8-3 -- 95,951

IN THE SUPREME COURT OF FLORIDA

MICHAEL HUTCHISON,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

5th DCA Case No. 97-2926

Supreme Court Case No.

PETITIONER'S BRIEF ON JURISDICTION

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

M. A. LUCAS
ASSISTANT PUBLIC DEFENDER
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ATTORNEY FOR PETITIONER

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IN THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT
OF THE STATE OF FLORIDA

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STATEMENT OF THE CASE AND FACTS

In case number 96-1336, Appellant was charged with committing the following offenses on January 10, 1996: Count I, attempted first degree murder of a law enforcement officer with a firearm, in violation of Sections 782.04(1)(a)(2), 774.04, 775.087 and 784.07(3), Florida Statutes; Count II, aggravated fleeing or attempting to elude a law enforcement officer, in violation of Section 316.1935(2), Florida Statutes; Count III, possession of a firearm in the commission of a felony, to wit: a shotgun, in violation of Section 790.07, Florida Statutes. Count IV, possession of a firearm by a convicted delinquent, in violation of Section 790.23, Florida Statutes; Count V, possession of a firearm by a minor, in violation of Section 790.22(3), Florida Statutes; Count VI, armed trespass to an occupied

conveyance, in violation of Sections 810.08(1) and 810.08(2)(c), Florida Statutes; Count VII, resisting an officer without violence, in violation of Section 843.02, Florida Statutes. (R 32-35)

In case number 96-1337, Appellant was alleged to have committed the following offenses between January 8, 1996 and January 11, 1996: Count I, home invasion robbery, in violation of Sections 812.135(1) and 775.087(1), Florida Statutes; Count II, possession of a firearm in the commission of a felony, in violation of Section 790.07, Florida Statutes. Count III, possession of a firearm by a minor, in violation of Section 790.22 (3), Florida Statutes. Count IV, possession of a firearm by a convicted delinquent, in violation of Section 790.23, Florida Statutes. (R 36-39)

In case number 96-1338, Appellant was charged with committing the following offenses on January 10, 1996: Count I, shooting at, within or into a building, in violation of Section 790.19, Florida Statutes; Count II, armed burglary of a conveyance with a firearm, in violation of Sections 810.02(b) and 775.087(2), Florida Statutes. Count III, possession of a firearm in commission of a felony, in violation of Section 790.07, Florida Statutes; Count IV, possession of a firearm by a minor, in violation of Section 790.22(3), Florida Statutes; Count V, possession of a firearm by a convicted delinquent, in violation of Section 790.23, Florida Statutes. (R 40-44)

In case number 96-1340, Appellant was charged with committing the following offenses between January 8 and January 11, 1996: Count I, burglary of a structure, in violation of Section 810.02(4)(a), Florida Statutes; Count II, grand theft of the third degree, in violation of Section 812.014(2)(c)(1), Florida Statutes. (R 45-46)

The State nol prossed the following counts in the following cases: In case number 96-1336, Count III and Count V. (R 220) In case number 96-1337, Count II and Count III. (R 221) In case number 96-1338, Count II, Count III, and Count IV. (R 222)

The case proceeded to trial on August 4, 5, 6, 1997, before the Honorable Richard F. Conrad, Circuit Court Judge of the Ninth Judicial Circuit, in and for Orange County, Florida. (T 1-538) Defense counsel renewed her motions to sever the four cases, which was again denied. (T 29-30) At the close of the State's case, defense counsel moved for a judgment of acquittal on all seven counts. (T 391-400) The trial court granted the motion for judgment of acquittal on the charge of aggravated fleeing, attempting to elude a law enforcement officer. (T 392-393, R 259) The trial court, however, denied the motion for judgment of acquittal on all the remaining counts. (T 392,395-398, 400) At the close of all the evidence, defense

counsel renewed her motions for judgment of acquittal which the court denied. (T 438) After deliberations, the jury returned verdicts of guilty as charged in all seven counts. (T 532-533)

Pursuant to a plea agreement with the State, Appellant entered a plea of no contest in case number 96-1336, Count IV. (R 429-432) The trial court sentenced Appellant to one year in the County Jail. (T 433) The State nol prossed Count IV and Count V in case number 96-1337. (T 433, R 363-364)

At the sentencing hearing, defense counsel argued that the trial court should consider that Appellant was a juvenile at the time he committed the offenses and was under the influence of drugs. (R 7) In Count I, in case number 96-1337 and in Count I, in case number 96-1336, Appellant was sentenced to life imprisonment. In case number 96-1336, Count VI, Appellant was sentenced to 5 years incarceration. In Count VII, Appellant was sentenced to one year in the Orange County Jail. In case number 96-1338, Appellant was sentenced to 15 years incarceration. In case number 96-1340, the trial court sentenced Appellant in Counts I and II to 5 years incarceration. (R 20-22)

On appeal to the Fifth District Court of Appeal, Petitioner argued that the trial court erred in sentencing Petitioner without considering juvenile sanctions. On April 30, 1999, the Fifth District issued its opinion affirming Petitioner's sentence.

See Hutchison v. State, 24 Fla. L. Weekly D 1052 (Fla. 5th DCA April 30, 1999). (Appendix) In rejecting Petitioner's argument, the District Court cited to Carson v. State, 707 So. 2d 898 (Fla. 5th DCA 1998) which in turn cites to Cargle v. State, 701 So. 2d 359 (Fla. 1st DCA 1997) which has been accepted by this Court for review in case number 92,031.

A timely notice to invoke this Court's discretionary jurisdiction was filed on June 28, 1999.

SUMMARY OF THE ARGUMENT

This Honorable Court has discretionary jurisdiction pursuant to Jollie v. State, 405 So. 2d 418 (Fla. 1981) to review the instant case where the Fifth District Court of Appeal cited in its opinion to a case which in turn cites to a case which is currently pending review with this Court.

ARGUMENT

THIS COURT HAS JURISDICTION TO REVIEW THE INSTANT CASE PURSUANT TO JOLLIE V. STATE, 405 So. 2d 418 (Fla. 1981).

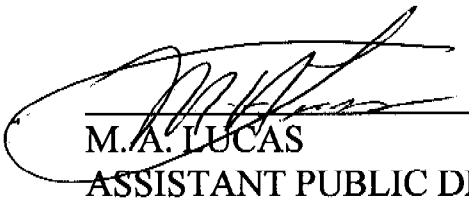
Petitioner appealed to the Fifth District Court of Appeal, arguing that the trial court erred in sentencing him as an adult without considering juvenile sanctions. The Fifth District affirmed Petitioner's sentences citing to Carson v. State, 707 So. 2d 898 (Fla. 5th DCA 1998) which in turn cites to Cargle v. State, 701 So. 2d 359 (Fla. 1st DCA 1997) which has been accepted by this Court for review in case number 92,031. This Honorable Court has discretionary jurisdiction to accept the instant case pursuant to Jollie v. State, 405 So. 2d 418 (Fla. 1981).

CONCLUSION

Petitioner respectfully requests this Honorable Court to exercise its discretionary jurisdiction and accept the instant case for review.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT



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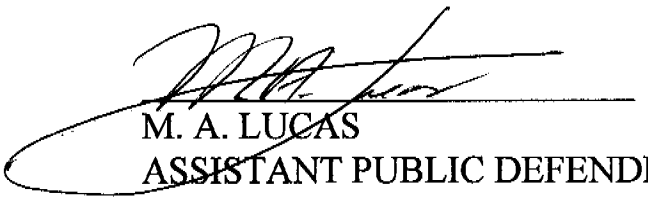
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to: The Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Blvd., Fifth Floor, Daytona Beach, FL 32118 via his basket at the Fifth District Court of Appeal and mailed to: Mr. Michael J. Hutchison, DC # #X01589, Okaloosa Correctional Institution, 3189 Little Silver Road, Crestview, Florida 32539-6708, on this 8th day of July, 1999.



M. A. LUCAS
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF FLORIDA

MICHAEL J. HUTCHISON,	)	
	)	
Petitioner,	)	
	)	
vs.	)	5TH DCA Case No. 97-2926
	)	
STATE OF FLORIDA,	)	Supreme Court Case No.
	)	
Respondent.	)	_____
_____	)	

APPENDIX

Hutchison v. State, 24 Fla. L. Weekly D 1052 (Fla. 5th DCA April 30, 1999).

Carson v. State, 707 So. 2d 898 (Fla. 5th DCA 1998)

Cargle v. State, 701 So. 2d 359 (Fla. 1st DCA 1997)

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for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Robin A. Compton, Assistant Attorney General, Daytona Beach, for Appellee.

(ANTOON, J.) A.P. appeals from an adjudication of delinquency arguing that the trial court erred in denying his pretrial motion to withdraw his guilty plea. We agree and therefore reverse.

After a petition for delinquency was filed, A.P. appeared before the trial court without an attorney and pled guilty to the charge of burglary of a dwelling.[1] Prior to disposition, A.P. filed a motion to withdraw his plea, asserting that his decision to plead guilty without first conferring with counsel was not made knowingly and voluntarily because he had not been properly advised of his right to counsel. *See* Fla. R. Juv. P. 8.080(b)(2). The motion was denied and A.P. was sentenced to a level six commitment.

A.P. argues that he should have been permitted to withdraw his guilty plea because the trial court failed to advise him of his right to be represented by an attorney appointed by the court. We agree.

A juvenile defendant can waive his right to counsel and proceed to enter an uncounseled guilty plea; however, before accepting the plea, the trial court is obligated to determine whether such waiver was made voluntarily and intelligently. *See K.M. v. State*, 448 So. 2d 1124, 1125 (Fla. 2d DCA 1984). In making this determination, it is essential for the trial court to advise the juvenile that he "has the right to be represented by an attorney at every stage of the proceedings and, if necessary, one will be appointed." Fla. R. Juv. P. 8.080(b)(2). *See also* Fla. R. Juv. P. 8.165(a). Here, the trial court's failure to advise A.P. of his right to receive appointed counsel renders the guilty plea colloquy inadequate. *See G.L.D. v. State*, 442 So. 2d 401 (Fla. 2d DCA 1983); *R.V.P. v. State*, 395 So. 2d 291 (Fla. 5th DCA 1981). Accordingly, we must vacate the adjudication and disposition entered in this case and remand this matter to the trial court for further proceedings consistent with this opinion.

VACATED and REMANDED. (GRIFFIN, C.J., and SHARP, W., J., concur.)

[1] § 810.02(3), Fla. Stat. (1997).

* * *

Criminal law—Consolidation of charges—Crime spree—Trial court did not abuse discretion in consolidating for trial of charges of home invasion robbery, shooting into building, burglary, and attempted murder of law enforcement officer, where charges arose out of ten hour crime spree, defendant claimed that he was under influence of rohypnol when offenses were committed so that his actions during entire sequence of events were relevant to his claim of intoxication, proof of entire sequence of events was necessary to explain how events unfolded, and same guns were used in three of the offenses

MICHAEL HUTCHINSON, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 97-2926. Opinion Filed April 30, 1999. Appeal from the Circuit Court for Orange County, Richard F. Conrad, Judge. Counsel: James B. Gibson, Public Defender, and M. A. Lucas, Assistant Public Defender, Daytona Beach, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Robin A. Compton, Assistant Attorney General, Daytona Beach, for Appellee.

(GRIFFIN, C.J.) Michael J. Hutchinson ["defendant"] appeals his convictions and sentences in four separate cases.

From approximately 5 p.m. on January 9, 1996 until 3 a.m. on January 10, 1996, defendant, a juvenile, participated in a ten-hour crime spree. He was accompanied by four other juveniles. During the crime spree, defendant took part in a home-invasion robbery, fired a shot into a trailer with a pump shotgun, burglarized a Little Debbie's Market, and engaged in a high-speed chase with police during which he fired on and struck a police officer in pursuit. Based on these acts, defendant was charged by information in four different cases with numerous offenses.

The cases were ultimately consolidated for trial over defendant's objection. Testimony concerning defendant's participation in and commission of the offenses was provided both by the victims and all four of defendant's juvenile accomplices. Their testimony showed that on January 9, 1996, all four accomplices—Joey Kauffman, Misty Taylor, Katie Simmons, and Daywin Weeks—were driving around in a stolen Ford Explorer when Simmons received a page on his beeper from defendant. They went over to defendant's home and picked him up around 5:00 or 5:30 P.M. Then they went to the home of defendant's friend, Adam Mosely. Defendant went inside and came out fifteen minutes later carrying two shotguns. Defendant also had a handgun which he either brought with him or picked up at Mosely's. After retrieving the guns, they drove around for a while looking for a house to burglarize so they could get some money to buy the drug rohypnol or "roofies." They found a house without any lights on, and the three boys exited the vehicle. All three were armed. Weeks testified that only defendant and Kauffman went inside. Kauffman said that it was defendant and Weeks who went inside. Regardless, once inside, they encountered the victim, Maria Fortero, who was apparently lying in bed. Defendant grabbed her purse, and the three boys ran back to their vehicle. The victim testified that two men came into her room, one of whom put a gun to her head while the other grabbed her purse from the dresser. Upon their return to the vehicle, defendant told the girls that:

> there was an old lady in there that was speaking Spanish, and that he had took her purse, because she was, I guess, laying in the bed, yelling at him, I guess, and he grabbed the purse and ran out.

Defendant looked through the victim's purse and found approximately $25. After getting the money, they drove back to Mosely's house, where defendant went inside and purchased ten roofies. Everyone ingested one or two roofies, except for Taylor. Taylor said that after ingesting the roofies, everyone became very hyper.

After taking the pills, the juveniles rode around for while. Kauffman was driving and defendant was sitting in the passenger seat. They drove by a trailer where a girl named Sara Caldwell lived. The second time they drove by, defendant fired a shotgun at the trailer. Caldwell testified that the shot went from the living room window next to where she was sitting, through the refrigerator in the kitchen, to the back room of the house.

The next stop was a Little Debbie's Market off of Goldenrod and Pershing Road. It was approximately 8 P.M. Weeks testified that Kauffman and defendant got out and kicked in the top of the front door. The rest of the juveniles testified that defendant kicked in the door. Defendant then went inside, and handed out some lottery tickets and cigarettes. The victim, Ramnarine Mahabir, testified that the group stole a total of $5,778 worth of Lotto tickets and cigarettes. While they were still at the store, a police officer drove by and turned around. They heard sirens and took off. They hid behind a house for about ten minutes. While they were hiding, defendant told Kauffman that if any officers came behind the house where they were hiding, he would shoot them.

They next drove over to an apartment complex off of Semoran, where they began scratching off lottery tickets. Defendant knew someone at the apartments named Jason and went upstairs to visit him. In all, they were at the apartments maybe twenty minutes. When they pulled out of the apartments, a policeman was waiting and began to chase them. Defendant said that if a policeman got close enough, he was going to shoot at the car. They turned onto the Greenway, and a policeman was sitting there and saw them turn around in the median. He also turned around and began following the juveniles at speeds of up to 130 m.p.h. Defendant started kicking at the back window. Both he and Kauffman were saying they were not going to jail for anyone. Defendant kept yelling not to stop. The window popped open, and defendant fired at the officer once or twice. Weeks said that he thought that defendant was trying to shoot out the tires. However, the shotgun blast went through the windshield, hitting Officer Winters, and the officer turned off the road.[1] Defendant shouted something like "I got him" or "I think I got one." However, they were all saying, "Yeah, yeah, we got him." Defendant was still yelling at the driver to keep going, and not to stop. The juveniles kept going faster and faster, and exited the Greenway in Kissimmee. They then tried to get back to Narcoosee Road through Kissimmee and St. Cloud but they were chased by police cars with their lights flashing and sirens blaring. As they attempted to run through a road blocked by officers, the car hit some stop sticks set by the police and all the tires went flat. The occupants

then jumped out and ran for the woods. Taylor was apprehended first. Kauffman and Weeks were apprehended after just a few minutes. Simmons and defendant were apprehended after several hours.

Defendant was found guilty of the seven counts submitted to the jury. He was sentenced to life in prison for the home invasion. He was also sentenced to life in prison for the attempted first-degree murder of a law enforcement officer with a firearm, which offense also carried a three-year mandatory minimum sentence. Defendant received fifteen years in prison for shooting at or into a building and five years for armed trespass of an occupied conveyance, burglary of a structure, and grand theft. He was also sentenced to one year in the county jail for resisting an officer without violence. All sentences were to run concurrently.

Defendant has raised three issues on appeal but only one merits discussion.[2] He complains that the court's decision to consolidate these four cases for trial was erroneous because they involved different offenses, different victims, and separate and distinct factual circumstances. He further complains that the improper consolidation of these case was prejudicial in that it a finding of guilt as to one case had a cumulative effect with respect to the remaining charges.

In reviewing a trial court's decision to consolidate separate offenses, this court must apply an abuse of discretion standard. *Crossley v. State,* 596 So. 2d 447 (Fla. 1992). Florida Rule of Criminal Procedure 3.151(b) states that:

> Two or more indictments or informations charging related offenses shall be consolidated for trial on a timely motion by a defendant or by the state. The procedure thereafter shall be the same as if the prosecution were under a single indictment or information. Failure to timely move for consolidation constitutes a waiver of the right to consolidation.

Rule 3.151 also provides:

> For purposes of these rules, 2 or more offenses are related offenses if they are triable in the same court and are based on the same act or transaction or on 2 or more *connected acts or transactions*.

Fla. R. Crim. P. 3.151(a) (emphasis added).

The "connected acts or transactions" requirement of rule 3.151 means that the crimes joined for trial must be "linked" together in some significant way. *Ellis v. State,* 622 So. 2d 991 (Fla. 1993). The requisite "linkage":

> can include the fact that they occurred during a "spree" interrupted by no significant period of respite, *Bundy* [*v. State,* 455 So. 2d 330 (Fla. 1984), *cert. denied,* 476 U.S. 1109, 106 S. Ct. 1958, 90 L. Ed. 2d 366 (1986)], or the fact that one crime is causally related to the other, even though there may have been a significant lapse of time. *Fotopoulos* [*v. State,* 608 So. 2d 784, 790 (Fla. 1992), *cert. denied,* __ U.S. __, 113 S. Ct. 2377, 124 L. Ed. 2d 282 (1993)].

Ellis, 622 So. 2d at 999. The factors to consider in determining whether joinder is permissible include "the temporal and geographical association, the nature of the crimes, and the manner in which they were committed." *Bundy v. State,* 455 So. 2d 330, 345 (Fla. 1984), *cert. denied*, 476 U.S. 1109, 106 S. Ct. 1958, 90 L. Ed. 2d 366 (1986). The mere fact of a general temporal and geographic proximity is not sufficient in itself to justify joinder but it may help prove a link between the crimes. *Ellis,* 622 So. 2d at 999, *citing Crossley v. State,* 596 So. 2d 447. The term "connected acts or transactions" is not meant to refer to "similar but separate episodes," which are separated in time and are connected only by the accused's alleged guilt in both or all instances. *Pittman v. State,* 693 So. 2d 1133 (Fla. 1st DCA 1997), *review dismissed,* 717 So. 2d 538 (Fla. 1998). Moreover, interests in practicality, efficiency, expense, convenience, and judicial economy, do not outweigh the defendant's right to a fair determination of guilt or innocence. *State v. Williams,* 453 So. 2d 824, 825 (Fla. 1984).

Application of these rules in crime spree cases is best seen by examination of several supreme court cases. For "crime spree" offenses to be tried together, they generally require both temporal and geographical proximity, as well as a similarity between the offenses. For example, in *Bundy,* the court found that the defendant was properly tried for both an attack on four women in a sorority house, which resulted in the death of two of those women, and the attack of a fifth woman roughly an hour later, which took place several blocks away. The Florida Supreme Court held that these crimes were properly joined since they were "connected by the close proximity in time and location, by their nature, and by the manner in which they were perpetrated." *Bundy* 455 So. 2d at 345.

Similarly, in *Gudinas v. State,* 693 So. 2d 953 (Fla.), *cert. denied*, 118 S. Ct. 345, 139 L. Ed. 2d 267 (1997), the court found that the defendant had properly been tried for two separate attacks which occurred within hours on two different women. In the first attack, the defendant made three separate, unsuccessful attempts to break into the victim's car upon her exit from a local bar. Ultimately, he attempted to smash his way through the driver's side window. Although the first victim escaped, no more than three hours later, in essentially the same location, the defendant brutally raped and murdered a second victim. The court found these offenses were properly tried together, stating:

> Gudinas' failure to complete his attack against Rachelle Smith may have provided a causal link to his completed attack on Michelle McGrath, thus allowing joinder under *Fotopoulos*. Furthermore, the State makes a persuasive argument that the attacks were separated by less than one hour. Under the State's scenario or even if approximately three hours elapsed, Gudinas' offenses constitute a crime spree as contemplated in Bundy. The attempted rape and accompanying violence of his aborted entry into Rachelle Smith's car, and the actual rape and extreme violence of his murder of Michelle McGrath demonstrate a "meaningful relationship" between the two attacks as required by *Crossley*.

Id. at 960. *See also Rolling v. State,* 695 So. 2d 278 (Fla.) (within 72 hour period defendant stabbed to death five college students in their apartments, sexually battering three victims before killing them; crimes demonstrated a "temporal continuity" sufficient to constitute a "spree" under *Bundy), cert. denied,* 118 S. Ct. 448, 139 L. Ed. 2d 383 (1997); *Rohan v. State,* 696 So. 2d 901 (Fla. 4th DCA 1997) ("crime spree" cases require a showing of a similarity between types of crimes or the manner of their commission, as if the criminal conduct erupted from a "common motivational source.").

In this case, it is a close question whether it was an abuse of the court's discretion to permit all four cases to be tried together. There are four separate offenses—a home invasion, shooting at or into a building, a burglary, and the attempted murder of a law enforcement officer. The offenses are dissimilar and were committed in separate geographical locations, and even in different cities. Nonetheless, the offenses were temporally connected, in that they occurred as part of a continuous "crime spree." Furthermore, defendant claims that he was under the influence of rohypnol when he committed all of the offenses (with the exception of the home invasion, which was allegedly committed to obtain the rohypnol), so that his actions during the entire sequence of events is relevant to his claim of intoxication, as well as lack of intent. Proof of the entire sequence of events is also necessary to explain how events unfolded, such as to explain where defendant got the rohypnol and why defendant and his companions were being chased by police. Finally, the same guns were used in the home invasion, the drive-by shooting, and the attempted murder. Given these links, and the continuous nature of the crime spree, we conclude that the trial court did not abuse its discretion in permitting all four cases to be consolidated for trial.

AFFIRMED. (HARRIS and PETERSON, JJ., concur.)

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[1]Officer Winters does not appear to have been seriously injured, although one pellet struck him in his eyeglasses, shattering the eyeglasses, and another went through his winter jacket and deflected off his vest.

[2]Defendant also complains on appeal about the lack of a written order determining adult sanctions but this error was not brought to the attention of the lower court. We have already decided that this error cannot be raised for the first time on appeal in light of the Criminal Appeal Reform Act. *Carson v. State,* 707 So. 2d 898 (Fla. 5th DCA 1998). Appellant also complains of the lower court's exclusion of his proffered expert but the exclusion of this witness was well within the court's discretion.

* * *

***898** 707 So.2d 898

23 Fla. L. Weekly D601

Ronald CARSON, Appellant,
v.
STATE OF Florida, Appellee.

No. 97-0259.

District Court of Appeal of Florida,

Fifth District.

March 6, 1998.

Defendant was convicted in the Circuit Court, Orange County, Michael F. Cycmanick, J., of burglary of dwelling with assault, attempted second degree murder, attempted robbery with firearm, and possession of firearm during commission of felony. Defendant appealed. The District Court of Appeal, Antoon, J., held: (1) defendant convicted of attempted robbery with firearm could not, under double jeopardy principles, be convicted and sentenced for possession of firearm during commission of attempted robbery; and (2) defendant did not preserve for review circuit court's failure to enter written order relating to imposition of adult sanctions.

Affirmed in part, reversed in part, and remanded.

1. DOUBLE JEOPARDY⚿ 145
135H ----
135HV Offenses, Elements, and Issues Foreclosed
135HV(A) In General
135Hk139 Particular Offenses, Identity of
135Hk145 Robbery.

Fla.App. 5 Dist. 1998.
Defendant convicted of attempted robbery with firearm could not, under double jeopardy principles, be convicted and sentenced for possession of firearm during commission of felony, to wit: attempted robbery, as two offenses stemmed from defendant's single act involving use of same firearm in same attempted robbery. West's F.S.A. §§ 775.087, 777.04, 790.07, 812.13.

2. INFANTS⚿ 243
211 ----
211VIII Dependent, Neglected, and Delinquent Children
211VIII(F) Review
211k243 Preservation of grounds for review.

Fla.App. 5 Dist. 1998.
Juvenile, who was prosecuted and sentenced as adult, did not preserve for appellate review trial court's failure to enter written order relating to imposition of adult sanctions, where juvenile did not object at sentencing. West's F.S.A. § 924.051.

3. INFANTS⚿ 69(8)
211 ----
211VI Crimes
211k69 Sentence and Punishment
211k69(8) Modification, vacation, and review.

Fla.App. 5 Dist. 1998.
Statutory provisions applying to terms and conditions of appeals in criminal cases applies to sentencing process when juveniles are prosecuted and sentenced as adults. West's F.S.A. § 924.051.

***899** James B. Gibson, Public Defender, and Nancy Ryan, Assistant Public Defender, Daytona Beach, for Appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Allison Leigh Morris, Assistant Attorney General, Daytona Beach, for Appellee.

ANTOON, Judge.

The jury returned verdicts finding Ronald Carson (the defendant) guilty of committing the offenses of burglary of a dwelling with an assault, (FN1) attempted second degree murder, (FN2) attempted robbery with a firearm, (FN3) and possession of a firearm during the commission of a felony; to wit, robbery. (FN4) We reverse in part, affirm in part, and remand for further proceedings.

[1] First, the defendant contends that we must reverse his judgment and sentence on the possession of a firearm during the commission of a felony charge because that conviction stems from the defendant's single act of attempted robbery with a firearm. Specifically, he argues that the imposition of two convictions based upon one criminal act violates the prohibition against double jeopardy. We agree.

This issue was addressed in *State v. Stearns,* 645 So.2d 417, 418 (Fla.1994). In *Stearns,* the defendant was convicted of armed burglary, grand theft, and carrying a concealed weapon while committing a felony, to wit: grand theft. The supreme court, responding to a certified question from this court, affirmed our ruling that the state cannot, consistent with double jeopardy principles, charge, convict and sentence a defendant for two offenses for the single act of possession of one weapon. *Id.*

Also, in an earlier opinion, *Cleveland v. State,* 587 So.2d 1145, 1146 (Fla.1991), our supreme court addressed a similar double jeopardy issue. Cleveland was convicted of attempted robbery with a firearm and use of a firearm while committing a felony. *Id.* As here, the convictions stemmed from a single criminal act committed by the defendant; namely, a robbery. *Id.* The supreme court determined that when a robbery conviction is enhanced because a firearm is used in the commission of the crime, the single act involving the use of the same firearm in the same robbery cannot form the basis of a separate sentence and conviction for use of a firearm while committing a felony. *Id.* In accordance with this case law, we must reverse the defendant's judgment and sentence for possession of a firearm during the commission of a felony.

[2] Next, the defendant asserts that he was improperly sentenced to adult sanctions. Specifically, he claims that the trial court failed to consider the statutorily enumerated criteria set forth in section 39.059(7)(c), Florida Statutes (1995). Although the defendant's claim of error possesses merit, due to section 924.051, Florida Statutes (Supp.1996), we cannot grant him appellate relief.

Prior to 1994, trial courts were required to make "specific findings" of fact and set forth the reasons for imposing adult sanctions. ***900.** *See* § 39.059(7)(d), Fla. Stat. (1993). The 1994 amendment to section 39.059(7) eliminated the earlier requirement of "specific findings," but did not eliminate the requirement of a written order. *See Roberts v. State,* 677 So.2d 1, 2 (Fla. 5th DCA 1996). The defendant aptly notes that no such written order appears in the instant record.

[3] A trial court's failure to enter a written order relating to the imposition of adult sanctions used to constitute *per se* error reversible on appeal even in the absence of a contemporaneous objection. *See Lang v. State,* 566 So.2d 1354, 1357 (Fla. 5th DCA 1990). However, section 924.051(3), Florida Statutes (Supp.1996), provides that "[a]n appeal may not be taken from a judgment or order of a trial court unless a prejudicial error is alleged and is properly preserved or, if not properly preserved, would constitute fundamental error." We agree with the first district that section 924.051 applies to the sentencing process when juveniles are prosecuted and sentenced as adults and these defendants may not argue that the trial court failed to enter a written order pursuant to section 39.059(7) for the first time on appeal. *See Cargle v. State,* 701 So.2d 359, 361 (Fla. 1st DCA 1997). Accordingly, since the defendant did not object at sentencing that the trial court failed to enter a written order, this claim of error has not been preserved for appellate review. (FN5)

AFFIRMED in part, REVERSED in part, REMANDED.

DAUKSCH and W. SHARP, JJ., concur.

FN1. § 810.02(2)(a), Fla. Stat. (1995).

FN2. §§ 782.04, 777.04, Fla. Stat. (1995).

FN3. §§ 812.13, 775.087, 777.04, Fla. Stat. (1995)

FN4. § 790.07, Fla. Stat. (1995).

FN5. The defendant raises two other claims of error which are also not reviewable because they were not preserved by timely objection. *See Williams v. State,* 697 So.2d 164 (Fla. 1st DCA), *rev. denied,* 700 So.2d 689 (Fla.1997); *Middleton v. State,* 689 So.2d 304, 305 (Fla. 1st DCA 1997).

***359** 701 So.2d 359

22 Fla. L. Weekly D2215

Rico L. CARGLE, Appellant,
v.
STATE of Florida, Appellee.

No. 96-2700.

District Court of Appeal of Florida,

First District.

Sept. 18, 1997.

Rehearing Denied Nov. 17, 1997.

Juvenile was charged as an adult and was convicted of attempted armed robbery with a firearm and aggravated battery with a firearm, in the Circuit Court, Okaloosa County, Keith Brace, J., and juvenile appealed. The District Court of Appeal, Miner, J., held that: (1) provisions of statute requiring preservation of issues for appeal apply to sentencing of juveniles as adults, and (2) juvenile waived claim of nonfundamental sentencing error by failing to preserve it.

Affirmed.

1. INFANTS⚷ 69(8)
211 ----
211VI Crimes
211k69 Sentence and Punishment
211k69(8) Modification, vacation, and review.

Fla.App. 1 Dist. 1997.
Provisions of statute requiring preservation of issues for appeal apply to sentencing process by which juveniles are sentenced as adults. West's F.S.A. §§ 39.059, 924.051.

2. INFANTS⚷ 69(8)
211 ----
211VI Crimes
211k69 Sentence and Punishment
211k69(8) Modification, vacation, and review.

Fla.App. 1 Dist. 1997.
Juvenile's claim that trial court erred in failing to set forth in sentencing order representation that trial court had considered statutory criteria for deciding whether to sentence as juvenile or adult was waived by juvenile's failure to comply with statute requiring preservation of issues for appeal, as juvenile did not object to being sentenced as adult. West's F.S.A. § § 39.059(7)(c, d), 924.051; West's F.S.A. RCrP Rule 3.800(b).

Nancy A. Daniels, Public Defender; Faye A. Boyce, Assistant Public Defender, Tallahassee, for appellant.

Robert A. Butterworth, Attorney General; Giselle Lylen Rivera, Assistant Attorney General, Tallahassee, for appellee.

MINER, Judge.

Appellant, 17 years old at the time of his arrest, was charged as an adult with attempted armed robbery with a firearm and aggravated battery with a firearm. A jury found him guilty as charged, a presentence investigation (PSI) and a predisposition report (PDR) were ordered, and the sentencing hearing was set. Shortly before this hearing, appellant turned 18 years of age.

At the sentencing hearing, the trial judge announced his intention to depart from the sentencing guidelines. Appellant's attorney urged that while the PDR indicated that appellant met the criteria to be sentenced as an adult, it also stated that juvenile sanctions would protect the public and rehabilitate the appellant. Appellant's counsel did not argue at sentencing that appellant should be sentenced as a juvenile but only that he should be given a guideline sentence or a youthful offender sentence.

The trial court imposed a 15-year sentence for attempted robbery with a firearm and a concurrent 30-year sentence on the aggravated battery charge. The court made findings to support both a 3-year minimum mandatory term and the departure sentence it imposed. No motion to correct, reduce, or modify appellant's sentence was filed.

Claiming that the trial court erred in imposing a departure sentence, appellant argues that the trial court did not consider the criteria in section 39.059(7)(c), Florida Statutes (1995), and further that the trial court erred by not putting in writing the representation that those statutory criteria had been considered before imposing sentence, which is

required by section 39.059(7)(d). Appellant contends that such errors require reversal, remand, and resentencing. The State counters that appellant did not object below to being sentenced as an adult and thus the issue was waived as a consequence of 1996 legislative revisions to chapter 924 (Criminal Appeal Reform Act). Alternatively, the State maintains that the record demonstrates that the trial court did, in fact, consider the chapter 39 criteria and, if required, remand should only be for the purpose of permitting the trial court to enter a nunc pro tunc ***360** written order containing a representation that these criteria were considered. For the reasons that follow, we affirm appellant's judgment and sentence.

At the outset, we note that appellant was sentenced on the very day the revisions to chapter 924 (FN1) and an amendment to Fla. R.Crim. P. 3.800 (FN2) took effect. So far as we have been able to determine, the precise question presented in this appeal has not been decided by any Florida court.

The substance of appellant's complaint at bar is that although the trial court listed its reasons in writing for imposing a departure sentence as required by Florida Rule of Criminal Procedure 3.702 (reasons supporting a departure sentence must be in writing), the written order made no reference to section 39.059(7)(c), which sets forth the criteria that must be considered before adult sanctions are imposed on a juvenile. The State candidly concedes that the order in question does not expressly indicate that the trial judge considered the (7)(c) criteria but argues that the record reflects that the judge did, in fact, consider such criteria. In view of our disposition of this appeal, however, we find it unnecessary to and do not address what the record reflects in this regard.

The appellant here was prosecuted as an adult and sanctions were imposed upon him under section 39.059(7), Florida Statutes (1995), which delineates the procedures for sentencing a juvenile prosecuted as an adult. Section 39.059(7)(d) provides that "[a]ny decision to impose adult sanctions must be in writing, but is presumed appropriate, and the court is not required to set forth specific findings or enumerate the criteria in this subsection as any basis for its decision to impose adult sanctions." The right to appeal the failure to meet this writing requirement is guaranteed by section 39.059(7). (FN3) Under cases decided before passage of the Criminal Appeal Reform Act of 1996 (Ch. 96-248, § 4, at 954, Laws of Florida.), a trial court's failure to commit the decision to impose adult sanctions to written order was reversible error. *Bridgewater v. State,* 668 So.2d 1092 (Fla. 1st DCA 1996); *Nation v. State,* 668 So.2d 284 (Fla. 1st DCA 1996). Such error, however, was deemed ministerial in nature and did not require resentencing with the defendant present. *Nation v. State,* 668 So.2d 284, 286 (Fla. 1st DCA 1996) (remanding "for the merely clerical or ministerial function" of entering a written nunc pro tunc order).

This court has stated that "[i]t is relatively well-settled that a juvenile's right to appeal is governed by chapter 39, Florida Statutes ..., and that chapter 924 does not apply to juvenile proceedings." We have also held that there is "nothing in the 1996 amendments to chapter 924 (ch. 96-248, at 953, Laws of Fla.) to suggest a contrary intent on the part of the legislature." *T.M.B. v. State,* 689 So.2d 1215 (Fla. 1st DCA 1997). *Accord J.M.J. v. State,* 22 Fla. L. Weekly D1673, --- So.2d ----, 1997 WL 369951 (Fla. 1st DCA ***361.** July 7, 1997); *R.A.M. v. State,* 695 So.2d 1308 (Fla. 1st DCA 1997) (certifying question of whether section 924.051(4), Florida Statutes (Supp.1996), applies in juvenile delinquency proceedings); *G.S.C. v. State,* 22 Fla. L. Weekly D1672, --- So.2d ---- (Fla. 1st DCA July 7, 1997); *K.A.S. v. State,* 22 Fla. L. Weekly D1823, --- So.2d ---- (July 22, 1997).

[1] It is our view that the imposition of adult sanctions pursuant to 39.059(7) on a child prosecuted as an adult is not strictly a juvenile proceeding. It is in the nature of a hybrid procedure. Although the requirements of section 39.059(7) must still be met, it must be remembered that the juvenile is being sentenced as an adult in criminal court. In *J.M.J. v. State,* 22 Fla. L. Weekly D1673, --- So.2d ---- (Fla. 1st DCA 1997), this court noted that there are important procedural differences between juvenile delinquency proceedings and the procedures applicable in adult criminal matters. For example, juveniles sentenced as such in delinquency proceedings do not have the opportunity to correct sentencing errors in a procedure comparable to that in amended Florida Rule of Criminal Procedure 3.800(b), and there is no collateral review procedure afforded in delinquency proceedings similar to the procedure afforded adults under Florida Rule of Criminal Procedure 3.850. *Id.* Such is not the case for

juveniles sentenced as adults. Accordingly, we hold that provisions of section 924.051, which require the preservation of issues for appeal, apply to the sentencing process by which juveniles are sentenced as adults. The application of section 924.051 to the procedure whereby a juvenile is sentenced as an adult does not obviate the right to appeal guaranteed in section 39.059(7), it merely requires that any such error be preserved as explained below.

To afford criminal defendants an opportunity to preserve sentencing errors, such as the lower court's error in the instant case of failing to enter a written order, the supreme court amended Fla. R.Crim. P. 3.800, effective on the day appellant herein was sentenced as noted in footnote 2. *Amendments to Fla. R.App. P. 9.020(g) and Fla. R.Crim. P. 3.800,* 675 So.2d 1374, 1375 (Fla.1996). The Court Commentary accompanying this amendment states the following:

> Subdivision (b) was added and existing subdivision (b) was renumbered as subdivision (c) in order to authorize the filing of a motion to correct a sentence or order of probation, thereby providing a vehicle to correct sentencing errors in the trial court and to preserve the issue should the motion be denied. A motion filed under subdivision (b) is an authorized motion which tolls the time for filing the notice of appeal. The presence of a defendant who is represented by counsel would not be required at the hearing on the disposition of such motion if it only involved a question of law. Fla. R.Crim. P. 3.800.

[2] As noted above, a juvenile sentenced as a juvenile in delinquency proceedings is not afforded this opportunity to preserve error, but a juvenile sentenced as an adult in criminal proceedings is not only required to preserve error for review under the Criminal Appeal Reform Act, but pursuant to Rule 3.800(b), he or she is afforded the opportunity to do so. Because appellant in the case at bar was sentenced as an adult after the July 1, 1996, effective date of the Criminal Appeal Reform Act, he had the opportunity pursuant to Rule 3.800(b) to preserve error on appeal here, but he did not. As a result, this issue is not subject to appellate review.

Affirmed.

ALLEN and LAWRENCE, JJ., concur.

FN1. Section 924.051, Florida Statutes (1996 Supp.) provides, in pertinent part:

> (1) As used in this section:
>
> (b) "Preserved" means that an issue, legal argument, or objection to evidence 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.
>
> (3) An appeal may not be taken from a judgment or order of a trial court unless a prejudicial error is alleged and is properly preserved or, if not properly preserved, would constitute fundamental error. A judgment or sentence may be reversed on appeal only when an appellate court determines after a review of the complete record that prejudicial error occurred and was properly preserved in the trial court or, if not properly preserved, would constitute fundamental error.

***361** FN2. On the same day the revisions to chapter 924 became effective, a revision to Fla. R.Crim. P. 3.800 took effect. New subsection (b) provides:

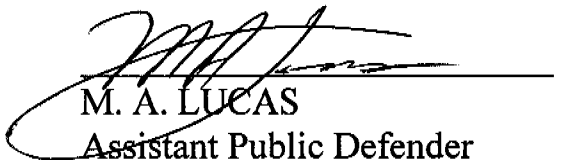
> (b) Motion to Correct Sentencing Error. A defendant may file a motion to correct the sentence or order of probation within ten days after the rendition of the sentence.

Subsequently, the above rule was amended to give defendants 30 days to file such a motion. *Amendments to the Florida Rules of Criminal Procedure,* 685 So.2d 1253, 1271 (Fla.1996).

FN3. "It is the intent of the Legislature that the criteria and guidelines in this subsection are mandatory and that a determination of disposition under this subsection is subject to the right of the child to appellate review under s. 39.069."

CERTIFICATE OF FONT

I HEREBY CERTIFY that the size and style of type used in the brief is 14 point proportionally spaced Times New Roman.



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