

IN THE FLORIDA SUPREME COURT

ROOSEVELT DAILEY,

Petitioner,

v.

CASE NO. 67,381

STATE OF FLORIDA,

Respondent.

FILED
 SID J. WHITE
 AUG 22 1985
 CLERK, SUPREME COURT
 By [Signature]
 Chief Deputy Clerk

ON DISCRETIONARY REVIEW FROM THE
FIRST DISTRICT COURT OF APPEAL

REPLY BRIEF OF PETITIONER

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II 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. Petitioner will argue again 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.

III ARGUMENT

ISSUE I

THE DECISION IN STATE v. RHODEN, 448 So.2d 1013 (Fla. 1984) IS NOT LIMITED TO THOSE SITUATIONS IN WHICH A STATUTE PLACES MANDATORY DUTY UPON THE TRIAL COURT TO MAKE SPECIFIC FINDINGS AND 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.

Respondent's initial rhetorical question (RB at 7) 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 presumably was overlooked in the immediacy of sentencing. Defense counsel's ethics and tactics should not be in question here and Petitioner urges this Court to focus only on the affects of the failure to object, for whatever reason, to a scoring error.

In its brief Respondent advances three arguments for requiring a specific contemporaneous objection in a sentencing context. Petitioner will address each argument individually to demonstrate why none of these rationales pertain to the instant situation.

Respondent 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 (RB at 10). 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 improperly assessing the points for victim injury and legal restraint; moreover, an objection would have been futile. The contention that a contemporaneous objection is necessary to develop the record and encourage the trial court to correct his ruling or amplify his reasons for refusing to do so is simply unavailing here.

Respondent's second argument erroneously assumes that had Petitioner timely objected to the scoring error, the objection would obviate the necessity of an appeal and subsequent discretionary review by this Court, thus conserving judicial resources (RB at 12). This assumes that the trial court would have corrected the error and eliminated the points for victim injury and legal constraint upon a timely objection. It further assumes that the court would not have departed, but would have imposed a sentence within the presumptive guidelines range based on 147 points (207 points minus 36 minus 24), an assumption wholly inconsistent with respondent'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 petitioner'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, 1983). 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.

Respondent'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" (RB at 13), imputes bad faith on the part of defense lawyers and is illogical. There is no rational 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" (RB at 14). 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, except the hapless client would serve more prison time. 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.

With the multitude of guidelines appeals involving scoresheet errors, it cannot be assumed that such errors are inten-

tionally 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 respondent 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 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.

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 hold 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 REVERSED
AND THE CAUSE REMANDED TO THE TRIAL
COURT FOR RESENTENCING.

Respondent urges that regardless of how this Court answers the certified question, Petitioner's sentence should be affirmed either because sentencing guidelines scoring errors are not reviewable or because this scoring error was harmless (RB at 22-26). Both arguments are without merit.

Respondent 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 outside 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, Respondent takes the unwarranted liberty of assuming that the

trial judge would have departed and inevitably imposed a 12 year sentence.

The basic problem with Respondent'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.

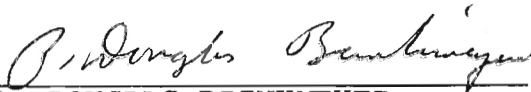
To suggest that remand is a useless act is to relegate Fla.R.Crim.P. 3.701 to a meaningless mechanism which can be manipulated to reach a desired sentence. Here the judge doubled what he thought was the recommended sentence. The correct point total of 147 leads to a 12-30 month sentence. It is ridiculous to assume that the judge would use a 12 times departure rate and impose a 12 year sentence. Petitioner 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.

IV CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, as well as that presented in the initial brief, petitioner requests this Court quash the decision of the First District and remand with directions that the scoresheet errors be addressed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above Reply Brief of Petitioner has been furnished by hand to Assistant Attorney General John Tiedemann, The Capitol, Tallahassee, Florida 32301; and by U.S. Mail to petitioner, Roosevelt Dailey, #044217, Post Office Box 578, Crestview, Florida 32536 on this 22nd day of August, 1985.


P. DOUGLAS BRINKMEYER