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IN THE SUPREME COURT OF FLORIDA

TYRONE K. POWELL,

Petitioner,

vs.

Case No.: SC14-593
LT No.: 1D13-1565

STATE OF FLORIDA,

Respondent.
_____/

REPLY BRIEF OF PETITIONER ON THE MERITS TYRONE K. POWELL

On Discretionary Review from a Decision of the District Court of Appeal, First District

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ARGUMENT

I. THIS COURT SHOULD HOLD THAT, NOTWITHSTANDING ITS RULING IN *MADDOX V. STATE*, 760 SO. 2D 89 (Fla. 2000), A DISTRICT COURT RETAINS THE POWER TO CORRECT CERTAIN UNPRESERVED SENTENCING ERRORS.

After reviewing the State's Answer Brief, it is clear that both parties recognize that there must be a mechanism for criminal defendants to raise unpreserved sentencing errors for appellate review after appointed counsel submits an *Anders* brief that fails to raise such errors. The United States Supreme Court's decision in *Anders v. California*, 386 U.S. 738, 744 (1967), and this Court's decisions adopting that ruling, all reflect the basic principle that a criminal defendant has the right to the assistance of counsel on direct appeal, and to the extent an appellate counsel fails to raise an issue on appeal and it is later identified by the appellate court, the criminal defendant is entitled to have the court-appointed counsel brief the issue and attempt to correct the error on direct appeal. *See generally Anders v. California*, 386 U.S. 738, 744 (1967) (noting that, if the court finds any legal point arguable on its merits, it must, prior to decision, afford the indigent the assistance of counsel to argue the appeal).

As discussed in the Initial Brief, the problem arises because Florida Rule of Criminal Procedure 3.800(b)(2) provides that a motion under that rule "must be served before the party's first brief is served." *See* Fla. R. Crim. P. 3.800(b)(2). If the *Anders* brief is considered the first brief, then appellate counsel loses the ability

to file a 3.800(b)(2) motion to preserve the sentencing error discovered by the appellate court. In its Answer Brief, the State addresses this problem by taking the position that, under the authority of *Collando-Pena v. State*, 141 So. 3d 229 (Fla. 1st DCA 2014); and *Proctor v. State*, 901 So. 2d 994 (Fla. 1st DCA 2005), an *Anders* brief is not the parties' "first brief" for purposes of rule 3.800(b)(2). Based on this legal conclusion, the State argues that, when a district court identifies a possible sentencing error, it can issue an order pursuant to *State v. Causey*, 503 So. 2d 321, 322 (Fla. 1987), and then allow the appellate counsel an opportunity to file a rule 3.800(b)(2) motion.

While the State's argument creates a mechanism for criminal defendants to raise unpreserved sentencing errors with the assistance of counsel in *Anders* cases, Powell can envision a problem that must be resolved if this legal conclusion were adopted. In *Collando-Pena v. State*, 141 So. 3d 229, 231 (Fla. 1st DCA 2014), the court held that an *Anders* brief is not the party's first brief for purposes of rule 3.800(b)(2). However, the First District also ruled that a 3.800(b)(2) motion served after an *Anders* brief is filed and after the time had elapsed for the *pro se* defendant to file and serve a *pro se* brief must be deemed untimely. *Id*. at 231.

The *Collando-Pena* case raises a question regarding the effect of a pro se brief. In *Anders* cases, does the filing of a *pro se* brief, or the defendant's failure to file a *pro se* brief, bar an appellate counsel's ability to later file a rule 3.800(b)(2)

motion? The State attempts to solve this problem by asserting that a criminal defendant's *pro se* brief should not count as the "first brief" for purposes of rule 3.800(b)(2). A.B., p. 16 n. 5. Powell agrees with that position and would assert that this legal conclusion is necessary to ensure that a criminal defendant is not deprived of his or her right to assistance of counsel on appeal. If the defendant's *pro se* brief in an *Anders* case has the effect of cutting off the appellate counsel's ability to preserve a later identified sentencing error, then the defendant has effectively been denied the assistance of counsel as to that sentencing error. Thus, even if a defendant files a *pro se* brief, appellate counsel should be allowed to take some action to correct a sentencing error later identified by the court.

Where Powell and the State disagree concerns the district court's power to correct a fundamental or serious and patent sentencing error on appeal without the need for the appellate counsel to take the additional step of filing a 3.800(b)(2) motion. The State spends much of its Answer Brief discussing Florida Rule of Appellate Procedure 9.140(e) and this Court's prior decisions, such as *Brannon v. State*, 850 So. 2d 452 (Fla. 2003), which hold that even unpreserved fundamental sentencing errors must first be raised through a rule 3.800(b)(2) motion. Powell does not dispute the State's recitation of the prior case law. However, this Court's prior cases never addressed the discrete situation where an *Anders* brief is filed and the district court's review reveals a sentencing error.

In adopting rule 9.140(e), this Court contemplated that an appellate counsel would file a rule 3.800(b)(2) motion prior to filing any brief, and thus, the trial court could consider the sentencing issue prior to the appellate court expending any judicial resources analyzing the appeal. In such a situation, it makes prefect sense that the sentencing error should be raised first in the trial court.

However, in situations in which an *Anders* brief has been filed, the appellate court has already conducted a review of the record and identified a sentencing error. It makes little sense to hold that, at that point, the appellate court is barred from correcting the fundamental sentencing error after giving the parties an opportunity to brief the issue. A procedure that forces the appellate counsel to file a 3.800(b)(2) motion to assert such sentencing errors wastes judicial resources.

As this Court stated in *Maddox v. State*, 760 So. 2d 89, 110 (Fla. 2000), "[n]either the interests of justice nor judicial economy will be served by preventing the appellate courts from correcting as fundamental error those serious, patent sentencing errors that have been brought to the courts' attention through the issues raised on appeal." *See also Zirin v. Charles Pfizer & Co.*, 128 So.2d 594, 596 (Fla. 1961) ("Needless steps in litigation should be avoided wherever possible and courts should always bear in mind the almost universal command of constitutions that justice should be administered without "sale, denial or delay.'").

Of note, the Criminal Appeal Reform Act of 1996 does not mandate that appellate courts cannot correct fundamental errors. *See* Ch. 96-248, § 4, Laws of Fla. Rather, section 924.051, Florida Statutes, provides, in part:

> (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*.

(emphasis added). If this Court adopted rule 9.140(e) to effectuate the terms of section 924.051, Powell would assert that rule 9.140(e)'s requirement that a sentencing error must be preserved by contemporaneous objection or by a rule 3.800(b)(2) motion goes further than what is mandated by the statute. For the sake of judicial economy and in order to expeditiously correct sentencing errors, this Court should allow district courts the discretion to correct fundamental sentencing errors on appeal in cases involving *Anders* briefs.

In any event, in *Anders* cases, a criminal defendant must be allowed the ability to correct identified sentencing errors with the assistance of appellate counsel. Both Powell and the State agree on this point, and Powell respectfully requests that this Court quash that aspect of the First District's ruling.

II. THIS COURT SHOULD REVERSE POWELL'S SENTENCE UNDER THE AUTHORITY OF *CLINES V. STATE*, 912 SO. 2D 550 (Fla. 2005).

In its Answer Brief, the State concedes that Powell's sentence as a violent career criminal and a habitual violent felony offender violated this Court's holding in *Clines v. State*, 912 So. 2d 550 (Fla. 2005). The State, however, argues that this Court should simply remand this case for the removal of the habitual violent felony offender sentence since the Court could sentence Powell as both a prison release reoffender and a violent career criminal. Powell disagrees.

Even assuming the State's interpretation of *Grant v. State*, 770 So. 2d 655 (2000), is correct and Powell could be sentenced as both a prison release reoffender and a violent career criminal, this case should not be remanded simply to remove the habitual violent felony offender sentence as the State suggests. Rather, because the trial court has discretion as to whether to impose a habitual violent felony offender sentence or a violent career criminal sentence, this case should be remanded for resentencing with the trial court fully aware of its options. On remand, the trial court may choose one or the other *or neither*, and since there is no mandatory duty on the court to sentence Powell as a violent career criminal, the trial court should be free to evaluate which sentence to impose.

The State's argument that a violent career criminal sentence must automatically be imposed is not supported by Florida law. *See, e.g., Oberst v. State*, 796 So. 2d 1263, 1265 (Fla. 4th DCA 2001) (remanding for resentencing to

allow the court to determine whether to impose habitual felony offender sentence or a violent career criminal sentence).

Indeed, in *Jordan v. State*, 143 So. 3d 335 (Fla. 2014), this Court recognized that, even when a trial court's original sentence of life imprisonment "appears to demonstrate the trial judge's intent to sentence [the defendant] to the maximum allowable punishment, the judge [is] . . . not obligated to maintain that same intent at resentencing." *Id.* at 340; *see also Phillips v. State*, 705 So. 2d 1320, 1322 (Fla. 1997) (quoting *King v. Dugger*, 555 So. 2d 355, 358-59 (Fla. 1990)) ("Phillips' resentencing proceeding was a 'completely new proceeding,' and the trial court was therefore under no obligation to make the same findings as those made in Phillips' prior sentencing proceeding."). Thus, the trial court here could decide not to impose a violent career criminal sentence.

Since the trial court has discretion as to what sentence to impose, Powell's resentencing will not be a ministerial act, and he is entitled to be present during his resentencing. See *Jordan v. State*, 143 So. 3d 335, 338 (Fla. 2014) (holding that a defendant has the right to be present at any resentencing).

In sum, while Powell's sentence would be authorized under the violent career criminal category, since the trial court has discretion not to impose any enhanced sentence under section 775.084, this Court should remand this case to the trial court for resentencing.

III. POWELL'S SENTENCE VIOLATED THE MANDATES OF *APPRENDI V. NEW JERSEY* AND *BLAKELY V. WASHINGTON* BECAUSE THE TRIAL COURT MADE FACTUAL FINDINGS THAT SUPPORTED THE ENHANCEMENT OF POWELL'S SENTENCE

As to the next two issues, the State spends much of its Answer Brief arguing that this Court should decline review because the *Apprendi* issue raised in this section and the cost issue raised in the next section were not argued before the trial court. In support of its position, the State cites to this Court's decision in *Savoie v. State*, 422 So. 2d 308 (Fla. 1982). The State, however, has misread the *Savoie* decision.

In *Savoie*, the issue before this Court concerned a denial of a motion to suppress made during trial. *Id*. at 310. Although the trial judge heard the motion on the merits, he denied it both on the merits and on the ground of waiver, finding waiver because the motion was made during trial and was, therefore, not timely under the provisions of Florida Rule of Criminal Procedure 3.190(h)(4). *Id*. On appeal, the district court affirmed the waiver ruling and refused to consider the denial on the merits. *Id*.

On discretionary review, this Court rejected the district court's holding that waiver was the proper basis for denying the motion to suppress. *Id*. at 311-12. This Court, however, affirmed the ultimate ruling of the trial court because the

court concluded the trial judge correctly denied the motion to suppress on the merits. *Id*. at 313.

In considering the denial of the motion to suppress on its merits, this Court stated that "once we accept jurisdiction over a cause in order to resolve a legal issue in conflict, we may, in our discretion, consider other issues properly raised and argued before this Court." *Id*. at 312. This Court went on to note that, in *Zirin v. Charles Pfizer & Co.*, 128 So.2d 594, 596 (Fla. 1961), Justice Drew explained the reasons why, once it has jurisdiction, this Court should exercise its discretion and dispose of the entire cause when the issues are properly before it:

> Needless steps in litigation should be avoided wherever possible and courts should always bear in mind the almost universal command of constitutions that justice should be administered without "sale, denial or delay." Piecemeal determination of a cause by our appellate court should be avoided and when a case is properly lodged here there is no reason why it should not then be terminated here…. "[m]oreover, the efficient and speedy administration of justice is… promoted" by doing so.

Id. at 312. This Court then stated, "We have concluded that, based upon these principles, we can appropriately address the correctness of the trial judge's denial of the motion to suppress on its merits. *Both parties have fully briefed and argued the issue before this Court, and our action in resolving this question will avoid a piecemeal determination of the case.*" *Id*. (emphasis added).

The State has interpreted this Court's statement that it may review other issues that "have been properly briefed and argued" as meaning the issue must be

briefed and argued below to the trial court. That, however, is not what this Court stated in *Savoie*. Rather, this Court stated that, since "both parties have fully briefed and argued the issue *before this Court*," it was proper to resolve the issue in the interest of judicial economy. *Id*. at 312.

On numerous occasions this Court has recognized that, even if an issue is not raised before the trial court, this Court has discretion to consider the issue once it has obtained jurisdiction over the case. *See, e.g., Pk Ventures v. Raymond James & Assocs.*, 690 So. 2d 1296, 1297 n.2 (Fla. 1997) (holding that court had discretion to consider economic loss rule issue, even though it was not raised before the trial court); *Cantor v. Davis*, 489 So. 2d 18, 20 (Fla. 1986) ("Prudence dictates that issues such as the constitutionality of a statute's application to specific facts should normally be considered at the trial level to assure that such issues are not later deemed waived. Once this Court has jurisdiction, however, it may, at its discretion, consider any issue affecting the case."). Thus, there is no merit to the State's claim that this Court cannot consider the issues raised by Powell, even if those issues were not raised before the trial court.

As to the merits, contrary to the State's assertions, Powell has not misread *Apprendi* or section 775.084, Florida Statutes. Section 775.084(3)(a), Florida Statutes, provides:

> For an offense committed on or after October 1, 1995, if the state attorney pursues a habitual felony offender sanction or a habitual

> violent felony offender sanction against the defendant and the court, in a separate proceeding pursuant to this paragraph, determines that the defendant meets the criteria under subsection (1) for imposing such sanction, the court must sentence the defendant as a habitual felony offender or a habitual violent felony offender, subject to imprisonment pursuant to this section *unless the court finds that such sentence is not necessary for the protection of the public*.
>
> Likewise, section 775.084(3)(c), Florida Statutes, provides:
>
> > For an offense committed on or after October 1, 1995, if the state attorney pursues a violent career criminal sanction against the defendant and the court, in a separate proceeding pursuant to this paragraph, determines that the defendant meets the criteria under subsection (1) for imposing such sanction, the court must sentence the defendant as a violent career criminal, subject to imprisonment pursuant to this section *unless the court finds that such sentence is not necessary for the protection of the public*.

Thus, under section 775.084, a trial court *must* make a factual finding that the sentencing enhancement is necessary for the protection of the public, or at the very least, the court must make a factual finding that the Defendant has not proven that the sentencing enhancement is not necessary for the protection of the public. In either case, the trial court is making a factual determination, unrelated to the defendant's prior convictions, that forms the basis of the trial court's enhancement of the defendant's sentence.

The State argues that it is only the fact of the prior conviction that increases the statutory maximum sentence. However, sentencing under section 775.084 is not a separate two-step process as the State is portraying it. Under section 775.084, the trial court cannot simply impose an enhanced sentenced based on a

prior conviction. Section 775.084(3)(c) requires that the trial court evaluate and consider whether the enhanced sentence is necessary for the protection of the public, and if the Court concludes that it is not necessary, the Court cannot impose the enhanced sentence. The statute makes this factual evaluation a necessary component of imposing an enhanced sentence under section 775.084. Thus, there is no practical difference in the language used in section 775.084(3)(c) than if the statute stated that the trial court could not impose a violent career criminal sentence unless it found that such an enhanced sentence was necessary for the protection of the public, which even the State would concede is a factual finding that must be made by a jury under *Apprendi* and *Blakely*.

Again, Powell recognizes that there have been Florida cases that have addressed the application of *Blakely* to section 775.084, and those cases have held that the imposition of a sentence under 775.084 does not violate *Blakely* or *Apprendi* because the sentencing enhancements are based solely on prior convictions. *See, e.g., Tillman v. State*, 900 So. 2d 633 (Fla. 2d DCA 2005); *Calloway v. State*, 914 So. 2d 12, 14 (Fla. 2d DCA 2005); *Grant v. State*, 815 So. 2d 667, 668 n.3 (Fla. 2d DCA 2002); *Matthews v. State*, 891 So. 2d 596 (Fla. 3d DCA 2004); *Frumenti v. State*, 885 So. 2d 924 (Fla. 5th DCA 2004); *McBride v. State*, 884 So. 2d 476 (Fla. 4th DCA 2004); *Fyler v. State*, 852 So. 2d 442 (Fla. 5th DCA 2003); *Jones v. State*, 791 So. 2d 580 (Fla. 1st DCA 2001); *Saldo v. State*,

789 So. 2d 1150 (Fla. 3d DCA 2001); *Dennis v. State*, 784 So. 2d 551 (Fla. 4th DCA 2001); *Gordon v. State*, 787 So. 2d 892 (Fla. 4th DCA 2001). However, it does not appear any of these prior cases examined the discrete argument that Powell raises here.

For the above reasons, on remand, this Court should order that, if the State intends to pursue sentencing enhancement under section 775.084, any findings regarding whether the sentencing enhancement is necessary for the protection of the public should be determined by a jury.

IV. THE TRIAL COURT'S WRITTEN SENTENCE DIFFERS FROM THE ORAL PRONOUNCEMENT REGARDING COSTS

The State asserts that this Court should not review the cost issue based on *Savoie v. State*, 422 So. 2d 308 (Fla. 1982). As discussed in Issue III above, the *Savoie* decision does not support the State's contention, and this Court has, on numerous occasions, addressed issues on review, even if those issues were not raised in the trial court. *See, e.g., Pk Ventures v. Raymond James & Assocs.*, 690 So. 2d 1296, 1297 n.2 (Fla. 1997) (holding that court had discretion to consider economic loss rule issue, even though it was not raised before the trial court); *Zirin v. Charles Pfizer & Co.*, 128 So.2d 594, 596 (Fla. 1961). The issue of the costs has properly been briefed to this Court, and Powell respectfully requests that this Court exercise its discretion and resolve the issue.

On the merits, the State does not challenge Powell's assertion that the sentencing order improperly imposes costs that are inconsistent with the trial court's oral pronouncement. Rather, the State argues that the cost issue should not be reviewed because it was not raised in a 3.800(b)(2) motion.

Powell would assert that this Court has the power to correct this error and, in the interest of saving judicial resources, this Court should remand with directions that the court amend the sentence to conform to the oral pronouncement. *See R.A.V. v. State*, 22 So. 3d 140 (Fla. 1st DCA 2009) (remanding *Anders* case with instructions to correct assessment of $20 in costs).

Respectfully submitted,

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I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via Email on this 13th day of February, 2015, to:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY the type style and size used herein is Times New Roman 14-point and that this brief complies with the requirements of Florida Rule of Appellate Procedure 9.210(a).

/s/ Henry G. Gyden
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