upon defendants in criminal cases. In *Wood v. State*, 544 So. 2d 1004 (Fla. 1989), the trial court informed Wood that costs would be assessed again him pursuant to § 27.3455. The court concluded in that case that the defendant had costs and statutory liens imposed upon him without prior notice or hearing, but noted the defendant failed to object to those costs at sentencing. In finding that this error constituted fundamental error, this court said:

> Our opinion in *Jenkins* is founded upon constitutional rights of due process and the most basic requirements of adequate notice and meaningful hearing prior to termination of substantive rights or some other state-enforced penalty. In *Jenkins* we held that court costs could not be assessed against a defendant without adequate notice and judicial determination that the defendant has the ability to pay. *Id*. at 950. This holding goes to the very heart of the requirements of due process clauses of our state and federal constitutions. The denial of these basic rights constitutes fundamental error.
>
> * * *
>
> . . . . It is the rights of these people whom the due process clause seeks to protect, and it is fundamental error for a court to fail to protect those rights. Without adequate notice and meaningful hearing, a court has no way of knowing who should pay costs and who should not. Without adequate notice and a meaningful hearing, the requirements of due process have not been met.

See also, *Henriquez v. State*, 545 So. 2d 1340 (Fla. 1989); *Sliney v. State*, 699 So. 2d 662 (Fla. 1997)(discretionary attorney fees and costs may not be imposed without affording the defendant "proper notice and an opportunity to be heard."); *Bull v. State*,

548 So. 2d 1103, 1104-1105 (Fla. 1989).

Wood, *Henriquez*, and *Bull* all dealt with the question of due process the imposition of attorney costs and liens. Fla. R. Crim. P. 3.720(d)(1) specifically requires the sentencing court to notify the accused of the imposition of a lien for services of the public defender, but further requires the court to give notice at sentencing of the accused's right to a hearing to contest the amount of the lien. While the statute permitting the imposition of restitution does not facially mandate like notice to the defendant, it also clearly envisions and provides for an adversarial hearing, as does the attorney lien statute and rule. Impliedly, notice of the right to that hearing is required by the restitution statute. But like the imposition of the attorney liens, notice of the right to a hearing to contest restitution or the amount thereof is required by state and federal constitutions' mandate of due process. *Wood*; *Henriquez*; *Bull*; *Sliney*; *Jenkins*. Here, without a hearing, and without notice of the right to a hearing, the court imposed restitution against the appellant. There was a complete absence of procedural due process in this case.

This Court explained the concept of due process as follows:

> . . . . One of the most basic tenets of Florida law is the requirement that all proceedings affecting life, liberty, or property must be conducted according to due process. Art. I, Sec. 9, Fla. Const. While we often have said that "due process" is capable of no precise definition, e.g. *Gilmer v. Bird*, 15 Fla. 410 (1875), there nevertheless are certain well-defined rights clearly subsumed within the meaning of the term.
>
> The essence of due process is that fair notice and a reasonable opportunity to be heard must be given to interested parties before judgment is rendered. *Tibbetts v. Olson*, 91 Fla. 824, 108 So. 679 (1926). Due process envisions a law that hears before it condemns, proceeds upon inquiry, and renders judgment only after proper consideration of issues

> advanced by adversarial parties. *State ex rel. Munch v. Davis*, 143 Fla. 236, 244, 196 So. 491, 494 (1940). In this respect the term "due process" embodies a fundamental conception of fairness that derives ultimately from the natural rights of all individuals. See art. I, Sec. 9, Fla. Const.

Scull v. State, 569 So. 2d 1251, 1252 (Fla. 1990). Such denial of due process is fundamental error, and may be addressed on direct appeal notwithstanding the failure to interpose a contemporaneous objection below or to move to correct the sentence under Rule 3.800(b). Indeed, because the error would have been perceived by trial counsel as fundamental error, imposed in the absence of notice of the right to a hearing and without a hearing mandated by the statute, counsel could have very likely concluded that under the Criminal Appeals Reform Act, which permitted fundamental error to be raised on appeal without other preservation, that a motion to correct would be unnecessary as an act to preserve the fundamental error for appeal. The district court's conclusion that the issue could not be addressed on direct appeal because it was not preserved by objection or motion, even if correct, does not bar addressing either an illegal sentence or fundamental error on direct appeal under the act.

For each of the foregoing reasons, appellant requests this court to determine that the imposition of restitution without notice of the right to a hearing, and without a hearing, constitutes an "illegal" sentence as well as fundamental error as a denial of due process that may be addressed on direct appeal.

CONCLUSION

Appellant, BRIAN McLEAN, based on all of the foregoing, respectfully urges the Court to vacate the judgments of restitution, to remand the case to the First District Court of Appeal for reconsideration, and to grant all other relief which the Court deems just and equitable.

Respectfully submitted,

NANCY A. DANIELS
Public Defender
Second Judicial Circuit

FRED P. BINGHAM II
Florida Bar No. 0869058
Assistant Public Defender

Leon County Courthouse
Suite 401
301 South Monroe Street
Tallahassee, Florida 32301
(850) 488-2458

Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by delivery to: James W. Rogers, Esq., Assistant Attorney General, Office of the Attorney General, The Capitol, Plaza Level, Tallahassee, Florida, and to the Appellant by U.S. Mail, first-class postage prepaid, on August 28, 2000.

Fred P. Bingham II

The Supreme Court of Florida

CASE NO. 95,949

BRIAN McLEAN,

Petitioner/Appellant **,**

v.

THE STATE OF FLORIDA,

Respondent/Appellee **.**

ON DISCRETIONARY REVIEW OF A DECISION
OF THE FIRST DISTRICT COURT OF APPEAL

PETITIONER'S APPENDIX

NANCY A. DANIELS
Public Defender
Second Judicial Circuit

FRED PARKER BINGHAM II
Assistant Public Defender
Florida Bar No. 0869058

Leon County Courthouse
Suite 401
301 South Monroe Street
Tallahassee, Florida 32301
(904) 488-2458

COUNSEL FOR PETITIONER

INDEX

The Supreme Court of Florida

CASE NO. 95,949

BRIAN McLEAN,

Petitioner/Appellant,

v.

THE STATE OF FLORIDA,

Respondent/Appellee.

ON DISCRETIONARY REVIEW OF A DECISION
OF THE FIRST DISTRICT COURT OF APPEAL

PETITIONER'S APPENDIX

NANCY A. DANIELS
Public Defender
Second Judicial Circuit

FRED PARKER BINGHAM II
Assistant Public Defender
Florida Bar No. 0869058

Leon County Courthouse
Suite 401
301 South Monroe Street
Tallahassee, Florida 32301
(904) 488-2458

COUNSEL FOR PETITIONER

INDEX