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IN THE SUPREME COURT OF FLORIDA

PETER PISANO,

Petitioner,

vs -

STATE OF FLORIDA,

Respondent.

_____ :

Case No. 74,045

FILED
 S. D. J. WHITE
 JUL 24 1989
 CLERK, SUPREME COURT
 By _____
 Deputy Clerk

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

INITIAL BRIEF OF PETITIONER ON THE MERITS

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FLORIDA BAR NO. 0143265

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RY STATEMEN

Petitioner, Peter Pisano, was the defendant in the trial court and the appellant/cross-appellee in the Second District Court of Appeal.

The opinion of the Second District Court of Appeal herein is reported at 539 So.2d 486, and is reproduced in the appendix to this brief.

References in this brief to the record on appeal that was before the Second District Court of Appeal are designated by an "R" followed by the appropriate page number. References to the supplemental record on appeal that was before that court are designated by "SR" followed by the page number. References to the appendix to this brief are designated by an "A" followed by the page number.

Finally, Petitioner calls the Court's attention to the fact that it has accepted jurisdiction in another case involving the same issue as that presented herein, Slauahter v. State, Case No. 73,743.

STATEMENT OF THE CASE AND FACTS

The State filed a three-count information in Lee County Circuit Court on July 14, 1986 charging Petitioner, Peter Pisano, with vaginal, anal, and oral sexual battery of C.P. by threatening to use force or violence likely to cause serious personal injury. (R126-127) The offenses allegedly occurred on June 5, 1986. (R126)

Petitioner was tried by a jury on December 3 and 4, 1986, with the Honorable R. Wallace Pack presiding. (R1-123, SR1-69)

At trial the alleged victim herein testified that Petitioner penetrated her vagina, anus, and mouth with his penis. (R38-40)

The jury found Petitioner guilty as charged in the information, on all three counts. (R121-122, 159)

A sentencing hearing was held before Judge Pack on January 26, 1987. (R176-187) The sentencing guidelines scoresheet that had been prepared prior to the hearing assessed 40 points under "Victim injury" for penetration or slight injury. (R175) The State objected to this scoring and argued that 120 points should have been assessed because Petitioner was found guilty of three counts of sexual battery, each involving penetration. (R173, 177-182, 186) The court overruled the State's objection. (R184)

The scoresheet recommended a sentencing range of 12 to 17 years incarceration. (R175) The trial court sentenced Petitioner to 17 years in prison on the first count, followed by

30 years probation on Counts Two and Three, the probationary periods to run consecutively to the prison sentence, but concurrently with one another. (R184-185, 194-199) The court also assessed various fines and costs against Petitioner. (R185-186, 194-195)

Petitioner filed his notice of appeal on January 27, 1987. (R188)

The State filed its notice of cross appeal on February 5, 1987. (R200)

The Second District Court of Appeal issued its opinion in this case on December 30, 1988. (A1) The court agreed with the State's position on cross-appeal that the trial court should have sentenced Petitioner pursuant to a scoresheet which included 120 points for victim injury (that is, 40 points for each of Petitioner's three convictions). (A2-3) The district court of appeal rejected Petitioner's argument that it was proper to score only 40 points for victim injury because at the time the offenses allegedly were committed Florida Rule of Criminal Procedure 3.701(d)(7), as explicated in the Committee Note thereto, did not provide for the assessment of points for victim injury for each of multiple counts involving a single victim. (A2-3)

On March 22, 1989 the Second District Court of Appeal denied Petitioner's motion for rehearing and motion for rehearing en banc.

Petitioner timely filed his notice to invoke the discretionary jurisdiction of this Court on or about April 17,

1989, because of conflict between the opinion rendered by the Second District Court of Appeal and decisions of other district courts of appeal.

On June 30, 1989 this Court issued an order accepting jurisdiction and dispensing with oral argument.

SUMMARY OF THE ARGUMENT

Florida Rule of Criminal Procedure 3.701(d)(7) as explicated by the accompanying Committee Note in effect when the offenses herein allegedly were committed did not authorize the trial court to assess victim injury points on the sentencing guidelines scoresheet for more than one count of sexual battery involving a single victim. A later version of the Committee Note which did authorize such an assessment of points cannot be applied to Petitioner without violating his constitutional right not to be subjected to ex post facto laws.

ARGUMENT

ISSUE I

THE SECOND DISTRICT COURT OF APPEAL ERRED IN HOLDING THAT THE TRIAL COURT WAS REQUIRED TO ASSESS VICTIM INJURY POINTS ON THE SENTENCING GUIDELINES SCORESHEET FOR EACH OF THE THREE COUNTS OF SEXUAL BATTERY ON A SINGLE VICTIM FOR WHICH PETITIONER WAS CONVICTED.

Florida Rule of Criminal Procedure 3.701(d)(7) provides for the scoring of points for victim injury on the sentencing guidelines scoresheet "for each victim physically injured during a criminal episode or transaction."

As the Second District Court of Appeal acknowledged in its opinion herein (A3), the Committee Note applicable to Florida Rule of Criminal Procedure 3.701(d)(7) that was in effect on June 5, 1986, when the offenses herein allegedly were committed, provided as follows:

(d)(7) This provision implements the intention of the commission that points for victim injury be added only when the defendant is convicted of an offense (scored as either primary or additional offense) which includes physical impact or contact. Victim injury is to be scored for each victim for whom the defendant is convicted of injuring and is limited to physical trauma.

There is nothing in the rule or accompanying Committee Note empowering the sentencing court to assess victim injury points for each of multiple counts involving a single victim; rather, the emphasis is on scoring for each victim injured when there is more

than one. And unless there is specific statutory authority for imposing a sentence, it cannot stand. Rozmestor v. State, 381 So.2d 324 (Fla. 5th DCA 1980). See also Massev v. State, 389 So.2d 712 (Fla. 2d DCA 1980).

The Committee Note in question was subsequently revised to provide for victim injury to be scored for each count, whether there are one or more victims. However, the revision did not take effect until October 1, 1986, several months after the offenses in question. The Florida Bar Re: Rules of Criminal Procedure (Sentencing Guidelines, 3.701, 3.988), 482 So.2d 311 (Fla. 1985); § 921.0015, Fla. Stat. (Supp. 1986).

The relevant version of the sentencing guidelines is that which was in effect when the alleged crimes were committed; subsequent amendments to the guidelines cannot be applied to the detriment of the person being sentenced without running afoul of constitutional ex post facto prohibitions. Hiller v. Florida, 482 U.S. ___, 107 S.Ct. 2446, 96 L.Ed.2d 351 (1987); State v. McGriff, 537 So.2d 107 (Fla. 1989); Booker v. State, 514 So.2d 1079 (Fla. 1987); Wilkerson v. State, 513 So.2d 664 (Fla. 1987); Art. I, § 10, U.S. Const.; Art. I, § 10, Fla. Const. This principle applies not only to changes in the body of the sentencing guidelines rules themselves, but equally to changes in the Committee Notes, which are part of the guidelines. Slappy v. State, 516 So.2d 342 (Fla. 1st DCA 1987); Burns v. State, 528 So.2d 78 (Fla. 2d DCA 1988); Bordeaux v. State, 471 So.2d 1353 (Fla. 1st DCA 1985); The Florida Bar: Amendment to Rules of Criminal Procedure (3.701, 3.988 -

Sentencia Guidelines), 451 So.2d 824 (Fla. 1984). Thus the Committee Note applicable to Petitioner's cause is the earlier version which did not authorize points for victim injury to a single victim for each count of a multi-count information.

Petitioner's position is supported by this Court's holding in Lerma v. State, 497 So.2d 736 (Fla. 1986), ~~receded from in part in~~ State v. Rousseau, 509 So.2d 281 (Fla. 1987), that the fact that the defendant committed two separate acts of sexual battery on a single victim could be used to support a departure from the recommended guidelines sentence. If this fact could be used to justify departure, it would be improper to also assess victim injury points on the scoresheet for more than one penetration of the one victim. Vanover v. State, 498 So.2d 899 (Fla. 1986).

In support of its opinion herein, the Second District Court of Appeal referred to a statement by this Court that the amendment to the Committee Note in question was intended to clarify the existing language which had been causing confusion. (A3) However, characterizing a change in the law as a "clarification" will not necessarily insulate that change from violating constitutional proscriptions against ex post facto laws when that change is applied retroactively, as the court indicated in Peterson v. State, 523 So.2d 168 (Fla. 5th DCA 1988).

Furthermore, penal provisions are to be strictly construed. When susceptible of differing constructions, such provisions must be construed most favorably to the accused.

Rozmestor; § 775.021(1), Fla. Stat. (1987). Therefore, any confusion caused by the language of the Committee Notes as it existed at the time of the instant offenses which required clarification of the Note should redound to Petitioner's benefit, not his detriment.

Finally, in Jackson v. State, 533 So.2d 888 (Fla. 3d DCA 1988), Rubier v. State, 530 So.2d 523 (Fla. 3d DCA 1988), Fennell v. State, 528 So.2d 1212 (Fla. 4th DCA 1988), and Smith v. State, 526 So.2d 1060 (Fla. 1st DCA 1988), the courts properly ruled that a revision to the scoring of victim injury may *not* be applied retroactively to the disadvantage of the person being sentenced. The opinion of the court below is contrary to these decisions and must be reversed.

CONCLUSION

Petitioner, Peter Pisano, respectfully requests this Honorable Court to reverse the opinion of the Second District Court of Appeal herein insofar as it requires the trial court to resentence Petitioner pursuant to a guidelines scoresheet that reflects points for victim injury for each of the three counts of sexual battery for which Petitioner was convicted.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to the Tampa Attorney General's Office, and to Peter Pisano, Inmate No. 10646, Lake Correctional Inst., P.O. Box 120099, Clermont, Florida 34712-0099, on this 21st day of July, 1989.

Respectfully submitted,



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