IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs. Case No. 77,970

LOUIE ANTHONY SELLERS,

Respondent.

PETITIONER'S REPLY BRIEF

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SUMMARY OF THE ARGUMENT

Respondent's legal constraint points were properly doubled, as he violated two sentences of community control imposed for two separately charged crimes. To the extent that doubling is attributed to the fact he committed two new offenses, any error is harmless.

ARGUMENT

ISSUE

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

Preliminarily, the State notes that Respondent made no comment on the grounds for this court's jurisdiction. Through his silence, he has conceded this point.

By truncating the issue (answer brief, p. 3), Respondent misses the issue. His legal constraint points were properly doubled at sentencing, as he was under two separately imposed sentences of community control when he committed two new offenses.

The number of Respondent's new offenses coincides with the number of prior sentences of community control. Because of this fortuity, it appears that Respondent's legal constraint points were doubled solely because he committed two new offenses.

However, Respondent's points could have been doubled to reflect the fact that he simultaneously violated two separately imposed (on the same day) sentences of community control. To the extent that Respondent's points were doubled based on the two new offenses, any error is harmless.

Preliminarily, the State raised this argument -- at least factually -- before the First District. In the opening paragraph of its answer brief below, the State noted Respondent's separately-charged offenses. Later, the State analogized to §775.021, Florida Statutes, as amended in 1988. While the primary emphasis of the briefs (and opinion) below was the number of new offenses, the argument now made was raised. In retrospect, it should have been stronger. Nevertheless, this court is not precluded from considering it. Respondent cites no authority for such.

Respondent was placed on separate terms of community control. He violated both. At page 7 of his answer brief, he describes these two separate sentences as "two conditions of community control." Similarly, Respondent characterizes his situation as one involving "different conditions of the same legal constraint." (answer brief, p. 9). These statements beg the question: should Respondent, oblivious to the trial court's largess when it imposed two separate sentences not requiring

imprisonment, be treated the same as a defendant who violates only one prior sentence imposing legal constraint. Respondent demands individually favorable, rather than fair and logical, application of the sentencing guidelines. He wants to be treated more leniently than another less culpable defendant.

The State's position is reasonable and not preculded by the guidelines: multiply the legal constraint points by the number of prior sentences. Under this approach, Respondent's points were properly doubled; had he committed ten new offenses, doubling would still be the maximum.

Respondent raises the specter of double-dipping. (answer brief, p. 6). This is specious. Nothing else in the guidelines scoresheet addresses the number of prior sentences imposing legal constraint as awll as imprisonment. Moreover, if Respondent's theory of double-dipping is correct, then any additional points for legal constraint would be duplicative.

Much of Respondent's answer (p. 4-5) sets forth analogies to cases[1] involving a defendant's failure to appear in two separate cases, leaving the scene of a traffic accident causing multiple injuries, and uttering forged instruments. These cases

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[1] Miles v. State, 418 So.2d 1070 (Fla. 5th DCA 1982); Hoag v. State, 511 So.2d 401 (Fla. 5th DCA), *rev. denied*, 518 So.2d 1278 (Fla. 1987); and Burke v. State, 475 So.2d 252 (Fla. 5th DCA 1985), *rev. denied*, 484 So.2d 10 (Fla. 1986); respectively.

were all decided before the Legislature amended the rule of lenity as to application of statutes to criminal episodes involving more than one offense. Just as these cases are not good law for purposes of double jeopardy issues, they are not good foundations for the analogies Respondent would construct. Similarly, Brown v. State, 569 So.2d 1223 (Fla. 1990), is not persuasive. No "multiplier" issue was before this court.

Respondent would depict the State's analogy to §775.021(4) as "strained, at best." (answer brief, p. 9). That statute generally requires conviction and sentencing for all criminal offenses committed within a single episode. Here, Respondent's single episode was to trespass, thereby also being away from home without permission. His single episode -- constituting two offenses with different elements of proof -- violated two separately imposed sentences of community control. Respondent should be punished commensurately, through additional legal constraint points.

CONCLUSION

Respondent's sentencing guidelines points for legal constraint were properly doubled. The opinion below must be reversed on this point.

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 **MR. GLEN 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 18th day of July, 1991.

Charlie McCoy
CHARLIE MCCOY