IN THE SUPREME COURT OF FLORIDA

CASE NO. 77,881

THE STATE OF FLORIDA,

Petitioner,

vs.

PEDRO CABRERA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF RESPONDENT

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit
of Florida
1351 Northwest 12th Street
Miami, Florida 33125
(305) 545-3005

VALERIE JONAS
Assistant Public Defender
Florida Bar No. 0616079

Counsel for Respondent

TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER AUTHORITIES

FLORIDA STATUTES

Florida Rules of Criminal Procedure (1989)

IN THE SUPREME COURT OF FLORIDA

CASE NO. 77,881

THE STATE OF FLORIDA,

Petitioner,

vs.

PEDRO CABRERA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF RESPONDENT

INTRODUCTION

The respondent, Pedro Cabrera, was the appellant below and the defendant in the trial court. The petitioner, the State of Florida, was the appellee below and the prosecution in the trial court. The symbols "R" and "T" will be used to designate the record on appeal and the transcript of proceedings.

STATEMENT OF THE CASE AND FACTS

Respondent would add to Petitioner's statement of fact that all three offenses for which convictions were obtained, and which constituted the three probation violations for which legal constraint points were assessed, arose out of the same act or transaction. Cabrera v. State, 576 So.2d 1307, 1308 (Fla. 3d DCA 1991).

SUMMARY OF ARGUMENT

There is no provision in Rule 3.701, Florida Rules of Criminal Procedure (1989) for multiple assessments of legal constraint points for all offenses at conviction. This Court has determined that Rule 3.701(d)(6) is vague with respect to a multiplier effect for legal constraint points. Where a penal statute is vague, it must be construed to favor the criminal defendant. Therefore, the holdings of the First District Court of Appeal, in Sellers v. State, 578 So.2d 339 (Fla. 1st DCA 1991); the Second District Court of Appeal, in Scott v. State, 574 So.2d 247 (Fla. 2d DCA 1991); and the Third District Court of Appeal, in Cabrera v. State, 576 So.2d 1307 (Fla. 3d DCA 1991); that legal constraint points may be assessed only once per sentencing scoresheet, should be approved; and the contrary holdings of the Fourth District Court of Appeal, in Carter v. State, 571 So.2d 520 (Fla. 4th DCA 1991); and the Fifth District Court of Appeal in, Flowers v. State, 567 So.2d 1055 (Fla. 5th DCA 1991); should be quashed.

Petitioner's argument that legal constraint points should be assessed for each discrete criminal episode constituting a violation of probation; or alternatively, that episodic violations of probation should support a departure from the one-cell bump-up provided in Rule 3.701(d)(14); has absolutely no application to the instant case, in which the substantive offenses constituting Respondent's probation violation arose from the same act or transaction. In any event, Rule 3.701(d)(6) does not provide for multiplication of legal constraint points upon any basis, and must

therefore be construed to preclude a multiplier effect for separate criminal episodes constituting probation violations. The question whether multiple violations of probation can support a departure from the one-cell bump-up provided in Rule 3.701(d)(14) is presently pending before this Court in Williams v. State, 559 So.2d 680 (Fla. 2d DCA 1991), Case No. 75,919, and need not be addressed herein.

ARGUMENT

LEGAL CONSTRAINT POINTS MAY NOT BE ASSESSED MORE THAN ONCE ON A SINGLE SENTENCING GUIDELINES SCORESHEET.

In Flowers v. State, 567 So.2d 1055 (Fla. 5th DCA 1990), the Fifth District Court of Appeal held that legal constraint points, pursuant to Rule 3.701(d)(6), Florida Rules of Criminal Procedure (1989), could be assessed for each offense scored at the time of conviction,[1] and certified to this Court a question similar to that certified by the Third District Court of Appeal in Cabrera v. State, 16 F.L.W. D898 (3d DCA, April 2, 1991):

> Whether legal constraint points may be assessed for each offense committed while under legal constraint.[2]

The Flowers majority relied, for this holding, upon its decision in Walker v. State, 546 So.2d 764 (Fla. 5th DCA 1989), which perfunctorily relied upon Gissinger v. State, 481 So.2d 1269 (Fla. 5th DCA 1986). As the Walker Court conceded, Gissinger presented an entirely different issue: whether legal constraint points could be scored where the original and primary offense (i.e.

---

[1]Accord Carter v. State, 571 So.2d 520 (4th DCA 1990). See Preston v. State, 16 F.L.W. D869 (Fla. 4th DCA, April 4, 1991) and Ricks v. State, 16 F.L.W. D1165 (Fla. 4th DCA, May 1, 1991), in which the Fourth District Court of Appeal certified to this Court the question whether

> "Florida's Uniform Sentencing Guidelines require that legal constraint points be assessed for each offense committed while under legal constraints."

[2]The precise question certified below in this case is "whether legal constraint points may be assessed more than once on a single sentencing guidelines scoresheet."

that carrying the most severe sanction) was committed while not under legal constraint, but the "additional offense" was committed while under legal constraint imposed in consequence of the original offense. In holding that legal constraint points could be scored for the additional offense, the Gissinger Court noted that otherwise a defendant could avoid legal constraint points because he committed a less serious offense while on probation for a more serious offense; but a defendant who committed the identical crime, though in reverse order, would incur legal constraint points. Such a result would, the Court correctly noted, be incongruous and inequitable. Because legal constraint points were not sought to be assessed for the primary offense in that case, Gissinger did not purport to address the question whether legal constraint points could be scored for more than one offense committed while under legal constraint. Gissinger thus offers no support for the holdings in Walker and Flowers.

Judge Cowart, dissenting in Flowers noted that, unlike factor V: victim injury, which expressly provides for multiplication for each victim injury, Rule 3.701(d)(7);[3] factor IV, legal status at time of offense, does not provide for assessment of points for each offense at conviction.[4] Nor, Judge Cowart noted, was the status of

---

[3]Rule 3.701(d)(7) provides:

> "Victim injury shall be scored for each victim physically injured during a criminal episode or transaction."

[4]Rule 3.701(d)(6) provides:

> 6. Legal status at time of offense is

legal constraint logically susceptible to separate scoring:

> "[F]actor IV relates to the defendant's status as being under, or not being under, legal constraint, a coin with but two sides, and not on the number of offenses that he committed while on or in a condition of legal constraint.
>
> "The number of offenses involved are adequately scored as an aspect of factors I. and II. (Primary and additional offenses at conviction) and should not be used as a multiplier factor or aspect of the defendant's legal status at the time of the offenses. His "legal status" is a simple concept -- he either was, or was not, under legal constraint when he committed any offense for which he is being sentenced. The guidelines neither expressly nor by implication contemplate nor provide for multiplying the defendant's legal status score for each offense involved in the manner that each victim's injury is scored."

567 So.2d at 1055.[5]

> 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 supersedeas bond; and offenders in pretrial intervention or diversion programs.

[5] Judge Cowart compared this issue to those presented in Miles v. State, 418 So.2d 1070 (Fla. 5th DCA 1982); and Hoag v. State, 511 So.2d 401 (Fla. 5th DCA 1987), rev. denied, 518 So.2d 1278 (Fla. 1987). In Miles, the defendant was released and ordered to appear, at one time and one place, on two separate criminal cases. The Fifth District reversed his conviction on one of the two ensuing charges for failure to appear: because "the essence of the charge was Miles' failure to appear which occurred but one time," the dual conviction for the same statutory offense, arising from the same act, violated Miles' double jeopardy rights.

In Hoag, the defendant left the scene of a crime in which four people were injured and one killed. The defendant was convicted of five counts of leaving the scene of an accident. The Fifth District vacated four of the five convictions: "there was but one accident, one scene of an accident, and one leaving of that scene one time by the defendant."

Judge Cowart concluded that, in the absence of express provision for multiplying legal constraint points for each offense committed while on legal constraint, and in view of the federal and state due process provisions for strict construction of criminal laws in favor of the accused, legal constraint points should be scored but once, because legal constraint is a single status.

The First District Court of Appeal in Sellers v. State, 578 So.2d 339 (Fla. 1st DCA 1991);[6] and the Second District Court of Appeal in Scott v. State, 574 So.2d 247 (Fla. 2d DCA 1991), and Lewis v. State, 574 So.2d 245 (Fla. 2d DCA 1991)[7] rejected the majority opinion in Flowers - the Sellers Court decrying that opinion's "absence of a clear analysis" - and adopted the rationale of Judge Cowart's dissent, holding that legal constraint points could be assessed but once for all offenses at time of sentencing. The Scott Court noted that, unlike the other four factors on the scoresheet (i.e., primary offense, additional offenses, prior record, and victim injury), there is no language in the rule "which expressly authorizes a multiplier for legal status"; and that, "in the absence of express language," the court would not imply a multiplier effect. 574 So.2d 248.[8] The Third District Court of

---

[6]See also Echtinaw v. State, 16 F.L.W. D1873 (Fla. 1st DCA, July 17, 1991) and Wilson v. State, 16 F.L.W. D1477 (Fla. 1st DCA, May 23, 1991).

[7]See also Worley v. State, 573 So.2d 1023 (Fla. 2d DCA 1991).

[8]The Scott Court additionally inferred that the legislature did not intend that factor IV be multiplied, because of the absurd results produced by a multiplier effect in that case. Scott's

Appeal in the instant case aligned itself with the first and second districts in holding that legal constraint points could be assessed but once per scoresheet. Cabrera v. State, 576 So.2d 1307 (Fla. 3d DCA 1991).

In Florida Rules of Criminal Procedure Re: Sentencing Guidelines (Rule 3.701 and 3.998), 576 So.2d 1307 (Fla. 1991), this Court considered a petition by the Florida Sentencing Guidelines Commission to amend the committee notes accompanying Rule 3.701(d)(6) to clarify, in order to reversee Flowers and its progeny, that it was never the Commission's intention to permit multiplication of legal constraint points for more than one offense per scoresheet.[9] This Court declined the Petition, noting that the legal constraint provision is "admittedly and self-evidently vague" with respect to a multiplier effect; but that the court could not, consistent with § 921.001, Florida Statutes (1989) and the doctrine of separation of powers, judicially clarify the rule; and, while approving the Commission's intent thus to clarify the Rule, this

---

multiplied legal constraint score was 428 points, or 56% of his point total, a numerical value which could have been obtained by the state's presentation of 411 first-degree felony convictions as additional offenses at conviction, or 41 such convictions as primary offenses. See also Wilson, noting that multiple assessments in that case, for seven pending offenses, produced 252 points, representing 54% of his Wilson's point total, a numerical value equivalent to the presentation of 62 first-degree felonies as additional offenses at conviction.

[9]See e.g. State v. Lanier, 464 So.2d 1192 (Fla. 1985), holding that the legislature's amendment to § 800.04, Florida Statutes (1983), which was effected to clarify the statute's intended coverage in order to correct a District Court's erroneous interpretation of its terms, was found not to alter the statute's terms but rather served as an aid to construction of the statute as it existed at the time of the subject offense.

Court required that any clarification be effected by the legislature.

This Court's determination that the legal constraint provision is vague with respect to the issue of multiplication for all offenses pending at sentencing is dispositive of the certified question, pursuant to pertinent principles of statutory construction. Where, as here, a penal statute is vague, or susceptible of different interpretations, it must be construed in favor of the accused. See Lambert v. State, 545 So.2d 838, 841 (Fla. 1989)(new offenses constituting probation violation could not support departure where rule silent on this issue); Weekley v. State, 553 So.2d 239, 240 (Fla. 3d DCA 1989)(amendment's omission of provision for multiple scoring of victim injury points for separate counts relating to same victim precluded multiplier effect). As this Court stated in Perkins v. State, 576 So.2d 1310 (Fla. 1991):

> "[T]o the extent that definiteness is lacking, a statute must be construed in the manner most favorable to the accused ...
>
> "The rule of strict construction ... rests on the doctrine that the power to create crimes and punishments in derogation of the common law inheres solely in the democratic processes of the legislative branch ...
>
> "This principle can be honored only if criminal statutes are applied in their strict sense, not if the courts use some minor vagueness to extend the statute's breadth beyond the strict language approved by the legislature. To do otherwise would violate the separation of powers ..."

576 So.2d at 1312-1313.

Furthermore, any doubt about the meaning of a statute must be resolved against the power of a court to supply missing words or applications. Armstrong v. Edgewater, 157 So.2d 422 (Fla. 1963); Fla.Jur.2d, Statutes, § 120. A penal statute, in particular, may not be extended by implication, inference or interpretation, beyond the ambit of its terms. Thayer v. State, 335 So.2d 815 (Fla. 1976); State v. Buchanan, 189 So.2d 270 (Fla. 3d DCA 1966).

Finally, the principle expresio unius est exclusio alterius: the mention of one thing implies the exclusion of another, forbids the implication of a multiplier for legal constraint points. Because Rule 3.701 expressly provides for a multiplier for e.g. victim injury, its omission to provide for a multiplier for legal constraint must be construed to preclude this effect. See e.g. State v. Diers, 532 So.2d 1271 (Fla. 1988)(no state appeal, pursuant to Youthful Offender Act, because statute refers only to defense appeal); Ellison v. State, 547 So.2d 1003 (Fla. 1st DCA 1989)(error to assess legal constraint points for "furlough status" where status unenumerated in Rule 3.701(d)(6)).

Because Rule 3.701(d)(6) does not provide for multiple assessment of legal constraint points, the holdings of the First, Second and Third District Courts of Appeal, that legal constraint points may be assessed just once on a single sentencing scoresheet, represent a correct application of the rules of statutory construction, and this Court should answer the certified question in the affirmative.

The petitioner urges that, in the event this Court answers the

certified question in the negative, it should nevertheless permit an additional assessment for each separate criminal episode committed while the defendant was under legal constraint, if not for all offenses comprising each separate criminal episode.[10] Petitioner suggests that this approach to the problem would accommodate both the defendant's interest in being free from a disproportionate assessment of legal constraint points, and the state's interest in enhancing the punishment of those who commit numerous criminal episodes while under legal constraint, in view of this Court's holding in Clark v. State, 572 So.2d 1387 (Fla. 1991), requiring a single scoresheet for sentencing a defendant on pending offenses charged in separate informations. This suggestion suffers the infirmity identified in connection with the Flowers holding assessing points for all offenses regardless of their episodic character: the rule does not provide for multiple assessments on any basis. The principles of lenity and strict construction forbid the implication of a multiplier nothwithstanding the asserted wisdom or equity of such implication.[11]

---

[10]The three offenses constituting the violation of Respondent's probation arose out of the same act or transaction and were accordingly joined in a single information. See Rule 3.150(a), Florida Rules of Criminal Procedure (1989); Cabrera, 576 So.2d at 1360. Therefore, the state's suggestion that points be assessed for each criminal episode committed while under legal constraint has absolutely no application to the instant case. Similarly, the state's suggestion that multiple episodes of probation violation should serve as a basis for departure from the one-cell bump-up provided in Rule 3.701(d)(14) is inapplicable to this case.

[11]In Scott, the Second District noted that the defendant had committed numerous robberies, as well as other felonies and misdemeanors, on two different days, resulting in seven separate informations. Although these offenses therefore comprised discrete

Finally, the state submits that if this Court decides that legal constraint points are not subject to multiple assessment - for either all offenses or for each criminal episode - in the absence of provision therefor, this Court should hold that a defendant's repeated violation of probation is a valid basis for departure from the one-cell bump-up provided in Rule 3.701(d)(4), Florida Rules of Criminal Procedure (1989).[12] This Court has held that a probation violation can never support departure from the guidelines. See Lambert v. State, 545 So.2d 838, 842 (Fla. 1989); See also Ree v. State, 565 So.2d 1329, 1331 (Fla. 1990); State v. Tuthill, 545 So.2d 850, 857 (Fla. 1989); Franklin v. State, 545 So.2d 851, 852-53 (Fla. 1989). Cf. Adams v. State, 490 So.2d 53 (Fla. 1986). The question whether repeated violations of probation will support a departure from the one-cell bump-up provided in Rule 3.701(d)(14) is presently pending before this Court in Williams v. State, 559 So.2d 680 (Fla. 2d DCA 1990), Case No. 75,919 and need not be addressed herein, because it is inapplicable to a case involving, as does this one, a single criminal episode.[13]

---

episodes, the Court declined to multiply legal constraint points on any basis, noting "[i]t may be that some reasonable multiplier would be appropriate for the factor of legal status, but the guidelines do not currently provide for such a multiplier." 574 So.2d at 249.

[12]See fn. 10.

[13]It is, however, worth noting that in Young v. State, 519 So.2d 719 (Fla. 5th DCA 1988), which was reviewed and decided with Lambert, the defendant committed three separate substantive offenses constituting probation violations: two sales and one possession of cocaine, on three different dates. This court characterized the facts in Young's petition for review as "pos[ing] a like issue" to Lambert's, which dealt with an egregious, rather

CONCLUSION

Based on the foregoing arguments and authorities, this Court should answer the certified question in the negative.

Respectfully submitted,

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit
of Florida
1351 Northwest 12th Street
Miami, Florida 33125
(305) 545-3005

BY: _____
VALERIE JONAS
Assistant Public Defender
Florida Bar No. 0616079

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was forwarded by mail to the Office of the Attorney General, IVY R. GINSBERG, 401 N.W. Second Avenue, Suite N-921, Miami, Florida 33128 this 12th day of August, 1991.

_____
VALERIE JONAS
Assistant Public Defender

---

than a repeated violation of probation. 545 So.2d at 840. The holding in Lambert, "that factors related to violation of probation ... cannot be used as grounds for departure," 545 So.2d at 842, thus apparently applies to both egregious and to repeated violations of probation.

APPENDIX

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

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JANUARY TERM, A.D. 1991

PEDRO CABRERA, a/k/a
ARLIX FUENTES,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

CASE NO. 90-1272

Opinion filed April 2, 1991.

An Appeal from the Circuit Court for Dade County, Thomas M. Carney, Judge.

Bennett H. Brummer, Public Defender, and Valerie Jonas, Assistant Public Defender, for appellant.

Robert A. Butterworth, Attorney General, and Ivy R. Ginsberg, Assistant Attorney General, for appellee.

Before COPE, LEVY and GODERICH, JJ.

COPE, Judge.

Pedro Cabrera appeals his convictions and sentences of aggravated battery, robbery and possession of a vehicle with an altered vehicle identification number. We affirm the convictions but reverse the sentences.

With regard to the first issue on appeal, assuming arguendo that the point was properly preserved, we conclude that the trial court did not abuse its discretion in admitting evidence of the defendant's use of other names. See United States v. Williams, 739 F.2d 297 (7th Cir. 1984); United States v. Kalish, 690 F.2d 1144, 1155 (5th Cir. 1982), cert. denied, 459 U.S. 1108, 103 S.Ct. 735, 74 L.Ed.2d 958 (1983); Wynn v. State, 571 So.2d 34 (Fla. 3d DCA 1990); Weston v. State, 452 So.2d 95 (Fla. 1st DCA), review denied, 456 So.2d 1182 (Fla. 1984).

With regard to the second issue, the State concedes that the defendant's objection during the prosecutor's closing argument should have been sustained insofar as it was susceptible of a suggestion that defendant may be engaged in other uncharged criminal conduct. See Randolph v. State, 556 So.2d 808, 809 (Fla. 5th DCA 1990); see generally Shorter v. State, 532 So.2d 1110, 1111 (Fla. 3d DCA 1988); State v. Bermudez, 515 So.2d 421, 422 (Fla. 3d DCA 1987). We conclude, however, that the comments complained of by defendant were harmless. See State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).[1]

Defendant's third point has merit. At the time of the offenses defendant was on probation. For disposition of the instant case, a category 3 sentencing guidelines scoresheet was prepared. Item IV of the scoresheet, "legal status at time of

---

[1] Defendant also contends that other comments in closing argument by the prosecutor, although not objected to, constituted fundamental error. We disagree. Assuming the comments were improper, and assuming the point was properly preserved, we think the comments were harmless. State v. DiGuilio.

offense," specifies 17 points if defendant is under legal constraint. Id.; see Fla. R. Crim. P. 3.701(d)(6).

In preparing the scoresheet the court assessed 17 points for each of the three counts, for a total of 51 points for legal constraint. That approach--multiplying legal constraint points times each count--has been adopted in the fourth and fifth districts. See Carter v. State, 571 So.2d 520 (Fla. 4th DCA 1990); Green v. State, 570 So.2d 1014 (Fla. 5th DCA 1990)(question certified); Flowers v. State, 567 So.2d 1055 (Fla. 5th DCA 1990); Walker v. State, 546 So.2d 764 (Fla. 5th DCA 1989).

The second district has interpreted the guidelines to call for assessment of legal constraint only once per scoresheet. See Lewis v. State, 16 F.L.W. D352 (Fla. 2d DCA Feb. 1, 1991); see also Scott v. State, 16 F.L.W. D356 (Fla. 2d DCA Feb. 1, 1991); Worley v. State, 16 F.L.W. D354 (Fla. 2d DCA Feb. 1, 1991). See generally Florida Rules of Criminal Procedure Re: Sentencing Guidelines (Rules 3.701 and 3.988), 16 F.L.W. S198 (Fla. Mar. 7, 1991). We think the latter is the better view and align ourselves therewith. We certify conflict with the fourth and fifth district decisions cited above.

Assuming the second district approach is adopted, the State suggests the following analysis. The guidelines scoresheet was designed on the assumption that it would ordinarily be used for sentencing after disposition of a single indictment or information. By definition, offenses joined in a single indictment or information "are based on the same act or transaction or on two or more connected acts or transactions."

Fla. R. Crim. P. 3.150(a). The guidelines contemplate that legal constraint will be scored only once for the single indictment or information, regardless of the number of counts therein.

If two or more indictments or informations are brought on for simultaneous sentencing, only a single scoresheet will be prepared. Clark v. State, 16 F.L.W. S43, S44 (Fla. Jan. 3, 1991); Fla. R. Crim. P. 3.701(d). The scoresheet only allows legal constraint points to be assessed once, even though they could be assessed for each separate information or indictment if there were separate sentencings.[2] Under existing sentencing guidelines doctrine, where there is a pertinent factor not otherwise scored on the guidelines scoresheet, that unscored factor can serve as a basis for departure. See Booker v. State, 514 So.2d 1079, 1080 (Fla. 1987). Thus, where there are multiple indictments or informations brought on for simultaneous sentencing on a single scoresheet, legal constraint points would be assessed only once, but the unscored factor--independent criminal episodes for which legal constraint points cannot be assessed--would be a basis for departure.[3]

---

[2] For purposes of this example, it is assumed that the defendant was under legal constraint at the time of the events giving rise to each information or indictment.

[3] The "indictment or information" analysis refers to the current charges being sentenced at disposition. Where there is a simultaneous revocation of probation, the penalty imposed for the offense for which the defendant was on probation is that provided by the one-cell increase of Florida Rule of Criminal Procedure 3.701(d)(14). See Ree v. State, 565 So.2d 1329, 1331 (Fla. 1990).

The present case involves sentencing upon conviction under a single information. Points for legal constraint should have been scored only once. Elimination of the excess points will reduce the guideline ranges. We therefore reverse the sentencing order and remand for resentencing under a corrected scoresheet.

Because the scoring issue presented here affects numerous sentencings on a daily basis, we certify that we have passed on a question of great public importance:

> Whether legal constraint points may be assessed more than once on a single sentencing guidelines scoresheet?

Convictions affirmed; sentencing order reversed and remanded for resentencing; conflict certified; question certified.