IN THE SUPREME COURT OF FLORIDA

JACK WILSON MERCHANT,

Petitioner,

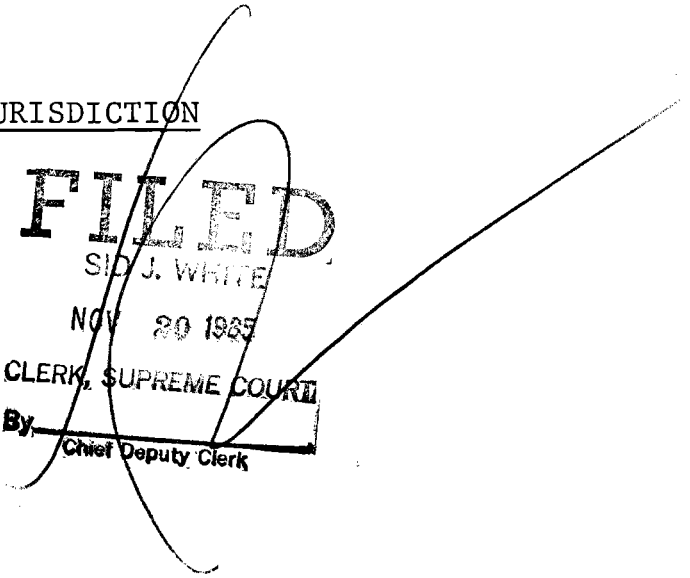
vs. CASE NO. 67,857

STATE OF FLORIDA,

Respondent.

_____/

RESPONDENT'S BRIEF ON JURISDICTION



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PRELIMINARY STATEMENT

Petitioner was the defendant in the trial court and the appellant in the First District Court of Appeal. The State of Florida was the prosecuting authority in the trial court and was the appellee on appeal. The parties will be referred to as they appear before this Court.

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's statement of the facts as a true and accurate account of the First District's version of the evidence and testimony. However, because Petitioner has apparently misinterpreted the court's holding, Respondent submits the following.

The First District held that Petitioner's requested instruction pertaining to use of deadly force to repel an aggravated assault or aggravated battery was properly denied as inapplicable in the instant case. The court obviously determined that there was not sufficient evidence upon which a jury could properly hold that the garden hose, as used in this case, constituted use of a deadly weapon (Appendix A at 3).

Pertaining to the admission into evidence of a prior violent act by the victim, the First District held that reaching over a fence with a garden hose cannot reasonably suggest a need for self-defense (Appendix A at 3).

With respect to Petitioner's argument that his sentence was based upon an erroneous scoresheet and should therefore be vacated, the court held that the contemporaneous objection rule applied to bar review in light of Dailey v. State, 471 So.2d 1349 (Fla. 1st DCA 1985). (Appendix A at 4.)

Respondent would allude to the fact that the primary offense at conviction was erroneously assessed 105 points for a second degree felony (Appendix C). The conviction should have been reclassified to a first degree felony because the

jury found that a firearm was used or possessed by Petitioner during the commission of the crime (Appendix B). This would increase Petitioner's presumptive sentencing range to 9-12 years (Appendix D).

SUMMARY OF ARGUMENT

Since Petitioner has misinterpreted the First District's holding that the use of the garden hose in this case did not constitute use of a deadly weapon, his cases in support of conflict jurisdiction are misplaced. Petitioner's assertion that "the Court determined a garden hose was not a deadly weapon as a matter of law" is wholly inaccurate.

Petitioner's cases in support of his second claim of conflict jurisdiction are clearly distinguishable from the instant case. The First District's conflict decision with Tucker v. State, 464 So.2d 211 (Fla. 3d DCA 1985) is resolved by a determination that the decision in Tucker is incorrect due to the confinement of the contemporaneous objection rule in Walker v. State, 462 So.2d 452 (Fla. 1985).

This Honorable Court should therefore refuse to accept review of this cause.

ARGUMENT

ISSUE I

THIS COURT SHOULD REFUSE TO ACCEPT REVIEW SINCE THE FIRST DISTRICT'S DECISION IS NOT IN EXPRESS AND DIRECT CONFLICT WITH A DECISION OF ANOTHER DISTRICT COURT OF APPEAL OR OF THIS COURT ON THE SAME QUESTION OF LAW.

Petitioner asserts that the First District found that a garden hose is not a deadly weapon as a matter of law. Such an assertion is undoubtedly a misinterpretation of the First District's opinion in this cause! The court determined that in Florida, an objective test is applied to look to the nature and actual use of the instrument in each individual case where the instrument used is not a firearm (Appendix A at 3). In this case, the First District applied the objective test and properly found that the garden hose "as used by the victim" did not constitute use of a deadly weapon. Nowhere in the court's opinion is it stated that a garden hose can never be used as a deadly weapon, as alleged by Petitioner. The court determined, and properly so, that there was not sufficient evidence upon which a jury could properly hold that the garden hose, as used in this case, constituted use of a deadly weapon. See Rogan v. State, 203 So.2d 24 (Fla. 3d DCA 1967).

There being no express or direct conflict with prior cases, this Court should deny review.

ISSUE II

THIS COURT IS WITHOUT JURISDICTION TO ACCEPT REVIEW IN THIS CAUSE BECAUSE SENTENCING GUIDELINES SCORING ERRORS ARE NOT REVIEWABLE.

The First District Court of Appeal held that, in light of Dailey v. State, 471 So.2d 1349 (Fla. 1st DCA 1985), the contemporaneous objection rule applies to bar review of the alleged sentencing guidelines scoring error (Appendix A at 4). Petitioner contends that this decision is in conflict with 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), where this Court held that a defendant may raise sentencing errors on appeal even though not preserved by contemporaneous objection. However, those cases are limited to sentencing procedures where the trial court is under a statutory duty to make affirmative findings on the record, thereby retaining the well established rule that the contemporaneous objection rule is applicable to both guilt and penalty phases of a trial, absent fundamental error. Walker, supra at 455. Here it is clear the trial court was under no statutory duty to review, for error, a sentencing guidelines scoresheet submitted as correct by defense counsel. Therefore, because the error sought to be asserted on appeal was not objected to contemporaneously, the First District was proper in denying review in light of Dailey. See also Bradley v. State, 10 F.L.W. 1544 (Fla. 2d DCA, June 28, 1985).

Petitioner also contends the decision below is in conflict with the decision of a sister court, to wit: Tucker v. State, 464 So.2d 211 (Fla. 3d DCA 1985), where the court held that although no objection was made at the time of sentencing, an error as to arithmetic miscalculation may be raised for the first time on appeal. Respondent respectfully disagrees with the holding in Tucker and submits that in light of the limitation announced in Walker by this Court, Dailey (review pending, No. 67,381) and Bradley, supra, provide the more appropriate application of the contemporaneous objection rule. Therefore, this Court should exercise its discretion in denying review of the First District's clearly proper decision in this cause. Art V, Section 3(b)(3), Fla. Const.

Furthermore, review should not be granted because sentencing guidelines scoring errors are not reviewable.

The right to appeal a departure from the maximum sentence recommended under the guidelines is authorized by §§921.001(5) and 924.06(1)(e), Fla. Stat. and Fla.R.App.P. 9.140(b)(1)(E). These authorities contain no comparable authorization for appellate review of a scoring error committed in computing this maximum recommended sentence, and the State would submit that the lack of such authorization precludes such review.

Should this Court determine that a sentencing guidelines scoring error is reviewable, absent a contemporaneous objection, then likewise the State should be afforded the

same opportunity to challenge the erroneous assessment of points for the primary offense at conviction in this case. Petitioner was found guilty of aggravated battery with a firearm (Appendix B). This offense was erroneously scored as a second degree felony on the scoresheet (Appendix C). Pursuant to §775.087(1)(b), Fla. Stat., this offense should have been reclassified as a first degree felony and thereby assessed an additional 42 points. Petitioner's recommended sentencing would therefore fall between 9-12 years.

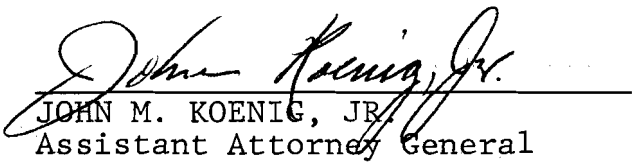
Nevertheless, Respondent would hold steadfast to its contention that the alleged scoring error in this cause is not reviewable.

CONCLUSION

Based on the facts and foregoing arguments, this Honorable Court should refuse to accept review of this cause.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL



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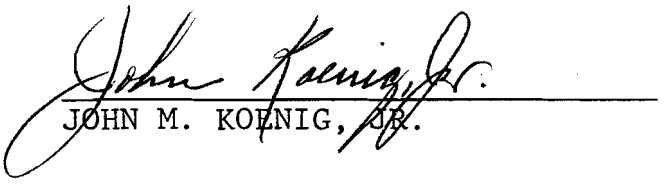
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand to P. Douglas Brinkmeyer, Assistant Public Defender, Post Office Box 671, Tallahassee, Florida, 32302, on this 20th day of November, 1985.



JOHN M. KOENIG, JR.