IN THE SUPREME COURT OF FLORIDA

SOLOMON WISE,

Petitioner,

v. CASE NO. SC96760

STATE OF FLORIDA, DCA case no.: 5D98-3123

Respondent.
_____/

ON REVIEW FROM THE FIFTH DISTRICT COURT OF APPEAL

RESPONDENT'S BRIEF ON THE MERITS

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CERTIFICATE OF TYPE SIZE AND STYLE

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SUMMARY OF ARGUMENT

The two issues before this Court are whether the trial court erred in finding that the facts supported the stop by law enforcement of the Petitioner and whether sentencing errors have to be presented to the trial court prior to being raised on appeal.

As to the first issue, the law in this area and the facts of this case are not in dispute. The only issue is whether the trial court's finding was incorrect legally. The State's position is that reversible error has not been shown by the Petitioner.

As to the second issue, the State's position is presently before this Court in numerous cases. Prior to raising a sentencing issue on appeal, defendants should be required to follow the statute and rules and present the claim to the trial court. Failure to do so should bar direct appeal of that issue.

ARGUMENT

POINT I

WHETHER THE TRIAL COURT ERRED IN DENYING THE DEFENSE'S MOTION TO SUPPRESS.

The Petitioner challenges the trial court's denial of his motion to suppress contending that the circumstances of the traffic stop did not establish that the deputy had a reasonable suspicion to stop the vehicle the Petitioner was operating. It is the position of the State that the evidence presented at the suppression hearing easily supports the trial court's denial of that motion.

First, it is well-established that a trial court's ruling on a motion to suppress is clothed in a presumption of correctness, Johnson v. State, 438 So. 2d 774 (Fla. 1983), cert. denied, 465 U.S. 1051 (1984); W.L.D. v. State, 724 So. 2d 601 (Fla. 5th DCA 1998); Poole v. State, 639 So. 2d 96 (Fla. 5th DCA 1994), and "a reviewing court must interpret the evidence and all reasonable deductions and inferences which may be drawn therefrom in a manner most favorable to the trial judge's conclusions." W.L.D., 724 So. 2d at 602.

The facts are not in dispute. On February 6, 1998, at approximately 1:30 a.m., Deputy Clifton Singleton (Singleton) of the Brevard County Sheriff's Office noticed a vehicle parked in front of an empty residence. The vehicle was located in a high-crime area, and Singleton, who stated that he had worked that area

for a year and a half, did not recognize the vehicle as belonging in the neighborhood. (R 21,22,23,35,36).

These facts led Singleton and another deputy to knock on the door of the house next door to the empty residence. (R 31). When a woman opened the door, the deputies inquired whether she knew who owned the red Nissan. She indicated she did not, but she said she would ask around and returned back inside the residence. Subsequently, the Petitioner opened the door and stepped outside.

Initially, the Petitioner denied knowing about the vehicle or its owner, but, eventually, he admitted that he knew the owner and, in fact, had arrived in that vehicle. (R 31). The deputies made contact with the owner of the vehicle, Christina Mick (Mick), and determined that her driver's license was suspended. (R 24). They also requested identification from others at the residence, and, as a result, one person was arrested on an outstanding warrant, and the deputies discovered that the Petitioner's driver's license was also suspended. (R 25,33).

Just a few hours later, at approximately 5:30 a.m., Singleton observed the same red Nissan being driven only about six to seven blocks from its previous location. (R 24,34). Singleton was able to positively identify the vehicle because of its color, make, and the substantial damage to the rear end that he had noted previously. (R 34,38). Because the windows were tinted, Singleton could not determine who was driving so he initiated a traffic stop to determine whether Mick was driving having already determined that her license was suspended. (R 24-25).

When Singleton approached the vehicle, he discovered that the Petitioner was in the driver's seat, and the owner, Mick, was seated in the passenger's seat. (R 25). When Singleton requested identification from the Petitioner, the Petitioner claimed he had left his identification at home. Singleton knew the Petitioner was being untruthful since just a few hours earlier the Petitioner had presented his broken identification card to Singleton. (R 26). Singleton ran the Petitioner's name, and, when the computer check once again indicated that the Petitioner's license was suspended, Singleton requested backup.

When another deputy arrived, Singleton arrested the Petitioner and searched the vehicle incident to arrest. (R 26-27). Directly underneath the spot that the Petitioner had been seated, Singleton found crack cocaine. A presumptive field test was performed, and the substance tested positive for cocaine. (R 27). The Petitioner did not testify at the hearing. (R 41).

The trial court found that the facts established a reasonable suspicion that the person operating the vehicle was driving with a suspended driver's license making the search incident to arrest lawful. (R 52-53). The Petitioner argued on appeal that the trial court erred in denying his motion to suppress submitting that the officer did not have reasonable suspicion to conduct a traffic stop of the car since the officer did not know who was driving. The State disagreed and cited to the Fifth District Court of Appeal the case of Smith v. State, 574 So. 2d 300 (Fla. 5th DCA 1991). It was the position of the State that the facts in Smith were very similar

to the Petitioner's situation. The Fifth District Court of Appeal affirmed the trial court's determination; however, this case also involves an unpreserved sentencing issue which is the second issue in this brief. It is the position of the State that the trial court and the appellate court were correct that the facts of this case clearly support a finding of reasonable suspicion for the stop involved in this case.

All the officer needed for a temporary detention was a founded or reasonable suspicion. Reasonable suspicion has been defined as "such suspicion as would warrant a person of reasonable caution in the belief that a stop is appropriate, and is a less demanding standard than that for probable cause." Brown v. State, 719 So. 2d 1243, 1245 (Fla. 5th DCA 1998); Johnson v. State, 696 So. 2d 1271, 1273 (Fla. 5th DCA 1997). Additionally, "[a] court's evaluation of reasonable suspicion is guided by common sense and ordinary human experience." State v. Malone, 729 So. 2d 1008 (Fla. 5th DCA April 9, 1999); State v. Burns, 698 So. 2d 1282, 1284 (Fla. 5th DCA 1997). Additionally, founded suspicion is one based upon facts and circumstances observed and interpreted by the officer in light of his knowledge and experience. Brown v. State, 687 So. 2d 13 (Fla. 5th DCA 1996). In determining whether an officer has reasonable suspicion to justify an investigative stop, each case is evaluated on its own particular facts. Brown, at 1245. The appropriate question in each case is whether the action was reasonable under the totality of the circumstances as interpreted in light of the officer's own knowledge. Id.

The facts in the previously cited case Smith showed that the defendant was operating a vehicle in a high crime area. A patrol officer ran the vehicle's tag and discovered that the owner of the vehicle did not have a valid license. Smith, 574 So. 2d at 300. Although the officer was not familiar with the owner of the vehicle, the officer initiated a traffic stop to determine if the operator had a valid driver's license. The owner was not driving, but Smith, who was the operator, admitted that his license was suspended. A search incident to the arrest for driving while license suspended violation revealed a concealed firearm. Id. The Fifth District Court of Appeal wrote that "an officer's investigatory detention of a vehicle's driver is supported by well-founded suspicion of unlawful activity when the officer first determines that the vehicle's registered owner does not possess a valid driver's license." Id. at 301.[1]

As in Smith, the officer had discovered prior to stopping the vehicle that the owner of the vehicle did not have a valid driver's license. According to the Fifth District Court of Appeal's holding in Smith, these facts alone were sufficient to establish a reasonable suspicion to justify the traffic stop of the red Nissan.

However, the facts in this case provide even greater support

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[1] The Petitioner filed a reply brief in the appellate court attempting to distinguish Smith or in the alternative asking the Fifth District Court of Appeal to certify a question to this Court if it found it to be controlling.

for the trial court's determination that the officer had a reasonable suspicion for the stop. For example, Singleton was familiar with both persons recently connected to this vehicle. The officer knew that neither the owner of the vehicle nor the Petitioner possessed a valid license. When Singleton had encountered the Petitioner, the Petitioner initially lied as to having any connection to the car, but he then admitted knowing the car's owner and having arrived in the car. Singleton saw the red Nissan within six or seven blocks from its original location and only a few hours after his initial contact with the Petitioner and Mick. (R 34). Thus, it was reasonable to believe that one of the two unlicensed people who had recently traveled to that area in the red Nissan would be driving it out of that area, too.

The trial court at the hearing also referred to the case of State v. Barnett, 572 So. 2d 1033 (Fla. 2d DCA 1991). The officers in Barnett had a warrant for a defendant and stopped Barnett's car based upon their knowledge that the defendant often rode with Barnett. Id. at 1033. Like the instant case, the officers could not see into the car because of dark tint. Id. However, unlike this case, the officers quickly determined that the defendant for which they were looking was not in the car. They next asked Barnett for his driver's license, and after determining that he did not have one, the officers discovered that there were outstanding warrants against Barnett as well. Id. The Second District Court of Appeal reversed the trial court's suppression of the stop and arrest and determined that these facts did support a stop.

The Petitioner argues that Barnett is different than the instant case; however, like Smith, the State would submit that the facts of the instant case provide even greater support for a stop. Unlike in Barnett, the officer in this case did not have some general knowledge that the car's owner may have a friend riding with him for which he had a warrant. Instead, the officer in the instant case knew that the owner of the car had no valid license. The officer also knew that the Petitioner had arrived to the earlier place only blocks away in that car. Not being able to see into the car to determine who was driving, the officer acting with reasonable suspicion stopped the car, and upon approaching it, immediately saw someone driving it who he knew had no license. Again, the facts clearly support the trial court's findings, and the Petitioner has failed to show any reason the trial court should be reversed.

POINT II

WHETHER A DEFENDANT MUST OBJECT TO THE TRIAL COURT IN ORDER TO PRESERVE THE DIRECT APPEAL OF SENTENCING ISSUES.

This is another sentencing issue case which is before this Court based upon the ruling of the Fifth District Court of Appeal that only sentencing errors which have been preserved can be raised on direct appeal. See, Maddox v. State, 708 So. 2d 917 (Fla. 5th DCA 1998), rev. granted, 718 So. 2d 169 (Fla. 1998).[2] This includes any sentencing errors which previously may have been labeled "fundamental." It is the position of the State that this is a correct interpretation of the changes to the appellate process (the new amendments to the rules will be discussed later in this brief). To understand how the Fifth District reached its conclusion, some background review of the previous law in this area is necessary.

First, an examination of case law prior to the Criminal Reform Act shows an inconsistent approach to whether an objection was

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[2] The fact that Maddox was an Anders case (Anders v. California, 386 U.S. 738 (1967)) which the appellate court chose to review and evidently easily found sentencing errors illustrates the complexity and constant changing nature of our current sentencing process. This exact point was made by this Court in the recent changes to Florida Rule Criminal Procedure 3.800 when it wrote in regards to sentencing: "[w]hich once was a straightforward function for trial courts, has become increasingly complex as a result of multiple sentencing statutes that often change on a yearly basis." Amendment to Rule 3.800, 24 Fla. L. Weekly S531 (Fla. Nov. 12, 1999).

needed to preserve a sentencing error. In the case Walcott v. State, 460 So. 2d 915, 917-921 (Fla. 5th DCA 1984), approved, 472 So. 2d 741 (Fla. 1985), Judge Cowart wrote a detailed analysis of the application of the contemporaneous objection rule to sentencing errors in his concurring opinion which pointed out many of the inconsistencies in the sentencing error cases. Adding to the inconsistencies of the necessity of a contemporaneous objection was the expansive definition of fundamental error when used in the sentencing context.[3] Case law held that an illegal sentencing error was fundamental error since it could cause a defendant to serve a sentence longer than is permitted by law; however, cases called sentencing errors fundamental which ranged from sentences in excess of the statutory maximum to jail credit to improper costs to conditions of probation. See, Larson v. State, 572 So. 2d 1368 (Fla. 1991) (illegal conditions of probation can be raised without preservation), Wood v. State, 544 So. 2d 1004 (Fla. 1989), receded from, State v. Beasley, 580 So. 2d 139 (Fla. 1991) (failure to provide defendant notice and opportunity to be heard as to costs imposed constitutes fundamental error), Vause v. State, 502 So. 2d 511 (Fla. 1st DCA 1987) (improper imposition of mandatory minimum sentence constituted fundamental error); Ellis v. State, 455 So. 2d 1065 (Fla. 1st DCA 1984) (error in jail credit fundamental since

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[3] The Second District Court wrote that "It is no secret that the courts have struggled to establish a meaningful definition of 'fundamental error' that would be predictive as compared to descriptive." Denson v. State, 711 So. 2d 1225, 1229 (Fla. 2d DCA 1998).

defendant may serve in excess of sentence), Jenkins v. State, 444 So. 2d 947 (Fla. 1984), receded from, State v. Beasley, 580 So. 2d 139 (Fla. 1991) (costs could not be imposed without notice).

Eventually it seems, case law evolved which provided that sentencing errors apparent from the record could be reviewed by the appellate court whether preserved or not. See, Taylor v. State, 601 So. 2d 540 (Fla. 1992), Dailey v. State, 488 So. 2d 532 (Fla. 1986), State v. Rhoden, 448 So. 2d 1013 (Fla. 1984). In Rhoden, the defendant was sentenced as an adult despite the fact he was seventeen years old. Id. at 1015. However, the trial court never addressed the requirements of the statute necessary to sentence a juvenile as an adult. There was no objection at the trial level. Id. The State's argument that the error was not fundamental and that an objection was needed was rejected by this Court which wrote

> If the state's argument is followed to its logical end, a defendant could be sentenced to a term of years greater than the legislature mandated and, if no objection was made **at the time of sentencing**, the defendant could not appeal the illegal sentence.

Id. at 1016, (emphasis added).

The appellate system became more and more clogged with sentencing errors which were either raised for the first time on direct appeal or were not even raised at all by appellate counsel but were simply apparent on the record. As Judge Cowart wrote in his concurrence in the previously referenced Walcott:

> Those who legislate substantive rights and who promulgate procedural rules should consider if the time has not arrived to

> take action to improve the present rules and statutes. The first step might be to eliminate these vexatious questions, perhaps by eliminating the right of direct appeal of sentencing errors with the injustice that necessarily attends application of the concept of implied waiver to the failure of counsel to timely, knowingly, and intelligently present appealable sentencing errors for direct appellate review. **Perhaps it would be better to have one simple procedure**, permitting and requiring, any legal error in sentencing that can result in any disadvantage to a defendant, to be presented once, specifically, explicitly, but at any time to the sentencing court for correction with the right to appeal from an adverse ruling.

460 So. 2d at 920, (emphasis added). More than a decade later, the better, simpler approach urged by Judge Cowart was attempted with an extensive overhaul of the appellate system in regards to criminal appeals. Included in this process was the Criminal Reform Act (Reform Act) which was codified in section 924.051, Fla. Stat. (1997) as well as changes to the Rules of Criminal and Appellate Procedure.

It should be noted there is no right under the United States Constitution to an appeal in a non-capital criminal case. This point was specifically recognized by this Court when it recently wrote

> The United States Supreme Court has consistently pointed out that there is no federal constitutional right of criminal defendants to a direct appeal. Evitts v. Lucey, 469 U.S. 387, 393, 105 S.Ct. 830, 834, 83 L.Ed.2d 821 (1985) ("Almost a century ago the Court held that the Constitution does not require States to grant appeals as of right to criminal

> defendants seeking to review alleged trial court errors."). Accord, Abney v. United States, 431 U.S. 651, 656, 97 S.Ct. 2034, 2038-39, 52 L.Ed.2d 651 (1977); Ross v. Moffitt, 417 U.S. 600, 94 S.Ct. 2437, 41 L.Ed.2d 341 (1974).

See, Amendments to the Florida Rules of Appellate Procedure, 685 So. 2d 773, 774 (Fla. 1996). However, this Court also noted that article V, section 4(b) of the Florida Constitution was a constitutional protection of the right to appeal. Id. This Court wrote

> . . . we believe that the legislature may implement this constitutional right and place **reasonable conditions** upon it so long as they do not thwart the litigants' legitimate appellate rights. Of course, **this Court continues to have jurisdiction over the practice and procedure relating to appeals.**

Id. (emphasis added)(footnote omitted).

Immediately after the passage of section 924.051 which was the legislature implementing reasonable conditions upon the right to appeal, this Court exercised its jurisdiction over the appellate process and extensively amended Florida Rule Appellate Procedure 9.140 to work with the Reform Act. As applied to appeals after a plea of guilty or nolo contendere,[4] the amended Rule provided

> (2) Pleas. A defendant may not

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[4] Many of the appeals being taken occurred after a defendant had negotiated a plea and was sentenced pursuant to his agreement. It is not coincidental that the instant case as well as several of the cases which will be discussed later in this brief were written after defense counsel on appeal had filed and Anders brief.

> appeal from a guilty or nolo contendere plea except as follows:
>
> (A) A defendant who pleads guilty or nolo contendere may expressly reserve the right to appeal a prior dispositive order of the lower tribunal, identifying with particularity the point of law being reserved.
>
> (B) A defendant who pleads guilty or nolo contendere may otherwise directly appeal only
>
> (i) the lower tribunal's lack of subject matter jurisdiction;
>
> (ii) a violation of the plea agreement, if preserved by a motion to withdraw plea;
>
> (iii) an involuntary plea, if preserved by a motion to withdraw plea;
>
> (iv) **a sentencing error, if preserved**; or
>
> (v) as otherwise provided by law.

(emphasis added). The Rule was also further changed in order to specifically refer to sentencing errors:

> (d) Sentencing Errors. A sentencing error may not be raised on appeal unless the alleged error has first been brought to the attention of the lower tribunal:
>
> (1) at the time of sentencing; or
>
> (2) by motion pursuant to Florida Rule of Criminal Procedure 3.800(b).

The Rule 3.800(b) referred to above was itself completely rewritten to provide that a "defendant may file a motion to correct the sentence or order of probation within thirty days after the rendition of the sentence."

It was these specific changes that led the Fifth District Court to find that the concept of fundamental sentencing errors no longer exists.[5] As the court noted, only "preserved" errors can be appealed. Sentencing issues become much more like other issues with there now being a specific requirement that they be preserved in order to be presented on appeal. See, section 90.104(1)(a), Fla. Stat. (1997) (requiring a specific objection to preserve an evidentiary issue); Fla. R. Crim. P. 3.390(d) (requiring an objection to preserve a jury instruction issue). Further, the situation that was of concern in Rhoden that the subject matter of the objection would not be known to the defendant until the moment of sentencing is solved by the fact that there is still a thirty (30) day window in which to present any sentencing issues to the trial court for remedy and for preservation.

As the Fifth District Court of Appeal noted

> The language of Rule 9.140(b)(2)(B)(iv) could not be clearer. And why should there be 'fundamental' error where the courts have created a '**failsafe**' procedural device to correct any sentencing error or omission at the trial court level?

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[5] As additional support for the fact that fundamental errors only apply to trial errors, the Fifth District Court relied on the case of Summers v. State, 684 So. 2d 729 (Fla. 1996). In Summers, this Court analyzed the issue whether failure to file written reasons to sentence a juvenile as an adult constitutes fundamental error. This Court wrote that:

> The trial court's failure to comply with the statutory mandate is a sentencing error, not fundamental error, which must be raised on direct appeal or it is waived.

Id.

> Elimination of the concept of 'fundamental error' in sentencing will avoid the inconsistency and illogic that plagues the case law and will provide a much-needed clarity, certainty and finality.

Maddox, 708 So. 2d 617, 620 (Fla. 5th DCA 1998) (emphasis added).

With this as a background, we now turn to the instant case. On direct appeal the Petitioner submitted that his probation period exceeded the statutory maximum and that the trial court imposed special conditions of probation upon him without them being orally pronounced. The State pointed out that none of these issues was presented to the trial court in any manner and that case law now would find them not preserved for appeal. The Fifth District Court of Appeal affirmed the judgment and sentence citing Maddox.

Now the Petitioner is arguing that this error is fundamental and did not have to be presented to the trial court. It is the position of the State that these are the exact types of errors that were intended to be presented to the trial courts prior to being reviewed by the appellate courts. If the probation period was improper, simply file a motion with the trial court so indicating. As to trial court's failure to orally announce the conditions of probation, the Petitioner simply had to object in order to preserve the issue. It is undisputed that he did not.

To repeat the point well made by the Fifth District Court as to the fact that only preserved sentencing errors can be raised on appeal:

> Elimination of the concept of 'fundamental error' in sentencing will avoid the inconsistency and illogic that

> plagues the case law and will provide a much-needed clarity, certainty and finality.

Maddox, 708 So. 2d at 620. It is the State's position that this is the very reason that this Court amended the appellate rules specifically to address the appeal of sentencing errors. And to repeat the previously cited amendment of Rule 9.140(d) which specifically addresses the appeal of sentences:

> (d) Sentencing Errors. **A sentencing error may not be raised on appeal unless the alleged error has first been brought to the attention of the lower tribunal:**
>
> **(1) at the time of sentencing; or**
>
> **(2) by motion pursuant to Florida Rule of Criminal Procedure 3.800(b).**

(emphasis added).

Based upon this, it is the State's position that this Court has clearly limited appeals of sentencing errors to only those which are preserved by presentation to the trial court; thus, eliminating the previously expansive exception of so-called fundamental error.

As previously noted, the Respondent is aware of the very recent changes to the criminal and appellate rules of procedure by this Court. The thirty day period was found to be inadequate and has now been expanded up until the time briefs are filed on appeal. See, Amendments to Fla. Rules of Crim. Pro. 3.111(e) & 3.800 & Fla. Rules of App. Pro. 9.010(h) 9.140, & 9.600, 24 Fla. L. Weekly S530 (Fla. Nov. 12, 1999). Additionally, the Clerk's office is now required to forward a copy of the judgment and sentence to the

defense attorney within fifteen days of the sentencing. However, despite these adjustments to the Reform Act, the overall point is the same - sentencing errors should be presented to the trial court in order to be preserved. With this added safety net for preservation, the goal of the Reform Act is strengthened even more. Furthermore, Rule 3.800(a) which allows a defendant to correct an illegal sentence and Rule 3.850 in which a defendant can prove ineffective assistance of counsel both still exist for errors not "caught" under the current system.

It has been said that there is no such thing as an error-free trial, and it is becoming more and more apparent that the same is true of sentencing. Clearly, no one should have to serve an illegal sentence; however, it is not unfair to require that sentencing errors should be presented to the trial courts in order to be preserved for appeal. Simply labeling almost any error as "fundamental" should not forgive the failure to preserve the issue as required by the rules. These issues were never presented to the trial court and should not now be allowed to be raised for the first time on direct appeal.

CONCLUSION

Based on the arguments and authorities presented above, the State respectfully prays this Honorable Court affirm the holding of the Fifth District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above Merits Brief has been furnished by delivery via the basket of the Office of the Public Defender at the Fifth District Court of Appeal to Susan A. Fagan, counsel for the Petitioner, 112 Orange Ave. Ste. A., Daytona Beach, FL 32114, this _____ day of February 2000.

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