IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

CARL SIMPSON,

Appellant,

v. Case No. 5D20-119

STATE OF FLORIDA,

Appellee.

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Opinion filed September 10, 2021

Appeal from the Circuit Court
for Hernando County,
Daniel B. Merritt, Jr., Judge.

Matthew J. Metz, Public Defender, and Louis A. Rossi, Assistant Public Defender, Daytona Beach, for Appellant.

Ashley Moody, Attorney General, Tallahassee, Rebecca Rock McGuigan and Kaylee D. Tatman, Assistant Attorneys General, Daytona Beach, for Appellee.

EISNAUGLE, J.

Carl Simpson appeals his judgment and sentence, as well as a costs order that imposes investigative costs in the amount of $20,141.38 pursuant to section 938.27, Florida Statutes (2020). We affirm in all respects but write to explain that an objection to the sufficiency of the evidence, at least in the context of the imposition of investigative costs, is not a "sentencing error" as contemplated by Florida Rule of Criminal Procedure 3.800(b). In so doing, we conclude our prior decision in *Munoz v. State*, 884 So. 2d 1070 (Fla. 5th DCA 2004) was implicitly overruled by our supreme court in *Mapp v. State*, 71 So. 3d 776 (Fla. 2011).

The Facts and Procedural History

A jury convicted Simpson on nine counts of possession of material including sexual conduct by a child and eight counts of transmission of child pornography by electronic device or equipment. At the subsequent sentencing hearing, the State sought imposition of investigative costs in favor of FDLE as follows:

> STATE: Small potatoes. Another small potatoes argument or request is cost of investigation. It's over $20,000.
>
> COURT: How much is it?
>
> STATE: It's -- exactly is -- let's see. There it is. Sorry. The last printout we have is $20,141.38.

> COURT: All right. $20,141.38, and is that to FDLE or the sheriff's office?
>
> STATE: FDLE.
>
> COURT: Cost of investigation to FDLE will be ordered and assessed.

Simpson did not stipulate to this amount, nor did he object at the sentencing hearing.

While this appeal was pending, Simpson filed a rule 3.800(b) motion arguing that the investigative costs should be stricken because the State failed to offer any evidence at sentencing to support the amount. The trial court denied the motion.

The Issue on Appeal

In his brief, Simpson argues, *inter alia*, that the imposition of the investigative costs is not supported by competent substantial evidence, citing to *Negron v. State*, 266 So. 3d 1266, 1267 (Fla. 5th DCA 2019) ("An award of investigative costs must be supported by competent substantial evidence." (citation omitted)).

In response, the State correctly observes that Simpson failed to raise this objection at the sentencing hearing. Simpson concedes as much but asserts that his argument was preserved by his rule 3.800(b) motion, relying

on this court's decision in *Munoz* and our supreme court's opinion in *Mapp*. However, we disagree with Simpson's reading of *Mapp* and affirm.

"Sentencing Error" as Contemplated by Rule 3.800(b)

Simpson's reliance on our opinion in *Munoz* has merit. In *Munoz*, the State requested investigative costs at sentencing by mere reference to some "paperwork" and failed to present any evidence to establish the amount of the costs. 884 So. 2d at 1070. The defendant made no contemporaneous objection at the hearing but raised the issue later in a rule 3.800(b) motion. *Id.* In striking the costs, we concluded that "the error is preserved because Munoz unsuccessfully sought correction by filing a motion pursuant to Florida Rule of Criminal Procedure 3.800(b)(2)." *Id*.

Thus, our decision in *Munoz* appears to be directly on point, and standing alone, compels the conclusion that the error alleged here was preserved by Simpson's rule 3.800(b) motion. However, *Munoz* is not the final word.

The fourth district considered a similar issue in *Pilon v. State*, 20 So. 3d 992 (Fla. 4th DCA 2009), and although it did not acknowledge our holding in *Munoz*, our sister court reached the opposite conclusion. In *Pilon*, the defendant objected to a restitution order for the first time in a rule 3.800(b)

motion, arguing that the evidence was insufficient to establish the amount of restitution. 20 So. 3d at 992–93.

On appeal, the district court concluded that an evidentiary error during a restitution hearing is not a "sentencing error" pursuant to rule 3.800(b) and therefore must be preserved by contemporaneous objection. *Id.* at 993. After deciding that the evidentiary error was not fundamental, the district court affirmed.

Similarly, in *Rivera v. State*, 34 So. 3d 207 (Fla. 2d DCA 2010), the second district agreed with *Pilon* and, not surprisingly, applied the same analysis to the costs order in that case. In *Rivera*, the defendant challenged the lack of documentation to support the ordered investigative and prosecution costs, raising the issue for the first time in his rule 3.800(b) motion. 34 So. 3d at 208–09.

On appeal, the district court affirmed as to costs, reasoning that "the alleged error is one in the sentencing process that required a contemporaneous objection and not one in the sentencing order. An error in the sentencing process cannot be preserved via a rule 3.800(b) motion." *Id*. at 209 (citing *Mapp v. State*, 18 So. 3d 33 (Fla. 2d DCA 2009), *decision approved in part, quashed in part*, 71 So. 3d 776 (Fla. 2011)). As in *Pilon*, the *Rivera* court found no fundamental error and affirmed the costs order.

Shortly thereafter, in *Mapp v. State*, our supreme court considered whether two errors, one related to a restitution order and the other related to an habitual felony offender ("HFO") designation, qualified as "sentencing errors" for purposes of rule 3.800(b). 71 So. 3d 776 (Fla. 2011). In *Mapp*, the defendant pled guilty in several cases. *Id.* at 777. At sentencing, the trial court imposed an HFO sentence, and "[a]fter hearing from the victims," entered an order of restitution. *Id.* at 778. The defendant challenged these rulings as "sentencing errors" in a rule 3.800(b) motion, claiming that the restitution order was not supported by sufficient evidence and the HFO designation was imposed without proper notice. *Id*. (citation omitted).

On appeal, the district court concluded that neither argument had been preserved because both "were errors in the sentencing process and not errors in the sentencing order." *Id.* (citation omitted).

On review, our supreme court agreed with the district court's conclusion as to the restitution order. *Id.* at 779–81. Thus, the sufficiency of the evidence objection to the restitution order was not cognizable pursuant to rule 3.800(b). *Id.* at 780–81. In support, the supreme court's analysis was brief, offering only that "[t]he error complained of here is not a sentencing error, but is one based on the sufficiency and credibility of the evidence that requires factual determination." *Id*.

In contrast, the supreme court concluded that the errant HFO designation was successfully preserved by the rule 3.800(b) motion, and therefore reversed the HFO sentence. In so doing, the supreme court explained that the failure to provide proper notice of an HFO sentence is a "sentencing error," and that "*when the error complained of affects the ultimate sanction* imposed—as does an HFO designation—it is cognizable under 3.800(b). Further, we have stated that improper habitual offender sentencing contrary to specific statutory requirements constitutes fundamental error." *Id.* at 780 (citation omitted) (emphasis added).

Preservation of the Evidentiary Error in this Case

Turning to the case at hand, Simpson contends that the evidentiary error is a "sentencing error" pursuant to rule 3.800(b), seizing upon language in *Mapp*, because it "affects the ultimate sanction imposed." We disagree.

We acknowledge *Mapp*'s holding that the errant HFO designation in that case was cognizable via a rule 3.800(b) motion because the error affected "the ultimate sanction imposed." We also readily concede that the evidentiary error in this case, at least in some sense, "affects the ultimate sanction imposed" to the extent that it increased the total amount of the costs order. Stated another way, Simpson's view is that this error is "apparent in

[the costs] *order*[] entered as a result of the sentencing process." *Jackson v. State*, 983 So. 2d 562, 572 (Fla. 2008).

Nevertheless, we need not divine what this language from *Mapp* might mean in other circumstances, because it does not apply to the evidentiary error here. If it did, the supreme court would have reversed the restitution order in *Mapp*. In our view, there is no meaningful distinction between an evidentiary error in a restitution order and the same error in a costs order.

Given our conclusion that the error in this case is not a "sentencing error," it is unpreserved, and "may be reviewed on appeal only for fundamental error." *Id.* at 566. However, as in *Pilon* and *Rivera*, the error here was not fundamental.

Conclusion

We conclude that *Mapp* implicitly overruled our decision in *Munoz*. Of course, we are bound to follow *Mapp*, but we observe that our holding also finds support in *Pilon* and *Rivera*. Accordingly, we affirm the order imposing investigative costs in this case because Simpson's argument that the amount is not supported by sufficient evidence was not preserved for review.

AFFIRMED.

HARRIS and NARDELLA, JJ., concur.