IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs. Case No. 77,970

LOUIE ANTHONY SELLERS,

Respondent.

PETITIONER'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, the State of Florida, will be referred to as the State; Respondent, as such. Citations to the record below will be in the form (R [page number]).

STATEMENT OF THE CASE AND FACTS

Respondent was charged, through separate informations, for burglary of a residence (R 96); and for trafficking in stolen property. (R 18). The burglary was alleged to have been committed between August 1 and 31, 1989 (R 96); trafficking, on August 18, 1989. (R 18). He pled no contest to both charges. (R 24, 114).

Two separate judgments and sentences were entered, placing Respondent on two concurrent terms of two years community control followed by three years probation. (R 40, 118). Respondent violated community control in March 1990 (R 42-3), and pled no contest to the violation. (R 5-6).

Upon resentencing for violating community control, the trial court referred to the original guidelines scoresheet, which included twelve points for legal constraint. (R 39, item IV). Based on the resultant guidelines score of 96 points, Respondent

received two concurrent sentences of six and three years imprisonment, followed by probation.[1]

On appeal, Respondent raised three sentencing errors: (1) propriety of doubling his legal constraint points from six to twelve; (2) propriety of sentencing within the permitted range upon resentencing, when the original sentence was a downward departure; and (3) other sentencing errors. The First District affirmed as to the second error alleged; the State conceded as to the third. Sellers v. State, 16 F.L.W. D921 (Fla. 1st DCA Apr. 3, 1991).

On the first issue -- the subject of this appeal -- the opinion below certified "direct conflict" with two cases from the Fifth District. *Id.*, at D922. The State's motion for rehearing was denied on May 10; notice of invoking this court's jurisdiction was filed May 21. By order dated May 31, this court postponed its decision on jurisdiction and directed filing of briefs on the merits.

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[1] The State conceded below that probation, as pronounced, was three years for the robbery.

SUMMARY OF THE ARGUMENT

Respondent originally committed two distinct criminal offenses not in the same "episode," in 1989. He was separately charged through two informations. He pled to both offenses, and received separate (but concurrent) terms of community control followed by probation. Under §775.021, as amended by ch. 88-131, Laws of Florida, Respondent must be separately punished and convicted for each offense. By analogy, his guidelines score for legal constraint was properly doubled to reflect the fact that Respondent violated two separately charged offenses and two separately imposed sentences.

The 1991 Legislature approved a change to the sentencing guidelines. *See* ch. 91-270, Laws of Florida (effective May 30, 1991). That change directs legal constraint points be assessed only once, when there is more than one new offense at conviction.[2] This change does not pertain to Respondent's situation.

The Legislature declined, despite this court's "invitation,"[3] to adopt language that would render that change

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[2] *See* Fla.R.Crim.P. Re: Sentencing Guidelines (Rules 3.701 and 3.988), 16 F.L.W. S198 (Fla. March 7, 1991).

[3] *Id.* at S199 (final decision to approve the proposed "clarification" must come from the Legislature).

retroactive; presumably, as a curative amendment. Respondent -- whose offenses and community control violations were committed well before the 1991 legislation took effect -- was properly assessed double points for violating two separate legal constraints.

ARGUMENT

ISSUE

WHETHER GUIDELINES POINTS FOR LEGAL CONSTRAINT MAY BE DOUBLED FOR VIOLATION OF TWO SEPARATE, BUT CONCURRENT, SENTENCES OF COMMUNITY CONTROL

When his guidelines scoresheet was calculated, Respondent was given twelve points for being under legal constraint. (R 39). He claims he should have been assessed only six points, implicitly admitting he was under such constraint. The question becomes whether Respondent, upon pleading to violations of two separately-imposed sentences of community control (R 40, 118), may be assessed "double" points.

Respondent was charged with burglary (i.e., theft of fishing equipment) from a residence, between August 1 and 31, 1989. (R 96). His plea bargain stipulated the State could prove a "prima facie case." (R 24). He was charged with trafficking in stolen property (R 18), *which he committed by pawning* the same fishing equipment on August 18. (R 12).

There was no challenge to the fact that the fishing equipment involved in both offenses was the same. Respondent must have completed his burglary, left the residence, and travelled to the pawn shop before he sold the equipment. Thereupon, he committed his second, distinct offense.[4] Respondent pled to both simultaneously. (R 24, 114). Significantly, he was separately placed on two terms of community control followed by probation. The terms were concurrent. (R 40, 118). He simultaneously violated both terms through his conduct in March 1990. (R 42-3).

Under these facts, and in light of this court's order postponing a decision on jurisdiction, the State will set forth the gist of its jurisdictional argument. The opinion below creates conflict -- not only as certified, by declining to follow two Fifth District cases -- but by following the Second District despite significantly different facts.

The opinion below expressly agreed with the "rationale" of Scott v. State, 574 So.2d 247 (Fla. 2d DCA 1991), and Lewis v. State, 574 So.2d 245 (Fla. 2d DCA 1991). Both are grounded on significantly different facts. The defendant in Scott was "on probation for forgery, grand theft, and uttering a forged

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[4] Respondent was charged by separate informations in case no. 89-3115 (R 18) and case no. 89-3116 (R 96).

instrument." 574 So.2d at 248. Although not completely clear, the quoted statement implies a single probationary term. Lewis is more clear. There, the defendant's legal constraint scores were multiplied by the number of new offenses constituting violation of probation. 574 So.2d at 246.

Here, Respondent's legal constraint points were doubled. He was concurrently serving two separately-imposed sentences for separately charged offenses. The First District's refusal to recognize this fact creates conflict jurisdiction in this court. The opinion below follows a rule of law (i.e., no multiplication of constraint points by the number of new offenses) announced in two cases that involve significantly different facts. This, of course, is in addition to the certified conflict with Walker v. State, 546 So.2d 764 (Fla. 5th DCA 1989)(legal constraint points doubled when defendant committed two new crimes while on community control); and Flowers v. State, 567 So.2d 1055 (Fla. 5th DCA 1990)(defendant's legal constraint points multiplied by the number of new offenses).

Respondent committed two violations (R 42-3) of community control, although only one was for a new crime (trespass). His circumstances are analogous to a defendant, under legal constraint, who repeatedly violates that constraint; but, on resentencing, cannot receive a sentence departing by more than

one cell. The Second District has upheld multi-cell departure under such circumstances. *See* Williams v. State, 559 So.2d 680 (Fla. 2d DCA 1990)(*en banc*)(defendant who violated probation and was given a longer probationary sentence could receive a multi-cell departure sentence upon violating the second probationary sentence), *appeal pending*, case no. 75,919.

Just as Williams approved multi-cell departure when the defendant had received, and violated, two probationary sentences; Respondent properly received double legal constraint points for violating two separately-imposed sentences of community control. The fact that Respondent's sentences were imposed at once and ran concurrently does not matter. He violated two distinct legal constraints.

Neither the opinion below, the two Second District cases it follows, nor the two Fifth District cases it rejects addressed the effect of §775.021(4), Florida Statutes (1989), on the interpretation of sentencing guidelines.[5] That statute, in relevant part provides:

> (4)(a) Whoever . . . commits an act or acts which constitute one or more

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[5] Similarly, the Fourth District's decision in Carter v. State, 571 So.2d 520 (Fla. 4th DCA 1990), does not consider this point. Carter, however, did follow Walker and allow multiplying of legal constraint points by the number of new offenses committed.

> separate criminal offenses . . . shall be sentenced separately for each criminal offense;
>
> * * *
>
> (b) The intent of the Legislature is to convict and sentence for each [e.s.] criminal episode. . . .

This statutory change (effective on July 1, 1988) applies to Respondent, whose original offenses were committed in 1989. Therefore, Respondent was correctly assessed double (twelve) points for legal constraint, in accord with the legislative intent to "convict and sentence" separately for each offense. It would be incongruous to recognize legislative intent to separately punish each distinct offense, yet not recognize separate assessment of points for each legal constraint that was violated.

It is proper to rely on §775.021 to interpret the guidelines (i.e., Fla.R.Crim.P. 3.701). This court did exactly that, when it relied on §775.021(1), Florida Statutes (1987), to disapprove multi-cell departure sentences based solely on violation of probation. Lambert v. State, 545 So.2d 838, 841 (Fla. 1989). Significantly, Lambert relied on §775.021 as it existed before the 1988 Legislature restricted application of the rule on lenity. *See* §7,. 88-131, Laws of Florida. Therefore, this court must account for the 1988 amendments to §775.021 when resolving this issue.

In its recent opinion adopting changes to the sentencing guidelines, this court approved language (subject to legislative ratification) that would allow legal constraint points to be scored only once, regardless of the number of current offenses constituting violations of legal constraint. This court expressly declined to adopt changes to the committee notes attending the changed language, and declared it was the legislature's prerogative to enact language that would apply the changes retroactively, presumably by treating them as curative amendments. *See* Fla.R.Crim.P. Re: Sentencing Guidelines (Rules 3.701 and 3.988), 16 F.L.W. S198, 199 (Fla. March 7, 1991)(final decision to approve the proposed "clarification" must come from Legislature).

Despite that implicit "invitation" by this court, the 1991 Legislature approved only the changes to the guidelines themselves, and not to the committee notes. *See* ch. 91-270, Laws of Florida, effective May 30, 1991 (attached as Appendix A). The only reasonable inference is that the Legislature intends the changes to be prospective only. Therefore, the passage of ch. 91-270 does not, of itself, preclude the doubling of Respondent's legal constraint points.

However, even "retroactive" application of the changes would prevent only the multiplying of legal constraint by the

number of new offenses constituting violations. Respondent is in a different situation -- his current offenses (one a misdemeanor, the other a violation of a condition of community control) were each a violation of two prior-imposed, separate sentences of community control. His circumstances are factually and legally different from those governed by the guidelines rule change, and from those of the defendants in the cases cited in the opinion below. Respondent's legal constraint points were properly doubled to reflect violation of his two earlier sentences of community control.

CONCLUSION

The trial court properly doubled Respondent's legal constraint points. It should be affirmed on this point, and the opinion below disapproved accordingly.

Respectfully submitted,

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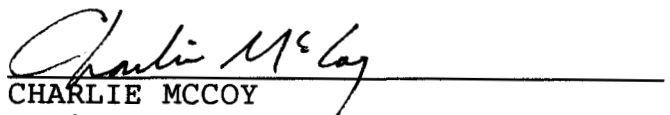

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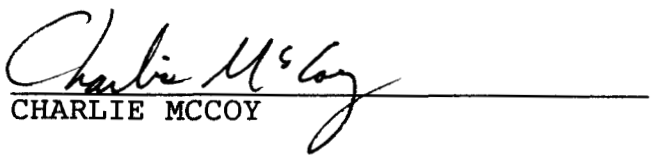
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to **MR. GLEN P. GIFFORD**, Assistant Public Defender, Office of the Public Defender, Second Judicial Circuit of Florida, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, Florida 32301, this 11th day of June, 1991.



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