

067

IN THE SUPREME COURT OF FLORIDA

**FILED**

SID J. WHITE

APR 8 1991

CLERK, SUPREME COURT.

By  Deputy Clerk

STATE OF FLORIDA, )  
 )  
 Petitioner, )  
 )  
 vs. )  
 )  
 JOHN STAFFORD, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

CASE NO.: 77,395

ON REVIEW FROM A QUESTION CERTIFIED  
TO BE OF GREAT PUBLIC IMPORTANCE  
FROM THE FIFTH DISTRICT COURT OF APPEAL

RESPONDENT'S BRIEF ON THE MERITS

JAMES B. GIBSON  
PUBLIC DEFENDER  
SEVENTH JUDICIAL CIRCUIT

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TABLE OF CITATIONS

AUTHORITIES CITED:

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OTHER AUTHORITIES CITED:

Rule 3.701(d) (c), Florida Rules of Criminal Procedure      2,3  
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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,            )  
                                  )  
                  Petitioner,    )  
                                  )  
vs.                                )  
                                  )  
JOHN STAFFORD,                )  
                                  )  
                  Respondent.   )  
\_\_\_\_\_                          )

CASE NO.: 77,395

RESPONDENT'S BRIEF ON THE MERITS

STATEMENT OF THE CASE AND FACTS

Respondent accepts the Statement of Case and Facts  
contained in the Petitioner's Brief on the Merits.

SUMMARY OF ARGUMENT

Committee Note (d) (5) to the Sentencing Guidelines Rule states that when a defendant is before the court for sentencing on old probation violation cases and new substantive offenses, the earlier offenses shall be scored as "prior record" and not as "additional offenses." The State's position is that this Court should take the phrase "shall be scored as prior record" and change it to read "shall be scored as prior record or primary offense", because this change would make the rule more logical. Mr. Stafford argues herein that (1) this Court cannot and should not ignore the plain meaning of the rule, and (2) there is no need for such a change in any event.

## ARGUMENT

THE TRIAL COURT MUST SCORE DEFENDANT'S ORIGINAL CONVICTION AS PRIOR RECORD WHEN THE COURT SENTENCES DEFENDANT FOR VIOLATING THE ORIGINAL PROBATION AND FOR A NEW SUBSTANTIVE OFFENSE AT THE SAME TIME.

The issue in this case is much simpler than the State's brief might lead the court to believe. It involves the common situation where a defendant appears before the trial court for sentencing on older cases for which he has violated probation by committing new substantive offenses. Before the 1986 amendment it was somewhat unclear how such a situation should be scored. The key question was whether the older VOP cases should be scored as primary offenses, additional offenses or prior record. The reason this issue matters in Mr. Stafford's case is that the trial judge's decision to score the older VOP offense as the "primary offense" would bring more of Stafford's juvenile record within the three year time period allowing it to be scored. Fla.R.Crim.P. 3.701(d)(5)(c).

The 1986 Amendment to Committee Note (d)(5) decisively and fairly settles this controversy.<sup>1</sup>

For any offense where sentence was previously suspended pursuant to the imposition of probation and such offense is now before the court for sentencing, upon a revocation of that probation based upon a subsequent criminal offense (which subsequent offense is also before the court for sentencing at the same time), the earlier offense shall be scored as "prior record" and not as "additional offense."

(Emphasis supplied)

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<sup>1</sup> Interestingly, though the State's brief contains much discussion of the Committee Note, the relevant portion is never quoted in its entirety.

The State believed the portion of the Note underlined above should read "shall be scored as prior record or primary offense". This is a proposed change which the Attorney General's office should take up with the Guidelines Commission, the Florida Legislature and this Court (in another forum). This Court cannot and should not amend the guidelines retroactively in a judicial opinion.

Why is the change the State desires so important that they propose this Court should ignore the plain language of the rule? Because, the State contends:

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.

(Merit Brief of Petitioner, Page 7)

The fallacy of this argument is that it assumes a defendant is only sentenced for an offense before the court if it is scored in the fashion they propose. In fact the defendant is sentenced on all offenses before the court for sentencing. Guidelines scoring merely places limits on the total sanction. It does not preclude sentencing for any offense. The State seems to argue that the guidelines rule (without the interpretation they suggest) is too lenient on people in Mr. Stafford's position. Not so. If one is being sentenced for both old VOP cases and new substantive offenses the trial judge has the discretion to apply both legal constraint points and the one cell "bump" for the VOP. Considering that violating probation is not a crime, the

increased sanctions allowed by the current rules are clearly adequate.

This Court very recently wrote:

One of the most fundamental principles of Florida law is that penal statutes must be strictly construed according to their letter. ... Words and meaning beyond the literal language may not be entertained nor may vagueness become a reason for broadening a penal statute.

Perkins v. State, 16 FLW S207 (Fla. March 14, 1991).

The same principles apply to substantive criminal rules. The phrase "shall be scored as prior record" requires no judicial interpretation. Therefore, the decision of the Fifth District Court of Appeal should be affirmed.

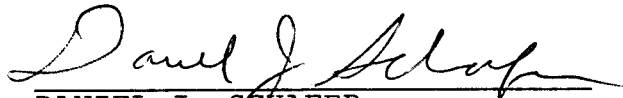


CONCLUSION

Based on the arguments and authorities cited herein, the certified question should be answered in the affirmative and the decision of the Fifth District Court of Appeal should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been delivered to the Honorable Robert Butterworth, Attorney General, 210 N. Palmetto Avenue, Suite 447, Daytona Beach, FL 32114, in his basket at the Fifth District Court of Appeal and to; John Stafford, #B-804089, P.O. Box 1500, Cross City, FL 32628, this 5th day of April, 1991.



DANIEL J. SCHAFER  
ASSISTANT PUBLIC DEFENDER