IN THE SUPREME COURT OF FLORIDA

CASE NO. SC00-1591

STATE OF FLORIDA,
DEPARTMENT OF CORRECTIONS
Appellant,

-vs-

TONY RANDALL WATTS,

Appellee.

ON DIRECT APPEAL OF TEE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA, CASE NO. 88-11505 CF CR-C

APPELLANT'S REPLY BRIEF

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SUMMARY OF THE ARGUMENT

Appellant, the Florida Department of Corrections (FDC) presented the sole issue in this appeal, whether a sentencing court can direct FDC in the placement of a sentenced individual. Appellee's answer brief attempts to raise new issues that were not presented in proceedings below and were not presented as a cross-appeal. Appellee's Answer Brief should only be considered to the extent it responds to the issue presented in Appellant's Initial Brief.

The lower court's requiring FDC to maintain Appellant in a hospital setting until he is "voluntarily taking his medication" should be reversed as violative of the doctrine of separation of powers.

ARGUMENT

WHETHER A CRIMINAL COURT HAS JURISDICTION TO

DIRECT THE DEPARTMENT OF CORRECTIONS INTO THE PLACEMENT OF A SENTENCED INDIVIDUAL

Death row inmate Tony Randall Watts has been housed at Corrections Mental Health Institution (CMHI) since May 4, 1999 based on orders entered by the Honorable L. Page Haddock in the context of his criminal proceeding. The issue presented on appeal is whether a sentencing court can order the continued placement of an inmate to a mental health treatment facility outside of the provisions contained in Florida Statute §945.41-945.47[1].

In "restating" the issue on appeal, Appellee has attempted to create a new issue, to wit, whether the Department of Corrections can refuse to treat Mr. Watts. The record below makes clear that the Department of Corrections has never refused to treat inmate Watts. (R. 228-236) The position consistently held by the FDC is that treatment for inmate Watt's mental

[1] Florida Statute §945.43 authorizes the placement of an inmate for up to six months at a mental health treatment facility after a hearing in the county where the inmate is in custody. At hearing, the court takes expert testimony to determine whether the inmate is mentally ill and in need of care and treatment. "In need of care and treatment" means that an inmate has a mental illness for which inpatient services in a mental health facility are necessary, which mental illness poses a real and present threat of substantial harm to the inmate's well-being or the safety of others." Fla. Stat. §945.41(5). The warden is authorized by Florida Statute §945.47 to transfer an inmate to another institution for outpatient and after care services if the inmate "continues to be mentally ill, but is not in need of care and treatment as an inpatient." Florida Statute §945.47.

illness can be accommodated outside of a hospital setting. More importantly, the issue presented by Appellee was not brought before the lower court for a determination and is not properly before this court on appeal.

At hearing on October 1, 1999, the Department of Corrections raised its Motion to Return the Defendant from Corrections Mental Health Institution. (R. 120) An extensive discussion ensued on whether inmate Watts was being treated to be restored to competency. (R. 120-149). The court denied the Department of Corrections motion, but did not make any determination on whether Mr. Watts was receiving sufficient treatment. (R. 139) The court stated:

> . . . there is currently an order in place that says he is to be treated in an effort to restore him to competency.
>
> If some party feels D.O.C. is not doing that they perhaps should file a motion about it. I don't have that before me today.

(R. 139) The court again invited a motion on the issue of FDC's treatment by stating:

> If somebody – both sides in the adversarial situation here have a vested interest in seeing this man returned to competency, so if one of you files a motion I will entertain it . . .

(R. 147-148). No motion was filed with the trial court regarding FDC's treatment of inmate Watts.

At a second hearing on January 7, 2000, FDC raised its

Motion for Amended Order Authorizing Continued Involuntary Placement. Counsel for inmate Watts suggested that the issue before the court was whether FDC would restore inmate Watts to competency. (R. 185) Counsel for FDC explained that FDC's motion only addressed whether inmate Watts could be transferred out of CMHI. (Id.) The court then stated:

> I did not interpret her motion as a motion to restore him to competency either, as far as that goes.

(Id) On April 18, 2000, the court denied FDC's motion for an amended order and required inmate Watts to "remain at CMHI for further treatment until such time as the Department of Corrections can show the Court that the Defendant is voluntarily taking his medication, is stable and can be returned to UCI." (R. 52). It is from this order that FDC appealed. At no time did Appellee file a motion challenging FDC's treatment of inmate Watts.

In his Answer Brief, Appellee asserts for the first time, that that FDC has refused to treat his mental illness in violation of his constitutional rights to due process of law, equal protection, access to courts and to be free of cruel and unusual punishment. As these issues were not raised in pleadings the issues were not legally presentable to the trial court nor presentable in appellate proceedings. *See* Mapoles v. Mapoles, 332 So.2d 373 (Fla. 1st DCA 1976).

The courts have held that a party cannot raise a new theory on appeal that was not presented to the court below. *See* Wolf v. Frank, 477 F.2d 467 (5th Cir. 1973); United Servs. Auto. Ass'n v. Porras, 214 So.2d 749 (Fla. 3rd DCA 1968); Nelson v. Cravero Constructors, Inc., 117 So.2d 764 (Fla. 3rd DCA 1960). "It is a well established fundamental principle of law that a ground for relief not presented at a trial level will not be considered for the first time on appeal." Jackson v. Whitmire Constr. Co., 202 So.2d 861 (Fla. 2nd DCA 1967).

The lower court was very clear that it would not enter an order on FDC's treatment of inmate Watt's unless it had a motion before it. (R. 139, 147) No motion was ever filed. FDC was not given an opportunity to defend against Appellee's outrageous accusation that FDC is withholding treatment to "make each day of Mr. Watts' incarceration a psychotic haze of religious delusions and hallucinations." (Answer Brief at p. 9)

FDC purposefully limited its presentation of evidence to what was necessary to support its motion for an amended order. As Appellee had not filed a motion challenging FDC's treatment of inmate Watt's, FDC did not have an opportunity to present evidence, testimony, or legal argument in response to the Appellee's allegations. Moreover, the lower court was deprived of the opportunity to review the sufficiency of the evidence and make a determination. By raising these issues for the first

time in an answer brief, Appellee is essentially asking this court to be a court of first impression.

In addition to presenting legal argument for the first time in the Answer Brief, Appellee has included an attachment and footnoted facts that were not presented in proceedings below. Matters outside the record below should not be considered on appeal and may properly be stricken. Gilman v. Dozier, 388 So.2d 294 (Fla. 1st DCA 1980); Eagle v. Benefield-Chappell, Inc., 476 So.2d 716 (Fla. 4th DCA 1985); Hastings v. Hastings, 45 So.2d 115 (Fla. 1950). There is no exception to this general rule for footnotes, so the allegations of events transpiring after the court entered its order in footnotes one and two should be disregarded by this court. Additionally, while this court may take judicial notice of a proposed rule, the proposed rule attached to the Answer Brief in appendix A should be disregarded as it was never presented to the tribunal below. Altchiler v. State Dep't of Professional Regulation, 442 So.2d 349 (Fla. 1st DCA 1983); Mann v. State Road Department, 223 So.2d 383 (Fla. 1st DCA 1969).

Appellee has attempted to reframe the question on appeal to seek direction on how to apply Carter v. State, 706 So.2d 873 (Fla. 1997) in this case. The lower court suggested that one remedy inmate Watts could pursue if he believed his situation was untenable was to appeal the order and ask the Supreme Court

how to apply their decision in Carter to these facts. (R. 243) Inmate Watts did not appeal the order. Instead, Appellee attempts to use his answer brief as a cross appeal without notice as required by Fla. R. App. P. 9.110(g). Appellee's answer brief goes as far as to request affirmative relief in the form of either an order directing FDC to comply with the lower court's order or remand for an order transferring inmate Watts outside of FDC's custody. (Answer Brief p. 19-20) In A-1 Racing Specialtes, Inc. v. K & S Imports of Broward County, Inc., 576 So.2d 421 (Fla. 4th DCA 1991), portions of an answer brief were stricken when no notice of cross appeal was filed yet there were arguments in the answer brief demanding affirmative relief and the answer brief went beyond the scope of the initial brief.

In the present case, the answer brief goes far beyond the limited issue presented in FDC's initial brief. Appellee seeks to have his own issues resolved, yet failed to file pleadings below, an appeal, or a cross-appeal in this case. As Appellee's answer brief does not respond to the question presented in the Initial Brief, it should not be considered by the court.

To the extent this Court entertains Appellee's newly minted arguments, FDC submits that Carter v. State, 706 So.2d 873 (Fla. 1997) does not impose a duty on FDC to house all incompetent inmates at CMHI. The facts in Carter indicate that death row inmate Antonio Carter was committed to CMHI, not by the

sentencing court, but by the circuit court in Union County, where Carter was in custody. This procedure is consistent with Florida Statute §945.43. *See* footnote 1. Inmate Carter was later released from CMHI at which time his competency was called into question. Carter at 874. The decision in Carter is instructional in how the court and the attorney representing a death row inmate should proceed if a client is believed to be incompetent. The opinion in Carter does not dictate that inmates determined to be incompetent be transferred to CMHI.

The argument that Appellee deftly tries to avoid is whether a sentencing court can direct FDC on where to house an inmate committed to its custody. Florida Statute §944.17(2) and (7) authorizes FDC to transfer prisoners within the corrections system. Florida Statute §945.47 authorizes FDC to transfer an inmate out of CMHI for outpatient and after care services if the inmate continues to be mentally ill, but is not in need of care and treatment as an inpatient. The lower court order directing that inmate Watts remain at CMHI until he is voluntarily taking his medication usurps FDC decision making authority as found in Florida Statutes §944.17 and §945.47.

As stated in the Initial Brief, case law confirms that a sentencing court lacks the authority to regulate the treatment of an inmate properly committed to the custody of the Department of Corrections. *See* State, ex rel. Dep't of Health and

Rehabilitative Services v. Sepe, 291 So.2d 108 (Fla. 3d DCA 1974) (a trial court's order committing a defendant in a criminal case to a state hospital and undertaking to direct a state agency as to treatment, amounted to a usurpation of the authority of the state agency and invaded the functions of the state agency as a division of the executive department in derogation of the doctrine of the separation of powers). Singletary v. Acosta, 659 So.2d 449 (Fla. 3rd DCA 1995) (a trial court wholly lacks the authority to regulate the placement and treatment of a sentenced inmate); Florida Dep't of Health and Rehabilitative Services v. Gross, 421 So.2d 44 (3rd DCA 1982), (orders entered in criminal proceedings, committing defendants to the Mentally Disordered Sex Offender Program, constituted an unwarranted judicial incursion into the executive function and authority of the Department of Health and Rehabilitative Services). Appellee's only response to the argument presented in the Initial Brief is "Appellant's cited case law is inapplicable to the present controversy." (Answer Brief at p. 16) Appellee then continues his attack on FDC's treatment of inmate Watt's without addressing the separation of powers argument or how the present case is distinguishable from the cases cited in Appellant's Initial Brief.

The lower court order in this case not only usurps the statutory authority granted to FDC, but allows inmate Watts to

control where he is housed. Pursuant to the order, inmate Watt's may choose to remain at CMHI indefinitely by refusing to take his medication[2]. Appellee argues that he should be allowed to remain at CMHI because that is where he can get the "best" treatment. A hospital setting is not the best level of care for all mentally ill inmates. FDC provides psychiatric care at the institutional level and believes this level of care is more appropriate for inmate Watts. Inmate Watts should not be in the position of choosing where he receives treatment for his mental illness.

CONCLUSION

The lower court usurped FDC's authority to regulate the treatment and placement of an individual sentenced to its custody. Appellee's answer brief does not respond to the issues presented in the initial brief and attempts to raise new arguments not presented in pleadings below or as a cross-appeal. FDC respectfully requests that the lower court order directing FDC to provide continued hospitalization at CMHI until inmate Watts voluntarily takes his medication be reversed.

Respectfully Submitted,

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2. The Department may not forcibly medicate inmate Watts outside the provisions of Florida Statute §945.48.

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CERTIFICATION OF TYPE SIZE

Appellant's Reply Brief is certified as being typed in 12 point Courier New, a font that is not proportionally spaced.

Susan Schwartz

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief was mailed this __ day of October, 2000, to the **Honorable L.P. Haddock,** 103 Duval County Courthouse, 330 E. Bay Street, Jacksonville, Fl 32202, **Andrew Thomas**, Asst. CCRC-N, P.O. Box 5498, Tallahassee, Fl 32314-5498, **Barbara Yates**, Asst. Attorney General, PL-01, the Capitol, Tallahassee, Fl 32399-1050, **Stephen Bledsoe,** Asst. State Attorney, 600 Duval County Courthouse, 330 E. Bay Street, Jacksonville, Fl 32202.

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