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IN THE FLORIDA SUPREME COURT

STATE OF FLORIDA,

Petitioner,

v.

WILLIE PEARL WHITFIELD,

Respondent.

CASE NO. 67,320

ON DISCRETIONARY REVIEW FROM THE
FIRST DISTRICT COURT OF APPEAL

RESPONDENT'S BRIEF ON THE MERITS

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RESPONDENT'S BRIEF ON THE MERITS

I PRELIMINARY STATEMENT

Respondent, WILLIE PEARL WHITFIELD, was the defendant in the trial and appellant in the district court of appeal. Respondent will be referred to in this brief as respondent or by her proper name. Petitioner, the State of Florida, was the prosecuting authority and appellee respectively in the courts below. The record on appeal consist of four volumes, consecutively numbered, and will be referred to as "R" followed by the appropriate page number in parenthesis. References to the appendix attached hereto will be designated as "A". Petitioner's brief will be referred to as "PB".

II STATEMENT OF THE CASE AND FACTS

Respondent was charged by information with the aggravated battery of Frank Ferdella with a deadly weapon, to wit: a broken bottle, and with intent tocause great bodily harm, permanent disability or permanent disfigurement with said weapon (R 6).

The evidence at trial was conflicting. Ferdella and his estranged wife, Melissa Ferdella, testifying for the state, claimed that respondent and a companion approached Frank, calling him names and spitting. Ms. Whitfield had a broken beer bottle in her hand and threatened to kill Frank. Frank was cut with the bottle when he raised his arm and attempted to leave (R 223, 225-228, 305-309). Expert medical testimony revealed the extent of Frank's injuries. He sustained a six inch laceration on the back of the arm just above the elbow; both the muscle and nerve in the arm were cut. Surgery restored the nerve, but Frank suffered permanent loss of function in the arm and hand (R 231-234, 243-250).

Respondent testified at trial that Frank was the aggressor. He came toward her kicking and spitting. He kicked her in the arm and she picked up the beer bottle from the ground to defend herself. When Ferdella kicked Ms. Whitfield in the face, respondent put her hand up to protect her face and Ferdella was cut. Ms. Whitfield said she did not remember swinging the bottle (R 350-355).

Other evidence revealed that Frank Ferdella was trained in karate and the marshal arts and had a bad reputation for violence (R 235-237, 399-401). An expert in the field of marshal

arts explained the powerfulness of a karate kick and demonstrated a round-house kick, the kind of kick Ms. Whitfield described Frank Ferdella using the night of the incident. The expert witness opined that if the target of that kind of kick was holding a bottle and attempting to fend off the kick, it was possible that the aggressor's momentum could carry him into the bottle (R 411-416).

Based on this evidence, the jury found respondent guilty of aggravated assault (R 68, 437).

The prosecutor prepared the guidelines scoresheet based on the charge of aggravated battery and noted before sentence was imposed that a new scoresheet would have to be prepared "under the verdict as rendered" (R 438). It appears from the record that the prosecutor tendered to the trial court the inaccurate scoresheet. The trial court noted that the score for a third degree felony, with 16 points under prior record and 36 points for severe victim injury, totaled 125 points, placing respondent in the category of 12 to 30 months or community control. When the trial court inquired whether the point split was inaccurate, defense counsel responded:

> No, Your Honor. I think that is what I have or what - - if I may just verify. I did not have a scoresheet.

(R 439).

The trial adjudicated respondent guilty and sentenced her to a term of 30 months incarceration (R 69-72), stating:

> I can only assume that the jury, for some reason, wish to grant you some benefit in their verdict that wasn't indicated in the evidence, because I don't see how they could have come back with the verdict they did, had they thought you innocent or had they thought you guilty. This verdict says there was no serious

> injury done to the young man and that, perhaps, is the only thing that was not in serious question in this trial. For that reason, I can only assume that the jury wish to give you a partial pardon for what you did. Frankly, I don't believe your testimony. I think you intentionally perjured yourself and did so to great length and, frankly, I'm very tempted to go beyond the sentencing guidelines and sentence you to five years for that reason. However, to substitute my opinion on your veracity for the jury's finding would be something that would penalize someone in the future who may give testimony, though true, it is hard to believe and that is the only reason why I won't go beyond the guidelines.

(R 442).

On appeal to the First District Court of Appeal, respondent urged that the trial court erred in assessing 36 points for victim injury on the sentencing guidelines scoresheet, since victim injury is not an element of aggravated assault. Petitioner conceded this point on appeal, but claimed the scoring error was not subject to appellate review in the absence of a contemporaneous objection. The district court reversed respondent's sentence, finding the inclusion of points for victim injury error, regardless of any injury actually sustained by the victim. In rejecting the state's argument that the issue was not properly preserved for appeal, the court stated:

> The language of the supreme court in State v. Rhoden, 448 So.2d 1013 (Fla. 1984), has been construed by this Court, as well as by other district courts, as meaning that a defendant's failure to contemporaneously object upon imposition of a sentence does not preclude appellate review of sentencing errors. Mitchell v. State, 458 So.2d 10 (Fla. 1st DCA 1984); Myrick v. State, 461 So.2d 1359 (Fla. 2d DCA 1984); Ramsey v. State, 462 So.2d 875 (Fla. 2d DCA 1985); Tucker v. State, 464 So.2d 211 (Fla. 3d DCA 1985).

(A 2). The court then certified the following question as one of great public importance:

> IS THE DECISION IN STATE v. RHODEN, 448 So.2d 1013 (Fla. 1984) TO BE LIMITED TO THOSE SITUATIONS IN WHICH A STATUTE PLACES A MANDATORY DUTY UPON THE TRIAL COURT TO MAKE SPECIFIC FINDINGS OR SHOULD RHODEN BE CONSTRUED TO MEAN THAT A DEFENDANT NEED NOT CONTEMPORANEOUSLY OBJECT TO ANY ALLEGED SENTENCING ERROR IN ORDER TO PRESERVE THAT ISSUE FOR APPEAL?

III SUMMARY OF ARGUMENT

This appeal does not concern the ethics of trial counsel. Rather, this appeal concerns the necessity of an objection to scoresheet errors which are contained in the sentencing guidelines scoresheet. Respondent will argue in this brief that there is no requirement that trial counsel make a contemporaneous objection to scoresheet errors, since guidelines departures are reviewable as a matter of right and any error can be corrected by a simple remand to the sentencing judge. A defendant who is sentenced under an incorrect scoresheet receives an illegal sentence, whether or not the court departs from the erroneous recommended sentence, which is cognizable on appeal. Such sentencing errors cannot be harmless where the trial court does not have the benefit of an accurate scoresheet and does not state clear and convincing reasons in writing for a departure.

IV ARGUMENT

ISSUE I

WHETHER THE DECISION IN STATE v. RHODEN, 448 So.2d 1013 (Fla. 1984) IS LIMITED TO THOSE SITUATIONS IN WHICH A STATUTE PLACES MANDATORY DUTY UPON THE TRIAL COURT TO MAKE SPECIFIC FINDINGS OR WHETHER RHODEN SHOULD BE CONSTRUED TO MEAN THAT A DEFENDANT NEED NOT CONTEMPORANEOUSLY OBJECT TO ANY ALLEGED SENTENCING ERROR IN ORDER TO PRESERVE THAT ISSUE FOR APPEAL.

Petitioner's initial rhetorical question, as well as much of its argument, suggests that the failure to make a contemporaneous objection is a deliberate act to sandbag the trial court in the hopes of gaining reversal on appeal. The instant issue does not involve trial tactics, but a legal error in calculation of a scoresheet, which was presumably was overlooked in the immediacy of sentencing and in light of the jury's verdict on a lesser included offense. The sentencing hearing below proceeded promptly after the verdict was rendered and neither defense counsel nor the state attorney had time to reflect on the point assessment once the jury found respondent guilty of aggravated assault. Indeed, trial counsel candidly admitted to the trial judge, "I did not have the scoresheet" (R 439). Defense counsel's ethics and tactics should not be in question here and respondent urges this Court to focus only on the affects of the failure to object, for whatever reason, to a scoring error.

In its brief, petitioner advances three arguments for requiring a specific contemporaneous objection in a sentencing

context. Respondent will address each argument individually to demonstrate why none of these rationales pertain to the instant situation.

Petitioner first asserts that the contemporaneous objection rule insures that the trial judge will have an opportunity to correct a possibly erroneous ruling on the spot or to explain its reasons for standing firm, thus permitting full development of the record for appellate review (PB 12). There is no contention here that the record is not fully developed to allow complete and effective appellate review. The record clearly reflects the trial court's reasons for assessing the points for victim injury and, moreover, an objection would have been futile. As petitioner noted in its statement of the case and facts (PB 4), respondent filed a motion in the trial court to correct her illegal sentence [on the same grounds successfully advanced on appeal], which motion the trial court summarily denied without a hearing (R 85-86, 90). [1] The contention that a contemporaneous objection is necessary to devolop the record and encourage the trial court to correct his ruling or amplify his reasons for refusing to do so is simply unavailing here.

Petitioner's second argument erroneously assumes that had respondent timely objected to the scoring error, the objection

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1/ Respondent would further note that the motion was filed simultaneously with the filing of the notice of appeal. Respondent's motion to correct the illegal sentence would not have tolled the time for filing her notice of appeal. Joseph v. State, 437 So.2d 245 (Fla. 5th DCA 1983).

would obviate the necessity of an appeal and subsequent discretionary review by this Court, thus conserving judicial resources. This assumes that the trial court would have corrected the error and eliminated the points for victim injury upon a timely objection, an assumption clearly refuted by the trial judge's oral pronouncements at the time of sentencing and denial of respondent's motion to correct the illegal sentence. It further assumes that the court would not have departed, but would have imposed a sentence within the presumptive guidelines range of any non-state prison sanction, an assumption wholly inconsistent with petitioner's argument in Issue II of its brief.

The interest of judicial economy and finality of judgments are certainly worthy considerations, but they should not operate to preclude relief from an illegal sentence. Had the direct appeal been precluded by respondent's failure to object to the scoring error, surely an appeal could have been taken from the denial of the motion to correct an illegal sentence, Fla.R.App. P. 9.140(b)(1)(D), or from denial of a motion for post conviction relief. See Chaplin v. State, Case No. BD-30 (Fla. 1st DCA August 13, 1985). In either event, the result would be a simple remand to the sentencing judge, which neither "casts a cloud of tentativeness over the criminal justice system," Witt v. State, 387 So.2d 922, 928 (Fla. 1980), nor unduly waste the court's time and limited resources.

Petitioner's third contention, that "the contemporaneous objection rule removes the incentive for defense attorneys to permit erroneous rulings in silence as insurance policies against an untoward outcome" (PB 14), imputes bad faith on the part of defense lawyers and is illogical. There is no rationale motive

for failing to object to a scoring error in hopes of gaining reversal on appeal, or plausible reasons why trial counsel would sandbag a scoring error. This is not a "Hobson's choice of ethically objecting to a judicial error and thus injuring his client's chances of reversal upon appeal . . . or of unethically remaining silent and thus enhancing his client's chances of reversal" (PB 15). If the error is noticed and an objection made, the erroneous points can be eliminated and a proper presumptive sentence calculated. If the error goes unnoticed and no objection is made, the only possible benefit on appeal would be a reversal and remand for proper calculation of the scoresheet. Nothing more can be gained by failing to object. However, if an objection is made and denied, there will still be an appeal. Whether an objection was made at trial and denied or whether trial counsel fails to object and appeals, again the outcome will be the same - - a remand for proper calculation of the scoresheet.

The suggestion that the application of State v. Rhoden in this context has the "affect of encouraging other counsel to remain silent as to scoring errors, lest the judge merely exercises his discretion to depart should they speak up" (PB 15) is sheer conjecture. With the multitude of guidelines appeals involving scoresheet errors, it cannot be assumed that such errors are intentionally overlooked at the cost of a defendant receiving a higher guidelines score; nor can it be assumed that a sentencing judge would exercise his discretion to depart when the correction of a scoresheet error results in the defendant receiving a lower presumptive sentence.

None of the arguments advanced by petitioner compel the result urged by the state. No one can seriously dispute that a scoring error is a sentencing error which results in an illegal sentence being imposed, whether or not the court departs from the erroneous recommended sentence. Vileta v. State, 454 So.2d 792 (Fla. 2d DCA 1984). As in State v. Rhoden, supra, where a defendant is not permitted to attack an incorrect score-sheet, due to his trial attorney's negligence, if the state's argument is followed to its logical end, a defendant could never attack a sentence which is patently illegal.

Numerous courts have addressed or found errors in score-sheets; in a majority of these cases, the decision is silent as to whether an objection was made: Bodine v. State, 452 So.2d 957 (Fla. 5th DCA 1984)(error in score by including prior conviction); Williams v. State, 454 So.2d 790 (Fla. 5th DCA 1984) (no error by including points for victim injury); Gibson v. State, 455 So.2d 1349 (Fla. 4th DCA 1984)(error in scoring victim injury); Toney v. State, 456 So.2d 559 (Fla. 2d DCA 1984)(error in scoring victim injury); Repetti v. State, 456 So.2d 1299 (Fla. 2d DCA 1984)(error in scoring additional offense); Brown v. State, 458 So.2d 313 (Fla. 5th DCA 1984)(error in reclassifying primary offense); Foreman v. State, 458 So.2d 1213 (Fla. 2d DCA 1984)(error in degree of primary offense); Williams v. State, 460 So.2d 478 (Fla. 5th DCA 1984)(no error to score municipal ordinance violation as misdemeanor); Hendry v. State, 460 So.2d 589 (Fla. 2d DCA 1984)(error to score injury although defendant had negogitated plea); Burke v. State, 460 So.2d 1022 (Fla. 2d DCA 1984)(error to score legal constraint on violation of probation); Yohn v. State, 461 So.2d 263 (Fla. 2d DCA 1984)

(unstated error in scoresheet conceded by state on appeal); Dominguez v. State, 461 So.2d 277 (Fla. 5th DCA 1985)(error to reclassify crimes for habitual offender); Mattheson v. State, 463 So.2d 48 (Fla. 2d DCA 1985)(errors in scoring prior convictions); Pugh v. State, 463 So.2d 582 (Fla. 1st DCA 1985)(errors in scoring prior convictions); Arquilla v. State, 464 So.2d 76 (Fla. 4th DCA 1985)(error to score North Carolina trespass as felony); Gonzales v. State, 465 So.2d 613 (Fla. 3d DCA 1985) (lesser offense improperly scored as additional offense); Fenton v. State, 466 So.2d 15 (Fla. 2d DCA 1985)(state conceded on appeal primary offense improperly scored). It is hard to believe that a proper objection was made in every one of these cases.

Several courts have further held that a defendant cannot be sentenced where judge did not have a scoresheet at all. Again the opinions are silent as to whether an objection was made. Gage v. State, 461 So.2d 202 (Fla. 1st DCA 1984); Doby v. State, 461 So.2d 1360 (Fla. 2d DCA 1984); Rasul v. State, 465 So.2d 535 (Fla. 2d DCA 1985); Newsome v. State, 466 So.2d 411 (Fla. 2d DCA 1985). In Vileta v. State, supra, it was error to sentence for two crimes based upon two scoresheets; the opinion does not reveal whether there was an objection.

On the other hand, the Second District Court of Appeal has expressly held that it is error to sentence without a scoresheet, even without an objection. Myrick v. State, 461 So.2d 1359 (Fla. 2d DCA 1984). The court specifically rejected the state's arguments that the error had not been preserved for review, citing State v. Rhoden, supra.

Numerous cases recognize that an incorrectly calculated minimum-maximum sentence range under the guidelines constitutes an erroneous base upon which the trial court exercises his sentencing discretion, and requires reversal for sentencing, even in the absence of a contemporaneous objection. Higgs v. State, 10 FLW 1369 (Fla. 3d DCA June 4, 1985); Tucker v. State, 464 So.2d 211 (Fla. 3d DCA 1985). In Tucker, the court specifically held that scoresheet errors can be attacked for the first time on appeal, citing State v. Rhoden. In Parker v. State, Case No. 84-2268 (Fla. 2d DCA July 31, 1985), the court reversed for improper inclusion of points for victim injury in the scoresheet, although no objection was made in the trial court. The court held:

> The First District had occasion to consider the erroneous addition of victim injury points to a guidelines scoresheet for aggravated assault in Whitfield v. State, No. BC-2 (Fla. 1st DCA June 25, 1985) [10 FLW 1564]. There, the court declined to follow the contemporenous objection rule. We agree with the Whitfield court. Rule 3.701(d)(7) places a mandatory duty upon the trial court. Hence, the inclusion of victim injury if not a factor of an offense at conviction is an error of law. This is the type of sentencing error which does not require a contemporaneous objection in the trial court. See Rhoden, supra.

Slip opinion at 4.

The First District Court of Appeal, again citing State v. Rhoden, and other courts have held that there is no need to object to a sentence when the judge departs from the recommended guidelines sentence. Key v. State, 452 So.2d 1147 (Fla. 5th DCA 1984); Mitchell v. State, 458 So.2d 10 (Fla. 1st DCA 1984); Mincey v. State, 460 So.2d 396 (Fla. 1st DCA 1984);

Ramsey v. State, 462 So.2d 875 (Fla. 2d DCA 1985); Joyce v. State, 10 FLW 876 (Fla. 5th DCA 1985). The distinction between being sentenced upon an incorrect scoresheet and being sentenced to a departure without sufficient reasons is a distinction without a difference. The resulting sentences are equally illegal, and should be attacked as such for the first time on appeal. See also the number of cases from the First District Court of Appeal, in which the court has strictly construed the requirement that written reasons for departure be given. The court routinely reverses on this issue even without an objection. See, e.g., Jackson v. State, 454 So.2d 691 (Fla. 1st DCA 1984); Oden v. State, 463 So.2d 313 (Fla. 1st DCA 1984); Harris v. State, 465 So.2d 545 (Fla. 1st DCA 1985). In all of these situations, the failure of the sentencing judge to comply with the various requirements of the guidelines rule renders the resulting sentence illegal, and subject to attack for the first time on appeal.

Sections 921.001(5) and 924.06(1)(e), Florida Statutes (1983), expressly provide for appellate review of sentences without the range recommended by the sentencing guidelines. Section 921.001(5) expressly provides:

> Sentences imposed by trial court judges must be in all cases within any relevant minimum and maximum sentence limitations provided by statute and must conform to all other statutory provisions. The failure of a trial court to impose a sentence within the sentencing guidelines shall be subject to appellate review pursuant to Chapter 924.

In addition, Fla.R.App.P. 3.701(d)(1) states that the sentencing judge shall approve all scoresheets. Ultimate responsibility for assuring that scoresheets are accurately prepared rests with

the sentencing court. See Committee Note, Rule 3.701(d)(1). The duty to sentence on an accurately prepared scoresheet is not unlike the requirement to make specific findings when sentencing a juvenile as an adult, to support a habitual offender sentence, or to retain jurisdiction. See State v. Rhoden, supra; Walker v. State, 462 So.2d 452 (Fla. 1985), and State v. Snow, 462 So.2d 455 (Fla. 1985).

While the juvenile statute is totally different from the sentencing guidelines statute, this Court's rationale in State v. Rhoden equally applies to the nonnecessity to object to a guidelines sentence based upon an erroneous scoresheet:

> The contemporaneous objection rule, which the state seeks to apply here to prevent respondent from seeking review of his sentence, was fashioned primarily for use in trial proceedings. The rule is intended to give trial judges an opportunity to address objections made by counsel in trial proceedings and correct errors. . . . The rule prohibits trial counsel from deliberately allowing known errors to go uncorrected as a defense tactic and as a hedge to provide a defendant with a second trial if the first trial decision is adverse to the defendant. The primary purpose of the contemporaneous objection rule is to insure that objections are freshest and not years later in a subsequent trial or post conviction relief proceeding. The purpose for the contemporaneous objection rule is not present in the sentencing process because any error can be corrected by a simple remand to the sentencing judge. If the state's argument is followed to its logical end, a defendant could be sentenced to a term of years longer than the legislature mandated and, if no objection was made at the time of sentencing, the defendant could not appeal the illegal sentence.

State v. Rhoden, 448 So.2d at 1016.

When a scoring error leads to a higher guidelines range, the resulting sentence is longer than that mandated by the sen-

tencing guidelines. Just as in Rhoden, the error can be corrected by a simple remand to the sentencing judge. This Court should soundly reject the state's procedural arguments and affirm the district court's holding below that no specific contemporaneous objection to a scoring error is required to preserve that error for appellate review.

ISSUE II

THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL SHOULD BE AFFIRMED AND THE CAUSE REMANDED TO THE TRIAL COURT FOR RESENTENCING.

Petitioner urges that regardless of how this Court answers the certified question, respondent's sentence should be affirmed either because sentencing guidelines scoring errors are not reviewable or because this scoring error was harmless. Both arguments are without merit.

Petitioner obviously misconceives the import of a scoring error by urging that the statutory right to appeal a departure from the maximum recommended sentence does not authorize appellate review of a scoring error committed in computing the maximum recommended sentence. When an error in scoring occurs, resulting in additional points which increase the presumptive sentence, the sentence imposed must be treated as an aggravated sentence and the statutory provisions provide for appellate review without reservation. There is no logical distinction between a sentencing error outsided the guidelines range and a scoring error which results in the wrong presumptive sentence. Guidelines sentencing is arrived at through a scoring process; if the scoring is inaccurate, the resulting sentence is no less illegal than had the trial judge departed from the recommended sentence without providing clear and convincing reasons. To prevent appellate review under these circumstances, where the sentencing error is patent and conceded by the state, is inconscionable.

In urging that a remand for resentencing is a useless act, petitioner takes the unwarranted liberty of assuming that the

trial judge would have departed and inevitably imposed a 30 month sentence. Petitioner recognizes that reversible error cannot be predicated upon conjecture (PB 22 n.4), yet engages in sheer speculation as to what the court would have found in aggravation. None of the purported reasons were propounded by the court below, nor can petitioner presume that a departure based on such factors, under the facts of this case, would be "readily-sustainable" (PB 22).

The basic problem with petitioner's harmless error argument is that the trial judge can depart from the guidelines only in the exercise of its judicial discretion. The state, on appeal, cannot be permitted to exercise the discretion of the trial court by conjuring up reasons to rationalize the sentence. It would be an abuse of discretion to allow a departure on appeal when the trial court did not have the benefit of an accurate scoresheet and did not provide clear and convincng reasons for departure in writing.

To suggest that remand is a useless act is to relegate Fla.R.Crim.P. 3.701 to a meaningless mechanism which can be manipulated to reach a desired sentence. Respondent submits that neither this scoring error nor any scoring error which results in an incorrect presumptive sentence can ever be deemed harmless. The scoring error below should not go uncorrected and the cause must be remanded for resentencing in accordance with the district court's opinion.

V CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, respondent respectfully requests this Court affirm the decision of the First District Court of Appeal and answer the certified question by holding that the contemporaneous objection rule does not apply to sentencing errors.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above Respondent's Brief on the Merits has been furnished by hand to Assistant Attorney General John W. Tiedemann, The Capitol, Tallahassee, Florida 32301; and by U.S. Mail to respondent, Willie Pearl Whitfield, #AF03961, Post Office Box 147, Lowell, Florida 32663 on this 15th day of August, 1985.

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