

047

FILED
SID J. WHITE
MAR 30 1991
CLERK, SUPREME COURT
By [Signature]
Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,
Petitioner,

v.

CASE NO. 77,395

JOHN STAFFORD,
Respondent.

_____ /

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

MERITS BRIEF OF PETITIONER

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

✓ REBECCA R. WALL
ASSISTANT ATTORNEY GENERAL
Fla. Bar #618586
210 N. Palmetto Avenue
Suite 447
Daytona Beach, FL 32114
(904) 238-4990

COUNSEL FOR PETITIONER

TABLE OF CONTENTS

PAGES:

TABLE OF AUTHORITIES.....ii

STATEMENT OF THE CASE AND FACTS.....2

SUMMARY OF ARGUMENT.....4

ARGUMENT.....5

POINT ON APPEAL

THE TRIAL COURT CORRECTLY SCORED
DEFENDANT'S ORIGINAL CONVICTION AS
THE PRIMARY OFFENSE WHEN THE COURT
SENTENCED DEFENDANT FOR VIOLATING
THE ORIGINAL PROBATION AND FOR A NEW
SUBSTANTIVE OFFENSE AT THE SAME
TIME.....5

CONCLUSION.....10

CERTIFICATE OF SERVICE.....10

TABLE OF AUTHORITIES

<u>CASES:</u>	<u>PAGES:</u>
<u>Florida Bar re: Rules of Criminal Procedure (Sentencing Guidelines 3.701, 3.988),</u> 482 So.2d 311 (Fla. 1985).....	5, 6
<u>Peters v. State,</u> 531 So.2d 121 (Fla. 1988).....	8
<u>Stafford v. State,</u> 15 FLW D2942 (Fla. 5th DCA December 6, 1990).....	3
<u>Stafford v. State,</u> 16 FLW D418 (Fla. 5th DCA February 7, 1991).....	3
<u>Stafford v. State,</u> 561 So.2d 32 (Fla. 5th DCA 1990).....	2
<u>Williams v. State,</u> 492 So.2d 1051 (Fla. 1986).....	8

OTHER AUTHORITIES

Art. V, § 3(b)(4) Fla. Const.....	5
Fla.R.Crim.P.3.701(b).....	8
Fla.R.Crim.P.3.701(d)(3)(a).....	6-9
Fla.R.Crim.P.3.701(d)(3)(b).....	6
Fla.R.Crim.P.3.701(d)(4).....	4, 6-7, 9
Fla.R.Crim.P.3.701(d)(5).....	3-6, 8

STATEMENT OF THE CASE AND FACTS

In 1987, Respondent was placed on probation for burglary to a dwelling and grand theft. In 1989, Respondent plead guilty to violating probation, and to one new substantive offense -- burglary to a dwelling.

On May 26, 1989 Respondent appeared before the trial court for sentencing. A probation officer prepared a guideline scoresheet which showed a recommended sentence of 4½ to 5½ years incarceration. The defense objected to the scoring of juvenile offenses which were committed more than three years before Respondent's new substantive offense (a burglary committed December 7, 1988). The court overruled the objection on the ground that, in his interpretation, the three year period should be counted back from Respondent's 1987 offenses, which were also before the court for sentencing. On appeal, the Fifth District Court of Appeal reversed and remanded for resentencing. One of the reasons for the remand was that the scoresheet was improperly prepared. Stafford v. State, 561 So.2d 32 (Fla. 5th DCA 1990). (A.1).

On June 8, 1990 the trial court entered an order correcting one sentencing error, but did not address the issue of the scoresheet. (R.66, A.2).¹ Respondent filed a motion to correct

¹ This case involves two sentencings and two appeal. Respondent was sentenced the first time and appealed that sentence. After Respondent was resentenced, he appealed again. That appeal was a new case with its own Record On Appeal. The case before this court for review stems from the second appeal. The Record On Appeal starts at page 64, the next consecutive page after the last page of the first appeal's record. However, the first appeal's record is not part of the record of this case.

sentence. (R.67-68, A.3-4). In an amended order, Dated August 2, 1990, the trial judge denied the motion to correct the scoresheet, reasoning that "if a score sheet denoting the 1987 conviction as the primary offense and including the contested juvenile record had been utilized at sentencing, it would result in the same guideline sentence range previously considered by the court at sentencing..." (R.89, A.6).

Respondent again appealed his sentence based on the scoresheet calculation. (R.92, A.7). The Fifth District Court again reversed and remanded. Stafford v. State, 15 FLW D2942 (Fla. 5th DCA December 6, 1990). (A.8)

On December 20, 1990 Petitioner filed a Motion For Rehearing/Motion For Certification. On February 7, 1991 the Fifth District Court granted rehearing and certified the following question to be of great public importance:

IN VIEW OF THE 1986 AMENDMENT TO THE
COMMITTEE NOTE TO FLA.R.CRIM.P.
3.701(d)(5), MUST THE TRIAL COURTS
SCORE AN OFFENSE FOR WHICH THE
DEFENDANT WAS ON PROBATION AS 'PRIOR
RECORD' AT A VIOLATION OF PROBATION
HEARING INVOLVING NEW SUBSTANTIVE
OFFENSES?

Stafford v. State, 16 FLW D418 (Fla. 5th DCA February 7, 1991). (A.10). On February 8, 1991 Petitioner filed a Notice To Invoke Discretionary Jurisdiction. (A.11).

SUMMARY OF ARGUMENT

The Committee Note to Fla.R.Crim.P. 3.701(d)(5), as it was amended in 1986, suggests that an earlier offense can be scored as the primary offense at a later sentencing that involves a violation of probation for the earlier offense and a new substantive crime. The amended Note identifies an exception to Rule 3.701(d)(4)'s requirement that after one offense is scored as the primary offense, all other pending charges must be scored as additional offenses. The exception is a case where the defendant violated probation by committing a new crime, and both the old and new offenses are before the court.

In those cases, the rule proscribes the old offense from being scored as an additional offense if the new offense is scored as the primary offense. However, nothing in the rule prevents the court from scoring the old offense as the primary offense. Therefore, it is not error for a sentencing judge to score the old offense as the primary offense when the defendant violated probation for the old offense with a new crime, and both crimes are before the court for sentencing.

ARGUMENT

POINT ON APPEAL

THE TRIAL COURT CORRECTLY SCORED
DEFENDANT'S ORIGINAL CONVICTION AS
THE PRIMARY OFFENSE WHEN THE COURT
SENTENCED DEFENDANT FOR VIOLATING
THE ORIGINAL PROBATION AND FOR A NEW
SUBSTANTIVE OFFENSE AT THE SAME
TIME.

This case comes before this court pursuant to this court granting discretionary review, under Article V, Section 3(b)(4) of the Florida Constitution, to consider the following question which was certified by the 5th District Court of Appeal.

IN VIEW OF THE 1986 AMENDMENT TO THE
COMMITTEE NOTES TO FLA.R.CRIM.P.
3.701(d)(5), MUST THE TRIAL COURTS
SCORE AN OFFENSE FOR WHICH THE
DEFENDANT WAS ON PROBATION AS "PRIOR
RECORD" AT A VIOLATION OF PROBATION
HEARING INVOLVING NEW SUBSTANTIVE
OFFENSES?

The issue before the court is whether the offense for which a defendant was placed on probation can ever be the primary offense at a later sentencing for a new substantive offense. The Committee Note to Fla.R.Crim.P. 3.701(d)(5), as it was amended in 1986, suggests that the earlier offense can indeed be scored as the primary offense at a later sentencing.

In 1986, Rule 3.701 and the Committee Notes accompanying the rule were amended. The Florida Bar re: Rules of Criminal Procedure (Sentencing Guidelines 3.701, 3.988), 482 So.2d 311 (Fla. 1985). The amendment to the rule addressed, among other things, the definitions of "primary offense", "additional offenses", and "prior record", for purposes of calculating the

guideline scoresheet. The amended definition of "primary offense" requires that every offense which is currently before the sentencing court must be calculated separately on an appropriate scoresheet as the primary offense, with all other offenses as additional offenses. Rule 3.701(d)(3)(a), Fla.R.Crim.P. The offense which results in the most severe sentence range must be treated as the primary offense, and all others are treated as additional offenses. Rule 3.701(d)(3)(b); Rule 3.701(d)(4). However, the amended Committee Note to Rule 3.701(d)(5) further explains that when one of the offenses which is currently before the sentencing judge is an earlier offense for which the defendant was placed on probation, and he is being sentenced on that offense pursuant to a violation of probation based on a new substantive charge, the earlier offense is not to be scored as an additional offense if the new offense is scored as the primary offense. 482 So.2d at 316.

The amended Committee Notes are designed to distinguish "additional offense" from "prior record" in cases where a defendant has violated probation with a new substantive offense, and both offenses are before the sentencing court. In this court's opinion adopting the 1986 amendments, the court included the Sentencing Guideline Commission's explanation that

[t]he commission took this action to clarify its intent concerning the application for scoring purposes of the offense which results in the imposition of probation where the offender commits an offense subsequent to the date probation is imposed and where both offenses are before the court for sentencing and

the subsequent offense is scored as
'primary offense'. (emphasis added)

Id. at 312.

When the amendment and the explanation are taken together, it is evident that the Commission contemplated situations in which the earlier offense -- the one for which the defendant was placed on probation -- could be scored as the primary offense instead. Otherwise, there would be no reason for the Commission to have specified that the amendment was intended to clarify how to treat the earlier offense when the new offense was scored as the primary one. So, even though Rule 3.701(d)(4) requires that all other offenses which are pending for sentencing must be scored as additional offenses, the exception to that rule is cases in which there is a probation violation and a new substantive charge. In those cases, if the new crime is scored as the primary offense, then the old crime must be scored as prior record instead of as an additional offense. But nothing in either the Rules or the Committee Notes states that the earlier offense cannot be scored as the primary offense.

To read such a restriction into the amended rule and the accompanying notes is to, in effect, preclude trial courts from ever sentencing probation violators for their initial crime when there is also a new crime before the court. It will limit them to always sentencing the probation violator for the new crime instead of the earlier one. Also, it is difficult to reconcile such a reading with Rule 3.701(d)(3)'s requirement that all offenses must be scored as a primary offense in order to see

which results in the most severe sentence range. That makes no sense if Rule 3.701(d)(5) is read to preclude the earlier offense from ever being utilized by the judge as the primary offense.

Even more incongruously, if earlier offenses can never be the primary offense when there is also a new offense, courts will be able to resentence probationers for technical violations, but will not be able to resentence probationers if they commit a new crime. Statutes should not be interpreted so as to yield an absurd result. Williams v. State, 492 So.2d 1051 (Fla. 1986). When the rule is read to limit the trial judge from scoring the initial offense as the primary offense, it creates an unwarranted variation in the sentencing process contrary to the clearly stated purpose of the guidelines. Rule 3.701(b), Fla.R.Crim.P.

Additionally, such a reading is inconsistent with the general intentions of the guidelines' drafters. This court has very succinctly stated that "[i]f there is any overriding purpose behind the sentencing guidelines it is that the guidelines be used to punish repeat offenders more severely than first-time offenders." Peters v. State, 531 So.2d 121 (Fla. 1988). If a trial judge is prohibited from scoring the earlier offense as the primary offense, when it would result in a higher guideline sentence range, the repeat offender is not punished more severely for his repeated criminality. And the whole thrust of the guidelines is defeated.

The amended Committee Note to 3.701(d)(5), on its face, deals with the relationship between an earlier offense and a later offense with regard to whether the earlier offense is to be

counted as "prior record" or as "additional offense". However, nowhere in the Committee Notes is there any reference to the relationship between the two with regard to which is to be scored as the primary offense. It is clear from the plain wording of the amended note that the Committee intended the note to affect only Rule 3.701(d)(4) (additional offenses) and not Rule 3.701(d)(3) (primary offenses). Therefore, the maxim of statutory interpretation expressio unius est exclusio alterius operates to imply that the Committee specifically intended not to include "primary offense" when it precluded courts from counting an earlier offense as "additional offense". Otherwise, the Committee's amendment, done for the purpose of clarifying its intent, would have read that, when sentencing for both an earlier probationary offense and a new substantive offense, the earlier offense shall be scored as prior record and not as additional offense or as primary offense.


The Committee did not preclude scoring an earlier offense as the primary offense when sentencing for both offenses. Although it had the opportunity to do so, it chose not to when it amended the Committee Notes to "clarify its intent". There is no legal bar to scoring the offense for which a defendant was put on probation as the primary offense when he violates that probation with a new charge and the new charge is also before the court for sentencing. Therefore, the trial court in the instant case, correctly scored the defendant's earlier offense as the primary offense for purposes of calculating the defendant's guideline scoresheet.

CONCLUSION

Based on the arguments and authorities presented herein, Petitioner respectfully prays this honorable court answer the certified question in the negative.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



REBECCA R. WALL
ASSISTANT ATTORNEY GENERAL
Fla. Bar #618586
210 N. Palmetto Ave.
Suite 447
Daytona Beach, FL 32114
(904) 238-4990

COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Merits Brief of Petitioner and appendix has been furnished by delivery to Daniel J. Schafer, Assistant Public Defender, this 18th day of March, 1991.



Rebecca R. Wall
Of Counsel