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IN THE SUPREME COURT OF FLORIDA

DOUGLAS W. ZOZAK,)
)
 Petitioner,)
)
 vs.) CASE NO.: 77,587
)
 STATE OF FLORIDA,)
)
 Respondent.)
 _____)

PETITIONER'S BRIEF ON THE MERITS

STATEMENT OF THE CASE AND FACTS

Petitioner, while under legal constraint, committed several other criminal offenses. Petitioner pled to several of these offenses and when he appeared for sentencing, a guidelines scoresheet was prepared in which legal constraint points were assessed for each of the offenses for which Petitioner was being sentencing.

Petitioner appealed to the Fifth District Court of Appeal and argued that there was no authority for applying a multiplier to the legal constraint points. The Fifth District Court of Appeal affirmed on the authority of Flowers v. State, 567 So.2d 1055 (Fla. 5th DCA 1990) wherein the Court certified the following question as being of great public importance:

DO FLORIDA'S UNIFORM SENTENCING GUIDELINES
REQUIRE THAT LEGAL CONSTRAINT POINTS BE
ASSESSED FOR EACH OFFENSE COMMITTED WHILE
UNDER LEGAL CONSTRAINT?

The Flowers decision is currently pending resolution by this Court in Case No. 76,854.

Petitioner filed a timely petition to invoke discretionary review.

SUMMARY OF ARGUMENT

The guidelines scoresheet provides that if a defendant is being sentenced for an offense which he committed while on probation, he is to be assessed points for being under legal constraint. There is no provision in the guidelines for applying multiple legal constraint points based on the number of offenses committed while under legal constraint. The Fifth District Court of Appeal has in essence created a multiplier for legal constraint points which they had no authority to do. The answer to the certified question herein must be a resounding no.

ARGUMENT

FLORIDA'S UNIFORM SENTENCING SENTENCING
GUIDELINES DO NOT PERMIT THAT LEGAL
CONSTRAINT POINTS BE MULTIPLIED FOR EACH
OFFENSE COMMITTED WHILE UNDER LEGAL
CONSTRAINT.

Petitioner, while under legal constraint, each committed several other criminal offenses. Petitioner pled to several of these offenses and when they appeared for sentencing, a guidelines scoresheet was prepared in which legal constraint points were assessed for each of the offenses for which the Petitioner was being sentenced. The effect of applying the multiplier to the legal constraint points was to increase the recommended guidelines sentence for Petitioner. On appeal, the Fifth District Court of Appeal affirmed the use of a multiplier for legal constraint points on the authority of Flowers v. State, 567 So.2d 1055 (Fla. 5th DCA 1990) wherein the Court certified to this Court the question of whether a multiplier is proper.

In Gissinger v. State, 481 So.2d 1269 (Fla. 5th DCA 1986), the defendant was serving probation for aggravated child abuse when he committed a new offense of resisting arrest with violence. In preparing the guidelines scoresheet, the aggravated child abuse offense was designated as the primary offense at conviction because it was the offense which when scored resulted in the most severe sanction. Fla.R.Crim.P. 3.701(d)(3). On appeal, Gissinger argued that legal constraint points should not have been scored because the defendant was not on probation for the primary offense. The Fifth District Court of Appeal rejected

the claim recognizing that the legal constraint provision did not clearly state whether "legal status at the time of the offense" referred to only the primary offense or to any offense at conviction. Despite the lack of clarity in the rule, when read in pari materia with the stated purpose of the guidelines to achieve uniformity in the sentencing, the Fifth District Court of Appeal concluded that legal status at the time of the offense should be scored for any offense for which the defendant is being sentenced, which was committed while under legal constraint. In Walker v. State, 546 So.2d 764 (Fla. 5th DCA 1989), the Court took this logic one step further and created a legal status multiplier in those cases in which the defendant committed several offenses while on a single probation. The Fifth District Court of Appeal reaffirmed its holding in Walker in Flowers v. State, 567 So.2d 1055 (Fla. 5th DCA 1990) but certified the question to this Court. Petitioner submits that the Fifth District Court of Appeal had no authority to create such a multiplier.

The key issue to be decided by this Court is whether the legislature intended that a multiplier be applied when calculating legal constraint points. Petitioner asserts that the answer to this question is no. Initially, it must be noted that the guidelines scoresheet itself does not provide a mechanism for multiplying legal constraint points. In determining the legislative intent, one needs only to examine the legislature's treatment of similar scoresheet factors. For instance, the amended rule of victim injury points permits victim injury points for each injured victim and for each count in which victim injury is

an element of the offense. See Committee Note, Fla.R.Crim.P. 3.701(d) (7) (1987 and 1988 amendments). Indeed, this Court has amended the sentencing guidelines scoresheet and forms including form 3.988(g), Category seven: Drugs. In re: Florida Rules of Criminal Procedure 3.701 and 3.988 (sentencing guidelines), 15 FLW S210 (Fla. April 10, 1990), revised on motion for clarification, 15 FLW S458 (Fla. September 6, 1990). The newly-approved guidelines form for category seven provides clearly on the face of the scoresheet a mechanism by which victim injury is multiplied by the number of victims. No such corresponding provision for multiplying legal status points appears on the face of the guidelines scoresheet.

Additionally, on several of the scoresheet categories, the legislature has clearly provided for multipliers to enhance prior offenses. Specifically, on the category one scoresheet, a multiplier is to be used for prior DUI convictions. On a category three scoresheet, there is a provision for prior category three offenses. On the category five scoresheet, there is a provision for prior category five offenses. And finally, on a category six scoresheet, there is a provision for prior convictions for category six offenses. Nowhere in the guidelines or the committee notes thereto is there such a provision for a legal status multiplier. Petitioner submits that the maxim "expressio unius est exclusio alterius" applies in the instant situation. Where the legislature has specifically provided for multipliers in other areas of the guidelines scoresheet, the absence of any multiplier in the legal status category must be assumed to be

intentional.

As noted by Judge Cowart in his dissent in Flowers, supra, the focus of the legal constraint factor is the defendant's legal status, a continuing condition, and not on the offense which relates to a point of time with respect to the legal status. Judge Cowart then gave other cases to illustrate by analogy what is intended in the legal constraint category.

In Miles v. State, 418 So.2d 1070 (Fla. 5th DCA 1982) the defendant was charged in two separate cases with aggravated assault, released, and ordered to appear before the trial court at one time and one place for a pre-trial conference. When the defendant failed to appear on that date he was charged with two counts of willfully failing to appear for the pre-trial conference. On appeal, the Fifth District Court of Appeal reversed on conviction, rejecting the state's argument that the emphasis should be on each of the original criminal cases for which Miles failed to appear. Rather, the Court recognized that the essence of the charge was Miles' failure to appear which occurred but one time even though it related to to different cases.

In Hoag v. State, 511 So.2d 401 (Fla. 5th DCA 1987), rev. denied 518 So.2d 1278 (Fla. 1987) the defendant left the scene of an accident in which four persons were injured and one person was killed. Hoag was convicted of five counts of leaving the scene of an accident involving injuries or death. The Fifth District Court of Appeal reversed four of the convictions on the grounds that the focus of the criminal conduct was on leaving the

scene of an accident and there was but one accident, one scene of an accident, and one leaving of that scene, one time by the defendant.

Finally, in Burke v. State, 475 So.2d 252 (Fla. 5th DCA 1985), rev. denied 484 So.2d 10 (Fla. 1986), the Fifth District Court of Appeal held that giving three altered dollars bills to one person at one time constituted but one criminal act of uttering a forged instrument.

Applying the logic of these cases to the instant case, 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 on the number of offenses that he committed while on or under legal constraint.

By permitting a multiplier for legal constraint points, the Court in essence permits "double dipping". The offenses for which the accused is being sentenced are already scored as either primary offenses or additional offenses at conviction. However, the same offenses then are used to calculate multiple legal constraint points. Surely, the legislature never intended for such "double dipping". To allow this to occur is in essence to eviscerate the sentencing guidelines.

This Court has the benefit of knowing what the position of the sentencing guidelines commission is with regard to this issue. Pursuant to Section 90.202(6), Florida Statutes (1989) this Court may take judicial notice of a petition currently pending before this Court. In Supreme Court Case No. 76,683, the Florida Sentencing Guidelines Commission is petitioning this

Court for a revision to the sentencing guidelines. Paragraphs eight through ten of this petition discuss the issue of assessing multiple legal constraint points. The commission has proposed a committee note to clarify the commission's intent with regard to this issue. The new rule will state:

Legal status points are to be assessed where forms of legal constraint existed at the time of the commission of offenses scored as primary or additional offenses at conviction. Legal status points are to be assessed only once whether there are one or more offenses at conviction.

The comment to this new rule states:

The purpose of this revision is to clarify the original intent that legal constraint is a status consideration and is not to be considered a function of the number of offenses at conviction.

(A copy of the petition is attached as an appendix hereto).

Thus, it is clear, that the decision of the Fifth District Court of Appeal in the instant cases is at odds with the intention and spirit of the guidelines themselves.

In summary, Petitioner argues that the guidelines do not permit points for legal constraint to be multiplied by the number of offenses for which the accused is being sentenced which were committed while he was on legal constraint. The concept of legal constraint points focuses solely on the defendant's status as being under or not being under legal constraint. The legislature never intended for a multiplier to be used in calculating legal constraint points. Therefore, this Court should answer the certified question in the negative. Consequently, Petitioner's

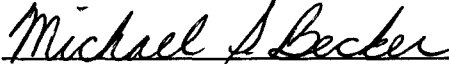
sentence must be vacated and the cause remanded for sentencing under a corrected scoresheet.

CONCLUSION

Based on the foregoing reasons and authorities, Petitioner urges this Honorable Court to answer the certified question in the negative and rule that in calculating legal constraint points, a court may not employ a multiplier based on the number of offenses committed while on legal constraint. The decision of the District Court must be quashed and the cause remanded with instructions to vacate Petitioner's sentence and remand for resentencing under a properly calculated scoresheet.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Robert A. Butterworth, Attorney General, 210 N. Palmetto Ave, Suite 447, Daytona Beach, FL 32114 in his basket at the Fifth District Court of Appeal and mailed to: Douglas W. Zozak, P.O. Box 628040, Orlando, FL 32862, this 3rd day of May, 1991.



MICHAEL S. BECKER
ASSISTANT PUBLIC DEFENDER