IN THE SUPREME COURT OF FLORIDA

LUCIOUS TIBBS, III,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. SC00-10

RESPONDENT'S ANSWER BRIEF

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PRELIMINARY STATEMENT

Respondent State of Florida was the appellee in the District Court of Appeal (DCA) and will be referred to as the state. Petitioner LUCIOUS TIBBS, III, was the appellant in the district court and will be referred to by proper name.

All emphasis through bold lettering is supplied unless the contrary is indicated.

CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was typed using Courier New 12.

STATEMENT OF THE CASE AND FACTS

The State accepts petitioner's statement of the case and facts but for clarity notes the following.

Petitioner was granted a belated appeal in the district court pursuant to Florida Rule of Appellate Procedure 9.140(j). His counsel filed a brief pursuant to Anders v. California, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967) representing to the district court that counsel could not in good faith argue that any reversible error occurred but there had been fundamental error in the sentencing procedure (sic). The district court affirmed in all respects, denying that the claims of sentencing error were fundamental, but certified the question from Locke v. State, 719 So.2d 1249 (Fla. 1st DCA 1998) on whether the trial court committed fundamental error in not orally pronouncing each statutorily authorized cost at the time of sentencing.

This certified question in the case has been in the bosom of the court for more than a year, and will thus be controlled by the decision in Locke v. State, case no. 94,396. See, also, Wright v. State, case no. 94,541; McCray v. State, case no. 94,640; Sassnett v. State, case no. 94,812; Burch v. State, case no. 94,956; Engeseth v. State, case no 95,003.

SUMMARY OF ARGUMENT

The decision here will be controlled by the forthcoming decision in Locke v. State and its progeny. See, also, related and encompassing question in Maddox v. State, case no. 92,805, and Hyden v. State, case no. 93,966, both pending review here.

There is no suggestion that the statutorily authorized costs were in fact illegal, only that they were not orally pronounced. Petitioner had the opportunity to challenge the costs, if he and his trial counsel considered them to be prejudicial error by Florida Rule of Criminal Procedure 3.800(b). He chose not to do so and should not be permitted to raise a claim of non-fundamental sentencing error for the first time on appeal. See, Florida Rule of Appellate Procedure 9.140(d)(A claim of sentencing error may not be raised on appeal unless it has been preserved in the trial court at the time of sentencing or by motion pursuant to rule 3.800(b)); §924.051(3), Florida Statutes (Supp. 1996)(An appeal may not be taken from a judgment or sentence unless a prejudicial error is properly preserved in the trial court or, if not preserved, the error is fundamental); Amendments to the Florida Rule of Appellate Procedure, 696 So.2d

1103 (Fla. 1996)(Upholding the authority of the Florida Legislature to require that appeals may not be taken from unpreserved claims of non-fundamental error in the trial court).

ARGUMENT

ISSUE

CERTIFIED QUESTION FROM LOCKE V. STATE, CASE NO. 94,396, FULLY BRIEFED AND PENDING REVIEW THIS COURT SINCE JANUARY 1999: DOES THE FAILURE OF THE TRIAL COURT TO ORALLY PRONOUNCE EACH STATUTORILY AUTHORIZED COST INDIVIDUALLY AT THE TIME OF SENTENCING CONSTITUTE FUNDAMENTAL ERROR?(Restated)

This review combines the all-too routine events of contemporary appellate review. A belated appeal from the trial court pursuant to Florida Rule of Appellate Procedure 9.140(j); a waiver by the defendant/appellant of the right to claim sentencing error in the trial court pursuant to rule 3.800(b); an initial brief in the district court by appellate counsel simultaneously certifying that the appeal is wholly frivolous and no good faith argument can be made that arguably reversible error occurred but, in "a brief that can fairly be characterized as schizophrenic"[1], asserting that unpreserved fundamental error going to the integrity of the trial also occurred and the case must be reversed and remanded; a denial by the district court of all relief but a certification to this court that an issue of

[1]McCoy v. Court of Appeals, 486 U.S. 429, 432, 100 L Ed 2d 440,449, 108 S Ct 429 (1988).

great public importance is presented; and, now, briefing and review in the state's highest court.

The district court decision should be approved and a negative answer given to the certified question. Claims of sentencing error which are not preserved in the trial court either contemporaneously by objection or by motion pursuant to Florida Rule of Criminal Procedure 3.800(b) are not cognizable on direct appeal pursuant to section 924.051(3), Florida Statutes (Supp 1996), Florida Rule of Appellate Procedure 9.140(d), Amendments to the Florida Rules of Appellate Procedure, 696 So.2d 1103 (Fla. 1996), Maddox v. State, 708 So.2d 617 (Fla. 5th DCA 1998)(**en banc**), review pending, case no. 92,805, and Hyden v. State, 23 Fla. L. Weekly D1342 (Fla. 4th DCA 3 June 1998)(**en banc**), review pending, case no. 93,966.

The state relies on its briefs in Locke and progeny but also urges the Court to adopt the reasoning in Maddox that even claims of fundamental sentencing error are no longer cognizable on appeal because of the provisions of rules 3.800, 3.850, and 9.140(d).

There is no certain definition of fundamental error, this Court has described it in Archer v. State, 673 So.2d 17, 20 (Fla. 1996) as "'error which reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error.' State v. Delva, 575 So.2d 643, 644-45 (Fla. 1991) (quoting Brown v. State, 124 So.2d 481, 484 (Fla. 1960)" and in J.B. v. State,

705 So.2d 1376, 1378 (Fla. 1998) as error "which goes to the foundation of the case or the merits of the cause of action and is equivalent to the denial of due process. Johnson 616 So.2d [1] at 3." The state suggests that no one could plausibly suggest that imposition of statutorily authorized costs invalidates the trial court process or the foundation of the case, and, in view of the ready remedy in rule 3.800(b), denies due process. Particularly with the recent changes to rule 3.800(b) permitting the filing of a rule 3.800(b) motion at anytime prior to the filing of an initial brief, the state suggests that any counsel who is capable of unassisted breathing should be capable of raising all claims of sentencing error in the trial court[2].

The wisdom of Maddox is that it sweeps away the necessity to struggle with these indecipherably descriptive phrases associated with fundamental error by holding that there are now remedies for **all** prejudicial sentencing errors, not merely fundamental, through contemporaneous objection, motion pursuant to rule 3.800(b) to correct sentence, and motion pursuant to rule 3.850 to claim ineffective assistance of counsel if trial or appellate

[2]Unfortunately, this sweeping authority to raise sentencing errors in the trial court by criminals does not extend to the citizenry of this state which, under this Court's rules of criminal and appellate procedure, is prohibited from raising sentencing errors in the trial court and must instead raise appealable sentencing errors for the first time in the appellate court. Amendment to Florida Rules of Criminal Procedure 3.111(e) and 3.800 and Florida Rules of Appellate Procedure 9.020(h), 9.140, and 9.600, Corrected opinion on grant of rehearing, issued 13 January 2000.

counsel overlook any prejudicial sentencing error and fail to timely file a rule 3.800(b) motion. The state urges in the most emphatic terms that no one can seriously suggest that defendants who are now provided with no less than three independent but mutually supportive due process remedies in the trial court to raise claims of sentencing error are nevertheless entitled, in the face of contrary statutory and procedural law, to demand that the judicial system also permit the claim to be raised for the first time on direct appeal. A right to a contemporaneous objection, a right to a motion to correct sentence prior to appellate briefing, and a right to claim ineffective assistance of counsel within two years of final judgment is due process to the ultimate degree. There is no denial of fundamental due process in requiring that defendants use trial court remedies readily available to them in raising claims of sentencing error. Maddox.

CONCLUSION

The certified question should be answered no and the decision of the district court approved.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONDENT'S ANSWER BRIEF has been furnished by U.S. Mail to Fred Parker Bingham, II, Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, this 14th day of February 2000.

_____
James W. Rogers
Attorney for the State of Florida

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