IN THE SUPREME COURT OF FLORIDA

CASE NO. 77,434

PATRICK CARTER,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

****

****

RESPONDENT'S BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

Petitioner, Patrick Carter, the criminal defendant and appellant below in the appended Carter v. State, 15 FLW D2911 (Fla. 4th DCA December 5, 1990), review pending, Case No. 77,434 (Fla. 1991), will be referred to as "petitioner." Respondent, the State of Florida, the prosecuting authority and appellee below, will be referred to as "the State."

No references to the record on appeal will be necessary or appropriate.

Any emphasis will be supplied by the State.

STATEMENT OF THE CASE AND FACTS

Those details related to a resolution of the threshold jurisdictional question are related in the unanimous decision of the Fourth District Court of Appeal in Carter v. State, which the State, following petitioner's general lead, adopts as its statement of the case and facts.

SUMMARY OF ARGUMENT

Petitioner seeks to invoke the discretionary jurisdiction of this Court under Article V, Section 3(b)(3) of the Constitution of the State of Florida and Fla.R.App.P. 9.030(a)(2)(A)(i)(iv) to review Carter v. State on the ground that this decision expressly and directly conflicts with two decisions of the Second District Court of Appeal, Lewis v. State, 16 FLW D352 (Fla. 2nd DCA February 1, 1991) and Scott v. State, 16 FLW D356 (Fla. 2nd DCA February 1, 1991) on the same question of law.

For several reasons, this Court should decline to grant certiorari to review the decision below.

ISSUE

THIS COURT SHOULD DECLINE TO REVIEW THE DECISION BELOW

ARGUMENT

Petitioner's claim that Carter v. State is in express and direct conflict with Lewis v. State and Scott v. State on the same question of law such that this Court may exercise its discretionary jurisdiction to review Carter is incorrect because Carter was rendered before Lewis and Scott. Compare Barnett v. State, 444 So.2d 967, 969 (Fla. 1st DCA 1983), wherein the First District Court of Appeal essentially held that a decision cannot legally conflict with a subsequent decision from the same district court of appeal for purposes of invoking intradistrict conflict review over the earlier decision under Fla.R.App.P. 9.331(c)(2).

In any event, while the State acknowledges that the Second District in Scott v. State, 16 FLW D356, correctly notes that its decision in that case prohibiting the scoring of Florida sentencing guideline scoresheet points for each offense upon which a criminal defendant is on legal constraint under Fla.R.Crim.P. 3.701 when he or she is sentenced conflicts with not only Carter but also with the decisions of the Fifth District in Flowers v. State, 567 So.2d 1055 (Fla. 5th DCA 1990), review granted, Case No. 76,854 (Fla. 1990) and Walker v. State, 546 So.2d 764 (Fla. 5th DCA 1989), see also Gissinger v. State, 481 So.2d 1269 (Fla. 5th DCA 1986), the State would nonetheless submit that this Court should refuse to review Carter because both the Fourth and the Fifth Districts' resolution of the

instant issue is proper for the reasons expressed in those decisions; and alternatively because, if even this Court rules to the contrary in Flowers, petitioner would still be completely free to pursue a Fla.R.Crim.P. 3.800(a) motion with the trial judge to correct his sentence in conformity therewith, see State v. Whitfield, 487 So.2d 1045 (Fla. 1986), rather than unnecessarily litigating this issue in this Court.

Also in the alternative, the State would submit that the interests of judicial, prosecutorial and defense economy could all be similarly served simply by staying further proceedings here pending this Court's decision in Flowers.

CONCLUSION

WHEREFORE respondent, the State of Florida, respectfully submits that this Honorable Court should DENY the instant petition for writ of certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I CERTIFY that a true copy of the foregoing ahs been forwarded by courier to: **TANJA OSTAPOFF**, Assistant Public Defender, The Governmental Center - 9th Floor, 301 N. Olive Avenue, West Palm Beach, Florida 33401 this 15 day of March, 1991.

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IN THE SUPREME COURT OF FLORIDA

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PATRICK CARTER,

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APPENDIX

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A P P E N D I X

neglect of FAA regulations and intentional subterfuge for the purposes of concealment. Forfeiture is too harsh a penalty for the former, and an already existing remedy for the latter. This Court finds FS 330.40, as it relates to the "Florida Contraband Forfeiture Act" to be unreasonable, arbitrary and capricious and lacks a substantial relation to the object sought to be attained. As such, it violates substantive due process rights guaranteed by the United States and Florida Constitutions.

It is hereby ORDERED AND ADJUDGED that Respondents' motion to Dismiss is GRANTED.

AFFIRMED. (LETTS and DELL, JJ., concur. WARNER, J., concurs specially.)

(WARNER, J., concurs specially.) While I concur in the result reached, I respectfully disagree that the statute is unconstitutional because of substantive due process violations. I would hold that the statute passes the two prong test of *State v. Saiez*, 489 So.2d 1125 (Fla. 1986). I find that the proper legislative purpose that it addresses is air safety, and the means employed are rationally related to the goal of making sure an aerodynamically unsafe plane doesn't fly. I don't think that the statute criminalizes activity which is inherently innocent. What it punishes is the possession of an inherently unsafe plane, and that plane equipped with nonconforming fuel tanks *cannot be put to a lawful use*. Thus, it is unlike the credit card embossing machine in *Saiez* which was in itself inherently innocent.

The forfeiture of the plane is explicitly authorized by statute. The statute declares that planes in violation of the statute are contraband per se. The amendment including that language was added for the specific purpose of avoiding the ruling of *City of Indian Harbour Beach v. Damron*, 465 So.2d 1382 (Fla. 5th DCA 1985) which held that an airplane which was improperly registered was an essential element of the offense itself and therefore was not subject to forfeiture as an instrumentality in the commission of the offense. *See* Staff of Florida Senate Comm. on Judiciary-Criminal, CS for HB 1467 (1987), Staff Analysis (revised May 25, 1987) (on file with committee). The legislative amendment has now made the plane contraband per se and thus not within the scope of the *Damron* ruling. Where the statute is clear and unambiguous, the courts have no discretion but to enforce its terms. *See U.S. v. Addison*, 260 F.2d 908 (5th Cir. 1958) (forfeiture statute must be enforced where clear and unambiguous). And forfeiture, while extreme, is exceedingly effective in removing an unsafe airplane from use. Thus, I would hold that the statute does not violate due process.

However, I would hold that the statute is preempted by federal legislation under the Supremacy Clause of the federal constitution.[2] 49 U.S.C.A. § 1472(b) (1) (G) provides that it is unlawful to operate a plane with nonconforming fuel tanks. Criminal penalties are imposed, and the plane is subject to forfeiture. I would hold that this act preempts state legislation on the subject. Where the federal interest in the area of regulation is so dominant, the federal system will be assumed to preclude enforcement of state laws on the same subject. *Hillsborough County, Fla. v. Automated Medical Laboratories*, 105 S.Ct. 2371 (1985). The nation's airways are indeed an area of particular federal interest. *City of Burbank v. Lockheed Air Terminal*, 93 S.Ct. 1854 (1973). Indicative of that is the extensive scheme of regulation through the Federal Aviation Administration. But most telling of a congressional intent to preempt this area of aircraft regulation is 49 U.S.C.A. § 1472(b)(5)—Effect on State Law. That section provides:

> Nothing in this subsection or in any other provision of this chapter shall preclude a State from establishing criminal penalties, including providing for forfeiture or seizure of aircraft, for a person who—
>
> (A) knowingly and willfully forges, counterfeits, alters, or falsely makes an aircraft registration certificate;
>
> (B) knowingly sells, uses, attempts to use, or possess with intent to use fraudulent aircraft registration certificate;
>
> (C) knowingly and willfully displays or causes to be displayed on any aircraft any marks that are false or misleading as to the nationality or registration of the aircraft; or
>
> (D) obtains an aircraft registration certificate from the administrator by knowingly and willfully falsifying, concealing or covering up a material fact, or making a false, fictitious, or fraudulent statement or representation, or making or using any false writing or document knowing the writing or document to contain any false, fictitious, or fraudulent statement or entry.

Notably absent from the permitted state offenses is the use of a plane with nonconforming fuel tanks. Therefore, I conclude that having legislated on this subject, and having specified the areas in which the state may still enforce its laws, Congress has preempted this area of aviation regulation of planes with nonconforming fuel tanks so that section 330.40, Florida Statutes (1987) is unconstitutional for violation of the Supremacy Clause.

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[1]In addition the owner claimed that the aircraft was conforming and certified by the F.A.A. and presented affidavits to that effect.

[2]I acknowledge that this was not raised by appellee in its answer brief. It was raised to the trial court by motion, and it allows me to concur in an affirmance of the trial court on a "right for the wrong reasons" analysis.

* * *

Criminal law—Sentencing—Guidelines—Written scoresheet must be prepared even in cases having mandatory penalties—Legal constraint points properly assessed to both primary offense of conviction and additional misdemeanor offenses—Error to assess costs without notice and hearing

PATRICK CARTER, Appellant, v. STATE OF FLORIDA, Appellee. 4th District. Case No. 90-0828. Opinion filed December 5, 1990. Appeal from the Circuit Court for Martin County; Robert R. Makemson, Judge. Robert A. Butterworth, Attorney General, Tallahassee, and John Tiedemann, Assistant Attorney General, West Palm Beach, for appellant. Richard L. Jorandby, Public Defender, and Tanja Ostapoff, Assistant Public Defender, West Palm Beach, for appellee.

(POLEN, J.) Appellant timely seeks review of his sentence based on a judgment and conviction of battery on a law enforcement officer and separate charges leading to adjudication of guilty of misdemeanor charges to which he had pled nolo contendere. Appellant asserts reversible error in the trial court's failure to use a sentencing guidelines scoresheet and in the multiple assessing of points for legal constraint as to the misdemeanors. Appellant also asserts reversible error in the assessment of costs. We affirm in part, reverse in part and remand to the trial court.

At the sentencing hearing, the trial judge, over objection, assessed points for being on legal constraint for the misdemeanors as well as the felony, thus placing appellant in a guidelines cell with a recommended range of seven to nine years and a permitted range of five and one-half to twelve years incarceration. However, based on *Branam v. State*, 554 So.2d 512 (Fla. 1990), the trial judge concluded where the statutory maximum or minimums preclude sentencing within the recommended range, the judge must impose sentences that come as close as possible to the guidelines recommended range. Therefore, the judge sentenced appellant to consecutive sentences for a total of six years and sixty days incarceration.

The record indicates a written scoresheet may have been used during the sentencing hearing; however, none has been provided in the record on appeal. The state argues that, because pursuant to *Branam* the trial judge was required to sentence appellant to the specific consecutive sentences bringing appellant's sentence

as close to the guidelines as possible, the absence of a scoresheet is not fatal. We disagree. The existence of mandatory sentences and their repercussions does not affect the requirement of a written scoresheet. Florida Rule of Criminal Procedure 3.701 states that even in the case of offenses having mandatory penalties, a scoresheet must be completed. Here, either the record must be supplemented with the "missing" scoresheet or if none is available, then upon remand for resentencing one must be considered and added to the record.

We find unconvincing appellant's argument of error in the trial court's adding points for legal constraint for the misdemeanor charges as well as the felony offense. The "legal status at the time of the offense" refers not only to the primary offense, but any offenses at conviction. 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. *See Walker v. State*, 546 So.2d 764 (Fla. 5th DCA 1989); *Gissinger v. State*, 481 So.2d 1269, 1270 (Fla. 5th DCA 1986). Since pursuant to the guidelines, an "offense" can be scored as a misdemeanor, and legal constraint points can be scored for additional "offenses," legal constraint points can be scored for misdemeanors as well.

Additionally, as costs were assessed against appellant without benefit of notice and a hearing, we find reversible error based on *Mays v. State*, 519 So.2d 618 (Fla. 1988). We note that an identical argument was raised by the state in *Beasley v. State*, 565 So.2d 721 (Fla. 4th DCA), *review granted*, No. 76,102 (Fla. June 7, 1990), wherein we certified the question of whether the imposition of costs against an indigent is different from the collection of those costs, making the question of ability to pay premature until attempt is made to collect such costs.

REVERSED AND REMANDED. (DOWNEY and GARRETT, JJ., concur.)

* * *

Juveniles—Habeas corpus—Potential inconvenience in scheduling interviews with victim and witnesses located in another city not adequate ground for continuation of secure detention beyond twenty-one days—Neither juvenile's prior record, inability to locate juvenile's mother, juvenile's bad behavior in group home in which he had been living, nor perceived danger once juvenile is released constitutes "good cause" for continuance of detention—Writ of habeas corpus granted

P.H., a child, Petitioner, v. RONALD FRYER, Superintendent of Broward Regional Juvenile Detention Center, Respondent. 4th District. Case No. 90-2714. Opinion filed December 5, 1990. Petition for writ of habeas corpus to the Circuit Court for Broward County; Lawrence L. Korda, Judge. Allen H. Schreiber, Public Defender, and Frank de la Torre and Michael Klein, Assistant Public Defenders, Fort Lauderdale, for petitioner. Robert A. Butterworth, Attorney General, Tallahassee, and Don M. Rogers, Assistant Attorney General, West Palm Beach, for respondent.

(PER CURIAM.) This motion for writ of habeas corpus or other appropriate relief is construed as a petition for writ of habeas corpus, and the Honorable Lawrence L. Korda, circuit court judge, is, *sua sponte*, stricken as a named respondent. By earlier order, this court granted the petition and ordered petitioner released from detention forthwith. This opinion follows to set forth the reasons behind our ruling.

Petitioner P.H., a juvenile, was held in secure detention for approximately twenty days when the state filed and argued a motion for extention [sic] of detention beyond the statutory twenty-one (21) day maximum detention period before an adjudicatory hearing, provided by section 39.032(6)(d), Florida Statutes (1989). As detention began on September 15, 1990, this case predates The Florida Juvenile Justice Act, Chapter 90-208, effective October 1, 1990. The state's form motion recites that petitioner was originally arrested for aggravated assault, and that an extension of detention was necessary for this reason:

> The BSO [Broward Sheriff's Office] Investigating Detective has had difficulty locating and scheduling victim and witness statements. Filing appt. is set for 10/10/90 with undersigned Assistant State Attorney.

The motion also makes a legal argument that the legislature did not intend to automatically release juveniles charged with "serious crimes" into the community after only twenty-one days, and acknowledges that other grounds for extension would be argued ore tenus. They were. At the hearing, the assistant state attorney said that the state investigators had "encountered difficulty" in locating and scheduling interviews of the victim and witnesses. However, the explanation offered did not support this contention. The victim, it was revealed, was said to live in Miami and work as a staff member at the group treatment home where petitioner was detained and where the aggravated assault allegedly occurred. The witnesses were the other juveniles at the home. The victim worked a noon to eight p.m. shift and on weekends. The state never said that any attempt to contact the victim and witnesses on weekends had ever been made to date.

Thus, the state did not show that the victim or any witnesses were actually unavailable. It did not even show that its investigation was ever commenced. At most, it argued potential inconvenience in scheduling interviews, as the subjects were located in Miami. This would not constitute adequate grounds for continuation of detention under section 39.032(6)(d). The courts are cautioned to look beyond the mere allegations in a motion for continuance. If a factual basis is lacking, continuance must be denied.

Also at the hearing on the state's motion for continuance of the twenty-one day period, a spokesperson for the group treatment home where petitioner has been held in the past advised the court that petitioner has been difficult to handle at times, but that he has never left the home. He also said petitioner's mother had not been located. The court further noted that petitioner's file, including a face sheet, and probable cause affidavit, revealed prior charges and adjudications for crimes. However, as the First District Court of Appeal held in *E.W. v. Brown*, 559 So.2d 712 (Fla. 1st DCA 1990), the "good cause" requirement of this statute does not relate to the original basis for detention, but to the reason for the delay in the commencement of the adjudicatory hearing process. *Id.* at 713.

It is clear from review of the transcript of the hearing on the state's motion for continuance that the trial court felt frustration with the constraints of the juvenile detention law given the facts before it. However, this frustration cannot be the basis for an order continuing detention beyond the twenty-one day period based on a juvenile's prior record, absent mother, bad behavior in a group home, or even perceived danger once released. None of these grounds constitutes "good cause" for continuance.

The petition for writ of habeas corpus is granted. (HERSEY, C.J., and GARRETT, J., concur. LETTS, J., concurs specially with opinion.)

(LETTS, J., specially concurring.) As a spate of decisions (in excess of forty) from this court over the last year will confirm, Judge Lawrence L. Korda does not like the statutory provisions on juvenile detention. Neither do I. However, as Gertrude Stein might put it, "the law, is the law, is the law." Surely, of all people, judges must have respect for it.

* * *

CERTIFICATE OF SERVICE

I CERTIFY that a true copy of the foregoing Appendix has been forwarded by courier to: **TANJA OSTAPOFF**, Assistant Public Defender, The Governmental Center/9th Floor, 301 N. Olive Avenue, West Paml Beach, Florida 33401 this 15 day of March, 1991.

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