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IN THE SUPREME COURT OF FLORIDA

FILED
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MAR 4 1985
CLERK, SUPREME COURT
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STATE OF FLORIDA,

Petitioner,

vs.

RANDALL WAYNE WALCOTT,

Respondent.

CASE NO. 66,391

PETITIONER'S REPLY BRIEF ON THE MERITS

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TOPICAL INDEX

PAGE

ARGUMENT

POINT

THE OBJECTION WAS NOT SUFFICIENT TO APPRISE THE TRIAL COURT OF THE ERROR IN RETAINING JURISDICTION AND THE APPELLANT SHOULD HAVE UTILIZED FLORIDA RULES OF CRIMINAL PROCEDURE 3.850 OR 3.800(a). ---------- 1-3

CONCLUSION ---------- 4

CERTIFICATE OF SERVICE ---------- 4

AUTHORITIES CITED

CASES — PAGE

DeSantis v. State,
400 So.2d 525 (Fla. 5th DCA 1981) -------------------- 2

Villery v. Florida Parole and Probation Commission,
396 So.2d 1107 (Fla. 1981) -------------------------- 2

Walcott v. State,
9 F.L.W. 2428 (Fla. 5th DCA, Nov. 15, 1984) ---------- 4

Williams v. State,
414 So.2d 509, 511 (Fla. 1982) ------------------- 1,2

OTHER AUTHORITIES

Fla. R. Crim. P. 3.850 -------------------------------- 1,2,3
Fla. R. Crim. P. 3.800(a) ----------------------------- 1,2,3

§ 947.16(3), Fla. Stat. (sup. 1978) ------------------- 1

POINT

THE OBJECTION WAS NOT SUFFICIENT TO APPRISE THE TRIAL COURT OF THE ERROR IN RETAINING JURISDICTION AND THE APPELLANT SHOULD HAVE UTILIZED FLORIDA RULES OF CRIMINAL PROCEDURE 3.850 OR 3.800(a).

ARGUMENT

Respondent argues that "magic words are not needed to make a proper objection." (*See*, respondent's answer brief on the merits at page 2-3.) Yet, petitioner notes, that in *Williams v. State*, 414 So.2d 509, 511 (Fla. 1982), the objection was certainly more specific and apprised the trial court of the putative error. In *Williams*, the defendant was challenging the retroactivity of section 947.16(3), Florida Statutes (sup. 1978). The defendant made the objection on the record below as follows:

> I think, moreover, there is a question as to whether or not that statute was in effect at such time that it can be applied in this case.

Id. at 511. Certainly the objection interposed below in *Williams*, did apprise the trial court of the putative error. In the case at bar, there is no hint in the objection that the respondent was challenging the retention of jurisdiction based upon the fact that burglary of a structure was not one of the enumerated crimes in the statute. Although the objection in *Williams* did not specifically mention "*ex post facto*" or "retroactivity," nevertheless, the objection does apprise the trial court of the specific grounds. In the case at bar, the grounds are general and do not in any way apprise the trial court of the error alleged by respondent.

Petitioner would note that this court held in Williams that the objection was sufficient but, in any event, that an objection was necessary in order to preserve the retroactivity issue. Petitioner submits that a contemporaneous objection should likewise be necessary in the case at bar. In Williams, it could have been argued that such an error could be considered a "fundamental error" that is "the excess caging of a human being without statutory authority." [See, respondent's answer brief on the merits at page six (6).]

Although respondent failed to apprise the trial court of the error at the sentencing hearing, petitioner submits that respondent should have been required at a later time to bring the error to the attention of the trial court pursuant to Florida Rules of Criminal Procedure 3.850 or 3.800(a). In DeSantis v. State, 400 So.2d 525 (Fla. 5th DCA 1981), a defendant appealed a denial of a motion filed pursuant to rule 3.850, based upon an illegal Villery[1] sentence. The Fifth Distirict suggested that either rules 3.800(a) or 3.850 would be alternative ways to apprise the trial court of the sentencing error.

Under respondent's theory, the trial court would never get a chance to correct any error. Respondent argues that by disallowing a direct appeal and requiring a defendant to utilize collateral motions would result in a multiplicity of appeals. Petitioner submits, that this scenario would occur in a very small percentage of the cases. If a trial court is apprised of a sentencing error, petitioner submits that in most cases the trial

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[1] Villery v. Florida Parole and Probation Commission, 396 So.2d 1107 (Fla. 1981).

court will correct the error and thus obviate any appellate proceedings whatsoever. A trial court should be given an opportunity to correct an alleged sentencing error. Under respondent's theory, it is assumed that even though the trial court is totally unaware of the alleged sentencing error, that it would deny any relief whatsoever even when apprised of the putative error. Petitioner submits that this reasoning is unrealistic.

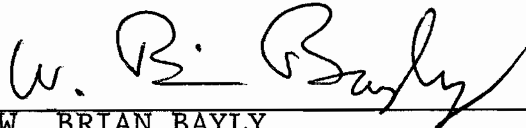
If a defendant need not apprise the trial court of a sentencing error, and if a defendant is able to directly appeal that issue, petitioner submits that the viability of rules 3.850 (as least for sentencing purposes) and 3.800(a) would be totally vitiated. This court would not have promulgated these rules if they were not to be utilized in some fashion. Petitioner notes that under rule 3.800(a), a defendant may move the trial court to correct an illegal sentence at any time. It is contended that the purpose of this latter rule is to at least at some time apprise the trial court of the putative sentencing error and to give the trial court an opportunity to correct the error, if any. As such, respondent should have utilized a collateral procedure to apprise the trial court of the putative sentencing error before taking a direct appeal.

CONCLUSION

BASED UPON the cases, authorities, and arguments presented herein, petitioner respectfully requests this honorable court to reverse the Fifth District Court of Appeal's opinion in Walcott v. State, 9 F.L.W. 2428, (Fla. 5th DCA, Nov. 15, 1984) to the extent that the opinion vacated the retention of jurisdiction. Furthermore, petitioner respectfully requests this honorable court to affirm the conviction and sentence in the case at bar and hold that respondent's remedy pursuant to any alleged sentencing error be corrected by collateral attack.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL



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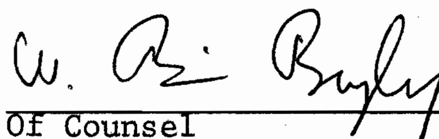
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Petitioner's Reply Brief on the Merits has been furnished, by mail, to Lucinda H. Young, Assistant Public Defender for respondent at 1012 S. Ridgewood Avenue, Daytona Beach, Florida 32014, this 1st day of March, 1985.



Of Counsel
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