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IN THE SUPREME COURT OF THE STATE OF FLORIDA JUN 3 1991

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TERRANCE RICKS,
Petitioner,
vs.
STATE OF FLORIDA,
Respondent,

CASE NO. 77,956

PETITIONER'S INITIAL BRIEF ON THE MERITS

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
301 N. Olive Avenue/9th Floor
West Palm Beach, Florida 33401
(407) 355-2150

TANJA OSTAPOFF
Assistant Public Defender
Florida Bar No. 224634

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF CONTENTS	i
AUTHORITIES CITED	ii
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE AND FACTS	2
SUMMARY OF THE ARGUMENT	4
ARGUMENT	5

POINT I

THE TRIAL COURT ERRED IN ASSESSING POINTS FOR BEING ON LEGAL CONSTRAINT FOR EACH OF THE EIGHT SUBSTANTIVE OFFENSES FOR WHICH MR. PRESTON WAS BEING SENTENCED.	5
CONCLUSION	12
CERTIFICATE OF SERVICE	12

AUTHORITIES CITED

<u>CASES</u>	<u>PAGE</u>
<u>Brooks v. State</u> , 478 So.2d 1052 (Fla. 1985)	10
<u>Cabrera v. State</u> , 16 F.L.W. D898 (Fla. 3d DCA April 2, 1991)	8
<u>Ferguson v. State</u> , 377 So.2d 709 (Fla. 1979)	7
<u>Florida Rules of Criminal Procedure</u> <u>re: Sentencing Guidelines</u> (Rules 3.701 and 3.988), 16 F.L.W. S198 (Fla. March 7, 1991)	9
<u>Flowers v. State</u> , 567 So.2d 1055 (Fla. 5th DCA 1990)	6
<u>Franklin v. State</u> , 545 So.2d 851 (1989)	7
<u>Gissinger v. State</u> , 481 So.2d 1269 (Fla. 5th DCA 1986)	8
<u>Lewis v. State</u> , 574 So.2d 245 (Fla. 2d DCA 1991)	8
<u>Lowry v. Florida Parole and Probation Commission</u> , 473 So.2d 1248 (Fla. 1985)	10
<u>Palmer v. State</u> , 438 So.2d 1 (Fla. 1983)	6
<u>Scott v. State</u> , 574 So.2d 247 (Fla. 2d DCA 1991)	7, 8
<u>Sellars v. State</u> , 16 F.L.W. D921 (Fla. 1st DCA April 3, 1991)	8, 9
<u>Walker v. State</u> , 546 So.2d 764 (Fla. 5th DCA 1989)	8
 <u>FLORIDA RULES OF CRIMINAL PROCEDURE</u>	
3.701(d)((6)	5
3.701(d)(14)	7

PRELIMINARY STATEMENT

Petitioner, Terrance Ricks, was the appellant in the Fourth District Court of Appeal and the defendant in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida. Respondent, the State of Florida, was the appellee in the appellate court and the prosecution in the trial court. In the brief, the parties will be referred to by name.

The following symbol will be used:

"R" Record on Appeal

STATEMENT OF THE CASE AND FACTS

Following a trial by jury, Petitioner, Terrance Ricks, was found guilty and convicted of kidnapping with a firearm (Counts I, III, and V), and robbery with a firearm (Counts II, IV, VI and VII) (R 434, 454-456, 472). In addition, Mr. Ricks pled nolo contendere to and was convicted of a charge of robbery with a firearm (Count IX) (R 460-466, 472).

The same day, he was sentenced to serve concurrent terms of life imprisonment on each of these eight counts, with a three year mandatory minimum term on each count and credit for time served (R 475-481). These sentences were in conformity with the sentencing guidelines recommendation of life in prison, based on a total of 668 points, which was arrived at by multiplying legal constraint points for each of the eight counts for which Mr. Ricks had been convicted (R 470). Absent the multiplied legal constraint points, Mr. Ricks' guidelines score of 476 points would have placed him within a sentencing range of twenty-seven to forty years incarceration.

On direct appeal, the Fourth District Court of Appeal held that the trial court did not err in multiplying legal constraint points to arrive at Mr. Ricks' guidelines sentence score. However, in its opinion dated May 1, 1991, it recognized that its decision conflicted with Scott v. State, 574 So.2d 247 (Fla. 2d DCA 1991) and certified the following question of great public importance:

DO FLORIDA'S UNIFORM SENTENCING GUIDELINES
REQUIRE THAT LEGAL CONSTRAINT POINTS BE AS-
SESSED FOR EACH OFFENSE COMMITTED WHILE UNDER
LEGAL CONSTRAINT?

The same question was certified in Preston v. State, 16 F.L.W. D869
(Fla. 4th DCA April 3, 1991), presently pending before this Court
as Case No. 77,781.¹

Mr. Ricks noticed his invocation of this Court's discretionary
jurisdiction on May 10, 1991. On May 29, 1991, this Court entered
an order postponing its decision on jurisdiction but setting a
briefing schedule on the merits. This brief follows.

¹Also pending before this Court on the same issue is Regan v.
State, Case No. 77,782.

SUMMARY OF THE ARGUMENT

In arriving at a guidelines sentence, points may be scored only once for the defendant's status of being on legal constraint at the time he commits new offenses for which he is being sentenced. The trial court erred in multiplying the legal constraint points for each of the eight new offenses for which Mr. Ricks was being sentenced, in the absence of any express language in the sentencing guidelines authorizing such scoring.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN ASSESSING POINTS FOR BEING ON LEGAL CONSTRAINT FOR EACH OF THE EIGHT SUBSTANTIVE OFFENSES FOR WHICH MR. PRESTON WAS BEING SENTENCED.

In the present case, Mr. Ricks' guidelines sentence was arrived at by scoring 192 points for being on legal constraint, 24 points for each of the eight offenses for which he was being sentenced and which were committed while he was on legal constraint (R 470). Mr. Ricks' objection to this multiplication of the points for being on legal constraint was overruled (R 423-424). This was error.

"Legal status" is defined, for purposes of the sentencing guidelines, in R.Cr.P. 3.701(d)((6) as

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.

This definition does not set forth whether legal constraint points will be assessed against the primary offense only or also multiplied for any additional offenses at conviction also committed while the defendant was under constraint. In this regard, it is to be contrasted with, for instance, the victim injury category, as to which the guidelines are express:

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

Moreover, only one numerical value is assigned to the "legal constraint" category in the sentencing guidelines, nor is there any provision for a multiplier on the face of the scoresheet with respect to this factor. Thus, as pointed out by Judge Cowart in his dissenting opinion in Flowers v. State, 567 So.2d 1055 (Fla. 5th DCA 1990), the logical inference to be drawn from the way in which legal constraint points are set forth in the guidelines scoresheet is that, "The emphasis is on the status, a continuing condition, and not on the offense which relates to a point in time with respect to the legal status." Id. at 1056. A defendant's

"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.

Id. at 1057.

In this, as in any sentencing issue, the absence of express authority for an enhancing interpretation of the statute requires that such an interpretation will not be indulged. E.g., Palmer v. State, 438 So.2d 1 (Fla. 1983) [imposition of consecutive mandatory minimum statutes upon multiple convictions of offenses involving the use of a firearm improper, where there was no express authority for denying defendant eligibility for parole for more than three years]. It is, after all, a fundamental rule of statutory construction that criminal statutes shall be strictly construed in favor of the person against whom a penalty is to be imposed.

Ferguson v. State, 377 So.2d 709 (Fla. 1979).

As defined by the sentencing guidelines, legal constraint, therefore, is analogous to the provision for an increase of sentence where the defendant has violated his probation. In such circumstances, the guidelines permit an enhancement of the defendant's presumptive sentence by one cell without the necessity of stating any reason for the departure. R.Cr.P. 3.701(d)(14). But where there are multiple violations of probation, the increase in sentence is still limited to a single cell, and the same is true no matter how many separate terms of probation are violated. Franklin v. State, 545 So.2d 851, 853 (1989).²

This conclusion is given support by the enormous impact the multiplication of legal constraint points can have on a defendant's guidelines sentencing recommendation, out of all proportion to either the nature of the new crimes committed or any of the other factors considered in arriving at a sentencing guidelines score. In Scott v. State, 574 So.2d 247 (Fla. 2d DCA 1991), for instance, the appellate court pointed out that "in order to obtain the same number of points without the legal status multiplier, the state would have had to present 411 first-degree felony convictions as additional offenses at conviction, or 41 such felonies as primary offenses in this case." More than half the points assessed against

²"Upon a violation of a probationary split sentence, a trial court may resentence the defendant to any term falling within the original guidelines range, including the one-cell upward increase. However, no further increase or departure is permitted for any reason." Id.

that defendant were the result of the multiplication of his legal constraint score. It is simply unreasonable to suppose that this single factor was intended by the legislature to have such an overwhelming effect on a defendant's ultimate guidelines sentencing score.

In Scott v. State, 574 So.2d 247 (Fla. 2d DCA 1991) and Lewis v. State, 574 So.2d 245 (Fla. 2d DCA 1991), the Second District Court of Appeal has agreed that the absence of express authorization either in the sentencing guidelines statutes or rules for the multiplication of legal constraint points precluded multiplying those points by the number of offenses committed by the defendant while he was on legal constraint. The appellate court found no evidence of any legislative intent that legal constraint points should be multiplied. This position has likewise been approved by the Third District Court of Appeal in Cabrera v. State, 16 F.L.W. D898 (Fla. 3d DCA April 2, 1991). The First District Court of Appeal in Sellars v. State, 16 F.L.W. D921 (Fla. 1st DCA April 3, 1991) has also aligned itself with the Second District Court of Appeal.

The Fifth District Court of Appeal has, however, held that a defendant is properly assessed points for being on legal constraint for each offense for which he is being sentenced and which was committed while he was on legal constraint. Walker v. State, 546 So.2d 764 (Fla. 5th DCA 1989). Walker is based upon Gissinger v. State, 481 So.2d 1269 (Fla. 5th DCA 1986), in which the Fifth District Court of Appeal stated that, in the absence of an express

statement as to the intent of the guidelines framers, legal status points would be scored not just for the "primary offense" at conviction, but also for any "additional" offenses on the score-sheet where the defendant was on probation at the time he committed them.

Gissinger and Walker, by assuming a more onerous application of the sentencing guidelines than is justified by their express terms, turn the applicable principle of statutory construction upon its head. Thus, the reasoning of those cases is not persuasive, as observed in Sellars v. State, supra. Indeed, in a legal memorandum, the director of the Sentencing Guidelines Commission has taken issue with the conclusion stated in those cases. Specifically, the director said:

8. Recent case law has held that legal status points are not limited to a single assessment and can properly be assessed for each offense committed while the defendant was on legal constraint. The scoring of multiple assessments of legal constraint points was never intended under the sentencing guidelines and disrupts the structure by which sentencing criteria are weighed. It is possible for legal status, when scored in multiple assessments, to routinely exceed the weight assigned to the offenses at conviction and prior record, contrary to the intent of the Commission.

(Petition for amendment of Florida Sentencing Guidelines, see, Appendix, emphasis added.) In ruling on this Petition, this Court held that the change to the sentencing guidelines proposed with respect to the scoring of legal constraint points could not be made by it, but should be subjected to legislative review and approval. Florida Rules of Criminal Procedure re: Sentencing Guidelines

(Rules 3.701 and 3.988), 16 F.L.W. S198 (Fla. March 7, 1991). In so holding, this Court observed:

With regard to the issues of victim impact and legal status offenses, the rules proposed by the Commission and adopted by the Legislature are admittedly and self-evidently vague. Yet this is the way they were proposed and adopted. We are in no position now to say, by judicial ukase, exactly what the Legislature did or did not intend at the time of adoption.

Id. at S199. Further, in a footnote to the opinion, this Court clarified:

Of course, if the Legislature approves the amendments, they then must be accorded the same legal status as any other express clarification of original legislative intent. Our opinion today is not meant to deny that the proposals in Appendix B are in fact a clarification, only to say that they will become a clarification only if and when the legislature approves them.

Id.

Certainly, it is proper to consider subsequent legislative amendments to determine the legislative intent in enacting a particular statute. Brooks v. State, 478 So.2d 1052 (Fla. 1985); Lowry v. Florida Parole and Probation Commission, 473 So.2d 1248 (Fla. 1985). While this Court has rejected the invitation of the Sentencing Guidelines Commission to adopt its commentary as the final word on the legislature's intent with respect to legal constraint scoring, the Commission's own understanding of the rules it was submitting for legislative approval must surely be given substantial weight in interpreting the ambiguity which this Court itself recognized. The sentencing guidelines are, after all, the

unique product of a joint operation between the judicial branch which, through the Commission, submits and recommends its provisions, and the legislature, which finally adopts them. What the Commission believes it is proposing must have some impact on how the proposal is presented and explained to the legislature and thus must infect the legislature's own view of the matter. As a result, the position of the Sentencing Guidelines Commission that legal constraint points are not to be multiplied should be accepted as evidence of the legislative intent at the time the guidelines were adopted.


Consequently, no clear legislative intent can be discerned to authorize the multiplication of legal constraint points for each new offense a defendant commits while on constraint. The Fourth District Court of Appeal was therefore in error to authorize such scoring in the present case. Mr. Ricks' incorrectly scored guidelines sentence must be reversed, and this cause remanded with directions to resentence him after correcting his guidelines scoresheet to assess no more than 24 points for being on legal constraint at the time he committed the new offenses for which he was being sentenced.

CONCLUSION

Based on the foregoing argument and the authorities cited, Mr. Ricks requests that this Court reverse the judgment and sentence below and remand this cause with directions to resentence him after correcting his guidelines scoresheet to reflect an assessment of only 24 points for his status on legal constraint at the time these offenses were committed.

Respectfully submitted,

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
301 N. Olive Avenue/9th Floor
West Palm Beach, Florida 33401
(407) 355-2150



TANJA OSTAPOFF
Assistant Public Defender
Florida Bar No. 224634

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to SYLVIA H. ALONSO, Assistant Attorney General, Elisha Newton Dimick Building, Suite 204, 111 Georgia Avenue, West Palm Beach, Florida 33401, by courier this 31st day of MAY, 1991.



Of Counsel