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IN THE SUPREME COURT OF FLORIDA

SID J. WHITE

JUL 24 1991

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STATE OF FLORIDA,
Petitioner,

v.

MATTHEW KENNY,
Respondent

Case. No.

97,611

ON APPEAL FROM THE SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA

PETITIONER'S BRIEF ON THE MERITS

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TABLE OF CASES

State v. Scott,
No. 77,415 (Fla., petitioner's brief on jurisdiction
served Mar. 11, 1991), 4

STATEMENT OF THE CASE AND FACTS

Matthew Kenny was serving a sentence on community control for failure to appear, burglary, and possession of cocaine. R80. While on community control:

Kenny stole money from the cash register in one restaurant (considered one incident herein);

failed to appear after being arrested for violating probation for, inter alia, drug use;

cashed five forged checks stolen from another restaurant where he worked;

and forged five credit card invoices arising from making a second invoice when preparing invoices for diners at a third restaurant. R60-61.

The total amount of money involved vis-a-vis restitution was less than \$3,000.

The state's initial sentencing guidelines sheet scored points for being under legal constraint for each of the offenses, raising Kenny's guidelines sentence to life. R199. At his original plea hearing November 28, 1989, Kenny's public defender argued that Kenny deserved a downward departure from the life sentence because of the nature of the charges. R200. Kenny and the state had been unable to agree to a negotiated plea--the state had offered 20 years in prison plus seven on probation, but Kenny would not accept the bargain. R200. Kenny had a large number of prior convictions, including fraudulent use of credit cards. R200. The judge proposed a nine year sentence plus five years on probation, and Kenny accepted the offer, without the

agreement of the state. R203 & R207-08.

Kenny asked for a brief furlough to attend to personal business before being sentenced. R203.

THE DEFENDANT: I give my word. I know what you'll do to me if I don't appear. I will be back the day you tell me to, sir.

THE COURT: You understand where [the assistant state attorney] has got you scored and what validly could happen to you if you get a failure to appear?

THE DEFENDANT: I do. Unfortunately, I--I didn't understand about the multiplier until Mr. Lindsey explained it me [sic].

THE COURT: You understand what you're looking at?

THE DEFENDANT: I know exactly, sir. I wouldn't ask--I wouldn't put myself in the situation if I didn't know.

THE COURT [during actual plea colloquy]: You further understand where you score on the guideline and if A) you got in any trouble or B) you failed to show up and C) you failed a drug test I'll require while you're out?

THE DEFENDANT: Yes, sir.

THE COURT: You and I couldn't have an agreement. Do you understand that?

THE DEFENDANT: Yes, sir.

R204-07.

Despite the clear understanding of the defendant that he faced up to life in prison if he failed to appear, Kenny, true to prior form, R203 (two prior failures to appear), failed to appear as ordered December 6, 1989. R212-13. Police didn't arrest Kenny until a half year later, May 15, 1990, after denying his identity to police until they confronted him with a booking photograph. R81-82.

While the original plea had been before Judge Farnell, the new proceedings were before Judge Stoutamire. In a sentencing memorandum, the state urged that Kenny be sentenced to life, or

as close thereto as consecutive sentencing would permit. R80-84. At one of the sentencing hearings, the state suggested that the court might find a 20 year sentence, a downward departure, more acceptable, but that, ultimately, the guidelines sentence remained life because of the multiplier. R362-64. The scoresheet ultimately used by Judge Stoutamire scored only one 24 point increment for being under legal constraint, but noting, parenthetically, that twelve incidents occurred under legal constraint. R87. With the one-cell bump for violation of probation, the sentence of fifteen years, plus five probation, was within the guidelines as scored without the multiplier for legal constraint. R87. The state appealed.

The second district adhered to decisions now pending before this court for the principle that no multiplier may be used on a single scoresheet.

SUMMARY OF THE ARGUMENT

The trial court should have used a scoresheet including points for legal constraint for each crime committed while on community control. The fifth district has ruled this way, and a certified question from that district is currently pending before this court.

ARGUMENT

POINTS SHOULD BE SCORED FOR LEGAL CONSTRAINT FOR EVERY OFFENSE COMMITTED WHILE UNDER LEGAL CONSTRAINT

The second district relied upon three decisions from the district in support of its decision sub judice (copy attached). Those cases are now pending before this court. This court has consistently accepted jurisdiction in cases where the district court cites to cases currently pending before this court, and it has done so in this case. Rather than burden this court with repetitious argument, the state relies upon the state's briefs in the other cases now pending, and, more particularly, adopts the argument from the state's brief in State v. Scott, No. 77,415, a copy of which is attached hereto.

CONCLUSION

The decision below should be quashed.

Respectfully submitted,

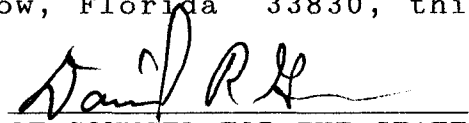
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Robert D. Rosen, Assistant Public Defender, Public Defender's Office, Polk County Courthouse, P.O. Box 9000--Drawer PD, Bartow, Florida 33830, this date, July 22, 1991,


OF COUNSEL FOR THE STATE