IN THE SUPREME COURT OF FLORIDA

JOHNNY E. BRANNON,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. SC01-1538

RESPONDENT'S ANSWER BRIEF

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

JAMES W. ROGERS
TALLAHASSEE BUREAU CHIEF,
CRIMINAL APPEALS
FLORIDA BAR NO. 325791

TRISHA E. MEGGS
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 045489

OFFICE OF THE ATTORNEY GENERAL
PL-01, THE CAPITOL
TALLAHASSEE, FL 32399-1050
(850) 414-3300
(850) 922-6674 (FAX)

COUNSEL FOR RESPONDENT

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PRELIMINARY STATEMENT

Respondent, the State of Florida, the Appellee in the District Court of Appeal (DCA) and the prosecuting authority in the trial court, will be referenced in this brief as Respondent, the prosecution, or the State. Petitioner, Johnny E. Brannon, the Appellant in the DCA and the defendant in the trial court, will be referenced in this brief as Petitioner or by proper name.

The record on appeal consists of one volume, which will be referenced according to the respective number designated in the Index to the Record on Appeal. "IB" will designate Petitioner's Initial Brief. Each symbol will be followed by the appropriate page number in parentheses.

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

STATEMENT OF THE CASE AND FACTS

The State agrees with petitioner's statement of the case and facts.

SUMMARY OF ARGUMENT

ISSUE I

Question one ask whether the concept of fundamental sentencing error applies to defendants who could have filed motions to correct his or her sentence pursuant Florida Rule of Criminal Procedure 3.800(b) up until the time the initial brief was filed in the defendant's direct appeal. Question one is ambiguous in that Maddox held that fundamental sentencing error could be raised for the first time on appeal **until** such time as amended rule 3.800(b) went into effect on 12 November 1999. Brannon's initial brief was filed well after amended rule 3.800(b) went into effect so the state reads Maddox as requiring that he raise **any** sentencing claim in the trial court.

Furthermore, question one appears to erroneously assume that this Court's Maddox decision either eliminated the concept of fundamental sentencing error or created some new form of fundamental sentencing error. It did neither. Grounded on the analysis of Chief Judge Griffin in the Fifth district's Maddox decision, this Court simply recognized that it was difficult to consistently identify fundamental sentencing error, and pointlessness to try to do so when **all** sentencing errors could be easily addressed in the trial court using the rules adopted on 12 November 1999 by Amendments. This Court simply held that after 12 November 1999, when amended rule 3.800(b) and companion rules became effective, **all** claims of sentencing error, whether fundamental or otherwise, must be raised in the trial court by

either (1) contemporaneous objection, or (2) motion filed pursuant to Florida Rule of Criminal Procedure 3.800(b) prior to the filing of the initial brief. This can be see more clearly if the Fifth District decision in Maddox is read **in para materia**. Judge Griffin would have enforced this requirement from the initial promulgation of rule 3.800(b) in 1996 whereas this Court held that the requirement should not become effective until amended rule 3.800(b) went into effect on 12 November 1999.

The Maddox holding was reiterated in Salters where this Court held that even claims that a statute violated the single subject rule, which had formerly been cognizable on appeal for the first time, henceforth had to be first raised in the trial court. Thus, question one has already been answered yes in Maddox and Salters and countless other cases.

ISSUE II

Question two asks if a defendant may raise an issue which the District Court had previously determined to be fundamental if the initial brief was filed before this Court issued its opinion in Maddox but after this Court had amended Rule 3.800(b) giving the defendant the opportunity to file a Motion to Correct Sentence in the trial court up until the time the initial brief was filed. This Court, in Maddox, has already answered the certified question by holding that the courts may only correct unpreserved fundamental sentencing errors for those defendant's whose initial briefs were filed before this Court amended Rule 3.800(b) in Amendments II. Thus, regardless of whether or not

the district court had held that an error was fundamental, if the defendant had the procedural mechanism of the amended Rule 3.800(b) available to him or her, but failed to file a Motion to Correct Sentence, the issue could not be addressed on the merits on direct appeal.

ISSUE III

Petitioner argues that this Court erred by sentencing him as a habitual offender. However, because this issue is beyond scope of the certified question and the First District did not rule on the merits of petitioner's claims, this Court should decline to address this issue on appeal. Nevertheless, even if this Court did address petitioner's claims, he would not be entitled to relief.

Petitioner was convicted of the sale of cocaine and possession of cocaine with the intent to sale, and the trial court sentenced him as a habitual offender to two concurrent fifteen-year prison sentences. (I.64-70). Petitioner argues that the trial court could not habitualize him for his possession of cocaine with intent to sale conviction. Because petitioner did not preserve this issue for appellate review and because the error has no effect on the length of time he will serve, this issue is not cognizable on appeal.

Petitioner also argues that the trial court erred by sentencing him as a habitual offender upon the revocation of his probation. The habitual offender sanction was proper because the trial court had originally found that petitioner was a

habitual offender rather than merely qualified as a habitual offender. The Court may sentence a habitual offender to probation. Accordingly, petitioner's original sentence to the jail bed program was a valid habitual offender sentence, and the petitioner's fifteen-year habitual offender sentence upon the revocation of his probation was appropriate.

ARGUMENT

ISSUE I

WHETHER THE CONCEPT OF FUNDAMENTAL SENTENCING ERROR, AS DISCUSSED IN MADDOX V. STATE, 760 SO.2D 89(FLA. 2000), APPLIES TO DEFENDANTS WHO COULD HAVE AVAILED THEMSELVES OF THE PROCEDURAL MECHANISM OF THE MOST RECENT AMENDMENTS TO FLORIDA RULE OF CRIMINAL PROCEDURE 3.800(B) SET FORTH IN AMENDMENTS TO FLORIDA RULE OF CRIMINAL PROCEDURE 3.111(E) AND 3.800 AND FLORIDA RULE OF APPELLATE PROCEDURE 9.020(H), 9.140 AND 9.600, 761 SO.2D 1015 (FLA. 1999)?

The concept of fundamental sentencing error does not apply to defendants who could have filed a Florida Rule of Criminal Procedure 3.800(b) as provided for in Amendments 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, 761 So.2d 1015 (Fla. 2000)(hereinafter Amendments II).[1]

Standard of Review

The issue before this Court is a legal issue which is reviewed de novo.

Argument

The certified question is grounded on a misunderstanding of this Court's decision in Maddox v. State, 760 So.2d 89 (Fla. 2000) where this Court approved in large part the decision of the Fifth District in Maddox v. State, 708 So.2d 617 (Fla. 5th DCA 1998). This Court did not eliminate or materially change the

[1] This precise question is pending before this Court in Harvey v. State, Case No. SC01-1139.

concept of fundamental sentencing error. Adopting in large part the analysis of Chief Judge Griffin in the district court, this Court held that in future cases where briefing occurred after this Court's adoption of amended appellate and criminal rules in Amendments 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, 761 So.2d 1015 (Fla. 2000), that **all** claims of sentencing errors must be first raised in the trial court, either contemporaneously or by amended rule 3.800(b). This holding did not eliminate the concept of fundamental error, it simply provided a fail safe remedy under which all sentencing errors had to be first raised in the trial court. This was an appropriate exercise of this Court's authority to promulgate rules of procedure for judicial proceedings.

The Maddox holding was reiterated by the subsequent decision in Salters v. State, 758 So.2d 667, 668 fn 4 (Fla. 2000) where this Court held that defendant/petitioners "who have available the procedural mechanism of our recently amended rule 3.800(b) [are required] in the future [to] raise a single subject rule challenge in the trial court prior to filing the first appellate brief."

Accordingly, the answer to the first certified question is that Brannon was required to first raise his claim of fundamental sentencing error in the trial court.

ISSUE II

WHERE THE DISTRICT COURT PREVIOUSLY RULED THAT A SENTENCING ISSUE IS FUNDAMENTAL ERROR, THE INITIAL BRIEF WAS FILED AFTER THE EFFECTIVE DATE OF RULE 3.800(B)(2), FLORIDA RULE OF CRIMINAL PROCEDURE, BUT BEFORE THE FLORIDA SUPREME COURT DECIDED MADDOX V. STATE, DOES MADDOX PRECLUDE THE DISTRICT COURT FROM RULING ON THE ISSUE AS A MATTER OF FUNDAMENTAL ERROR?

This Court's decision in Maddox precludes merits review of a sentencing issue, even when the district court had previously ruled it was fundamental error, when the initial brief was filed after the effective date of Amendments II but before this Court's decision in Maddox became final.

Standard of Review

The issue before this Court is a legal issue which is reviewed de novo.

Argument

In Amendments to the Florida Rules of Appellate Procedure, 696 So.2d 1103, 1104 (Fla.1996)(hereinafter Amendments I), this Court adopted Florida Rule of Criminal Procedure 3.800(b) to allow criminal defendants to file a motion to correct sentencing errors thirty days after sentencing. This Court adopted rule 3.800(b) "to accomplish two purposes. First, [the Court] intended to provide defendants with a mechanism to correct sentencing errors in the trial court at the earliest opportunity, especially when the error resulted from a written judgment and sentence that was entered after the oral pronouncement of sentence. Second, [the Court] intended to give

defendants a means to preserve these errors for appellate review." Amendments 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, 761 So.2d 1015, 1016 (Fla. 1999). Subsequently, this Court amended Rule 3.800(b) to allow a motion to correct a sentencing error to be filed in the trial court up until the first appellate brief was filed. Id. at 1018. The amendment to Rule 3.800(b) became effective immediately. Id. at 1020.

In Maddox, this Court addressed the issue of whether unpreserved sentencing issues could be raised on direct appeal, and provided a window period in which unpreserved sentencing issues could be raised. This Court stated:

> Thus, we conclude that **for those defendants who did not have the benefit of our recently promulgated amendment to rule 3.800(b) in Amendments II, during this window period the appellate courts should continue to correct unpreserved sentencing errors that constitute fundamental error.** To hold otherwise would neither advance judicial efficiency nor further the interests of justice. **However, for those defendants who had available the procedural mechanism of our recently amended rule 3.800(b), we anticipate that the interests of justice should be served by the ability of appellate counsel to first raise the issue in the trial court prior to filing the first appellate brief.**

Maddox v. State, 760 So.2d 89,98 (Fla. 2000)(emphasis added). Accordingly, this Court, in Maddox, has already answered the certified question by holding that the courts may only correct unpreserved fundamental sentencing errors for those defendant's whose initial briefs were filed before this Court amended Rule 3.800(b) in Amendments II. Thus, regardless of whether or not

the district court had held that an error was fundamental, if the defendant had the procedural mechanism of the amended Rule 3.800(b) available to him or her, but did not raise the issue in the trial court or file a Rule 3.800(b) motion, the issue could not be addressed on the merits on direct appeal.

ISSUE III

DID THE TRIAL COURT COMMIT FUNDAMENTAL ERROR BY SENTENCING PETITIONER AS A HABITUAL OFFENDER AFTER HE VIOLATED HIS PROBATION AND BY IMPOSING HABITUAL OFFENDER SENTENCE FOR PETITIONER'S CONVICTION FOR POSSESSION OF COCAINE WITH INTENT TO SALE WHICH WAS CONCURRENT TO HIS OTHER SENTENCE? (Restated)

Petitioner contends that the trial court erred by imposing a habitual offender sentence for his possession of cocaine with intent to sale conviction and by imposing the habitual offender sentence upon petitioner's violation of probation.

Standard of Review

Whether the trial court could sentence petitioner as a habitual offender is a question of law which is subject to the de novo standard of review.

Preservation

Petitioner's claims are beyond the scope of the certified questions, and the First District did not rule on the merits of these claims. Therefore, this Court should decline to address these issues. Crocker v. Pleasant, 778 So.2d 978, 990-991 (Fla. 2001)(declining to address issues raised by the parties which were beyond the scope of the certified question and were not discussed in the District Court's opinion); Owens-Corning Fiberglas Corp. v. Ballard, 749 So.2d 483, 490 n.7 (Fla. 1999)("We decline to address Owens-Corning's second issue on appeal, that of forum nonconveniens, as it is beyond the scope of the certified question in this case."); Goodwin v. State, 634 So.2d 157 (Fla. 1994)("We decline to address the other

issues raised by the parties, which lie beyond the scope of the certified question.”).

Furthermore, petitioner did not preserve these issues for appellate review because petitioner did not object to his habitual offender sentence in the trial court below or file a Florida Rule of Criminal Procedure 3.800(b) motion. Therefore, petitioner is not entitled to appellate review.

Nevertheless, in abundance of caution, the State will address appellate’s claims.

Argument

A. Petitioner’s habitual offender sentence for his conviction for possession of cocaine with intent to sell.

Section 775.084(1), Florida Statutes (1997), provides in part that:

> (1) As used in this act:
>
> (a) "Habitual felony offender" means a defendant for whom the court may impose an extended term of imprisonment, as provided in paragraph (4)(a), if it finds that:
>
> * * *
>
> 3. The felony for which the defendant is to be sentenced, and one of the two prior felony convictions, is not a violation of s. 893.13 relating to the purchase or the possession of a controlled substance.

A defendant may not be habitualized for possession of cocaine with intent to sale. In the case at bar, the trial court imposed two concurrent fifteen-year habitual offender sentences

for petitioner's convictions for possession with intent to sale and sale of cocaine, (I.64-70).

In Maddox v. State, this Court stated that for unpreserved sentencing error occurring in the window period, only errors that are both patent and serious should be corrected on direct appeal as fundamental error. This Court stated that:

> The first requirement for a sentencing error to be correctable on appeal continues to be that it is patent. In other words, the error must be apparent from the record. ... If the appellate courts do not have a sufficient factual record to determine whether error occurred, the error cannot be corrected on direct appeal.... More important, however, is the second requirement: in 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**.

Id. at 100(citations omitted). The Court concluded that "[i]n 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." Id. Because petitioner's sentence for possession with intent to sale is concurrent with his sentence for the sale of cocaine, petitioner's habitual offender status for the possession with intent to sale has no effect on the length of time he will spend in prison. Therefore, this is not "serious" error which has a quantitative effect on petitioner's sentence, and it may not be raised for the first time on appeal. Accordingly, petitioner is entitled to no relief.

B. The imposition of the habitual offender sentence after petitioner violated his probation.

Petitioner contends that the trial court erred by sentencing him as a habitual offender upon the revocation of his probation after originally placing him on probation. Petitioner overlooks the fact that he did not receive a hybrid split sentence, but instead, the trial court originally sentenced him as a habitual offender.

"Sentencing under the habitual felon statute is permissive, not mandatory . . . and involves a two-step determination." King v. State, 681 So.2d 1136, 1138-1138 (Fla. 1996). The court must first determine whether the defendant qualifies as a habitual offender which is ministerial rather than discretionary. Id. at 1139. "Second, the judge must decide whether the defendant will be sentenced as an habitual felony offender." Id. The Court may determine that a defendant qualifies as a habitual offender, but that habitual offender sanctions are not necessary for the protection of the public. Id. "[T]he sentencing judge may elect to impose an habitual offender sentence or a guidelines sentence, but not both." Id. at 1140. "Hybrid split sentences of incarceration without habitual offender status followed by probation as an habitual offender are not authorized by section 775.084 and are in fact inconsistent with the plain language of the statute." Id. (emphasis added). However, "**the trial judge has the discretion to place an habitual felony offender on probation.**" McKnight v.

State 616 So.2d 31 (Fla. 1993) (emphasis added). See King v. State 681 So.2d 1136, 1141, n.8 (Fla. 1996)(affirming that the trial court has the discretion to place a habitual offender on probation).

In the case at bar, the trial court found that petitioner was a habitual offender when he sentenced him to probation. (I.45). At the original sentencing hearing the prosecutor asked the court to make a determination that petitioner was a habitual offender, although the State was not seeking a sentence for an extended period of time. (I.91). At the hearing, that trial court stated that "Johnny E. Brannon is a habitual felony offender under the meanings of the laws of Florida, specifically Chapter 775.084." (I.93-94). The trial court later repeated this finding, stating that: "And the court confirms that Mr. Brannon is sentenced as a habitual felony offender. And by stipulation of the parties, he is sentenced to the jail bed program." (I.101). The trial court also stated in the written order placing petitioner on probation: "You are adjudged a Habitual Felony Offender." (I.45).

Therefore, this case differs from King v. State, 681 So.2d 1136 (Fla. 1996). In King, the trial court found that King qualified as a habitual offender, but stated that it would not sentence King pursuant to the habitual offender statute, and instead imposed a guidelines sentence. Id. at 1137. It was not until after King violated his probation that the trial court found that King was a habitual offender and sentenced him to a

habitual offender sentence. Id. Likewise, in Spencer v. State, 739 So. 2d 1247 (Fla. 1st DCA 1999), Spencer acknowledged that he was eligible for sentencing as a habitual violent felony offender. Id. at 1247. However, the Court found that the trial court rejected the habitual violent felony offender sentencing option and placed Spencer on probation. Because the trial court did not originally impose a habitual offender sentence, the Court held that trial court could not sentence Spencer as a habitual violent felony offender upon his violation of probation. Id. at 1248.

To the contrary, in the case at bar, the trial court did more than find that petitioner qualified as a habitual offender. The trial court originally sentenced petitioner as a habitual felony offender. Therefore, upon the revocation of petitioner's probation, the trial court could impose the fifteen-year habitual offender sentence. See Welling v. State, 748 So.2d 314 (Fla. 4th DCA 1999)(holding that because trial courts are authorized to a place habitual offenders on probation, Wellings' original suspended sentence was a valid habitual offender sentence and the trial court could impose the thirty-year habitual offender sentence upon his violation of probation), rev. denied, 770 So.2d 163 (Fla. 2000). Accordingly, this Court should affirm petitioner's sentence.

CONCLUSION

Based on the foregoing, the State respectfully submits the first certified question should be answered in the negative, second certified question should be answered in the affirmative, and the decision of the District Court of Appeal reported at 791 So. 2d 1154 should be approved, and the sentence entered in the trial court should be affirmed.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Kathleen Stover, Esq., Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, by MAIL on December _____, 2001.

Respectfully submitted and served,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

_____
JAMES W. ROGERS
Tallahassee Bureau Chief,
Criminal Appeals
Florida Bar No. 325791

_____
TRISHA E. MEGGS
Assistant Attorney General
Florida Bar No. 045489

Attorneys for State of Florida
Office of the Attorney General
Pl-01, the Capitol
Tallahassee, Fl 32399-1050
(850) 414-3300
(850) 922-6674 (Fax)

[AGO# L01-1-10478]

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of Fla. R. App. P. 9.210.

_____
Trisha E. Meggs
Attorney for State of Florida

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