NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

THOMAS LEE CROWDER,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. 2D19-4217

Opinion filed December 2, 2020.

Appeal from the Circuit Court for Charlotte County; Donald H. Mason, Judge.

Howard L. Dimmig, II, Public Defender, and Julius J. Aulisio, Assistant Public Defender, Bartow, for Appellant.

Ashley Moody, Attorney General, Tallahassee, for Appellee.

MORRIS, Judge.

In this appeal filed pursuant to Anders v. California, 386 U.S. 738 (1967), Thomas Crowder challenges his judgment and sentences for sale of a controlled substance within 1000 feet of a park, possession of drug paraphernalia, and possession of cocaine which were rendered upon his negotiated plea of no contest to the charges. Our independent review of the record reveals no basis to reverse either the judgment or

the sentences, but we write to address a minor, unpreserved sentencing error that was not identified by appellate counsel in the Anders brief but which arises with some frequency in cases before this court.

The trial court imposed a $100 fee for the services of the Office of the Public Defender, and our review of the transcript of the plea and sentencing hearing does not reveal that Crowder was orally notified of his right to a hearing to contest that fee. Nor was the right to a hearing addressed in the plea form. Our court holds that Florida Rule of Criminal Procedure 3.720(d)(1) and section 938.29, Florida Statutes (2019), require notice to be provided before imposition of the statutorily mandated fee. See Vandawalker v. State, No. 2D18-4977, 2020 WL 5986000, *1 (Fla. 2d DCA Oct. 9. 2020); Jenkins v. State, 45 Fla. L. Weekly D1373, D1373 (Fla. 2d DCA June 5, 2020); Newton v. State, 262 So. 3d 849, 849-50 (Fla. 2d DCA 2018); Gedehomme v. State, 160 So. 3d 533, 534 (Fla. 2d DCA 2015); Neal v. State, 62 So. 3d 1277, 1277-78 (Fla. 2d DCA 2011).

However, the improper imposition of a public defender fee "does not constitute fundamental error" but rather is a sentencing error that should be raised in a motion to correct sentencing error filed pursuant to Florida Rule of Criminal Procedure 3.800(b)(2). Jackson v. State, 983 So. 2d 562, 574 (Fla. 2008); Maddox v. State, 760 So. 2d 89, 109 (Fla. 2000) ("We conclude that an unpreserved error in the assessment of costs[, including public defender fees,] cannot be considered a serious, patent sentencing error that should be corrected on appeal as fundamental in the absence of

proper preservation in the trial court.").[1] The preservation requirement applies regardless of whether counsel has filed a no-merit brief pursuant to Anders, thereby necessitating this court's independent review. See Gedehomme, 160 So. 3d at 534 (explaining, in a case briefed pursuant to Anders, that "[a] rule 3.800(b)(2) motion is the appropriate mechanism to seek relief from the erroneous imposition of costs" and reaching the public defender fee issue in that case because it had been preserved by the appellant's rule 3.800(b)(2) motion (citing Jackson, 983 So. 2d at 574)); cf. Swift v. State, 53 So. 3d 394, 395 (Fla. 2d DCA 2011) (reversing imposition of public defender fee in a case briefed pursuant to Anders where issue had been preserved via a rule 3.800(b) motion); Meier v. State, 912 So. 2d 1277, 1279 (Fla. 2d DCA 2005) (striking imposition of public defender fee in case briefed pursuant to Anders, noting that the appellant "preserved the[] cost issue[] for appeal by filing a motion to correct sentencing error[] under" rule 3.800(b)(2)); Ciccia v. State, 854 So. 2d 243, 243 (Fla. 4th DCA 2003) (reversing imposition of public defender fees in case briefed pursuant to Anders where issue had been "preserved for appeal by the denial of [appellant's] rule 3.800(b)(2) motion").

We note further that "indigents in their first appeal as of right should not lose their Anders rights simply because counsel are able to identify some relatively minor sentencing issues[—including the improper imposition of costs—]in 'no merit' briefs." In re Anders Briefs, 581 So. 2d 149, 152 (Fla. 1991). Indeed, this court has recognized that "[c]ost issues are properly included in an Anders brief." Meier, 912 So.

[1]Although the court in Maddox used the term "costs," one of the cases before it involved the imposition of public defender fees. 760 So. 2d at 108 n.17.

2d at 1278 n.2; see also Lambert v. State, 912 So. 2d 1275, 1276 (Fla. 2d DCA 2005) ("Cost issues are properly addressed in an Anders brief." (first citing Palen v. State, 588 So. 2d 974, 974-75 (Fla. 1991), and then citing In re Anders Brief, 581 So. 2d at 152)).

Yet, in this case, the public defender fee issue was neither preserved below via a rule 3.800(b) motion, nor was it identified as a possible error by counsel in the Anders brief. We recognize that we have discretion to address unpreserved sentencing errors in the Anders context by striking the briefs and permitting the appellant to file a rule 3.800(b)(2) motion. See Fla. R. App. P. 9.140(g)(2)(B); see also Stange v. State, No. 2D19-1613, 2020 WL 6050606, *1 (Fla. 2d DCA Oct. 14, 2020) (striking, via a published order, an Anders brief pursuant to rule 9.140(g)(2)(B) and permitting appellant to file a rule 3.800(b) motion where he was not orally advised of the right to a hearing on the public defender fee issue and where the plea form contained potentially misleading language indicating that appellant had the right to a hearing when the fees exceeded the statutory minimum, explaining that notice of the right to a hearing "is not limited to when the trial court imposes 'in excess' of the statutory minimum").

But in this case, we do not have the same misadvisement concern that was present in Stange.[2] Instead, we have the basic failure-to-advise issue, which was neither preserved in a rule 3.800(b)(2) motion, nor even identified as a possible issue in the Anders brief. Thus we conclude that the better approach is to affirm. Cf. Selwyn v.

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[2]Although Stange noted the language of the plea form and suggested it might be problematic, it relied on Newton, Jenkins, and Gedehomme, which were all based on the simple failure to advise the defendant of his or her right to contest the public defender fee. Newton, Jenkins, and Gedehomme did not address the issue of whether advisement language like that used in the plea form in Stange is misleading or constitutes an independent basis for reversal. We take no position on the merits of that issue.

State, 903 So. 2d 361, 363 (Fla. 2d DCA 2005) (affirming imposition of public defender's fee where appellant filed a rule 3.800(b) motion raising the issue but where the "motion did not fairly apprise the trial court of the grounds for his claim that procedural safeguards were not followed"); Rivera v. State, 718 So. 2d 856, 858-859 (Fla. 4th DCA 1998) (affirming imposition of public defender fee in part on the basis that appellant failed to preserve challenge to the fee by not moving to correct his sentence under rule 3.800(b)).

Finally, we note that Crowder still has an avenue to seek relief on this issue. He may raise the issue in a timely motion for postconviction relief filed pursuant to Florida Rule of Criminal Procedure 3.850. See Lindquist v. State, 155 So. 3d 1193, 1194 (Fla. 2d DCA 2014) (explaining that claim that trial court failed to advise appellant of his right to contest costs and fees may be raised in a rule 3.850 motion); Rodriguez v. State, 202 So. 3d 460, 461 n.1 (Fla. 5th DCA 2016) (explaining that appellant's challenge to trial court's failure to advise him of right to hearing to contest amount of public defender fees can be challenged under rule 3.850).

Accordingly, we affirm without prejudice to Crowder's right to raise this issue in a motion filed pursuant to rule 3.850.

BLACK and SMITH, JJ., Concur.