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

REPLY BRIEF OF PETITIONER

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_________________________________/

PRELIMINARY STATEMENT

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

"R. __" — Record on Appeal to this Court;

"T. __" — Transcripts of Proceedings in the Trial Court.

"AB. _" — Appellee's Answer Brief.

All cited references will be followed by the relevant page number(s). All other citations will be self-explanatory or will otherwise be explained.

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

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ARGUMENTS

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.

The state argues that because the prosecutor stated in court he had prepared several orders, including restitution orders, that the defendant should have then objected. An objection would have been premature at that point, at least until the court announced its intention to enter such judgments. However, the court, in pronouncing the sentence never announced it's intention to the sign the proposed orders or judgments nor did it advise the defendant that he had a right to a hearing on the question of restitution. Nor did the court obtain a waiver of any such hearing or an agreement by the defendant to the amount of restitution. The state speculates that the judgments were likely signed by the court at the hearing itself. Whether true or not, that did not relieve the court of its obligation to comply with the requirements of the restitution statute, § 775.089(6)(a) and § 775.089(7), Fla. Stat, or that of due process notice; nor by signing the judgments at the hearing (without comment about doing so), did this give the defendant notice that the court was entering these judgments even if the Respondent's speculation is accurate.

Further, this court, in its recent decisions amending Rule 3.800(b) and related rules, concluded that Rule 3.800(b) was not functioning as the foolproof remedy the court had intended to correct and preserve sentencing errors. *Amendments to Florida Rules*

of Criminal Procedure 3.111(e), 3.800 and Florida Rules of Appellate Procedure 9.020(h) and 9.600, Case No. 95,707, 24 Fla. L. Weekly S530 (Fla. November 12, 1999), *opinion corrected* 24 Fla. L. Weekly S576 (Fla. November 22, 1999); and *Amendments to Florida Rules of Criminal Procedure 3.670 and 3.700(b)*, Case No. 95.117, 24 Fla. L. Weekly S527 (Fla. November 12, 1999), *opinion corrected* 24 Fla. L. Weekly S576 (Fla. November 22, 1999)("[W]e recognize this apparent failure of rule 3.800(b) to provide "a 'failsafe' method to detect, correct and preserved sentencing errors." "[M]any times sentencing errors are not detected until appellate counsel reviews the transcripts of the sentencing hearing and the written judgment and sentence. At that point, counsel is left to argue that the error constitutes fundamental error under section 924.041(3), Florida Statutes (1997)").

This record facially contains no evidence whatever that the two restitution judgments in question were promptly or timely served on the defendant's counsel —or in fact ever served — after they were entered such that the counsel would be aware of the need to seek to correct the error by a Rule 3.800(b) motion and to take the steps to do so.

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. Respondent does not contend that it is not so. What constituted "fundamental error" as a matter of law before the enactment of the Criminal Appeals Reform Act remains "fundamental error" after the effective date of the new

statute, including sentencing errors which had been declared to result in an "illegal sentence" or "fundamental error." Respondent does not contend otherwise.

Finally, Respondent argues that under Rule 3.800(b)(2), adopted effective November 12, 1999, the issue here is mooted because appellate counsel could have move the trial court in this case to challenge this sentencing error. However, by the very terms of the newly adopted rule, appellate counsel cannot file a motion to correct under Rule 3.800(b)(2) after an initial brief has been filed in the case on appeal. Clearly, an initial brief was filed in this case in the DCA long before the rule was promulgated by this court, and, indeed, petitioner's counsel had already filed his initial brief on the merits in this Court. Thus, Respondent's argument on this point is without merit.

In all other respects, Petitioner will continue to rely upon the arguments and authorities cited in his Initial Brief on the Merits.

CONCLUSION

Petitioner, BRIAN McLEAN, based on the foregoing, respectfully urges the Court to disapprove the decision of the District Court and to remand accordingly, and to grant such other relief the Court deems just and equitable.

August 28, 2000.

Respectfully submitted,
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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 December ___, 1999.

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FRED P. BINGHAM II