In the Supreme Court of Florida

CASE NO. SC00-10

LUCIOUS TIBBS, III,

Petitioner/Appellant,

v.

THE STATE OF FLORIDA,

Respondent/Appellee.

ON DISCRETIONARY REVIEW OF A DECISION OF THE FIRST DISTRICT COURT OF APPEAL

REPLY BRIEF OF PETITIONER

NANCY A. DANIELS
Public Defender
Second Judicial Circuit

FRED PARKER BINGHAM II
Assistant Public Defender
Florida Bar No. 0869058
301 South Monroe Street, Suite 401
Tallahassee, Florida 32301
(850) 488-2458

Attorney for Petitioner/Appellant

IN THE DISTRICT COURT OF APPEAL
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_____/

PRELIMINARY STATEMENT

Citations in this brief to designate record references are as follows:

"R__" __ Record on Appeal , Vols. I through IV, including transcript of sentencing (Vol. IV);

"T__" — Transcript of trial proceedings, Vols. V and VI.

"AB. _" — Respondent's Answer Brief.

All cited references will be followed by the relevant page number(s). All other citations will be self-explanatory or will otherwise be explained.

Pursuant to an Administrative Order of this Court dated July 13, 1998, counsel certifies that this brief is printed in 14 point Times roman, a proportionately-spaced, computer-generated font.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

ARGUMENTS

DOES THE FAILURE OF THE TRIAL COURT TO ORALLY PRONOUNCE EACH STATUTORILY AUTHORIZED COST INDIVIDUALLY AT THE TIME OF SENTENCING CONSTITUTE FUNDAMENTAL ERROR?

Respectfully, the question certified by the First District Court is broader than the issues appellant raised concerning restitution , costs and special conditions of probation before that court in appellate counsel's *Anders* brief, the same issues raised here. The certified question, facially as posed, reaches both mandatory costs, which are not required to be orally announced at sentencing, *State v. Beasley*, 580 So. 2d 139 (Fla. 1991)(mandatory costs need not be pronounced), as well as statutorily authorized discretionary costs but which must be orally pronounced individually at sentencing because of their discretionary nature, *Jenkins v. State*, 444 So. 2d 947 (Fla. 1984).

The Respondent's Answer Brief fails to address the merits of any of the errors the Petitioner argues occurred during sentencing in this case, thereby impliedly conceding that the errors asserted occurred.

Respondent's Answer Brief also fails to address frontally Petitioner's argument that what constituted fundamental error under decisions of this and other court's of review prior to enactment of the Criminal Appeals Reform Act ("CARA"), *generally* § 924.051(3), Fla. Stat., remains fundamental error subsequent to the effective date of the new statute (July 1, 1996) in that the statute did not attempt to define, redefine, alter or restrict what was fundamental error under the statute.

Respondent appears to suggest that the recent amendments to Rule 3.800(b) would now permit Petitioner's appellate counsel to raise his claims of sentencing errors in the trial

court. These amendments, adopted long after Petitioner had filed his initial brief in his case, were and are patently unavailable to him. Fla. R. Crim. P. 3.800(b)(2) (effective November 12, 1999); *Amendment to Florida Rules of Criminal Procedure 3.111(e), 3.800 and Florida Rules of Appellate Procedure 9.020(b), 9.140, and 9.600*, **24 Fla. L. Weekly S530 (Fla. November 12, 1999),** *corrected opinion*, **24 Fla. L. Weekly S567,** *opinion on rehearing*, **25 Fla. L. Weekly S37 (Fla. January 13, 2000).**

Respondent relies on "[t]he wisdom of Maddox," which had concluded that there was no longer any fundamental errors in sentencing given the "failsafe" procedures available under Rule 3.800 to correct sentencing errors prior to the filing of appeal. *Maddox v. State*, **708 So. 2d 607 (Fla. 5th DCA 1998)(en banc),** *review pending*, **Case No. 92, 805. However, this Court, in** *Amendment to Florida Rules of Criminal Procedure 3.111(e), 3.800 and Florida Rules of Appellate Procedure 9.020(b), 9.140, and 9.600*, **24 Fla. L. Weekly S530 (Fla. November 12, 1999), recognized that the rules of criminal procedure and the practices of the courts with regard to sentencing failed to provide the "failsafe" means to correct sentencing errors that was the underpinning for the Fifth District Court's decision in** *Maddox*. **As we have already noted in the initial brief on the merits, the record in this case fails to demonstrate that the sentencing documents (restitution and cost order and order of probation) alleged to be in error were ever served upon the petitioner's trial counsel or served in a timely manner so as to permit recourse to former Rule 3.800(b) prior to filing of the appeal, precisely one of the shortcomings that compelled this Court to substantially modify the rules this past November.**

As to the fundamental nature of the errors in this case, Petitioner will continue to rely

on the arguments presented in his initial merit brief.

CONCLUSION

Petitioner, LUCIOUS TIBBS, III, based on the foregoing, respectfully urges the Court to accept jurisdiction, to answer the certified question in the affirmative, to disapprove the decision of the First District Court and to remand accordingly, and to grant such other relief the Court deems just and equitable.

Respectfully submitted,

NANCY A. DANIELS
Public Defender
Second Judicial Circuit

FRED P. BINGHAM II
Florida Bar No. 869058
Assistant Public Defender

Leon County Courthouse
Suite 401
301 South Monroe Street
Tallahassee, Florida 32301
(850) 488-2458

Attorney for Petitioner/Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by delivery to James W. Rogers, Esq., Assistant Attorney General, Office of the Attorney General, The Capitol, Plaza Level, Tallahassee, Florida, and to the Appellant by U.S. Mail, first-class postage prepaid, on February _____, 2000.

FRED P. BINGHAM II