IN THE FLORIDA SUPREME COURT

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 77,551

RICKY LEWIS,

Respondent.

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DISCRETIONARY REVIEW OF DECISION OF THE
SECOND DISTRICT COURT OF APPEAL

MERIT BRIEF OF PETITIONER

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STATEMENT OF THE CASE AND FACTS

On January 11, 1989 the Respondent was charged with possession of a controlled substance. He entered a plea of nolo contedere and was placed on probation for a period of 18 months. Affidavits of violation of probation were filed on July 24, July 26, and October 6 of 1989.

On October 11, 1989, the State Attorney of the Twelfth Judicial Circuit for Manatee County, Florida, filed an information charging Respondent, RICKY LEWIS, with possession of cocaine and possession of drug paraphernalia occurring on June 14, 1989, in violation of Section 893.13, Florida Statutes (1988) and Section 893.147, Florida Statutes (1985), respectively. Two previous informations had been filed on September 14, 1989, and October 9, 1989, charging the Appellant with possession of cocaine, sale of cocaine, possession with intent to sell and possession of paraphernalia in violation of Section 893.13, Florida Statutes (1988) and Section 893.147, Florida Statutes (1985), respectively.

On December 21, 1989, defense counsel filed a motion to strike the State's use of a multiplier when calculating points for legal constraint on the scoresheet. The State multiplied the points for legal constraint by the number of new offenses for which he was to be sentenced. A hearing was held on the motion and subsequently, it was denied by the trial court. Judge Gallen, stated in his order that he believed the Appellant's argument to be a strong one but felt that absent any other

precedent, he was required to follow the ruling of Walker v. State, 546 So.2d 764 (Fla. 5th DCA 1989) allowing such a procedure.

Respondent, reserving the right to appeal the guidelines score and sentence entered nolo contendere pleas to the new substantive offenses and to the violation of probation. Respondent received an overall sentence of seven years incarceration. Notice of Appeal was timely filed on January 31, 1990.

On appeal, the Second District Court held that the trial court erred in multiplying the points for legal constraint by the number of new offenses committed by the defendant while on probation to arrive at the defendant's presumptive guidelines sentence. The Second District reversed Respondent's sentence and remanded the case for correction of the scoresheet and sentencing.

The ruling of the Second District directly and expressly conflicted with the ruling in Walker, supra, and Carter v. State, 571 So.2d 520 (Fla. 4th DCA 1991). Petitioner filed a notice to invoke discretionary jurisdiction based on the express and direct conflict.

SUMMARY OF THE ARGUMENT

In view of the purpose and intent of sentencing guidelines, it is clear that the Legislature did not intend for repeat offenders to only be assessed legal constraint points once and be given immunity for all violations thereafter when the defendant commits thirteen new offenses. Therefore the trial court properly assessed legal constraints points for each offense. This court should reverse the ruling of the Second District and reinstate the sentence imposed by the trial court.

ARGUMENT

ISSUE

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

The purpose of the sentencing 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 1989). The Respondent committed thirteen new offenses while on community control. The primary purpose of sentencing is to punish the offender. Fla.R.Crim.P. 3.701(b)(2). In view of the purpose and intent of sentencing under the guidelines, the procedure used in Walker v. State, 546 So.2d 764 (Fla. 5th DCA 1989), and followed by the circuit in this matter, is both logical and necessary.

The "legal status at the time of the offense" refers not only to the primary offense, but any offenses at conviction. Carter v. State, 571 So.2d 520, 522 (Fla. 4th DCA 1990). Therefore a defendant is properly assessed legal constraint points to each offense for which he is sentenced where he was under legal constraint at the time of the offense. Id. To do otherwise would be irrational and unfair.

The State recognizes the recent opinion in Florida Rules of Criminal Procedure RE: Sentencing Guidelines (Rules 3.701 and 3.988), 16 F.L.W. (S)198 (Fla. March 7, 1991), wherein the court acknowledges receipt of a petition to make changes to the

committee notes accompanying Rule 3.701(d)(6). The petition states that the commission never intended to assess legal constraint points for each offense committed while under legal constraint. However the State believes that the rule itself and the purpose of the guidelines is a better indication of the intent of the legislature rather than a reactionary statement from the commission rendered after the judicial process has been involved.

The legal status points should be applied if not for each new offense, then at least for each new separate criminal episode. To permit a defendant to commit numerous crimes with only one penalty is equivalent to permitting him to commit several crimes and only be charged for one. Each time Appellee committed a new offense knowing that he was on probation, he violated his probation. Therefore he should be assessed legal constraint points for each offense. To do otherwise would tell defendants that once they violated their probation or community control, they are free to commit as many crimes as possible since they will only receive one punishment. This is not what was intended by the legislature.

The Fifth and Fourth District courts of Appeal properly assessed points each for each new offense. This Court should uphold the procedure employed in Walker and Carter, and reverse and remand this matter.

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. 76,845 pending in this court), and the decision in the instant case reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Megan Olsen, Assistant Public Defender, P.O. Box 9000-Drawer PD, Bartow, Florida 33830, on this 15th day of July, 1991.

Brenda S. Taylor
OF COUNSEL FOR PETITIONER

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

RICKY LEWIS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 90-00369

Opinion filed February 1, 1991.

Appeal from the Circuit Court
for Manatee County;
Thomas M. Gallen, Judge.

James Marion Moorman, Public
Defender, and Megan Olson,
Assistant Public Defender,
Bartow, for Appellant.

Robert A. Butterworth, Attorney
General, Tallahassee, and
Brenda S. Taylor, Assistant
Attorney General, Tampa,
for Appellee.

THREADGILL, Judge.

Ricky Lewis appeals a guidelines sentence of seven years in prison. He challenges the computation of his guidelines scoresheet on two grounds, and we reverse on both.

The appellant first contends that Florida Rules of Criminal Procedure 3.701, and 3.988, do not authorize the use of a multiplier when calculating points for legal constraint. On the scoresheet used to compute the appellant's recommended sentence, the state multiplied the points for legal constraint by four, the number of new offenses the appellant committed while on probation. The trial court felt bound by the authority of Walker v. State, 546 So.2d 764 (Fla. 5th DCA 1989), to use the multiplier. See Chapman v. Pinellas County, 423 So.2d 578, 580 (Fla. 2d DCA 1982) ("[A] trial court in this district is obliged to follow the precedents of other district courts of appeal absent a controlling precedent of this court or the supreme court."). Since Walker, the Fifth District has certified the use of the multiplier to the Florida Supreme Court, Flowers v. State, 567 So.2d 1055 (Fla. 5th DCA 1990), and the Fourth District has ruled in favor of a multiplier, Carter v. State, 15 F.L.W. D2911 (Fla. 4th DCA Dec. 5, 1990). We do not agree that the guidelines require the use of a multiplier with legal constraint.

Florida Rules of Criminal Procedure 3.701,[1] and 3.988, do not require the use of a multiplier. Nor do they contain language susceptible of a different construction. Even assuming

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[1] Florida Rule of Criminal Procedure 3.701d.6. (1989): Legal status at time of offense is defined as follows: Offenders on parole, probation, or community control; in custody serving a sentence; escapees; fugitives who have fled to avoid prosecution or who have failed to appear for a criminal judicial proceeding or who have violated conditions of a proceeding or who have violated conditions of a supersedeas bond; and offenders in pretrial intervention or diversion programs.

ambiguity in the rules as to scoring legal constraint, the rule of lenity would bar the use of a multiplier. Section 775.021(1), Florida Statutes (1988) provides: "[t]he provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused." We construe this statute as applying to the sentencing guidelines rules. See Williams v. State, 528 So.2d 453, 454 (Fla. 5th DCA 1988)(adopts the rule of lenity in resolving an ambiguity in the application of the guidelines to a true split sentence); §§ 921.0015 and .001, Fla. Stat. (Supp. 1988)(adopts rules 3.701 and 3.988, as substantive criminal penalties).

Strict construction requires that "'nothing that is not clearly and intelligently described in [a penal statute's] very words, as well as manifestly intended by the Legislature, is to be considered included within its terms; and where there is such an ambiguity as to leave reasonable doubt of its meaning, where it admits of two constructions, that which operates in favor of liberty is to be taken.'" State v. Wershow, 343 So.2d 605, 608 (Fla. 1977), quoting Ex Parte Amos, 93 Fla. 5, 112 So. 289 (1927). Therefore, applying the rule of lenity and strict construction to the sentencing guidelines rules and statutes, we conclude that a multiplier may not be used with legal constraint to arrive at a recommended guidelines sentence.

The appellant also argues that the scoresheet incorrectly scores the second and third-degree felony offenses in

the primary offense category. In addition, the scoresheet incorrectly scores three third-degree offenses, whereas the appellant was convicted of only two. The state concedes error, but argues it is harmless because the revised score would place the appellant in a "permitted" sentencing range of three and one-half to seven years in prison, whereas he is currently sentenced in the "recommended" range of seven years. We disagree.

Rules 3.701d.8.[2] and 3.988(a)-(i) were amended to provide for a permitted range within which the trial court might increase a recommended guidelines sentence without written reasons for departure. As we have stated before, a trial court is without sufficient information to decide which sentence to impose without knowing the presumptive guideline sentence. See Berrio v. State, 518 So.2d 979 (Fla. 2d DCA 1988); Parker v. State, 478 So.2d 823, 824 (Fla. 2d DCA 1985). The presumptive guideline sentence as recomputed would be four and one-half to five and one-half years in prison.

We see no reason to modify our previous decisions because of the addition of a higher discretionary range. By creating two discretionary ranges, instead of merely increasing

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[2] Florida Rule of Criminal Procedure 3.701d.8. (1989): Guidelines Ranges: The recommended sentences provided in the guideline grids are assumed to be appropriate for the composite score of the offender. A range is provided in order to permit some discretion. The permitted ranges allow the sentencing judge additional discretion when the particular circumstances of a crime or defendant make it appropriate to increase or decrease the recommended sentence without the requirement of finding reasonable justification to do so and without the requirement of a written explanation.

the presumptive range, we can only conclude that the legis intended the trial courts to apply different criteria to e range. Without knowing both the presumptive and permitted for a particular offense, courts cannot implement the inte the sentencing guidelines rules and statutes. We therefor reverse the appellant's sentence and remand for correction scoresheet and resentencing.

Reversed and remanded.

SCHOONOVER, C.J., and RYDER, J., Concur.