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IN THE SUPREME COURT OF FLORIDA

THOMAS BANEGAS,

Petitioner,

v. CASE NO. ~~77,031~~ 77,301

STATE OF FLORIDA,

Appellee.
_____/

MERITS BRIEF OF RESPONDENT

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SUMMARY OF ARGUMENT

Legal constraint points are properly assessed for each offense committed by a defendant while on probation. "The severity of a sanction should increase with the length and nature of the offender's criminal history." Fla.R.Crim.P. 3.701(b)(4). Although violations of probation are not substantive offenses, it is nonetheless proper to sanction more severely those who blatantly violate their restrictions by repeatedly committing crimes.

ARGUMENT

LEGAL CONSTRAINT POINTS ARE PROPERLY ASSESSED FOR EACH OFFENSE COMMITTED BY A DEFENDANT WHILE UNDER SUCH CONSTRAINT.

As the Fifth District Court of Appeal observed in an earlier case, "[one] stated purpose of the guidelines is to increase the severity of the sanctions as the length and nature of the defendant's criminal history increases." *Gissinger v. State*, 481 So.2d 1269 (Fla. 5th DCA 1986), *citing* Fla.R.Crim.P. 3.701(b)(4). As the defense acknowledges, the defendant committed several additional offenses while on probation for earlier offenses (B 3).[1] A defendant who commits a second or subsequent violation of probation can only be sentenced to the next higher cell under the sentencing guidelines without providing written reasons for departure. Fla.R.Crim.P. 3.701(d)(14). If the defense interpretation is accepted, the defendant, who committed numerous criminal acts despite the legal constraint, will receive no more of a sanction for blatantly and repeatedly violating his probation than does a defendant who violated it but once.

The defense points to the recently amended scoresheet to support its position. It is true that the new scoresheet provides for the multiplication of victim injury points. Equally as true, it was not until the amendment that the scoresheet contained a multiplier on its face. *Cf.* 15 F.L.W. S210 and S458 (Fla. April 12, 1990 and September 6, 1990); Fla.R.Crim.P. 3.988,

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[1] The parties are referred to as the state and the defendant(s). References to the record denoted "(R and page)"; those to the merits brief of the petitioner(s) are indicated "(B and page)".

Florida Rules of Court, West Pub. (St. Paul, MN 1990). One of the problems in comparing legal constraint points with victim injury points is that the latter seems to have finally been resolved, while the instant issue is of recent origin. There have been no committee notes whatsoever regarding legal constraint points under rule 3.701(d)(6) since the guidelines were established. Subsection (d)(7), on the other hand, has been amended on a number of occasions for purposes of clarification. *See, e.g., Pisano v. State*, 539 So.2d 486, 487 (Fla. 2d DCA 1989), *jurisdiction accepted*, 545 So.2d 1368 (Fla. 1989), *cause dismissed* 554 So.2d 1165 (Fla. 1990). Because this is the first plenary review of the instant issue by this court, the mere omission of a multiplier on the face of the scoresheet is not significant.

The comparison between the legal constraint provision and the express multipliers in categories 1, 3, 5, and 6 is tenuous because each of the latter is included under a defendant's prior criminal record. Prior record, like legal constraint, is in and of itself a section under the rule. Fla.R.Crim.P. 3.701(d)(5). The express multipliers, on the other hand, are not. Further, points for prior convictions are not straight multipliers. For example, one prior conviction for a life felony scores 60 points on a category 7 scoresheet, while four priors score 300 points. Of course, if the prior record was a straight multiplier the score would have been 240. Hence, a comparison between prior record and legal constraint is strained because it appears likely that different policy considerations apply.

The defense compares this case to *Miles v. State*, 418 So.2d 1070 (Fla. 5th DCA 1982); *Hoag v. State*, 511 So.2d 401 (Fla. 5th DCA 1987); and *Burke v. State*, 475 So.2d 252 (Fla. 5th DCA 1985). It speciously contends that the logic of those cases leads to the conclusion in this case that "the focus of factor four on the guidelines relates to a defendant's status as being under, or not being under, legal constraint, and not the number of offenses that he committed while on or under legal constraint." (B 8). First of all, none of these cases is on point. However, if they were they would lead to precisely the opposite conclusion. Miles was "twice charged with and later convicted of, the same crime" because there was nothing to distinguish the two counts. *Miles*, 1071. "[T]he failure of Hoag to stop at the scene of his accident constituted but one offense although that accident resulted in injuries to four persons and the death of a fifth." *Hoag*, 402. "[T]hree bills were given simultaneously for rent . . . this transaction is a single criminal act . . ." *Burke, supra*. The instant defendants' crimes, on the other hand, were not committed as one transaction. To the contrary, the numerous criminal acts of each of the defendants were committed separately and distinctly from his other criminals acts.

The defense characterizes the assignment of legal constraint points as "double-dipping" because points are already scored for the other offenses (B 8). Independently of the crimes per se, the fact that a criminal continues to commit crimes despite placement on probation is material to consideration of the "nature of the offender's criminal history." Fla.R.Crim.P.

3.701(b)(4). Although violation of probation is not a substantive offense, criminal defendants should not be free to repeatedly defy such restrictions with virtual impunity.

In closing, it is worthy of note that another district court of appeal has given plenary review to the instant issue. The court in *Carter v. State*, 15 F.L.W. D2911 (Fla. 4th DCA December 5, 1990), held that legal constraint points were properly assessed for each offense. *Id.*, D2912 (citations omitted).

CONCLUSION

The question certified by the Fifth District Court of Appeal in *Flowers v. State*, 567 So.2d 1055 (Fla. 5th DCA 1990), should be answered affirmatively (*see* case no. 76, 854 pending in this court), and the decision in the instant cases approved.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Michael S. Becker, Assistant Public Defender, 112-A Orange Ave., Daytona Beach, FL 32114, by interoffice delivery on this 7th day of March, 1991.

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