IN THE SUPREME COURT OF FLORIDA

KENNETH TAYLOR,)
)
Petitioner,)
)
vs.) CASE NO. 96,671
)
STATE OF FLORIDA,)
)
Respondent.)

ON DISCRETIONARY REVIEW FROM THE FIFTH DISTRICT COURT OF APPEAL

PETITIONER'S MERIT BRIEF

JANE C. ALMY-LOEWINGER
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO . 0075 108
112 Orange Avenue, Suite A
Daytona Beach, Florida 32114
Phone: (904) 252-3367
COUNSEL FOR PETITIONER

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STATEMENT OF THE CASE AND FACTS

The Petitioner pled no contest to one count of Grand Theft, was placed on probation for two years and adjudication was withheld. (R 1-7, Vol. I) Petitioner served seven months of his probation, during which time he made regular payments of restitution to the victim, reported regularly to his Probation Officer and also participated in alcohol counseling. On April 2, 1996, the Appellant violated his probation by using drugs. (R 34-38, Vol. I) And on May 6, 1996, his probation was modified to include inpatient substance abuse treatment at the Salvation Army and was extended to September 13, 1998. (R 42, Vol. I) The Appellant served ten more months of the modified probation sentence before a new Affidavit of Violation was filed by his Probation Officer on March 3 1, 1997.

(R 43-50, Vol. I) The Affidavit alleged that Appellant had ceased reporting in April of 1997 and had moved from his place of residence on or about March 10, 1997, without notifying his Probation Officer. The Affidavit also alleged that the Appellant admitted to his Probation Officer on February 22, 1997, that he had used crack cocaine.

On August 11, 1998, the Appellant was adjudicated guilty of the original charge of Grand Theft and was sentenced to 270 days in the County Jail with credit for 54 days followed by four years and three months of probation with the original condition that he pay the remaining restitution due the victim of $2,095 .78. The Appellant had already completed the condition of probation that he graduate from inpatient drug treatment at the Salvation Army prior to his being violated. No credit was given to the Appellant for the seventeen (17) months of probation that he had already completed prior to his violation.(R 8-21, Vol. I) On appeal the Office of the Public Defender filed a merit brief arguing that the court illegally sentenced the Petitioner to a new term of probation of four years and three months, plus 270 days in the county jail without giving him credit for the seventeen months of probation he had previously served of his original sentence, in violation of section 924.051 (3), Florida Statutes and 775.082 (3) (d), Florida Statutes.

The Office of the Attorney General filed an Answer Brief on April 5, 1999, arguing that the issue of the "alleged sentencing error" was not preserved for appeal at the trial court level. The Petitioner argued in his merit brief, and again in his reply brief, that a sentencing error rises to the level of fundamental error, and therefore, can be addressed by the Court even in the event that it was not preserved below .

SUMMARY OF ARGUMENT

The Criminal Reform Act of 1996 as codified in Section 924.051 , Florida Statutes (1996), did not abolish the concept of fundamental error in the sentencing context. The Fifth District Court of Appeals in Maddox v. State, 708 So. 2d 617 (Fla. 5th DCA 1998), held that, "no unpreserved sentencing error will be considered fundamental or correctable error on direct appeal. " However, the First, Second, Third and Fourth Districts continue to recognize that sentencing errors can constitute fundamental error that can be raised on direct appeal despite the lack of preservation. See Harriel v. State, 710 So. 2d 102 (Fla. 4th DCA 1998), Jordon v. State, 728 So. 2d 748 (Fla. 3d DCA 1998), review granted, 735 So. 2d 1285 (Fla. 1999) and Bain v. State, 730 So. 2d 296 (Fla. 2d DCA 1999).

ARGUMENT

THE DECISION OF THE FIFTH DISTRICT COURT OF APPEALS INCORRECTLY INTERPRETS THE CRIMINAL REFORM ACT OF 1996 AS ABOLISHING THE CONCEPT, OF FUNDAMENTAL ERROR WITH REGARD TO SENTENCING ERRORS, AS EVIDENCED BY THEIR DECISION IN MADDOX V. STATE, 708 SO. 2D 617 (FLA. 5TH DCA 1998).

The Courts and Section 775.082 (3) (d), Florida Statutes (1997), mandate that the maximum sentence that can be imposed for a third degree felony cannot exceed five (5) years. In the instant case the issue of "illegal sentence", was not preserved by the Appellant in the trial court proceeding, however, Section 924.05 1 (3), Florida Statutes (1997), provides:

> 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 review of the complete record&at prejudicial error occurred and was properly preserved in the trial court. or. if not properly preserved, would constitute fundamental error. (emphasis added)

Sentencing a defendant to an unlawful sentence constitutes fundamental error.

Recently the Court in Nelson v. State, 23 Fla. L. Weekly D2241 (Fla. 1st DCA October 1, 1998), held that, an unpreserved sentencing error could be

remedied on direct appeal if the resulting sentence was illegal; and the sentence was illegal and constituted fundamental error. According to the trial court transcript (R 54-58 Vol. I), trial counsel had originally recommended that the Appellant serve 364 days in jail. The Appellant's probation officer had recommended that the Appellant be sentenced to two years of community control, however, the Court stated that it did not feel that was a valid sentence. (R 54-58 Vol. I) The court proceeded to sentence the Appellant to 270 days in jail followed by four years and three months of probation for the purpose of insuring that the Appellant paid the victim in this case the remaining balance of the restitution. (R 54-59, Vol. I) This could have easily been accomplished if the Court had accepted the recommendation of the probation officer and placed the Appellant on community control for two years. That sentence would have been legal and in compliance with Section 775.082 (3) (d), Florida Statutes (1997).

In the case of Sanders v. State, 698 So. 2d 377 (Fla. 1st DCA 1997), the Court quoted Neal v. State, 688 So. 2d 392 (Fla. 1st DCA 1997), when it held that, Section 924.05 1, Florida Statutes (1997), does not preclude an appellate challenge to an unpreserved sentencing error that constitutes fundamental error. The Court went on to state that.. . "an illegal sentence is regarded with such disdain by the law that it, unlike other trial court errors, may be challenged for

the first time by way of collateral proceedings instituted even decades after such a sentence has been imposed.. . The extraordinary provision made from remedying illegal sentences evidences the utmost importance of correcting such errors even at the expense of legal principles that might preclude relief from trial court errors of less consequence. The Court in Sanders, supra, concluded by stating that, in light of this, illegal sentences necessarily constitute fundamental error, and may therefore be challenged for the first time on direct appeal.

The Appellant, in the instant case was originally sentenced to probation in 1995 for the offense of Grand Theft, a third degree felony. Section 775 .082 (3) (d), Florida Statutes (1995) provides that the penalty of imprisonment for a hird degree felony shall not exceed five years. (emphasis added)

The statutory language as to sentencing for a third degree felony remains the same today and is set out in Section 775.082 (3) (d) (1997).

The Court in Kolovrat v. State, 574 So. 2d 294 (Fla. 5th DCA 1991), held that the defendant was improperly placed on probation for a total of six years for a third degree felony when probation was reimposed for three years following revocation. The Court went on to state that, the maximum probation that can be legally imposed for a third degree felony is five years and by reimposing probation for three years following the revocation, the court improperly placed

defendant on probation for a total of over six years.

In the instant case, the Appellant was originally sentenced in 1995 to two years probation, adjudication withheld, on the third degree felony of Grand Theft. He subsequently violated his probation after serving seven months and his probation was then modified to include inpatient drug treatment and extended for another year to September 13, 1998. The Appellant served another ten months of the extended probation, successfully completing the modification by graduating from an inpatient drug treatment program before he was violated on March 3 1, 1997. On September 11, 1998, the Court adjudicated the Appellant guilty of the original charge of Grand Theft and sentenced him to serve 270 days in jail with credit for 54 days time served followed by four years and three months of probation. This sentence is clearly illegal because it is in violation of Section 775.082 (3)(d), Florida Statutes (1995) and Section 775.082 (3) (d), Florida Statutes (1997), which states that the maximum sentence that can be imposed for a third degree felony is five (5) years. By sentencing the Appellant to 270 days in jail followed by four years and three months of probation, the Court is exceeding the statutory limit on sentencing for a third degree felony by one year and five months.

The Court in Prvor v. State, 704 So. 2d 217 (Fla. 3d DCA 1998), held that

credit for time served on probation or community control is awarded only towards a new sentence of either probation or community control, or the probation/ community control portion of a split sentence, not towards the prison term portion of a split sentence.. . " In the instant case, had the Court followed the Pryor, supra, ruling, it would have been in compliance with Section 775.082 (3) (d), Florida Statutes (1997), because in allowing the Appellant credit for the seventeen months that he had previously served on probation, the total sentence would have been two months short of five years, the maximum sentence allowed for a third degree felony. According to the Court in Hewitt v. State, 702 So. 2d 633 (Fla. 1 st DCA 1997), if a sentence is illegal, then it constitutes error as a matter of law, which is fundamental error that may be corrected at any time without objection. West's F.S.A.R. App. P. Rule 9.140 (c)(l)(J). Appellant's new sentence, without credit given for his prior probationary term, is an illegal sentence and reversal is mandated.

In the case of Maddox v. State, 708 So. 2d 617 (Fla. 5th DCA 1998), the Fifth District Court of Appeal is at odds with the other Districts in Florida on the issue of what constitutes fundamental error. The Court in Maddox. supra, held that, "no sentencing error may be considered in direct appeal unless such error has been preserved for review, that is, presented to and ruled on by the trial

court, regardless of whether error is apparent on the face of the record or whether the defendant went to trial or entered a plea. " In Harriel v. State, 7 10 So. 2d 102 (Fla. 4th DCA 1998), the court held that, "where no motion is made in the trial court, the only issues which the appellate court can consider on appeal from a plea of guilty or nolo contendre without reservation are subject matter jurisdiction of the trial court and illegality of sentence; all other issues are foreclosed if they are not preserved by motion to withdraw plea or to correct sentence." (emphasis added) The court in Bain v. State, 730 So. 2d 296 (Fla. 2d DCA 1999), held that, "under the Criminal Appeal Reform Act, appellate jurisdiction to review a sentence couid be founded on an allegation either of preserved sentencing error or of unpreserved fundamental sentencing error." (emphasis added) As mentioned above, the Fifth District Court of Appeal holds a completely different interpretation of the Criminal Appeal Reform Act, which is at odds with not only the Second District Court of Appeal on Ram, supra, but with the other Districts in Florida as well. The Fifth District Court of Appeal interprets the Criminal Appeal Reform Act of 1996, as preventing them from addressing sentencing issues that were not preserved in the lower court, while the other Districts interpret the Act as allowing t-hem to view sentencing errors as fundamental error, and thus opening the door for them to be reviewed and corrected. (emphasis added)

In this regard, the Fifth District Court of Appeal expressed it's direct disagreement with all of the remaining district courts of appeal, which continue to recognize the concept of fundamental error, at least in regard to illegal sentences. The Fifth District Court of Appeal is ignoring the plain language of the rule and this Court has already ruled that illegal sentences do not require preservation.

CONCLUSION

Based on the foregoing reasons and authorities, Petitioner respectfully requests this Honorable Court to quash the decision of the Fifth District below and remand with instructions to grant relief on the sentencing issue pursuant to Section 775.082 (3) (d), Florida Statutes (1997), allowing the Petitioner to receive credit for the seventeen months of probation that he has already completed.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

JANE C. ALMY-LOEWINGER
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 0075108
112 Orange Avenue, Suite A
Daytona Beach, Florida 32114
Phone: (904) 252-3367

COUNSEL FOR PETITIONER

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 Boulevard, 5" Floor, Daytona Beach, Florida 32118, via his basket at the Fifth District Court of Appeal and mailed to Mr. Kenneth Taylor, 3609 Old DeLand Road, Daytona Beach, Florida 32114, on this 29th day of December, 1999.

JANE C. ALMY-LOEWINGER
ASSISTANT PUBLIC DEFENDER