IN THE FLORIDA SUPREME COURT

ROOSEVELT DAILEY,

Petitioner,

v.

CASE NO. 67,381

STATE OF FLORIDA,

Respondent.

ON DISCRETIONARY REVIEW FROM THE
FIRST DISTRICT COURT OF APPEAL

BRIEF OF PETITIONER ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS
(CONT'D)

TABLE OF CITATIONS
(CONT'D)

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Petitioner,	:	
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BRIEF OF PETITIONER ON THE MERITS

I PRELIMINARY STATEMENT

Petitioner was the appellant in the lower tribunal and the defendant in the trial court. The parties will be referred to as they appear before this Court. A one volume record on appeal and one volume transcript are sequentially numbered, and will be referred to as "R" followed by the appropriate page number in parentheses. Attached hereto as Appendix A is a copy of the District Court's opinion dated May 1, 1985. Appendix B contains a copy of the order of June 27, 1985, withdrawing the prior opinion, and a copy of the revised opinion and denial of rehearing.

II STATEMENT OF THE CASE AND FACTS

By information filed May 18, 1981, petitioner was charged with attempted second degree murder with a knife (R 28). On July 27, 1981, having entered a plea of guilty to aggravated battery as a lesser offense, petitioner was placed on probation for five years, on condition that he serve one year in the county jail, and make restitution for medical expenses (R 29). On November 15, 1983, and December 8, 1983, the probation order was modified (R 35-36).

On February 20, 1984, an affidavit for violation of probation was filed (R 33). On April 10, 1984, petitioner appeared with counsel. The court found petitioner guilty of a violation of his probation orally (R 18) and by written order (R 37). The court requested a sentencing guidelines scoresheet and recessed for that purpose (R 18-19). The prosecutor later presented the scoresheet to the court, and related petitioner's prior record. After determining that the instant offense had been counted twice in the scoresheet, the prosecutor determined that 207 points were accurate, which called for a recommended sentence of 6 years (R 19-24). The court noted its intention to deviate from the guidelines and imposed a 12 year state prison sentence (R 25). The court declined to give petitioner credit for time served for the one year he had served in jail as a condition of probation (R 26).

On April 25, 1984, a timely notice of appeal was filed (R 45). On appeal, petitioner argued the scoresheet was incorrect because 24 points had been given for moderate victim

injury, and because 36 points were added for legal restraint. The First District, in an opinion dated May 1, 1985, declined to reach these errors because petitioner's counsel had not objected to them (Appendix A). Upon rehearing, the court withdrew its May 1 opinion and issued a new opinion and a contemporaneous denial of rehearing, but certified the question to be of great public importance (Appendix B). The court properly ordered a correction to the sentence to grant credit for time served and a correction to the revocation order to conform it to the testimony. These matters are not before this Court for review. On July 18, 1985 a timely notice of discretionary review was filed.

III SUMMARY OF ARGUMENT

Petitioner will argue in this brief that there is no requirement that trial counsel make an objection to errors which are contained in the sentencing guidelines scoresheet. Since guidelines departures are reviewable as a matter of right, the appellate court has an obligation to reach scoresheet errors which are discovered for the first time by appellate counsel. A number of cases have addressed scoresheet errors on appeal. Since the appellate court can normally resolve scoresheet errors from the face of the record, there is simply no need for a contemporaneous objection at the sentencing hearing.

IV ARGUMENT

ISSUE PRESENTED

THE CONTEMPORANEOUS OBJECTION RULE DOES NOT APPLY TO SCORESHEET ERRORS.

In the lower tribunal, petitioner argued that 36 points could not be included on the violation of probation scoresheet for prior restriant, since petitioner was not on probation at the time of the 1981 aggravated battery, on authority of Carter v. State, 452 So.2d 953 (Fla. 5th DCA 1984); Burke v. State, 460 So.2d 1022 (Fla. 2d DCA 1984); and Daniels v. State, 462 So.2d 51 (Fla. 3d DCA 1984). Petitioner also argued that 24 points for victim injury were improper since that element was not proven by the state at sentencing. There is absolutely no evidence in this record to support a finding that there was moderate, as opposed to slight, victim injury. In any aggravated battery with a knife, the offense may be committed in two alternative ways, either by causing great bodily harm, or by committing a battery with a deadly weapon. Section 784.045, Florida Statutes; Short v. State, 423 So.2d 562 (Fla. 2d DCA 1982); and Lee v. State, 444 So.2d 580 (Fla. 5th DCA 1984). Hypothetically, if one goes to a barber shop and the barber becomes outraged at the size of his anticipated tip, he may take his straight razor and nip the customer on the face while trimming his sideburns; or in the alternative, he may slice the customer's throat. Under either set of hypothetical facts, an aggravated battery has occurred, but the degree of victim injury

is vastly different. There is nothing in this record to show which type of aggravated battery occurred here. In any event, to impose a sentence without sufficient evidence to support findings of fact is a violation of due process. Specht v. Patterson, 386 U.S. 605 (1967).

This Court should reaffirm its view that State v. Rhoden, 448 So.2d 1013 (Fla. 1984), Walker v. State, 462 So.2d 452 (Fla. 1985) and State v. Snow, 462 So.2d 455 (Fla. 1985), affirmed after remand, 464 So.2d 1313 (Fla. 1st DCA 1985) do not require an objection to be made at sentencing, because the First District has read these cases too narrowly, as a brief review of these cases will show.

In Walker v. State, 442 So.2d 977 (Fla. 1st DCA 1983), the First District had held that the defendant must object to the failure of the court to make findings in support of a habitual offender sentence. Shortly thereafter, this Court decided State v. Rhoden, supra, and held that an objection is not necessary where a sentencing judge fails to justify sentencing a juvenile as an adult. While the juvenile statute is totally different from the sentencing guidelines statute, this Court's reasoning applies to the nonnecessity to object to scoresheet errors:

> 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 error to go uncorrected as a defense tactic and as a hedge to provide a defendant a second trial if the first trial decision is adverse to the defendant. The primary purpose of the contemporaneous objection

> rule is to ensure that objections are made when the recollections of witnesses are freshest and not years later in a subsequent trial or a 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 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 greater 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; emphasis added.

Shortly thereafter, citing Rhoden, the First District felt which way the wind was blowing, receded from Walker and held in Weston v. State, 452 So.2d 95 (Fla. 1st DCA 1984) that the lack of an objection at sentencing did not preclude attack on appeal where the sentencing judge did not justify a habitual offender sentence.

Finally, this Court in Walker v. State, 462 So.2d 452 (Fla. 1985) quashed the First District's opinion and approved Weston, all on authority of Rhoden. Likewise, on the same date, this Court extended Rhoden to yet another sentencing scheme, and held that it is not necessary to object to the failure of the sentencing court to justify retaining jurisdiction over parole. State v. Snow, 462 So.2d 455 (Fla. 1985), quashing Snow v. State, 443 So.2d 1074 (Fla. 1st DCA 1984).

The common theme of Walker, Rhoden, and Snow, in addition to the sound policy reasons from Rhoden, is that there is no need to object where the sentencing court fails to perform a statutory duty. Admittedly, there is nothing expressed in Section 921.001, Florida Statutes, which requires the scoresheet to be accurate. However, Fla.R.Crim.P. 3.701(d)(1) - (10) presents

an elaborate system of directions for filling out a scoresheet. Each statute and rule assume that a scoresheet will be prepared correctly. The sentencing judge also has a duty under this rule, much like he does in imposing adult sanctions upon a juvenile, or in retaining jurisdiction, or in finding a defendant to be a habitual offender. That duty is to make sure the scoresheet is correct:

> Ultimate responsibility for assuring that scoresheets are accurately prepared rests with the sentencing court.

Committee Note to Fla.R.Crim.P. 3.701(d)(1). This burden is no different from the burden placed on the trial judge by the three other sentencing statutes.

A defendant who is sentenced under an incorrect scoresheet receives an illegal sentence, whether or not the court departs from the erroneous recommended sentence. Vileta v. State, 454 So.2d 792 (Fla. 2d DCA 1984). As in Rhoden, where a defendant is not permitted to attack an incorrect scoresheet, 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.

A large number of decisions have addressed or found errors in the scoresheets. In a majority of these cases, the opinion 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 negogiated 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 483 (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); Mattheson v. State, 10 FLW 361 (Fla. 2d DCA February 8, 1985)(wrong scoresheet used); Harper v. State, 10 FLW 492 (Fla. 2d DCA February 22, 1985)(wrong scoresheet used); Gonzales v. State, 465 So.2d 613 (Fla. 3d DCA 1985) (lesser offense improperly scored as additional offense); and Fenton v. State, 466 So.2d 15 (Fla. 2d DCA 1985)(state conceded on appeal primary offense improperly scored). The undersigned finds it hard to believe that a proper objection was made in every one of these cases.

On the other hand, the following opinions reflect that an objection was made to some facet of the scoresheet: Moore v. State,

455 So.2d 535 (Fla. 1st DCA 1984)(defense attorney objected to prior convictions); Motyka v. State, 427 So.2d 114 (Fla. 1st DCA 1984)(defense attorney objected to score for victim injury); Reid v. State, 460 So.2d 921 (Fla. 2d DCA 1984)(defense attorney argued that guidelines applied to resentencing); Daniels v. State, 462 So.2d 51 (Fla. 3d DCA 1984)(defendant plead nolo to violation of probation and preserved question of calculation of points); and Davis v. State, 463 So.2d 398 (Fla. 1st DCA 1985) (defense attorney objected to unverified prior conviction).

Several courts have held that a defendant cannot be sentenced where the 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); and Newsome v. State, 466 So.2d 411 (Fla. 2d DCA 1985). Likewise, it was error to sentence for two crimes based upon two scoresheets in Vileta v. State, supra; the opinion does not reveal whether there was an objection.

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

Petitioner submits that being sentenced pursuant to an incorrect scoresheet is the same as being sentenced without a scoresheet at all, since the purpose behind the judge having a scoresheet before him at the time of sentencing is for him to know what the presumptive sentence and whether to depart therefrom.

The distinction between having no scoresheet and having an incorrect scoresheet is a distinction without a difference, because the resulting sentences in both instances are illegal.

The First District, 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), review denied 459 So.2d 1041 (Fla. 1984); Mitchell v. State, 458 So.2d 10 (Fla. 1st DCA 1984); Mincey v. State, 460 So.2d 396 (Fla. 1st DCA 1984); and Ramsey v. State, 462 So.2d 875 (Fla. 2d DCA 1985). Again, 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.

Likewise, it has been held that it is fundamental error to deny the defendant the opportunity to elect a guidelines sentence if he is eligible for one. Boyett v. State, 452 So.2d 958 (Fla. 2d DCA 1984), approved, 467 So.2d 997 (Fla. 1985); Perry v. State, 457 So.2d 543 (Fla. 4th DCA 1984); and Sias v. State, 464 So.2d 1277 (Fla. 3d DCA 1985)(citing State v. Rhoden). It is also fundamental error to impose a guidelines sentence for a capital crime. Brosz v. State, 466 So.2d 256 (Fla. 5th DCA 1985).

Likewise, if a defendant receives a guidelines sentence for a pre-October 1, 1983, crime, and does not affirmatively elect to be sentenced under the guidelines, the appellate courts will reach the issue on appeal and hold that the defenant received a non-guidelines sentence. See, e.g., Harrington v. State,

455 So.2d 1317 (Fla. 2d DCA 1984); Randolph v. State, 458 So.2d 64 (Fla. 1st DCA 1984); and Patterson v. State, 462 So.2d 33 (Fla. 1st DCA 1984). By their very nature, "silent election" cases contain no contemporaneous objection by the trial attorney. See also the number of cases from the First District, in which the First District has strictly construed the requirement that written reasons for departure be given. The First District routinely reverses on this issue even without 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); and 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.

In Tucker v. State, 464 So.2d 211 (Fla. 3d DCA 1985) the court specifically held that scoresheet errors can be attacked for the first time on appeal. In that case the defendant argued that his scoresheet was incorrect due to an error in arithmetic. The court held:

> We find that although no objection was made at the time of sentencing, this error as to arithematic miscalculation may be raised for the first time on appeal, [citing State v. Rhoden, supra; Mitchell v. State, supra; and Brumley v. State, 455 So.2d 1096 (Fla. 5th DCA 1984)] and that considering the admitted erroneous calculation, the sentence be and the same is hereby vacated and set aside and the matter is returned to the trial court for resentencing after a new computation in accordance with the sentencing guidelines statute, Section 921.001(5), Florida Statute (1983), and the applicable authority.

Id. at 212. Because an error in arithmetic leads to the same

incorrect scoresheet as an error in scoring legal restraint or victim injury, Tucker must be adopted by this Court as the rule of law in the instant case.

In summary, then, the First District has read this Court's rejection of the contemporaneous objection rule in sentencing cases too narrowly. Since the framers of the guidelines intended that correct scoresheets be used, as a basis for a guidelines sentence or for a departure sentence, scoresheet errors may be raised for the first time on direct appeal. The appellate court may correct the error if it is obvious from the record. If it is not obvious from the record, a simple remand to the trial court should be ordered. There is no reason to require a contemporaneous objection to scoresheet errors.

V CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, petitioner requests that this Court quash the opinion of the First District and remand to that court with directions that the First District consider these scoresheet errors.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above Brief of Petitioner on the Merits has been furnished by hand to Assistant Attorney General Thomas Bateman, The Capitol, Tallahassee, Florida 32301; and by U.S. Mail to petitioner, Roosevelt Dailey, #044217, Okaloosa Correctional Institution, Post Office Box 578, Crestview, Florida 32536 on this 1 day of August, 1985.

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