IN THE SUPREME COURT OF FLORIDA

ROY LYNN FOREHAND,

Petitioner,

v. CASE NO. 72,370

STATE OF FLORIDA,

Respondent.

_____/

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

The petitioner was the appellant below and the defendant in the trial court. The parties will be referred to as they appear before this Court. A five volume record will be referred to by the use of the symbol "R" followed by the appropriate page number in parenthesis.

STATEMENT OF THE CASE AND FACTS

The respondent adopts the statement of the case and facts set forth in its initial brief on appeal and the facts set forth in the district court's opinion filed April 7, 1988.

SUMMARY OF ARGUMENT

The appellant's claim that the trial court erred when it scored a prior Texas murder conviction as a life felony was not objected to in the trial court and can not be raised for the first time on appeal. Moreover, the Court should look at the elements of the out-of-state offense to find the corresponding Florida Statute. The appellant also failed to preserve his second issue by failing to object at trial on direct appeal.

ARGUMENT

ISSUE I

WHETHER THE GUIDELINES SCORESHEET IMPROPERLY SCORED A PRIOR FELONY CONVICTION AS A LIFE FELONY.

Pursuant to the recommended guidelines, the petitioner received a life sentence for sexual battery. In the District Court of Appeal the petitioner alleged that the guidelines scoresheet was improperly computed. The disputed computation is based upon two hundred and sixty-four points awarded the petitioner for a prior life felony conviction in the State of Texas. Even though this was a murder conviction, the defendant contends that it should not have been scored as a life felony.

According to the record, the petitioner received a sentence of two to eighteen years in prison for the Texas convictions. He raised no objection at the sentencing hearing but argued on appeal that the trial court erred when it scored his prior murder conviction as a life felony. Florida courts have determined that sentencing errors which produce an illegal sentence or an unauthorized departure from a recommended guidelines sentence do not require a contemporaneous objection to preserve the issue for appeal. State v. Whitfield, 487 So.2d 1045 (Fla. 1986). The Whitfield decision has been somewhat limited however, by the Supreme Court's decision in Daily v. State, 488 So.2d 532 (Fla. 1986) wherein this Court stated that sentencing errors must be evident from the record in order for the appellate court to

review the sentence absent a contemporaneous objection. If it is evident from the record that an illegal sentence resulted from a sentencing error, the error may be raised on appeal without a contamporaneous objection. Merchant v. State, 509 So.2d 1109 (Fla. 1977). (Improper addition of points to scoresheet for prior life felony conviction was apparent from the record because defendant's prior conviction was for second degree murder, a crime not classified as a life felony.); State v. Whitfield, 487 So.2d 1045 (Fla. 1986) (Victim injury points improperly scored where defendant had been convicted of aggravated assault, a crime not involving injury); State v. Snow, 462 So.2d 455 (Fla. 1985) (Lack of reasons for trial court's retention of jurisdiction over one third of defendant's sentence was evident from the record.); Walker v. State, 462 So.2d 452 (Fla. 1985) (Sentencing defendant as an habitual offender without underlying factual basis evident from the record.); Hembree v. State, ___So.2d___ (Fla. 2nd DCA 1988); opinion filed February 12, 1988, 13 F.L.W. 440 (Conflicting references to the number of prior felony convictions contained in different portions of the scoresheet); Brown v. State, 508 So.2d 776 (Fla. 1st DCA 1987) (Lack of credit against court costs for defendant's community service hours evident from the record); Johnson v State, 506 So.2d 1086 (Fla. 1st DCA 1987).

In Daily v. State, 471 So.2d 1349 (Fla. 1st DCA 1985) affirmed, 488 So.2d 532 (Fla. 1986) the First District held:

> In the instant case, however, the error sought to be asserted on appeal (1) were not objected to below, and (2) are not determinable

> from the record before us. There was no failure of the court to make affirmative findings required by law. It is incumbent upon defendant's counsel to raise, at the trial level, any objections to underlying factual matters supporting the factors on the scoresheet. Here, counsel did not object to either of the issues now asserted, there is no ruling by the trial court, and there is no record supporting either the pro or the con of appellant's contentions on appeal. Sentencing errors may be reviewed on appeal, even in the absence of a contamporaneous objection, if the errors are apparent from the four corners of the record. Thus, errors such as those in Roden, supra, Walker, supra, and Snow, supra, involving the trial court's failure to make an affirmative finding required by the mandate of a statute, appear on the face of the record and are not subject to appellate review. The errors asserted here require an evidentiary determination and may not be initially raised in this court. Id. at 471 So.2d 1349, 1351.

Here, as in Daily, alleged error is based upon underlying and unresolved factual matters which are not determinable from the record. See Johnson v. State, 506 So.2d 1086 (Fla. 1st DCA 1987) (Defendant's claim that he had fewer misdemeanor convictions than appeared on the scoresheet and that he was not under legal constraint were factual matters which were not clear from the record); Lomont v. State, 506 So.2d 1141 (Fla. 2nd DCA 1987) (Defendant's claim of only one prior felony conviction instead of three was not evident from the record); Senior v. State, 502 So.2d 1360 (Fla. 5th DCA 1987) review denied, 511 So.2d 299 (Fla. 1987) (The state's allegation that defendant had

additional felony convictions that had not been scored was an evidentiary question not apparent from the "four corners" of the record of the initial sentencing). In the instant case, the petitioner contends that the only information in the record regarding his Texas conviction is the sentence itself. He reasons that the length of the Texas sentence indicates that it is a crime analogous to a second degree felony in Florida. The respondent urges this Court to reject the petitioner's analysis and instead adopt that of the First District Court of Appeal. In making a determination of the analogous or parallel Florida Statute the District Court emphasized the elements of the out-of-state conviction rather than the punishment meted out by the foreign state. See Frazier v. State, 515 So.2d 106 (Fla. 5th DCA 1987).

As pointed out by the District Court, the record is lacking facts sufficient enough to determine whether the analogous or parellel Florida crime would or would not be a life felony. Unquestionably, a defendant could be convicted of a murder classified as a life felony and yet receive a sentence of only two to eighteen years.

Citing Florida Rule of Criminal Procedure 3.701(d)(5) the defendant claims that since the analogous Florida Statute can not be determined from the record his prior murder conviction should automatically be scored as a third degree felony. As correctly pointed out by the District Court, the provisions of Florida Rule of Criminal Procedure 3.701(d)(5) which state that "Where the

degree of felony is ambiguous or impossible to determine, score the offense as a third degree felony" only apply where the defendant has raised the issue in the trial court. In making that determination, the District Court quite correctly cited the Committee note which states that "Disagreement as to the propriety of scoring specific entries in the prior record should be resolved by the trial judge." The petitioner's failure to object at trial deprived the trial court of the opportunity to resolve the dispute, thus, the appellate court was left with no trial court decision upon which to apply the rule. See Samples v. State, 516 So.2d 50 (Fla. 2nd DCA 1987); Robbins v. State, 482 So.2d 580 (Fla. 5th DCA 1986); Rodriguez v. State, 472 So.2d 1294 (Fla. 5th DCA 1985). Different results have been reached by other district courts of appeal. See Rotz v. State, 13 F.L.W. 638 (Fla. 5th DCA, March 10, 1988); Weekland v. State, 13 F.L.W. 539 (Fla. DCA 1987); Donner v. State, 515 So.2d 1368 (Fla. 2nd DCA 1987).

Respondent asserts that the First District Court's opinion in regard to preserving the issue should be adopted. As pointed out by the District Court, the petitioner's failure to object at trial not only deprived the trial court of determining the degree of the Texas felony but also deprived the State of the opportunity to demonstrate the nature of the prior crime. An objection by the appellant may very well have resolved the issue. If the State had established that the Texas conviction was a life felony, no appeal would have been necessary. Similarly, after the State's presentation, had an ambiguity still

existed a third degree felony classification would have been mandated by the rule. Thus, the respondent urges this Court to affirm the District Court and rule that the petitioner's failure to object at trial is fatal to his appeal.

Should this Court determine that the petitioner has properly preserved his objection, the District Court's decision should still be affirmed. The petitioner advances the theory that when a court is faced with determining an analogous or parallel Florida Statute pursuant to Rule 3.701(d)(5) it should look to the sentence received by the defendant. As pointed out by the District Court, the petitioner's reasoning is incorrect.

Florida Rule of Criminal Procedure 3.701(d)(5)(a)(2) provides that "When scoring federal, foreign, military, or out-of-state convictions, assign a score for the analogous or parellel Florida Statute. Making this determination based upon the elements of the offense is much more logical than basing it upon the sentence received. The elements of the offense are established by the State's legislature and are not subject to variation from case to case. A defendant's sentence upon conviction for a given offense is subject to many non-statutory variables which differ from case to case. These variables exist even in sentences conferred by a sentencing guidelines state such as Florida and are even more apparent in non-guidelines states such as Texas. A review of the elements of the out-of-state conviction will enable a court to determine if such a crime exists in Florida and the proper number of points we should

assign to that conviction. See Rotz v. State, 13 F.L.W. 638 (Fla. 5th DCA, March 10, 1988); Samples v.State, 516 So.2d 50 (Fla. 2nd DCA 1987); Frazier v. State, 515 So.2d 1061 (Fla. 5th DCA 1987); Armontrout v. State, 503 So.2d 984 (Fla. 5th DCA 1987); Nolen v. State, 489 So.2d 873 (Fla. 1st DCA 1986); Robbins v. State, 482 So.2d 580 (Fla. 5th DCA 1986); Rodriguez v. State, 472 So.2d 1294 (Fla. 5th DCA 1985).

In Nolen v. State, 489 So.2d 873 (Fla. 1st DCA 1986) the court was faced with two prior Indiana convictions for theft, one involving twenty-five dollars worth of property and one involving forty-six dollars worth of property. Theft of any type of property in Indiana was classified as a Class D felony. In Florida the theft of property of a value of less than one hundred dollars is classified as a misdemeanor. The Court using the elements of the Indiana offenses determined that although the convictions were felonies in Indiana, they should be classified as misdemeanors pursuant to Rule 3.701(d)(5)(a)(2). The same type of reasoning was used in Arguelo v. State, 464 So.2d 716 (Fla. 4th DCA 1985). In Arguelo two prior North Carolina convictions were scored by the court as felonies. The court examined the North Carolina statute underlying the defendant's conviction and determined that the analogous Florida Statute was a misdemeanor trespass. The court stated "Therefore, Section 3.701(d)(5)(a) would mandate that those crimes be scored as misdemeanors." 464 So.2d at 717.

In Frazier v. State, 515 So.2d 106 (Fla. 5th DCA 1987) the

Fifth District examined a military AWOL conviction and determined that there was no analogous Florida Statute and thus struck the conviction from the defendant's scoresheet. The court reasoned that Rule 3.701(d)(5) required that points be assessed only for conduct that would be criminal in Florida. The respondent urges this Court to adopt the First District's analysis and that of the above cited cases and reject the petitioner's analysis and that of the Second District Court of Appeal in Weekland, supra and Donner, supra and by doing so, affirm the petitioner's conviction and sentence.

ISSUE II

WHETHER THE TRIAL COURT ERRED IN ENTERING MULTIPLE CONVICTIONS BASED ON ONE CRIMINAL ACT.

The petitioner did not raise his second issue either in the trial court or in the First District Court of Appeal. The petitioner's failure to properly preserve his issue below precludes review by this Court. State v. Barber, 301 So.2d 7 (Fla. 1974); Clark v. State, 363 So.2d 331 (Fla. 1978); Tillman v. State, 471 So.2d 32 (Fla. 1985); Steinhorst v. State, 412 So.2d 332 (Fla. 1982).

Even if this Court determines that the petitioner has properly preserved this issue for appeal, which the respondent contends he has not, he should not be granted relief since the issue is moot. Senate Bill 1082 and House Bill 1653 passed by the Florida Legislature amended Florida Statute 775.021 so that Carawan has been explicity overruled. As of this day, the Senate and House Bills have been passed and the Governor has signed the measure into Legislation.

Attached hereto as Appendix 1,2 is a copy of the Senate Bill 1082. The state announces its intention to include the signed Legislation as supplemental authority when it becomes available.

The anti-Carawan Legislation would control the instant appeal. According to the Florida Supreme Court,

When, as occurred here, an amendment to a statute is enacted soon after controversies as to the interpretation of the original act arise, a court may consider that amendment as legislative interpretation of original law and not as a substantive change thereof. Lowery v. Parole and Probation Commission, 473 So.2d 1248, 1250 (Fla. 1985).

CONCLUSION

Based upon the foregoing arguments and citation of authority the respondent prays that this Honorable Court affirm the petitioner's judgment and sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing has been forwarded by U.S. Mail to Sharon Bradley, Assistant Public Defender, Post Office Box 671, Tallahassee, Florida 32302, on this 6th day of July, 1988.

Kurt L Barch

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