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IN THE SUPREME COURT OF FLORIDA

PETER PISANO,

Petitioner,

vs .

STATE OF FLORIDA,

Respondent.

Case No.

74,045

FILED
 APR 27 1989
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DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

BRIEF OF PETITIONER ON JURISDICTION

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TENTH JUDICIAL CIRCUIT
FLORIDA BAR NO. 0143265

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Fla. R. Crim. P. 3.701(d)(7)

3, 6, 8

PRELIMINARY STATEMENT

Petitioner was the defendant in the trial court and the appellant in the Second District Court of Appeal.

Attached hereto in an appendix are copies of the opinion of the Second District Court of Appeal, a Motion for Rehearing and a Motion for Rehearing En Banc filed by Petitioner, and the order of the Second District Court of Appeal denying Petitioner's motions.

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.

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 or about January 16, 1989 Petitioner filed a Motion for Rehearing and a Motion for Rehearing En Banc. (AS-7, 8-10) Among other things, Petitioner pointed out in his motions that the appellate court's decision conflicted with the decision reached by a different three - judge panel of the court on the same question

of law in Rambo v. State, 525 So.2d 890 (Fla. 2d DCA 1988), Case Numbers 86-1620 and 86-1485 (consolidated). (A6-7, 8-10) The Second District Court of Appeal denied both motions on March 22, 1989. (All)

Petitioner timely filed his notice to invoke the discretionary jurisdiction of this Court on or about April 17, 1989, because the opinion rendered by the Second District Court of Appeal expressly and directly conflicts with decisions of other district courts of appeal on the same question of law.

SUMMARY OF THE ARGUMENT

The version of the sentencing guidelines, including Committee Notes, in effect at the time of the alleged offense is the version which must be applied. The sentencing guidelines rule and explicating Committee Note applicable to Petitioner's case did not provide for the scoring of victim injury points for more than one count where there was but a single victim. The opinion of the Second District Court of Appeal herein, requiring use of a Committee Note which became effective long after the crimes occurred, to Petitioner's detriment, conflicts with other cases establishing that a revision to the scoring of victim injury points may not be applied retroactively.

ARGUMENT

ISSUE I

THE OPINION OF THE LOWER TRIBUNAL IS IN DIRECT AND EXPRESS CONFLICT WITH PRIOR DECISIONS WHICH HOLD THAT AMENDMENTS TO THE SENTENCING GUIDELINES RULES CANNOT BE APPLIED RETROACTIVELY.

The relevant version of the sentencing guidelines is that which was in effect when the crimes allegedly were committed; subsequent amendments to the guidelines cannot be applied to the detriment of the person being sentenced. Miller v. Florida, 428 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). These principles apply 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 344 (Fla. 1st DCA 1987).

The Committee Note to Florida Rule of Criminal Procedure 3.701(d)(7) in effect on June 5, 1986, when the crimes herein allegedly were committed, and hence the Committee Note applicable to Petitioner's case, read 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.

A revision to the Committee Note providing for victim injury to be scored for each count, whether there are one or more victims, did not become effective until October 1, 1986, which was several months after the crimes in question. The Florida Bar Re: Rules of Criminal Procedure (Sentencing Guidelines, 3.701, 3.9881, 482 So.2d 311 (Fla. 1985); § 921.0015, Fla. Stat. (Supp. 1986).

Petitioner would also note that 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 suggests that points could not be assessed on a scoresheet for more than one penetration of a single victim.

In Jackson v. State, 533 So.2d 888 (Fla. 3d DCA 1988), Rubier v. State, 530 So.2d 523 (Fla. 3d DCA 1988), Fennel 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. The decision of the court below flies in the face of these decisions.

That confusion exists in this area of the law is made manifest by the fact that the decision of the Second District Court of Appeal herein directly conflicts with a decision of another panel of the court in another case. (See Petitioner's Motion for

Rehearing (A5-7) and Motion for Rehearing En Banc (A8-10).)

The issue herein is pending before this Court in another case, Slaughter v. State, Case No. 73,743.

This Court should accept jurisdiction herein to end the confusion over retroactive application of changes in the Committee Note to Florida Rule of Criminal Procedure 3.701(d)(7).

CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, Petitioner requests this Honorable Court to accept jurisdiction to review the erroneous interpretation of the law by the lower tribunal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy has been furnished to the Attorney General's Office, Park Trammell Building, Eighth Floor, 1313 Tampa Street, Tampa, Florida, 33602, by mail on this 25th day of April, 1989.



ROBERT F. MOELLER

RFM/an