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IN THE SUPREME COURT OF FLORIDA

CASE No. 77,434

PATRICK CARTER,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

****

ON CERTIFIED QUESTION FROM THE FOURTH DISTRICT COURT OF APPEAL

****

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, Patrick Carter, the criminal defendant and appellant below in the appended Carter v. State, 571 So.2d 520 (Fla. 4th DCA 1990), review granted, 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."

References to the one-volume record on appeal will be designated "(R:)."

Any emphasis will be supplied by the State unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Subject to the additions and clarifications contained in the argument portion of this brief which are necessary to resolve the narrow issue presented upon certiorari, the State accepts petitioner's "statement of the case and facts" as a relatively accurate depiction of the events below.

SUMMARY OF ARGUMENT

The Fourth District properly approved the trial court's assessment of seventy-two sentencing guideline scoresheet points for petitioner's legal constraint on two misdemeanors. A criminal defendant who commits multiple offenses while on legal constraint should be treated more harshly than a defendant who commits only one such offense.

ISSUE (Petitioner's Points I & II)

THE FOURTH DISTRICT DID NOT REVERSIBLY ERR BY APPROVING THE TRIAL COURT'S ASSESSMENT OF 72 SENTENCING GUIDELINE SCORESHEET POINTS FOR LEGAL CONSTRAINT

ARGUMENT

On March 1, 1990, Martin County Circuit Judge Robert Makemson sentenced petitioner to five years of imprisonment upon his conviction for the third degree felony of battery on a law enforcement officer. The judge also consecutively sentenced petitioner to one year of imprisonment for the first degree misdemeanor of resisting arrest without violence, and sixty days of imprisonment for the second degree misdemeanor of possession of an open container near a liquor store (R 29-35, 42, 69-72, 91, 105-112). Judge Makemson not only assessed petitioner thirty-six points for being on legal contraint at the time he committed the felony, but further assessed petitioner seventy-two points for being on legal constraint while committing the two misdemeanors. These computations resulted in a permissive Fla.R.Crim.P. 3.988(d) sentencing guideline range of 5½ to 12 years of imprisonment, rather than the 1 to 4½ years permissive range which would have resulted had the judge sustained petitioner's objection to the scoring of legal constraint points for the two misdemeanors (R 9, 15-19, 30-32).

On appeal, the Fourth District held as follows:

> We find unconvincing [petitioner]'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 offense 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.

Carter v. State, 571 So.2d 520, 521-522. See also Flowers v. State, 567 So.2d 1055 (Fla. 5th DCA 1990), review granted, Case No. 76,854 (Fla. 1990). Petitioner's machinations do not detract in the slightest from this lucid holding.

The State will close by quoting at length from its brief to this Court in Flowers v. State, which is the lead case on the instant question:

> "A person who commits more than one crime while on probation should be treated more harshly and in direct proportion to the number of crimes for which he is convicted, than one who commits only one crime." Adams v. State, 16 F.L.W. D641, D642 (Fla. 5th DCA March 7, 1991). The Fifth District Court of Appeal observed in an earlier case that "[one] stated purpose of the 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 1986), citing Fla.R.Crim.P. 3.701(b)(4). The defendant committed several additional offenses while on probation for earlier offenses. A defendant who commits a second or subsequent violation of probation can only be sentenced to the next higher cell under the sentencing guidelines without providing written reasons for departure. Fla.R.Crim.P. 3.701(d)(14). If the defense interpretation is accepted, the defendant, who committed numerous criminal acts despite the legal constraint, will receive no more of a sanction for blatantly and repeatedly violating his

probation than does a defendant who violated it but once.

The defense points to the recently amended scoresheet to support its position. It is true that the new scoresheet provides for the multiplication of victim injury points. Equally as true, it was not until the amendment that the scoresheet contained a multiplier on its face. Cf. 15 F.L.W. S210 and S458 (Fla. April 12, 1990 and September 6, 1990); Fla.R.Crim.P. 3.988, Florida Rules of Court, West Pub. (St. Paul, MN 1990). One of the problems in comparing legal constraint points with victim injury points is that the latter seems to have finally been resolved, while the instant issue is of recent origin. There have been no committee notes whatsoever regarding legal constraint points under rule 3.701(d)(6) since the guidelines were established. Subsection (d)(7), on the other hand, has been amended on a number of occasions for purposes of clarification. See, e.g., Pisano v. State, 539 So.2d 486, 487 (Fla. 2d DCA 1989), review granted, 545 So.2d 1368 (Fla. 1989), cause dismissed, 554 So.2d 1165 (Fla. 1990). Because this is the first plenary review of the instant issue by this court, the mere omission of a multiplier on the face of the scoresheet is not significant.

The comparison between the legal constraint provision and the express multipliers in categories 1, 3, 5, and 6 is tenuous because each of the latter is included under a defendant's prior criminal record. Prior record, like legal constraint, is in and of itself a section under the rule. Fla.R.Crim.P. 3.701(d)(5). The express multipliers, on the other hand, are not. Further, points for prior convictions are not straight multipliers. For example, one prior conviction for a life felony scores 60 points on a category 7 scoresheet, while four priors score 300 points. Of course, if the prior record was a straight multiplier the score would have been 240. Hence, a comparison between prior record and legal constraint is strained because it appears likely that different policy considerations apply.

The defense compares this case to Miles v. State, 418 So.2d 1070 (Fla. 5th DCA 1982);

Hoag v. State, 511 So.2d 401 (Fla. 5th DCA 1987); and Burke v. State, 475 So.2d 252 (Fla. 5th DCA 1985). It speciously contends that the logic of those cases leads to the conclusion in this case that "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 the number of offenses that he committed while on or under legal constraint." (B 8). First of all, none of these cases is on point. However, if they were they would lead to precisely the opposite conclusion. Miles was "twice charged with and later convicted of, the same crime" because there was nothing to distinguish the two counts. Miles, 1071. "[T]he failure of Hoag to stop at the scene of his accident constituted but one offense although that accident resulted in injuries to four persons and the death of a fifth." Hoag, 402. "[T]hree bills were given simultaneously for rent . . . this transaction is a single criminal act . . ." Burke, supra. The instant defendants' crimes, on the other hand, were not committed as one transaction. To the contrary, the numerous criminal acts of each of the defendants were committed separately and distinctly from his other criminals acts.

The defense characterizes the assignment of legal constraint points as "double-dipping" because points are already scored for the other offenses (B 8). Independently of the crimes per se, the fact that a criminal continues to commit crimes despite placement on probation is material to consideration of the "nature of the offender's criminal history." Fla.R.Crim.P. 3.701(b)(4). Although violation of probation is not a substantive offense, criminal defendants should not be free to repeatedly defy such restrictions with virtual impunity.

It is worthy of note that another district court of appeal has given plenary review to the instant issue. The court in Carter v. State, 15 F.L.W. D2911 (Fla. 4th DCA December 5, 1990), held that legal constraint points were properly assessed for each offense. Id., D2912 (citations omitted).

> In closing, one more point needs to be addressed. The defense speaks of "the new rule". As its discussion indicates, the passage will not become part of the rule unless the legislature implements it. Florida Rules of Criminal Procedure re: Sentencing Guidelines (Rules 3.701 and 3.988), 16 F.L.W. S198, S199 (Fla. March 7, 1991); see also Ricks v. State, 16 F.L.W. D1165 (Fla. 4th DCA May 1, 1991).

("State's Brief on the Merits" in Flowers v. State, pages 4-7).

It follows that this Court must approve the decision of the Fourth District in this case.

CONCLUSION

WHEREFORE respondent, the State of Florida, respectfully submits that this Honorable Court must APPROVE the decision under certiorari review.

Respectfully Submitted,

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I CERTIFY that a true copy of the foregoing has been forwarded by courier to: Ms. Tanja Ostapoff, Assistant Public Defender, 301 N. Olive Ave./9th Floor, West Palm Beach, FL 33401, this 15 day of July, 1991.

John Tiedemann

Of Counsel

IN THE SUPREME COURT OF FLORIDA

CASE No. 77,434

PATRICK CARTER,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

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ON CERTIFIED QUESTION FROM THE FOURTH DISTRICT COURT OF APPEAL

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APPENDIX TO RESPONDENT'S ANSWER BRIEF ON THE MERITS

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unlike Mr. Boland, had not affirmatively elected guidelines sentencing. Because the trial court chose to use the guidelines at the first hearing and because it could have lawfully used those guidelines with the consent of the defendant at that hearing, it was appropriate to limit the trial court to the grounds which it articulated at the first hearing.

In this case, Mr. Boland affirmatively elected guidelines sentencing, but is not bound by his own election due to the constitutional nonexistence of the guidelines at the time of his election. For purposes of the sentencing guidelines, that hearing was a virtual nullity because it occurred outside the lawful sentencing structure. We conclude that, if the sentencing was unconstitutional and Mr. Boland's first election is not binding upon him, it is only appropriate that the trial court be given a new opportunity to depart based upon the procedures and reasons for departure which are valid at the time of Mr. Boland's new election. *Cf. Jones v. State,* 559 So.2d 204 (Fla.1990) (*Whitehead* not applicable where previous sentence was not deemed to be a guidelines sentence).

Reversed and remanded.

LEHAN, A.C.J., and PARKER, J., concur.

FLORIDA PERFECTIONS, INC., Appellant,

v.

J & D FINANCIAL CORPORATION, Appellee.

No. 90–1064.

District Court of Appeal of Florida, Third District.

Dec. 4, 1990.

As Corrected on Grant of Clarification Jan. 15, 1991.

An Appeal from the Circuit Court for Dade County; Jon I. Gordon, Judge.

Michael Lechtman, North Miami Beach, for appellant.

Richard B. Carmel, North Miami, for appellee.

Before BARKDULL, HUBBART and FERGUSON, JJ.

PER CURIAM.

A summary judgment was rendered in appellee/plaintiff's favor on certain counts of a complaint. This appeal followed. Counsel for the appellee having admitted before this court that the remaining counts of the complaint against appellant, Florida Perfections, Inc., have been abandoned, the summary judgment is affirmed. *See and compare Pacific Mills v. Hillman Garment,* 87 So.2d 599 (Fla.1956); *Goldberger v. Regency Highland Condominium Association, Inc.,* 452 So.2d 583 (Fla. 4th DCA 1984); *Bowman v. Kingsland Development, Inc.,* 432 So.2d 660 (Fla. 5th DCA 1983); *Spurrier v. United Bank,* 359 So.2d 908 (Fla. 1st DCA 1978); *Sottile v. Gaines Construction Company,* 281 So.2d 558 (Fla. 3d DCA 1973); *Accurate Metal Finishing Corp. v. Carmel,* 254 So.2d 556 (Fla. 2d DCA 1971).

Affirmed.

Patrick CARTER, Appellant,

v.

STATE of Florida, Appellee.

No. 90–0828.

District Court of Appeal of Florida, Fourth District.

Dec. 5, 1990.

Rehearing Denied Jan. 16, 1991.

Defendant sought review of sentence based on judgment and conviction before

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the Circuit Court for Martin County, Robert R. Makemson, J., of battery on a law enforcement officer and separate misdemeanor charges, and he appealed. The District Court of Appeal, Polen, J., held that: (1) written scoresheet was required to sentence defendant, notwithstanding that trial judge had to sentence defendant to specific consecutive sentences to bring his sentences close to guidelines as possible; (2) legal constraint points could be assessed for misdemeanor charges as well as for felony offense; and (3) it was reversible error to assess costs against defendant without benefit of notice and hearing.

Reversed and remanded.

1. Criminal Law ⚿1322

Written scoresheet was required to sentence defendant, notwithstanding that trial judge had to sentence defendant to specific consecutive sentences to bring his sentences close to guidelines as possible. West's F.S.A. RCrP Rule 3.701.

2. Criminal Law ⚿1245(2)

A defendant is properly assessed legal constraint points to each offense for which he is sentenced while he was under legal constraint at the time of the offense.

3. Criminal Law ⚿1245(3)

Legal constraint points could be assessed for misdemeanor charges as well as for felony offense.

4. Costs ⚿314

It was reversible error to assess costs against defendant without benefit of notice and hearing.

Robert A. Butterworth, Atty. Gen., Tallahassee, and John Tiedemann, Asst. Atty. Gen., West Palm Beach, for appellant.

Richard L. Jorandby, Public Defender, and Tanja Ostapoff, Asst. Public Defender, West Palm Beach, for appellee.

POLEN, Judge.

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.

[1] 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.

[2, 3] 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.

[4] 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.

Dorcas Irene TONNELIER, the Former Wife, Appellant,

v.

Thomas Henry TONNELIER, Former Husband, Appellee.

No. 90–281.

District Court of Appeal of Florida, First District.

Dec. 5, 1990.

Rehearing Denied Jan. 15, 1991.

Former wife appealed from an order of the Circuit Court for Alachua County, Nath C. Doughtie, J., which denied her petition to modify dissolution judgment by converting her rehabilitative alimony to permanent periodic alimony. The District Court of Appeal, Wigginton, J., held that: (1) trial court should not have considered only "change in circumstances" test, and (2) court should have given wife more credit for nursing her daughter through her daughter's terminal illness.

Reversed and remanded.

1. Divorce ⟹247

Trial court considering wife's petition to modify dissolution judgment by converting her rehabilitative alimony to permanent periodic alimony abused its discretion by considering only "change in circumstances" test; court should have considered original objectives for rehabilitation, whether wife achieved those objectives, whether there was reasonable likelihood that wife could maintain ability of self-support in view of her age and foreseeable physical condition and whether wife made diligent efforts to become rehabilitated and, despite those efforts, substantial rehabilitation had not occurred.

2. Divorce ⟹247

Trial court when considering former wife's petition to modify dissolution judgment by converting her rehabilitative alimony to permanent periodic alimony should have given wife more credit for nursing her daughter through her daughter's terminal illness, inasmuch as such evidence showed that former wife, through no fault of her own, was unable to rehabilitate herself.

N. Albert Bacharach, Jr., Gainesville, for appellant.

H. Stephen Pennypacker, Gainesville, for appellee.

WIGGINTON, Judge.

The wife appeals from the trial court's order denying her second supplemental pe-

CERTIFICATE OF SERVICE

I CERTIFY that a true copy of the foregoing has been forwarded by courier to: Ms. Tanja Ostapoff, Assistant Public Defender, 301 N. Olive Ave./9th Floor, West Palm Beach, FL 33401, this 15 day of July, 1991.

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