

IN THE SUPREME COURT OF FLORIDA

STEPHEN A. ERVIN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO.: SC97135

DCA case no.: 5D98-3315

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

RESPONDENT'S BRIEF ON THE MERITS

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CERTIFICATE OF TYPE SIZE AND STYLE

The type size and style used in this brief is 12 point Courier New.

SUMMARY OF ARGUMENT

The issue in this case - whether the departure sentence which was imposed with orally stated reasons and contemporaneous written reasons - is one which can be raised for the first time on the direct appeal without ever having been presented to the trial court. It is the State's position that the issue is not fundamental and is one to which an objection to the trial court should be required.

ARGUMENT

POINT OF LAW

WHETHER OBJECTION TO A DEPARTURE
SENTENCE FOR WHICH THE TRIAL JUDGE
GAVE TIMELY ORAL AND WRITTEN REASONS
CAN BE RAISED FOR THE FIRST TIME ON
DIRECT APPEAL.

The Fifth District Court of Appeal affirmed the judgment and sentence in this case based upon the case of Maddox v. State, 708 So. 2d 617 (Fla. 5th DCA 1998). This Court has accepted this case for review, and it is the State's position that the alleged error does not meet the definition of "fundamental" error as defined by this Court in Maddox v. State, 25 Fla. L. Weekly S367 (Fla. May 11, 2000).

The sentence imposed in this case is an upward departure sentence. The Petitioner was charged and found guilty after a jury trial of the offense of lewd and lascivious act upon a child under the age of sixteen. (R 28, 84). With a criminal record which included a conviction for lewd and lascivious act upon a child under the age of sixteen, the Petitioner scored on his scoresheet a range of 68.2 months (5.7 years) to 113.7 months (9.5 years). (R 87-88).

At sentencing the trial court listened to the witnesses and argument presented by both sides, and the judge then imposed an upward departure sentence of 15 years. (R 1-27). The trial court explained that he had reviewed the file and determined that an increased sentence was more appropriate. (R 21-23). Supporting

this departure, the trial court announced three reasons for departure. (R 21-23). Also, these three reasons were entered into writing the same day as sentencing. (R 90, 100).

Nowhere in the record is there any type of objection by the defense. Not at the time of sentencing and not within the thirty day time period previously given for preservation purposes. This led to the State's argument to the Fifth District Court of Appeal that the issue was waived.

Subsequent to the Fifth District Court's opinion citing its own case of Maddox, this Court issued its opinion in Maddox which allows appellate review of sentencing errors which are fundamental¹. To be fundamental the error must be both patent and serious. It is the position of the State that the alleged error in this case does not qualify.

As a background, requiring objection to issues like in the present case actually predates Maddox and the 1996 Reform Act. As this Court noted in State v. Montague, 682 So. 2d 1085 (Fla. 1996):

We have repeatedly held that absent an illegal sentence or an unauthorized departure from the sentencing guidelines, only sentencing errors 'apparent on the face of the record do not require a contemporaneous objection in order to be

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It is the State's understanding of this decision that the issue of whether a sentencing error is "fundamental" only applies to those cases on appeal during the thirty day preservation period and that the question would not apply to cases after the expansion of the preservation window in Amendments to Florida Rules of Criminal Procedure 3.111(e) & 3.800 & Florida Rules of Appellate Procedure 9.020(h), 9.140, & 9.600, 24 Fla. L. Weekly S530 (Fla. Nov. 12, 1999), reh'q granted, 25 Fla. L. Weekly S37 (Fla. Jan. 13, 2000).

preserved for review.' Taylor v. State, 601 So. 2d 540, 541 (Fla. 1992) (emphasis added); see also, ...Forehand v. State, 537 So. 2d 103, 104 (Fla. 1989) ("absent a contemporaneous objection ... sentencing errors must be apparent on the face of the record to be cognizable on appeal") (emphasis added); Dailey v. State, 488 So. 2d 532, 534 (Fla. 1986) (alleged sentencing errors requiring an evidentiary determination may not be initially raised on appeal). This follows the general rule that "objections which are not timely made are waived." Charles W. Ehrhardt, Florida Evidence § 104.1 at 10 (1995 ed.)

... By our decision today, we again emphasize that the sentencing hearing is the appropriate time to object to alleged sentencing errors based upon disputed factual matters.

682 So. 2d at 1088-1089.

Even more relevant to the issue presented in this case, the Maddox opinion specifically discussed the application of the preservation requirement in the context of departure sentences. See, 25 Fla. L. Weekly S372-373 (Fla. May 11, 2000). The analysis dealt with cases in which either no reasons were orally announced or untimely written reasons were given. This Court noted

In our opinion, while there is a qualitative effect on the integrity of the sentencing process when the trial court fails to file any written reasons for imposing a departure sentence, this same concern is not present when the written reasons are filed late but within sufficient time for the defendant to file a motion to correct the sentence on this

basis. See, Weiss 720 So. 2d at 1114² (finding that even if the trial court had filed the written reasons for departure three days late, the defendant had not been prejudiced thereby); Jordan, 728 So. 2d at 753³ (finding the defendant had not been prejudiced when the written reasons for departure were filed twenty-two days late but the defendant was able to attack the court's reasons for imposing the departure sentence on appeal). We agree that when written reasons for imposing a departure sentence were filed late, this late filing does not constitute a fundamental sentencing error if the defendant was not hindered in his or her efforts to challenge the grounds for imposing the departure sentence on direct appeal. See Weiss, 720 So. 2d at 1115; Jordan, 728 So. 2d at 753.

Maddox, 25 Fla. L. Weekly at S373. In applying this logic, this Court upheld the district court cases which found that the departure issue was barred from appellate review. Also, this Court wrote that a late filing of written reasons for departure did not have a "qualitative effect on the integrity of the sentencing process." Id.

As already pointed out, the trial court in the instant case set out the reasons orally at sentencing, and written reasons were filed the same day. Even if the defense attempted to argue that it was unaware of the written reasons being filed and that ignorance led to the failure to present the issue to the trial court within

²
The full cite is Weiss v. State, 720 So. 2d 1113 (Fla. 3d DCA 1998).

³
The full cite is Jordan v. State, 728 So. 2d 748 (Fla. 3d DCA 1998).

the thirty day time period for preserving the issue, the record clearly shows that the trial court stated the reasons with no objection at the time of sentencing.

As previously noted, this Court found late filings of written reasons do not have a "qualitative effect on the integrity of the sentencing process." Therefore, it would seem obvious that when a trial court completely follows the requirements and both orally states the reasons and files written reasons with still no objection from the defense, then the issue should be found to be one which can not be raised for the first time on direct appeal.

In the instant case the trial judge announced his reasons, and the defense did not object in any manner. As this Court wrote in Ray v. State, 403 So. 2d 956, 960 (Fla. 1981),

It is well-established law that where the trial judge has extended counsel an opportunity to cure any error, and counsel fails to take advantage of the opportunity, such error, if any, was invited and will not warrant reversal.

See also, Starks v. State, 627 So. 2d 1194, 1198 (Fla. 3d DCA 1993) (also finding the failure to object when given the opportunity as creating invited error).

Based on the facts and argument above, it is the State's position that any alleged sentencing error in this case was clearly never presented to the trial court and should be found to be not preserved for appeal.

CONCLUSION

Based on the arguments and authorities presented above, the State respectfully prays this Honorable Court affirm the judgments and sentences imposed by the trial court in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

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