IN THE SUPREME COURT OF FLORIDA

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JAMES CLARK,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

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CASE NO. 72,075

DCA CASE NOS: BR-7

BR-8

PETITIONER'S BRIEF ON THE MERITS

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BRIEF OF PETITIONER ON THE MERITS

I PRELIMINARY STATEMENT

This case consists of two cases which were consolidated by the Florida First District Court of Appeal: Case No. BR-7, Circuit Court Case No. 86-1126, and Case No. BR-8, Circuit Court Case No. 86-1685. The record of each case consists of two consecutively paginated volumes and reference to the former shall be by the symbol "7BR-" followed by the appropriate page number. Reference to the latter shall be by the symbol "8BR-" followed by the appropriate page number.

II STATEMENT OF THE CASE AND FACTS

The facts relevant to this case are as follows:

By information in Case No. BR-7 (86-1126), petitioner was charged on August 6, 1986, with the sale and possession of cocaine arising from a controlled buy on January 16, 1986.(7BR-7-8). By separate information with the same date, petitioner was charged with sale and possession of cocaine arising from a controlled purchase on June 4, 1986. (8BR-7-8).

After pleading not guilty to all four counts in the two informations, petitioner was tried by a jury on November 19, 1986, before Judge Yawn and found guilty as charged. (8BR-176).

Thereafter, he was tried by jury in Case No. BR-7 on November 21, 1986, before acting Circuit Court Judge Beauchamp. (7BR-48). The trial was a short

one and the jury broke for lunch around 12:15, and the lunch recess was followed by its deliberation. (7BR-138).

Before the verdict was rendered in BR-7, petitioner was hauled before Judge Yawn for sentencing in case number BR-8, at or around 1:20 p.m., November 21, 1986. (8BR-186).

Petitioner then received a sentence of two concurrent 4 year sentences for each count in Case No. BR-8. The Guidelines scoresheet provided for a 3 1/2 to 4 1/2 year range of imprisonment. (8BR-51).

After the sentencing hearing concluded in Case No. BR-8, the jury convicted petitioner on both the sale and possession counts of the information in Case No. BR-7. (7BR-141).

Judge Beauchamp then proceeded to sentence Petitioner shortly after the jury's verdict in BR-7 (on the same date as the sentencing in BR-8).

Counsel for petitioner complained that the State could have charged all four offenses in one information and the Court in BR-7 should not run the sentence in that case consecutively to the sentence in BR-8. (7BR-145-146).

The Court then imposed a sentence of 4 years imprisonment for each count to run concurrently with each other but consecutively with the sentence imposed in BR-8. (7BR-38-39). This sentence was based on a separate but similar score-sheet to the one prepared in Case No. BR-8. (7BR-111).

Defense counsel listed in his Statement of Judicial Acts to be Reviewed that the "[s]entence imposed exceed[ed] [the] guidelines" (by virture of it running consecutively to the sentence imposed in BR-8). (7BR-46).

By order of the Florida First District Court of Appeal, this issue was raised in the supplemental briefs of the parties. In its opinion issued February 8, 1988, (appendix) the Florida First District Court of Appeal certified to this Court the following question as "a matter of great public importance. . .":

> Whether it is the trial court's duty to assure that all of a defendant's cases pending in a particular county at the time of a defendant's first sentencing hearing are disposed of using one scoresheet, including deferral of sentencing until all of the pending cases have been adjudicated unless this would cause unreasonable delay or would unduly burden the court or prejudice the defendant?

This appeal follows.

III SUMMARY OF THE ARGUMENT

In a case similar to this one, the Second District Court of Appeal has concluded that where sentences are imposed the same day in combined proceedings, a single scoresheet should be used.

This procedure prevents artful manipulation of the timing of the imposition of sentences in order to dodge the requirement of providing written reasons in the record for departure sentences.

IV ARGUMENT

THE DISTRICT COURT OF APPEAL'S CERTIFIED QUESTION SHOULD BE ANSWERED IN THE AFFIRMATIVE.

Although the Florida First District Court of Appeal affirmed petitioner's sentences on the basis that the first case was completed before petitioner was sentenced in Case No. BR-7, the District Court was troubled (and rightly so) by the opportunity presented to the lower courts to manipulate trial and sentencing calendars in order to impose, in similar circumstances to this case, guidelines departure sentences without the apparent necessity to depart from the guidelines sentence and provide written reasons for doing so. (Opinion at 4).

The First District Court of Appeal is not the only appellate court to be troubled by this problem. In Render v. State, 576 So.2d 1085 (Fla. 2nd DCA 1987), that court was faced with a similar situation, was troubled by the same concerns, and reached a result different than the one reached in this case.

In that case, the defendant plead guilty in 1985 to various criminal offenses and was placed on 3 years probation. On May 8, 1986, an information was filed alleging that she had committed further criminal offenses. In a separate proceeding, the state issued a petition alleging that she had, based on these new criminal offenses, violated her parole.

While the jury was deliberating the defendant's fate on the new offenses, the judge held a VOP hearing and found the defendant guilty of violating the terms and conditions of her parole. Interestingly enough, the judge was an acting circuit court judge (like Judge Beauchamp in this case). Based on the guidelines scoresheet, 3 1/2 year sentences were imposed concurrently.

The jury (as in this case) then finished its deliberations and returned guilty verdicts on the current (1986) charges. Based on a separate guidelines scoresheet, the acting circuit court judge gave the defendant a sentence of

12 years on each charge to run concurrently with each other but to run consecutively with the defendant's sentences on the 1985 charges. The net effect of this was for the defendant to receive 15 1/2 years worth of sentences, which exceeded the recommended sentencing range of a single scoresheet which would have covered all offenses before the court.

Recognizing the inequity of this, the Florida Second District Court of Appeal stated:

> . . . [W]e believe the spirit of the rule [Fla.R.Crim.P. 3.701(d)(1)] would be defeated by allowing separate sentencing based on separate scoresheets where, as here, <u>the sentences are imposed the same day in combined proceedings</u>. In this case, sentencing on the offenses underlying the appellant's probation should have been deferred until the conclusion of her trial, and then all sentences on all offenses should have been imposed on the basis of a <u>single</u> scoresheet." [<u>Id</u>. at 1087--Emphasis added.]

Here, as in <u>Render</u>, the petitioner was sentenced on all counts on the same day in combined proceedings. Under the circumstances, and because of procedural manipulation, a departure sentence was imposed without the apparent necessity of entering written reasons for doing so and with the real effect of significantly increasing the amount of time petitioner must spend in prison. This clearly is an inequitable result, which violates the spirit if not the letter of the law, and defeats the purposes of imposing uniform sentences and maintaining respect for the law.

Perhaps a cost-benefit analysis would be appropriate here. First, a look at the benefits of following the procedure suggested by both the Florida First District Court of Appeal in its opinion at pages 4 & 5, and the Florida Second District Court of Appeal's opinion quoted above: 1) Uniform sentencing is assured. 2) Respect for the law will be maintained. 3) Departure sentences, as required by the sentencing guidelines, may be objectively reviewed by superior courts with written reasons for departure entered in the record. 4) Procedural manipulation is eliminated.

As for the costs of such a procedure, it's hard to find any valid costs. If an increased sentence is justified, there should be a legitimate reason for imposing it and that reason should be placed in writing to be objectively reviewed.

Moreover, the fate of the defendant should not haphazardly hinge upon the prosecutor's or trial court's manipulation of scheduling. The sentence should be the appropriate one imposed with the circumstances considered in a uniform scoresheet.

Clearly, it is this suggested procedure which is contemplated by Florida Rule of Criminal Procedure 3.701(d)(1), which provides, in pertinent part, that "[o]ne guideline scoresheet shall be prepared for each defendant covering all offenses pending before the court for sentencing." [Emphasis added.]

The State would like to suggest that because (in this case) the sentencing in the first case (BR-8) was completed prior to the rendering of a guilty verdict in the second case (BR-7), the rule was not "technically" violated because only the latter case was pending at the time of the imposition of the consecutive sentences. This argument presupposes that the unit of time which determines whether a case is "pending" before the court is the hour and not the day. Clearly, both cases were pending before the court for sentencing on the same day (November 21, 1986) and but for a little artful manipulation, this question would not have arisen. It is such temporal manipulation that the procedure suggested by the District Courts would eliminate, thereby ensuring a fair, above-board sentencing procedure.

V CONCLUSION

Based on the foregoing arguments, the District Court of Appeal's certified question should be answered in the affirmative, and this case should be remanded to the trial court for resentencing with the restriction that the total of the four sentences should not exceed the recommended guidelines range. See Shull v. Dugger, 515 So.2d 748 (Fla. 1987).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT a true and accurate copy of the foregoing has been sent by U.S. Mail/hand delivery to A.E. Pooser, IV, Assistant Attorney General, The Capitol, Tallahassee, Florida 32399-1050 this 4th day of April 1988.

David P. Gauldin