IN THE SUPREME COURT OF FLORIDA

CASE NO. 00,115

BYRON TISDOL,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF RESPONDENT ON THE MERITS

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

MICHAEL J. NEIMAND
Division Chief
Florida Bar Number 0239437

JAN E. VAIR
Assistant Attorney General
Florida Bar Number 0175315
Office of the Attorney General
Appellate Division
9th Floor
110 S.E. 6th Street
Fort Lauderdale, Florida 33301
Telephone: (954) 712-4600

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES **PAGE**

STATE STATUTES AND RULES

INTRODUCTION

The Petitioner, BYRON TISDOL, was the Defendant in the trial court and the Appellant in the Third District Court of Appeal (hereafter, "Third District"). The State of Florida was the prosecution in the trial court and the Appellee in the Third District. In this brief, the parties will be referred to as they stood in the trial court. The symbol "R" will be used to refer to the Record on Appeal. The symbol "S.R." will be used to refer the transcripts of the proceedings of July 27, 1994.

CERTIFICATE OF FONT AND TYPE SIZE

This brief is formatted to print in 12 point Courier New type size and style.

STATEMENT OF THE CASE AND FACTS

The defendant was indicted in circuit court case number 93-2188 on January 19, 1993, for sexual battery by threat or physical force or violence (count I) and kidnaping (count II) of a minor over the age of twelve years, alleged to have occurred on or about January 3, 1993 (R. 1-3).

The defendant pled guilty to the lesser offenses of attempted sexual battery and false imprisonment (R. 70). On October 20, 1993, the trial court found the defendant guilty, withheld adjudication and placed the defendant on probation for three (3) years (R. 70, 75). At the time, the recommended sentence was 3 ½ to 4 ½ years, with a permitted range of 2 ½ to 5 ½ years (R. 72).

On January 11, 1994, an affidavit of violation of probation was filed in case number 93-2188, in which it was alleged that the defendant failed to report as required and was also suspended from high school for ten days (R. 78).

The trial court, on February 7, 1994, entered an order modifying the defendant's probation in case number 93-2188, to order him to reside with his mother and complete the Marine Institute Program (R. 82).

On February 21, 1994, a second affidavit of violation of probation was filed in case number 93-2188, in which it was alleged

that the defendant failed to maintain his residence with his mother because he left for two days (R. 80).

Subsequently, on March 4, 1994, a third affidavit of violation of probation was filed in case number 93-2188. This affidavit alleged that the defendant had committed a new substantive offense, in circuit court case number 94-5876 (battery on a police officer; resisting an officer with violence; disorderly conduct), plus other violations such as failing to remain at liberty without violating the law and failure to maintain his residence with his mother (R. 81).

On July 27, 1994, the trial court entered a judgment in case number 93-2188, noting "probation violator." The judgment also reflected that the defendant had entered a plea of guilty and adjudged the defendant guilty of sexual battery by threat or physical force or violence (count I) (a first degree felony, under section 794.011(4), Florida Statutes (1991), and guilty of kidnaping (a first degree felony, under section 787.01, Florida Statutes (1991))(R. 83-84)[1].

On July 24, 1994, the trial court entered an order in case

[1]Although this Order indicated that Defendant was adjudicated guilty of the offenses of sexual battery and kidnaping, it appears that this reflects a clerical error, as Defendant pleaded guilty to the lesser charges of attempted sexual battery and false imprisonment. (R. 229).

number 94-5876, pursuant to section 39.059, Florida Statutes (1992), sentencing the defendant in that case. It found the defendant guilty of battery on a law enforcement officer, resisting an officer with violence, disorderly conduct and resisting an officer without violence. On this case, the trial court withheld adjudication of guilt and found the defendant to have committed a delinquent act (R. 91-92, S.R. 8-15).

On August 4, 1994, in case number 93-2188, the court entered an order of probation noting that the defendant had pled guilty to attempted sexual battery and false imprisonment, adjudged the defendant guilty of same and placed him on probation for five (5) years. The trial court also imposed several special conditions of probation and ordered that it be concurrent to case number 94-5876 (R. 87-88).

On March 21, 1996, another affidavit of violation of probation was filed in case number 93-2188. The defendant was cited for a refusal to give his new address to his probation officer (R. 95).

On November 17, 1997, another affidavit of violation of probation was filed in case number 93-2188, alleging six (6) violations, including committing the offense of driving with a suspended license (R. 96-97).

On April 15, 1998, a hearing was held on the subject of a

negotiated, written plea agreement in case numbers 93-2188 and 94-5876, entered into by the defendant and the State and signed personally by the defendant, then twenty years old (R. 264-265). In the written agreement, the defendant pled guilty to violating his probation in case numbers 93-2188 and 94-5876. It stated that the trial court would accept the plea and enter an adjudication of guilt, revoke the probation and sentence the defendant to seventeen (17) years in prison. However, the sentence would be suspended pursuant to certain terms and conditions, i.e., the defendant would be placed on four (4) years total years of supervision by the Department of Corrections. Specifically, the defendant would be placed on two (2) years of community control with an electronic monitor, followed by two years of probation. He would enroll in college and live with his mother. He would not modify his place of residence without prior court authorization. If he violated any of the terms and conditions in the contract or other terms and conditions to which he was subject, he would be sentenced to seventeen (17) years in state prison. Paragraph four stated that the defendant's plea and admission to the violation were irrevocable and that any violation would automatically result in a revocation of community control and/or probation. Further, after the court found him in violation of any of said terms and

conditions, the defendant would be immediately incarcerated and receive a sentence of seventeen (17) years. The defendant waived his right to file a motion to mitigate, a motion for early termination or a motion to seal or expunge. It was also agreed that he would refrain from committing any crimes. Finally, paragraph eight provided that all of the agreements between the State and the Defendant were contained within that contract. There were no other agreements between the State and the Defendant with regard to the case (R. 264-265).

After the hearing, the plea agreement was ratified by the trial court (R. 266). Pursuant to the agreement, the trial court entered an order revoking the defendant's probation in case number 93-2188 (R. 113-114). The court entered an order of community control (R. 106-108), followed by two (2) years of probation (R. 109-111). The trial court specified that the state prison sentence would be imposed if the defendant violated community control or probation as per the plea agreement and that it would run consecutive to the sentence in 94-5876 (R. 116).

On June 8, 1998, another affidavit of violation of probation was filed in case number 93-2188 (R. 117). On July 10, 1998, the affidavit was amended to add more violations (R. 123-124).

A violation of probation hearing was held on September 22,

1998. (R. 147-235). During the violation hearing, the trial court took judicial notice of the plea agreement of April 15, 1998 (R. 165). During the defendant's testimony, the defendant acknowledged the plea agreement and admitted that it was his signature on that agreement and that he had signed it after he consulted with his lawyer (R. 194). The trial court made extensive findings after the hearing, in which it stated with specificity why it found the defendant's violation to be willful and noted that the defendant had been given many, many breaks and had continued to be a problem. Perhaps, noted the trial court, the problem was that he was given too many chances (R. 222-230). The trial court noted, with respect to the last time the defendant had started going forward with a violation of probation hearing [April 15, 1998]:

> The last time up he was going forward with the hearing and he was looking at twenty-seven years or forty years, some horrible number. But we just didn't want to give up on him. We just kept hoping that he would get it together. So we thought by entering into this contract that he knew what was hanging over his head, that he would think twice about this. That he would say "no, I am not going to go out and mess around with this girlfriend and stay with the girlfriend and have this attitude problem," and all those other things, because he knew if he came back and I order the transcript, he was told if he came back there would be no more chances, that hopefully this would be enough to get the message through to him that that was the last shot.

> So that's what this plea agreement was all about, why it is a stiff agreement. But to tell you the truth, it is what he could have originally have received in this case the first time and he has had four violations since then. So this actually limited -- although it looks horrendous, it limits his exposure, because probably from all the violations under the old '93 guidelines, he probably could get life.

(R. 224-225). Upon completion of the September 22, 1998 hearing, the trial court sentenced the defendant in case number 93-2188 to seventeen (17) years in count I, five (5) years in count II, to run consecutive to count one. (R. 233). In case number 94-5876, the trial court sentenced the defendant to five (5) years in count I (R. 295); two (2) years in count II (R. 296); 424 days in counts III and IV (time served) (R. 297). The defendant did not object to his sentences on the ground of noncompliance with section 39.059(7)(c), Florida Statutes.

Subsequently, on October 12, 1998, the defendant filed his first motion for postconviction relief under Florida Rule of Criminal Procedure 3.850 (R. 130-140). He raised ten (10) claims, none of which addressed any failure of the trial court to comply with section 39.059(7)(c), Florida Statutes or its 1991 version (R. 130-140). The trial court, on October 20, 1998, filed an "Excerpt of Proceedings," noting that it had no jurisdiction to rule on the

defendant's motion under rule 3.850, because the cause was pending on direct appeal (R. 145).

On October 20, 1998, Defendant filed his direct appeal in the Third District, asserting for the first time that the trial court erred in imposing adult probation in 1994.

On December 15, 1999, the Third District issued a *per curiam* opinion affirming Defendant's sentence, finding that the issue was not preserved for appellate review where Defendant was sentenced as an adult after the Criminal Appeals Reform Act. However, the Third District certified this cause to this Court to pair it for review with *Cargle v. State*, 701 So.2d 359 (Fla. 1st DCA 1997), review granted, 717 So.2d 529 (Fla. 1998) on the question of the applicability of the Criminal Appeals Reform Act to situations involving juveniles being sentenced as adults.

POINT INVOLVED ON APPEAL

SECTION 924.051'S PRESERVATION REQUIREMENTS PRECLUDE PETITIONER FROM CHALLENGING THE LEGALITY OF HIS SENTENCE WHERE PETITIONER AGREED TO THE SENTENCE PURSUANT TO A VALID PLEA AGREEMENT.

SUMMARY OF THE ARGUMENT

The Third District correctly found that the defendant did not preserve for appeal his claim that the trial court reversibly erred when it sentenced him as an adult for offenses committed as a juvenile, without complying with section 39.059(7)(c), Florida Statutes. The defendant, who was most recently sentenced after the effective date of the Criminal Appeals Reform Act, neither raised the issue before the trial court at sentencing, nor did he file a motion to correct the sentencing error under Florida Rule of Criminal Procedure 3.800.

ARGUMENT

SECTION 924.051'S PRESERVATION REQUIREMENTS PRECLUDE PETITIONER FROM CHALLENGING THE LEGALITY OF HIS SENTENCE WHERE PETITIONER AGREED TO THE SENTENCE PURSUANT TO A VALID PLEA AGREEMENT.

Petitioner claims that "the gravamen of this case is the failure of the court to have complied with the statutory requirements after having later actually entered juvenile disposition in both cases (July 27, 1994) and *thereafter* entering adult dispositions without any compliance whatsoever with §39.059." (See Brief of Petitioner at n.3). The State submits that the defendant waived this claim, which is a nonfundamental sentencing error, by failing to preserve it. *See Cargle v. State*, 701 So. 2d 359 (Fla. 1st DCA 1997), *rev. granted*, 717 So. 2d 529 (Fla. 1998).

In *Cargle v. State*, 701 So. 2d 359 (Fla. 1st DCA 1997), *rev. granted*, 717 So. 2d 529 (Fla. 1998), a direct appeal from a judgment and sentence, the defendant argued that the trial court did not consider the criteria in section 39.059(7)(c), Florida Statutes (1995), and erred by not putting in writing the representation that those statutory criteria had been considered before imposing sentence. The First District affirmed the sentence, noting that the defendant was sentenced as an adult after the July 1, 1996 effective date of the Criminal Appeal Reform Act.

Thus, the defendant had an opportunity pursuant to Rule 3.800(b) to preserve error on appeal but did not.[2]

The Court in *Cargle* held that section 924.051, Florida Statutes, which requires preservation of issues for appeal, applies to juveniles being sentenced as adults. The First District reasoned that the imposition of adult sanctions pursuant to section 39.059(7) on a child prosecuted as an adult is not strictly a juvenile proceeding, but rather a hybrid procedure. Although the acknowledged that section 39.059(7) requirements must still be met, the Court stated that it must not be discounted that the juvenile was still being sentenced as an adult in criminal court. The court further noted that a defendant sentenced as a juvenile would not have the opportunity to correct sentencing errors in a proceeding under Florida Rule of Criminal Procedure 3.800(b), and would have no collateral review alternative under Rule 3.850. In contrast,

---

[2] Florida Rule of Criminal Procedure 3.800(b) provides:

> Motion to Correct Sentencing Error. A defendant may file a motion to correct the sentence or order of probation within thirty days after the rendition of the sentence.

Additionally, the Court Commentary to the rule explains that subdivision (b) was added to provide "a vehicle to correct sentencing errors in the trial court and **to preserve the issue** should the motion be denied. A motion filed under subdivision (b) is an authorized motion which tolls the time for filing the notice of appeal." (Emphasis supplied.)

the same defendant, if sentenced as an adult, would have those alternatives. Since the defendant in *Cargle* had not taken advantage of his opportunity via Rule 3.800(b) to correct or preserve the error complained of, the issue was not subject to appellate review. *Id*. at 360. Notably, the Fourth and Fifth Districts have followed *Cargle*. *See*, *Wright v. State*, 721 So. 2d 1253 (Fla. 4th DCA 1998); *accord*, *Carson v. State*, 707 So. 2d 898, 899-900 (Fla. 5th DCA 1998).

The present defendant was most recently sentenced in this matter in 1998, long after the effective date of the Criminal Appeals Reform Act. The State submits that Petitioner is precluded from challenging the legality of his sentence where he failed to raise the issue on April 15, 1998, when Petitioner, then twenty years old, signed a valid plea agreement whereby he admitted violation and agreed to be sentenced to seventeen years if he should violate yet again. *See Novaton v. State,* 610 So.2d 726, 728 (Fla. 3d DCA 1992), *approved,* 634 So.2d 607 (Fla. 1994); *Madrigal v. State*, 545 So.2d 392, 395 (Fla. 3d DCA 1989) and cases cited therein. *See also, McMillan v. State,* 701 So.2d 1214 (Fla. 3d DCA 1997) (having accepted terms of extremely beneficial plea agreement pursuant to which he was sentenced to community control, and having failed to live up to those generous terms, movant was estopped from

challenging that agreement on the ground that community control was statutorily precluded, and thus could not be revoked); *Mann v. State,* 622 So.2d 595 (Fla. 3d DCA 1993)(defendant who accepts the benefit of a plea agreement cannot be allowed to disavow the agreement).

By entering this plea, Petitioner effectively waived any challenge to the legality of his previously imposed probation by admitting violation and agreeing to the terms of the plea agreement. In fact, after Petitioner violated probation *again* and was sentenced pursuant to the April 15, 1998 plea agreement, he still failed to challenge the legality of his 1994 adult probation. It was not until Petitioner filed a direct appeal on October 20, 1998 that he raised the issue of the legality of the adult probation imposed in 1994. Whether the adult probation was lawfully imposed is a legally dispositive issue which must be presented to the trial court in order to be preserved pursuant to Section 924.051. Petitioner also could have preserved this issue by filing a motion to correct sentence within thirty (30) days after his sentence. Fla.R.Crim.P. 3.800(b).[3] Here, Petitioner did

[3] The defendant filed a *pro se* motion for postconviction relief under Florida Rule of Criminal Procedure 3.850, on October 12, 1998, in which he raised ten (10) claims. None of the claims raised addressed his sentencing as an adult and lack of compliance with section 39.059(7)(c) or (d)(R. 130-140).

neither.

Petitioner alleges that the Third District misconstrued his claim and concludes his Brief by arguing that "nothing should have subjected the Petitioner, then a juvenile in fact, to the later enactment of the Criminal Appeals Reform Act". (See Petitioner's Brief at p. 15). Such a proposition leads to illogical results, especially where Petitioner, as an adult, failed to challenge the legality of his adult probation when he admitted violations on two separate occasions and was sentenced after the effective date of the Criminal Appeals Reform Act. The adult nature of Petitioner's proceedings necessitates the imposition of obligations of Section 924.051's preservation requirements.

The State points out that Petitioner is obviously aware of his rights and remedies in adult proceedings, as evidenced by Petitioner's filing of a Motion pursuant to Rule 3.850, in an attempt seek collateral review of his sentence, a remedy which is only available to adults. *Cargle, supra.* Where Petitioner exercised the right within an adult proceeding to seek collateral review, he should be likewise bound by the Section 924.051 obligation attendant to adult proceedings to provide the trial court the opportunity to correct a purported error prior to claiming it on appeal.

The legislature intended for the obligations of Section 924.051 to apply to Petitioner's adult proceedings, where Petitioner was adult when sentenced and all parties, including defense counsel and Petitioner, have treated Petitioner as an adult, with his case processed through adult circuit court, not juvenile circuit court. Defense counsel affirmatively acknowledged at Petitioner's most recent sentencing in October, 1998, without complaint, that Petitioner "was always sentenced as an adult" in circuit court case 93-2188. (R. 232). Indeed, Petitioner's usage of "Byron Tisdol," *See* 9.145(d), Fla. R. App. P. (delinquency appeals require reference to juvenile with initials), illustrates the status of this proceeding as adult in nature.

Finally, as Petitioner acknowledges, this Court has found that the failure of a trial court to comply with section 39.059(7)(c) does not render the sentence illegal. (See Brief of Petitioner at p. 12). As such, the State submits that the instant case is distinguishable from the case law cited by Petitioner.

In *State v. Rhoden*, 448 So.2d 1013 (Fla. 1984) this Court approved the Second District's determination that a trial court was required to explain in writing why adult sanctions were appropriate where a juvenile was sentenced as an adult. In *Rhoden*, this Court determined that "the provisions of section 39.111(6) must be

followed by a trial judge in sentencing a juvenile as an adult, and the failure to do so requires a remand for resentencing". 448 So.2d at 1017.

In *Sirmons v. State*, 620 So.2d 1249 (Fla. 1993), this court examined whether a juvenile who entered into a plea agreement that allows a court to consider adult or juvenile sanctions necessarily waives the right for the court to make the required findings of section 39.111. This court determined that the trial court must inform the juvenile of the rights provided by statute before accepting a plea. Where no such waiver was obtained, the case must be remanded for resentencing. 620 So.2d at 1252.

Later that same year, in *Troutman v. State*, 630 So.2d 528 (Fla. 1993), this Court again determined that the trial court must consider each statutory criteria for imposing adult sanctions on a juvenile before determining the suitability of adult sanctions.

In *State v. Veach*, 630 So.2d 1096 (Fla. 1994), this Court approved the First District's decision in *Veach v. State*, 614 So.2d 680 (Fla. 1st DCA 1993). In *Veach*, the First District found that without a waiver by the juvenile of his right to findings under 39.059 that is knowing, intelligent and manifest on the record, "it is reversible error for a trial court to impose adult sanctions upon a juvenile without making the required findings". 614 So.2d

at 680. This Court's brief *per curiam* opinion approved the decision on the authority of *Sirmons* and *Troutman.* 630 So.2d at 1097.

The instant case is distinguishable in that here, Petitioner entered into a valid plea agreement and was sentenced after the effective date of the Criminal Appeals Reform Act. If Petitioner had raised the issue now on appeal at the time he entered into the April 15, 1998 plea agreement, the issue may have been properly preserved for appellate preview. However, where Petitioner failed to challenge the legality of his 1994 probation when he signed a plea agreement as an adult on April 15, 1998 and then *again* failed to raise the issue even when he was sentenced pursuant to the plea agreement on September 22, 1998, Petitioner failed to properly preserve the issue for appellate review.

In *Summers v. State*, 684 So.2d 729 (Fla. 1996), this Court examined whether a trial court's failure to enter written findings as required by section 39.059(7) and *Troutman*, is cognizable in collateral proceedings. This Court, relying on its decision in *Davis v. State*, 661 So.2d 1193 (Fla. 1995), determined that a "trial court's failure to comply with the statutory mandate is a sentencing error, *not fundamental error, which must be raised on direct appeal or it is waived*." 684 So.2d at 729. (Emphasis

added).

Next, in *State v. Evans*, 693 So.2d 553 (Fla. 1997), this court again examined whether the failure to make written findings required when a juvenile was sentenced as an adult could be challenged in collateral proceedings. Again, this Court found that the failure to make such written findings did not render a sentence illegal.

In *Evans*, the defendant pleaded nolo contendere to one count of armed robbery, a first-degree felony punishable by life imprisonment. He was adjudicated as an adult and placed on probation. After the defendant violated probation, the trial court sentenced Defendant to seventeen years imprisonment, followed by five years probation, a sentence which was appealed and affirmed. *Evans v. State*, 623 So.2d 508 (Fla. 5th DCA 1993). Almost two years after his sentenced was affirmed, the defendant filed a post-conviction motion alleging that he was improperly sentenced as an adult where the trial court did not make the specific written findings as required by section 39.059(7), Fla. Stat. (1991). 693 So.2d at 554. This Court, again relying on its decision in *Davis*, supra, found that the "failure of a trial court to comply with the mandated discretion of providing written reasons does not make a sentence illegal." Id.

Here, as in *Evans*, Petitioner's sentence was not illegal and he should therefore be required to raise any purported sentencing error before the trial court in order to preserve the issue for appellate review.

Petitioner also suggests that this Court's opinion in *State v. Mancino*, 714 So. 2d 429 (Fla. 1998), which is distinguishable on its facts, requires reversal in the instant case. Petitioner is mistaken.

The *Mancino* case involves a credit for time served issue, in which this Court held that awarding credit for time served is not discretionary with the court because a defendant is simply entitled to release when he is entitled to release (and in fact should first seek administrative relief in the corrections system and, that failing, seek relief through rule 3.800(a), mandamus or habeas corpus). *See id*. at 432.[4] The *Mancino* opinion has nothing to do with section 39.059 and does not present an analogous situation. With respect to findings to comply with section 39.059(7)(c), a trial court's failure to comply does not impact upon the defendant's right to release and does not cause a juvenile to serve

[4] Thus, as a example, a defendant sentenced to two years in prison who has already served six months is entitled to receive credit for the six months already served. Otherwise, he will end up with a sentence of two years and six months. This would be a clear violation of due process.

any more time than he would normally be required to serve, had section 39.059(7)(c) been complied with. The defendant either qualifies to be sentenced as an adult, or he does not, and the trial court makes that determination before sentence is imposed. Since failure to take the additional step of memorializing the findings has no practical effect on the defendant or his liberty interest (as credit for time served indisputably does), failure to comply with section 39.059(7)(c) is, and should be, considered a sentencing error, not a fundamental error, which must be preserved. *Evans*; *Summers*; *Cargle*.

Thus, the defendant's claim is waived and should not be considered on appeal.

CONCLUSION

Based upon the foregoing, the State submits that Third District properly held that the Defendant failed to preserve the issue for appellate review. This Court should therefore affirm.

Respectfully Submitted,

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

MICHAEL J. NEIMAND
Division Chief
Florida Bar Number 0239437

JAN E. VAIR
Assistant Attorney General
Florida Bar Number 0175315
Office of the Attorney General
Appellate Division, 9th Floor
110 S.E. 6th Street
Ft. Lauderdale, FL 33301
Telephone: (954) 712-4600
Facsimile: (954) 712-4761

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Respondent was mailed this 27th day of February, 2000 to Bruce A. Rosenthal, Assistant Public Defender, 1320 N.W. 14th Street, Miami, Florida, 33125.

JAN E. VAIR
Assistant Attorney General