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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

CARL LEWIS BURNS,

Respondent.

Case No. SC18-1208

ON DISCRETIONARY REVIEW FROM THE
DISTRICT COURT OF APPEAL, FIRST DISTRICT

PETITIONER'S REPLY BRIEF ON THE MERITS

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ARGUMENT

ISSUE I: THE MAJORITY DECISION BELOW CREATES A DESTRUCTIVE POLICY FOR FLORIDA BY HOLDING THAT SENTENCING COURTS MAY NOT CONSIDER A DEFENDANT'S VOLUNTARY CONFESSION CLAIMING HIS ADOPTED DAUGHTER, THE MINOR SEXUAL BATTERY VICTIM, "ENJOYED IT," AND THAT HE DID NOT BELIEVE HAVING SEX WITH HER WAS WRONG, AS LACK OF REMORSE WHEN FASHIONING SENTENCE

A. Standard of Review

Respondent's Answer Brief emphasizes the unclear standard of review in cases involving an improper sentencing consideration. Respondent acknowledges that the error in this case is unpreserved and should be reviewed for fundamental error. (AB-8). However, Respondent goes on to describe the method of analysis as involving an identification of an impermissible factor considered at sentencing, then "if the judge's comments can reasonably be construed to suggest the defendant's sentence was based, even in part, on a constitutionally impermissible factor—then a due process violation has occurred resulting in fundamental error," and then that the State has the burden "to show that the trial judge did not rely on an impermissible factor." (AB-10-11).

This structure outlined by Respondent, specifically the fact that the burden is shifted to the State to show that the factor was not considered, shows that the lower courts have deviated from the fundamental error analysis demanded by this unpreserved error. This Court has previously discussed what type of sentencing error can be fundamental, observing:

> [I]n order to be considered fundamental, an error must be serious. In determining the seriousness of an error, the inquiry must focus on the nature of the error, its qualitative effect on the sentencing process and its quantitative effect on the sentence. See Bain, 730 So.2d at 304-05. In most cases, a

> fundamental sentencing error will be one that affects the determination of the length of the sentence such that the interests of justice will not be served if the error remains uncorrected.
>
> Maddox v. State, 760 So. 2d 89, 99-100 (Fla. 2000).

So, the proper analysis in this and all cases involving a fundamental error at sentencing if is the error so significantly impacts the sentence that the interests of justice demand it be corrected—not that the State prove that a factor was considered or not. Respondent's brief shows that the District Courts have deviated from this fundamental error standard in their consideration of this issue by adding new burdens and effectively merging the requirements for a fundamental error analysis with a harmless error analysis. The State asks that this Court apply the correct standard to this case and all cases presenting this issue by asking not if the State proved if a factor was considered or not, but if the factor considered significantly, negatively impacted the defendant's sentence to the point that it must be corrected.

B. Due Process and the Law

Respondent's brief assumes that the consideration of remorse at sentencing is a due process violation. (AB-19). However, the issue of whether the consideration of remorse at sentencing is a due process violation is the very question before the Court in this case. It is the State's position that trial courts can consider a defendant's freely offered statements that indicate a lack of remorse as part of an evaluation of the defendant's character and ability to be rehabilitated. Under these

circumstances, consideration of remorse at sentencing is not a due process violation because the defendant is not being penalized for protesting his innocence, but the defendant's character demonstrated in his statements is being evaluated. For instance, if the defendant told the Court that he committed the crime, that he hoped the victim suffered, or that he would do it again, he has clearly shown a lack of remorse that the court should be able to consider.

This Court is uniquely situated to re-evaluate Florida's laws on the issue of remorse at sentencing because there is no controlling case law from this Court. The law surrounding consideration of remorse at sentencing is a series of rules and prohibitions that have been developed in the District Courts. Respondent's brief demonstrates this point by exclusively relying on cases from the district courts to support his position that consideration of remorse violates a defendant's due process rights. (AB 9-12).

The only cases from this Court cited by Respondent on this topic are those previously discussed by the State in the initial brief—Holton and Del Percio. Holton v. State, 573 So. 2d 284 (Fla. 1990); City of Daytona Beach v. Del Percio, 476 So. 2d 197 (Fla. 1985). As previously argued, these cases do not provide a foundation for a prohibition on the consideration of remorse. Holton says nothing about the consideration of remorse at sentencing. Holton holds that a defendant cannot be penalized at sentencing based on his protestations of innocence, a sentencing scenario that is distinct from a consideration of remorse at sentencing.

Del Percio has been overruled by United States v. Dunnigan, 507 U.S. 87 (1993). Del Percio prohibited a judge from penalizing a defendant for lying, because "the proper method of imposing punishment for perjury would be through a separate prosecution." Del Percio, 476 So. 2d at 205. Del Percio based this holding exclusively on federal law, and not the Florida Constitution. In Dunnigan, the United States Supreme Court explicitly held that "upon a proper determination that the accused has committed perjury at trial, a court may enhance the accused's sentence," and that the enhancement of sentence is a substitution for a separate perjury prosecution. Dunnigan, 507 U.S. at 87. Because Del Percio bases its holding in federal law, and the federal law was explicitly overruled in Dunnigan, Del Percio is no longer a basis for a prohibition on the consideration of truthfulness at sentencing.

Respondent's Answer Brief does not dispute the State's interpretation of the legal status of Holton and Del Percio. There is no caselaw from this Court that prohibits a consideration of remorse at sentencing, and no caselaw that bases such a ban on the Florida Constitution. Because there is no controlling caselaw on remorse at sentencing from this Court, there is no *stare decisis* issue to overcome. The question before this Court is if, under certain circumstances, a consideration of remorse at sentencing violates due process. It is the State's position that remorse can be considered at sentencing without violating due process.

This position is fully supported by the federal case law on this issue. Respondent argues that the federal law is not controlling and

inapplicable. (AB-14). The State agrees that the federal caselaw is not binding on this Court, but the holdings of these cases are persuasive and relevant to this argument. The body of federal case law on this subject demonstrates that federal courts have determined that due process is not violated when a judge factors remorse into a sentence. The United States Supreme Court has explicitly recognized lack of remorse as a sentencing factor. In Zant v. Stephens, the United States Supreme Court noted "'Any lawful evidence which tends to show the motive of the defendant, his lack of remorse, his general moral character, and his predisposition to commit other crimes is admissible in aggravation, subject to the notice provisions of the statute.'" Zant v. Stephens, 462 U.S. 862, 886 n. 22 (1983)(quoting Fair v. State, 245 Ga. 868, 873 (1980)).

The circumstances in this case, as suggested by the question certified by the First District, are about when a consideration of remorse is acceptable at sentencing. This case presents a circumstance where such a consideration is appropriate, as the defendant's due process rights are not implicated by the consideration. There is a difference between a judge considering a lack of remorse when a defendant has maintained their innocence and their silence, and a judge considering a lack of remorse when a defendant choses to make a statement and does not truthfully maintain their innocence during a trial. In this case, the Respondent did not maintain his innocence at all times. Respondent affirmatively confessed post-Miranda in a recorded, properly admitted statement to repeatedly raping his daughter, an act which he did not find to be wrong since she

"had begin to enjoy it." (R-369-370). Trial judges in Florida should not be required to turn a blind eye to a defendant's freely offered and uncoerced statements admitting to a crime when deciding if that defendant's character mandates a more severe sentence. This Court can fully protect a defendant's due process rights without limiting the factors trial court judges can consider during sentencing.

C. Validity of a Bright Line Rule

Respondent disputes the State's contention that the law of the District Courts has created a legal environment where, when the word remorse is used at sentencing, that sentence is frequently reversed for fundamental error based on the use of the word. (AB-12, 13). Respondent seems to argue that because remorse is often considered as part of mitigation, there is no strict prohibition on consideration of remorse at sentencing. The State acknowledged in the Initial Brief that remorse can be considered formally during mitigation. (IB-25). However, this does not change the fact that the District Courts have a near prohibition on consideration of remorse absent a request for mitigation, and the case law has become so ingrained as to treat the mention of the word remorse as almost a per se reversible error. See Soto v. State, 874 So. 2d 1215 (Fla. 3d DCA 2004); Bracero v. State, 10 So. 3d 664 (Fla. 2d DCA 2009).

The later parts of Respondent's brief prove this argument. Respondent's brief repeatedly extols the fact that Florida's rule regarding consideration of remorse at sentencing is a "bright line," and urges this Court to maintain the strict prohibition against consideration of remorse

at sentencing. (AB-16). There is no doubt that a bright line prohibition against an act or a word is easier than what the State is asking this Court to do, and easier than what the federal courts do. Federal caselaw acknowledges that there is a fine line between an impermissible consideration of innocence and an allowable analysis of remorse. See United States v. Miller, 589 F.2d 1117, 1138 (1st Cir. 1978).

However, there is a clear benefit to allowing a consideration of remorse, and it outweighs the fact that judges will have to analyze an additional factor at sentencing. Judges have long had wide discretion in sentencing, and as Respondent acknowledges, character and ability to be rehabilitated, as demonstrated by a lack of remorse, are key factors that should be open to a judge in that determination. (AB-17). This Court has similarly recognized the importance of a judge considering the defendant's character in sentencing and allowed its consideration. See Preston v. State, 607 So. 2d 404, 409 (Fla. 1992)(stating "the basic premise of the sentencing procedure is that the sentence consider all relevant evidence regarding the nature of the crime and the character of the defendant to determine the appropriate punishments.").

This case demonstrates why consideration of remorse is necessary, and why a bright line rule that robs the trial judge of the ability to consider key information at sentencing does not serve the public interest. Respondent voluntarily made a graphic confession, stating that his adopted daughter enjoyed being sexually abused, and then he nonsensically retracted that confession, committing perjury in the process. This is highly

illustrative of Respondent's character, and the fact that he is not likely to be rehabilitated since he does not think that what he did to the victim is wrong. To not allow a judge to openly consider these factors is to ignore pivotal information necessary for the imposition of a just sentence. Not only is this information necessary for a proper sentence to be imposed, but it is not harmful to Respondent. Respondent voluntarily made the statement, there is no evidence of coercion, and the statement was introduced into evidence. There is no due process violation if the trial judge considers the content and implications of this lawfully obtained and introduced statement, and there are ample reasons why such a consideration is necessary to ensure that the appropriate punishment is given.

Respondent repeatedly argues throughout his brief that the problem with the specific facts of this case are that the judge strayed beyond a consideration of remorse and into a consideration of the defendant's protestations of innocence at trial. This argument blends together many of the points the State has made about this topic. The first is that a consideration of an improper sentencing factor cannot be looked at as a single bright line rule, where the use of a single word or phrase violates that rule, but instead must be considered in context of the whole record. This is particularly true in a fundamental error analysis where the question is if the impact of the consideration of a factor was so significant as to demand correction. In this case, the judge said:

> The Court found [sic] that the evidence in this case was compelling. And the Court finds that you have really shown no remorse and denied that any of this took place.

(R-212).

Standing alone, this comment can be read as a comment on innocence, particularly where the judge says that Respondent "denied that any of this took place." (R-212). However, when considered in the context of a defendant who fully confessed and retracted his confession with no cogent explanation,[1] this is a comment on that series of events, and on Respondent's truthfulness and lack of remorse in retracting his confession. This case illustrates not only the importance of allowing a consideration of remorse at sentencing, but also the necessity of eradicating a bright line rule and allowing a consideration of all the facts of a case in deciding if a judge's comment at sentencing violates due process.

IV. Conclusion

The comments by the sentencing judge in this case do not amount to a due process violation when considered in the broader context of the evidence presented during the trial. In this case, there is no evidence of the sentencing proceeding being so impacted as to rise to the level of fundamental error. The fact that the trial court used the word "remorse" and stated that Respondent denied this took place is not sufficient on this record when, in context, it appears the judge was permissibly evaluating Respondent's character based on the content of his voluntarily made

[1] At no point during trial or sentencing did Respondent provide a rational explanation for his confession. He testified during trial that he confessed to "protect his young'uns" without explaining how confessing protected his children. (R-437).

confession to police.

However, even if this Court disagrees with the State's position on the specific facts in this case, this Court is still faced with the opportunity to create rules governing the consideration of remorse at sentencing for the State of Florida. The State urges this court to reaffirm the use of a pure fundamental error standard where the burden is strictly on the defendant to prove that the consideration of an improper factor at sentencing so negatively impacted the sentence that it must be corrected, based not on the use of a word, but on the entirety of the record. On a policy level, trial courts in Florida should be able to consider a defendant's freely offered statements indicating lack of remorse as part of an evaluation of the defendant's character and sentence him accordingly. The public interest is harmed when a sentencing judge cannot consider all relevant factors when imposing sentence, including a defendant's character and ability to be rehabilitated as demonstrated by their lack of remorse for their crime.

There is a way to balance a defendant's due process rights, and the public's interest in the imposition of appropriate sentences—other jurisdictions which allow such a consideration model that path. A defendant must make a voluntary, uncoerced statement at some time during the legal proceeding—to police, to the jury, to the judge. If a defendant chooses to make such a statement, they have put themselves and their character, lack of remorse, and credibility at issue and a sentencing judge has the right to use information gleaned from those statements in crafting a sentence.

Such a policy balances the defendant's right to due process protections with the need for a sentencing judge to fully evaluate all relevant factors in imposing a sentence.

Based on the foregoing, the State respectfully submits that the certified question asked by the First District Court of Appeal be answered in the affirmative, that their decision be quashed, and the judgment and sentence entered in the trial court should be affirmed.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to the following by ELECTRONIC MAIL on April 24, 2019 to David A. Henson, David.Henson@flpd2.com.

CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Courier New 12-point font.

Respectfully submitted and certified,
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