IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Appellant,

v. CASE NO. 77,970

LOUIE ANTHONY SELLERS,

Appellee.

_____/

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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RESPONDENT'S ANSWER BRIEF ON THE MERITS

STATEMENT OF THE CASE AND FACTS

Respondent accepts the state's rendition of the case and facts as reasonably accurate, and adds only that his original sanctions of community control and probation were imposed on the same date, as were his sentences on violation of community control.

The opinion of the First District Court of Appeal below may now be found at 578 So.2d 339.

SUMMARY OF THE ARGUMENT

The guidelines provide that a defendant being sentenced for an offense committed while on probation is to be assessed points for being under legal constraint. There is no provision in the guidelines for application of multiple legal constraint points based on the number of offenses committed while under legal constraint. The Fifth District Court of Appeal, standing alone, has in essence created a multiplier for legal constraint points, a step it had no authority to take.

Petitioner has made several novel arguments in its initial brief, all without merit. Its analogy between one who violates more than one condition of legal constraint and offenders who repeatedly, successivley violate probation or community control is flawed. Moreover, under this Court's previous decisions, a multicell departure is unauthorized even for successive violations of probation. Finally, petitioner is incorrect in its view that this Court invited the legislature to adopt a committee note which would, in petitioner's view, have made a prohibition of the legal constraint multiplier retroactive. Consequently, petitioner's conclusion that the legislature in declining the "invitation" must have intended only prospective application is equally flawed.

ARGUMENT

THE DISTRICT COURT OF APPEAL CORRECTLY CONCLUDED THAT DOUBLE ASSESSMENT OF LEGAL CONSTRAINT POINTS WAS UNAUTHORIZED.

This Court now faces this issue in numerous cases from the Fifth District Court of Appeal, including Fields v. State, no. 77,660. The first portion of the argument below is taken largely from the petitioner's initial brief on the merits in Fields. Next, respondent addresses several specific assertions made by petitioner in its initial brief on the merits.

The question this must answer is whether the legislature intended that a multiplier be applied when calculating legal constraint points. All evidence suggests the answer is no. Initially, it must be noted that the guidelines scoresheet itself does not provide a mechanism for multiplying legal constraint points. In determining the legislative intent, one need only examine the legislature's treatment of similar scoresheet factors. For in- stance, the amended rule of victim injury points permits assessment of points for each injured victim and for each count in which victim injury is an element of the offense. See Committee Note, Fla.R.Crim.P. 3.701(d)(7) (1987 and 1988 amendments). Indeed, this Court has amended the sentencing guidelines scoresheet and forms including form 3.988(f), Category six: In re: Florida Rules of Criminal Procedure 3.701 and 3.988 (sentencing guidelines), 566 So.2d 770 (Fla. 1990). The newly-approved guidelines form for category six provides clearly on the face of the scoresheet a mechanism by which victim injury is multiplied by the number of victims. No such corresponding provision for

multiplying legal status points appears on the face of the guidelines scoresheet.

Additionally, in several of the scoresheet categories, the legislature clearly has provided for multipliers to enhance prior offenses. Specifically, on the category one scoresheet, a multi- plier is to be used for prior DUI convictions. On a category three scoresheet, there is a provision for prior category three offenses. On the category five scoresheet, there is a provision for prior category five offenses. And finally, on a category six scoresheet, there is a provision for prior convictions for category six offenses. Nowhere in the guidelines or the committee notes thereto is there such a provision for a legal status multiplier. Respondent submits that the maxim "expressio unius est exclusio alterius" applies in the instant situation. Where the legislature has specifically provided for multipliers in other areas of the guidelines scoresheet, the absence of a multi- plier in the legal status category must be assumed to be intentional.

As noted by Judge Cowart in his dissent in Flowers v. State, 567 So.2d 1055 (Fla. 5th DCA 1990), rev. pending, Fla. S.Ct. No. 76,854, the focus of the legal constraint factor is the defendant's legal status, a continuing condition, and not on the offense which relates to a point of time with respect to the legal status. Judge Cowart then pointed to other cases to illustrate by analogy what is intended in the legal constraint category.

In Miles v. State, 418 So.2d 1070 (Fla. 5th DCA 1982), the defendant was charged in two separate cases with aggravated

assault, released, and ordered to appear before the trial court at one time and one place for a pre-trial conference. When the defendant failed to appear on that date he was charged with two counts of willfully failing to appear for the pre-trial conference. On appeal, the Fifth District Court of Appeal reversed on conviction, rejecting the state's argument that the emphasis should be on each of the original criminal cases for which Miles failed to appear. Rather, the Court recognized that the essence of the charge was Miles' failure to appear which occurred but one time even though it related to two different cases.

In Hoag v. State, 511 So.2d 401 (Fla. 5th DCA), rev. denied, 518 So.2d 1278 (Fla. 1987) the defendant left the scene of an accident in which four persons were injured and one person was killed. Hoag was convicted of five counts of leaving the scene of an accident involving injuries or death. The Fifth District Court of Appeal reversed four of the convictions on the grounds that the focus of the criminal conduct was on leaving the scene of an accident and there was but one accident, one scene of an accident, and one leaving of that scene, one time by the defendant.

Finally, in Burke v. State, 475 So.2d 252 (Fla. 5th DCA 1985), rev. denied 484 So.2d 10 (Fla. 1986), the Fifth District Court of Appeal held that giving three altered dollars bills to one person at one time constituted but one criminal act of uttering a forged instrument.

Applying the logic of these decisions to the instant case, the focus of factor four on the guidelines scoresheet relates to a defendant's status as being under, or not under, legal

constraint, and not on the number of offenses that he committed while under legal constraint.

Permitting a multiplier for legal constraint points would in essence allow "double dipping." The offenses for which the accused is being sentenced are already scored as either primary offenses or additional offenses at conviction. However, the same offenses then are used to calculate multiple legal constraint points. Surely, the legislature never intended for such "double dipping." To allow this to occur is in essence to eviscerate the sentencing guidelines.

This Court has the benefit of the perspecitve of the sentencing guidelines commission on this issue. In Fla.R.Crim.P. Re: Sentencing Guidelines (Rules 3.701 and 3.988), 576 So.2d 1307 (Fla. 1991) this Court approved an amendment to the Florida Rule of Criminal Procedure 3.701d.6., which limits legal constraint points to a single assessment. The Court stated that the Commission never intended to permit the practice of a legal constraint multiplier. Id. at 1308. The Legislature subsequently approved the amendment. Ch. 91-270, Laws of Florida.

Respondent also directs this Court's attention to its decision in Brown v. State, 569 So.2d 1223 (Fla. 1990). In Brown, the defendant was released on bail and committed three other offenses. The trial court departed from the recommended sanction on the basis of violations of the conditions of bail release. In disapproving the departure, this Court ruled that a violation of specific conditions of release on bail was equivalent to violating legal constraint and as such could not be used as a reason to depart. This Court noted:

> Had Brown been on probation when he committed [the offenses], there would have been seventeen extra points factored into his guidelines scoresheet for legal constraint.

Id. at 1225. Thus, this Court has already disapproved the legal constraint multiplier in ruling that Brown could only be scored once for legal constraint despite committing three offenses.

Respondent further notes that in addition to the First District Court of Appeal below, at least two of its sister Courts have rejected the reasoning of the Fifth District. Lewis v. State, 574 So.2d 245 (Fla. 2d DCA 1991) and Cabrera v. State, 576 So.2d 1358 (Fla. 3d DCA 1991).

In summary, the guidelines do not permit points for legal constraint to be multiplied by the number of offenses for which the accused is being sentenced which were committed while under legal constraint. The concept of legal constraint points focuses solely on the defendant's status as being under or not under legal constraint. Points are assessed for this factor once or not at all. The legislature never intended for a multiplier to be used in calculating legal constraint points.

* * *

In more specific response to petitioner's arguments on the merits, the state raises for the first time in these proceedings an argument concerning respondent's violations of two conditions of community control. (page 6 of the initial brief) This argument was not presented in the District Court of Appeal nor did the state contest respondent's assertion that the double assessment of legal constraint points evidently flowed

from commission of two offenses while under legal con- straint. It must be noted that one violation inhered in the other: in committing a trespass at specific time and place, Sellers was away from his home without permission. (R46) Any conclusion which the state seeks to draw from the congruence of a technical violation and a violation of the "new crimes" condition is weakened by the consideration that both violations involved the same conduct.

The state's analogy between the circumstances of Sellers' violation of community control and the repeated violation legal constraint is flawed. One who repeatedly violates conditions of legal constraint demonstrates persistent unwillingness to abide by those conditions, and further shows the sanction is unworkable as to the offender. In contrast, one who engages in a discrete course of conduct which constitutes a violation of more than one condition of constraint does not show a course of persistent refusal to comply with the constraint. Additionally, the rationale for multicell departures upon a second or third violation of constraint is marginally stronger, as a trial court often imposes the maximum one-cell departure upon the initial violation, leaving no permissible sanction for a successive violation. In any event, repeated violation of probation or community control does not authorize a multicell departure sentence. This Court has repeatedly rejected multicell departures for violation of probation, regardless of circumstances. Ree v. State, 565 So.2d 1329 (Fla. 1990); Lambert v. State, 545 So.2d 838 (Fla. 1989); Franklin v. State, 545 So.2d 851 (Fla. 1989). In Niehenke v. State, 561 So.2d 1218

(Fla. 5th DCA 1990), the court correctly followed this Court's precedents in limiting the sentencing court to a one-cell increase upon violation of probation, and certified the question of multicell departures for repeat violators. That case is now pending before this Court, no. 76,528. Thus, even had the analogy to repeated violations of legal constraint been apt, it would not support the state's position on multicell departures under these circumstances.

Next, at page 7 of its initial brief, the state attempts to apply section 775.021(4), Florida Statutes (1989), to these circumstances. Plainly, the provision has no bearing on this case. The attempt to construct a legal constraint multiplier from a statutory amendment clearly drafted for other purposes is strained, at best. No parallel exists between separate offenses, to which section 775.021(4) applies, and violations of different conditions of the same legal constraint. The state correctly notes that this court based its decision in Lambert on section 775.021(1), Florida Statutes, known as the rule of lenity. However, its suggestion that the 1988 amendment to the statute restricts its application in this context is contrary to the plain language of the amended statute, which prevents application of the rule of lenity only to convictions and sentences for criminal episodes or transactions. Section 775.021(4)(b), Fla. Stat. (1989). The amendment expresses no legislative intent on the course to be followed for violations of probation or community control.

Finally, the recent amendment to the guidelines rules prohibiting a legal constraint multiplier does not support the

state's assertions at page 9 of the initial brief. This Court did not invite the legislature to adopt the Committee Note as a means of proscribing the multiplier. The Court merely held it had no authority to resolve an ambiguity in the rule via the route of an amended committee note. Fla.R.Crim.P. Re: Sentencing Guidelines (Rules 3.701 and 3.988), 576 So.2d 1307, 1308 (Fla. 1991). The Court recommended only the rule amendment to the legislature, which thus had no committee note amendment before it when adopting the rule change. Ch. 91-270, Laws of Florida. The state's inference of intended prospective application of the rule change is thus wholly unwarranted. The amendment corrects a misapplication of the rule by the Fifth District Court of Appeal, nothing more and nothing less. This Court should likewise correct that misapplication in the cases now before it.

For these reasons, this Court should approve the decision of the First District Court of Appeal, and hold the multiple assessment of legal constraint points unauthorized for commission of multiple offenses while under constraint, or for any other reason.

CONCLUSION

Based on the arguments contained herein and the authorities cited in support thereof, respondent requests that this Honorable Court approve the decision of the First District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Respondent's Answer Brief on the Merits has been furnished by hand-delivery to Charlie McCoy, Assistant Attorney General, The Capitol, Tallahassee, Florida, 32302, Mr. Louie Sellers, #830956, North Florida Reception Center, Post Office Box 628-W, Lake Butler, Florida, on this 3rd day of July, 1991.

GLEN P. GIFFORD