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11-8-91

IN THE SUPREME COURT OF FLORIDA

HENRY TAYLOR,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

SUPREME COURT CASE NO. - 78,133

PETITIONER'S BRIEF ON THE MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

MICHAEL S. BECKER
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ATTORNEY FOR PETITIONER

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PETITIONER'S BRIEF ON THE MERITS

STATEMENT OF THE CASE AND FACTS

Petitioner, while under legal constraint, committed ten other criminal offenses. Petitioner pled guilty to these ten offenses as well as three separate violations of probation. (R 216) A category seven guidelines scoresheet was prepared in which Petitioner was assessed 140 points for legal constraint, representing ten times the permitted points allowed. (R 253) The trial court imposed an aggregate sentence of 65 years in the Department of Corrections which represented a departure from the recommended guidelines sanction. On the bottom of the sentencing guidelines scoresheet the trial court wrote one reason for departure. (R 253) Two days after the sentencing proceeding, the trial court issued a written order of departure setting forth the same reason for departure. (R 254-256)

Petitioner appealed to the Fifth District Court of Appeal which affirmed his judgment and sentences with a series of string cites including the cite to Flowers v. State, 567 So 2d

1055 (Fla. 5th DCA 1990).

Petitioner filed a timely petition to invoke discretionary review and on September 23, 1991, this court issued its order accepting jurisdiction.

SUMMARY OF THE ARGUMENT

POINT I: This court has ruled that the sentencing guidelines do not permit that points be multiplied for the legal constraint based on the number of offenses committed while under legal constraint.

POINT II: The trial court erred in departing from the sentencing guidelines on the basis of a consistent and persistent pattern of criminal conduct where Petitioner was currently pending sentence for all offenses he had ever committed and each offense was scored on the guidelines scoresheet.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN ASSESSING LEGAL CONSTRAINT POINTS FOR EACH OF THE TEN OFFENSES COMMITTED WHILE PETITIONER WAS UNDER LEGAL CONSTRAINT.

When Petitioner appeared for sentencing a guidelines scoresheet was prepared assessing 140 points for legal constraint. (R 253) Although legal constraint points should have been assessed for 14 points, the trial court choose to multiply this point total by each of the ten offenses Petitioner committed while under legal constraint. The Fifth District Court of Appeal affirmed on this issue citing to its previous decision in Flowers v. State, 567 So.2d 1055 (Fla. 5th DCA 1990). However, this court has recently quashed the decision of the Fifth District Court of Appeal in Flowers v. State, 16 FLW S637 (Fla. October 3, 1991) in which this court ruled that a multiplier is not to be used in calculating legal constraint points where the defendant has committed multiple offenses while under legal constraint. Thus, this court must reverse Petitioner's sentence and remand with instructions to sentence him upon calculation of a correct scoresheet.

POINT II

THE TRIAL COURT ERRED IN SENTENCING PETITIONER TO A DEPARTURE SENTENCE WHERE THE SOLE REASON FOR DEPARTURE IS INVALID.

At sentencing, the trial court imposed a departure sentence totalling 65 years in prison and as a reason for his departure, the trial court stated it was the continuing and persistent criminal conduct. (R 253) While such a reason has been upheld in the past, it should not be upheld in this case based on the particular facts. Petitioner committed three prior offenses for which he was placed on probation. Sentencing for these offenses all occurred on the same date and included a prison sentence of 1 year and one day followed by four years probation. Petitioner was released from prison on these offenses on December 14, 1988 and began to serve his probation. Some eight months later Petitioner was arrested and charged with ten new offenses. Petitioner entered guilty pleas to the ten new offenses as well as to violation of probation on the three previous offenses. Thus, Petitioner appeared for sentencing for all the offenses that he had committed in his adult life. This is borne out by the guidelines scoresheet which shows points assessed for three prior offenses (the offenses for which Petitioner was on probation) and a total of ten current offenses scored either as primary offenses at conviction or additional offenses at conviction. Because points are assessed on the scoresheet for each of these offenses it is improper to use these very same offenses as a reason for departure. This court has

recognized that principle as long as ago as Hendrix v. State, 475 So.2d 1218 (Fla. 1985), in which this court held that factors already used in computing the recommended sentence could not be used as a reason for departure. The important thing to note in this particular case is that every offense that Petitioner committed in his adult life was currently before the court for sentencing. Therefore, the trial court could not point to other criminal conduct on the part of Petitioner to justify his departure reason. Under these peculiar facts, Petitioner asserts that the reason for departure is invalid. Thus, this court should vacate Petitioner's sentence and remand the cause for resentencing upon a correctly calculated scoresheet.

CONCLUSION

BASED UPON the foregoing reasons and authorities, Petitioner respectfully requests this Honorable Court to vacate his sentences, remand to the cause to the trial court with instructions to sentence Petitioner pursuant to a correctly calculated scoresheet.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to: The Honorable Robert A. Butterworth, Attorney General, 210 N. Palmetto Ave., Ste 447, Daytona Beach, FL 32114 via his basket at the Fifth District Court of Appeal and mailed: Henry Taylor, P.O. Box 158, Lowell, FL 32663, this 14th day of October, 1991.

Michael S Becker
MICHAEL S. BECKER
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF FLORIDA

HENRY TAYLOR, Petitioner, vs. STATE OF FLORIDA, Respondent.	Sup. Ct. Case No. 78,133

A p p e n d i x

Taylor v. State, 579 So.2d 405 (Fla. 5th DCA 1991)

The proposed final judgment provided language awarding attorney's fees and treble damages, however, the trial judge struck through these provisions. Accordingly, the final judgment awards only compensatory damages and costs.

A/J filed and served a timely motion to amend the final judgment pursuant to Rule 1.530(g) of the Florida Rules of Civil Procedure. In the motion A/J requested an award of attorney's fees and treble damages. Because in the interim period the trial judge retired, this matter was assigned to a successor judge who conducted a hearing on A/J's motion to amend. Upon consideration of the motion the successor judge concluded that he was without authority to amend the final judgment entered by the trial judge. Therefore, the successor judge denied the motion for attorney's fees and treble damages, and entered an order awarding only costs. This appeal followed.

As noted above, the jury entered a special verdict finding that the Letteliers had committed civil theft against A/J in violation of section 812.035 of the Florida Statutes (1985).[2] Section 812.035 provides:

> 812.035 Civil remedies; limitation on civil and criminal actions.—
>
> * * * * * *
>
> (7) Any person who is injured in any fashion by reason of any violation of the provisions of ss. 812.012–812.037 or s. 812.081 has a cause of action of threefold the actual damages sustained and, in any such action, is entitled to minimum damages in the amount of $200. Such person shall also recover court costs and reasonable attorneys' fees in the trial and appellate courts.

The record does not contain any indication as to why the trial judge struck through the provision in the final judgment awarding attorney's fees and treble damages thereby denying A/J's request for attorney's fees and treble damages. The applicable case law clearly holds, however, that the award of treble damages under the Florida civil theft statute is mandatory. *Alvarez v. Striegel*, 471 So.2d 1356 (Fla. 3d DCA 1985); *Senfeld v. Bank of Nova Scotia Trust Company*, 450 So.2d 1157 (Fla. 3d DCA 1984). Consequently, the trial court had no discretion to decline to award treble damages in this case. As for A/J's claim for attorney's fees, A/J is entitled to such an award. Section 812.035 states that a victim of civil theft "shall ... recover court costs and reasonable attorneys' fees in the trial and appellate courts." Because this is a statutory authorization for an award of attorney's fees, the trial court had no discretion to decline to enforce such a right.

Accordingly, we reverse the denial of A/J's request for treble damages and reasonable attorney's fees. We remand this case for entry of an award of treble damages and, after having a hearing, reasonable attorney's fees.

REVERSED and REMANDED.

GOSHORN and GRIFFIN, JJ., concur.

Henry TAYLOR, Appellant,

v.

STATE of Florida, Appellee.

No. 90–1519.

District Court of Appeal of Florida, Fifth District.

May 23, 1991.

Appeal from the Circuit Court for Brevard County; Martin Budnick, Judge.

2. Effective October 1, 1986 section 812.035 was amended to limit treble damages to the state or its agencies but at the same time section 772.11 of the Florida Statutes was amended to provide individual claimants with the remedy of treble damages which the new section 812.035 deleted. Here, however, the underlying civil theft committed by the Letteliers occurred prior to the amendment in October of 1986 and, therefore, the treble damages were available under the 1985 version of section 812.035. *See Warren v. Monahan Beaches Jewelry Center, Inc.*, 548 So.2d 870 (Fla. 1st DCA 1989).

James B. Gibson, Public Defender, and Paolo G. Annino, Asst. Public Defender, Daytona Beach, for appellant.

Robert A. Butterworth, Atty. Gen., Tallahassee, and Bonnie Jean Parrish, Asst. Atty. Gen., Daytona Beach, for appellee.

PER CURIAM.

AFFIRMED on the authority of (1) *State v. Williams*, 576 So.2d 281 (Fla.1991); (2) *Lipscomb v. State*, 573 So.2d 429 (Fla. 5th DCA 1991) (en banc); (3) *Adams v. State*, 577 So.2d 963 (Fla. 5th DCA 1991), *on rehearing* (1991); *Flowers v. State*, 567 So.2d 1055 (Fla. 5th DCA 1990); *Jackson v. State*, 569 So.2d 527 (Fla. 5th DCA 1990), *rev. granted*, 577 So.2d 1326 (Fla.1991); *Jones v. State*, 569 So.2d 530 (Fla. 5th DCA 1990), *rev. granted*, 577 So.2d 1327 (Fla. 1991); *Graham v. State*, 569 So.2d 530 (Fla. 5th DCA 1990), *rev. granted*, 577 So.2d 1326 (Fla.1991); *Znajmiecki v. State*, 569 So.2d 531 (Fla. 5th DCA 1990), *rev. granted*, 577 So.2d 1331 (Fla.1991); *Walker v. State*, 546 So.2d 764 (Fla. 5th DCA 1989); *Accord Carter v. State*, 571 So.2d 520 (Fla. 4th DCA 1990). *Contra Cabrera v. State*, 576 So.2d 1358 (Fla. 3d DCA 1991); *Sellers v. State*, 578 So.2d 339 (Fla. 1st DCA 1991); *Lewis v. State*, 574 So.2d 245 (Fla. 2d DCA 1991); *Scott v. State*, 574 So.2d 247 (Fla. 2d DCA 1991); *Worley v. State*, 573 So.2d 1023 (Fla. 2d DCA 1991).

W. SHARP, COWART and PETERSON, JJ., concur.

WEST KEY NUMBER SYSTEM

Sheryl DYKSTRA–GULICK, Appellant,

v.

Douglas GULICK, Appellee.

No. 90–1702.

District Court of Appeal of Florida, Fifth District.

May 23, 1991.

Wife filed declaratory judgment action for injuries received in automobile accident which occurred prior to the parties' marriage. Husband's motion to dismiss was granted by the Circuit Court, Marion County, William T. Swigert, Sr., J., and wife appealed. The District Court of Appeal held that: (1) proper disposition of case was abatement pending possible termination of marriage, but (2) order granting motion to dismiss was not order dismissing action, and therefore was not appealable.

Appeal dismissed.

1. Declaratory Judgment ⇐361

Proper disposition of suit by wife against husband for injuries received in automobile accident which occurred prior to the parties' marriage was abatement of cause of action pending possible termination of the marriage, rather than dismissal.

2. Appeal and Error ⇐105

Order granting motion to dismiss is not an order dismissing action, and is therefore not appealable.

David M. Lopez and Dock A. Blanchard, of Blanchard, Custureri, Merriam & Adel, Ocala, for appellant.

Anthony J. Salzman of Moody & Salzman, Gainesville, for appellee.

PER CURIAM.

Appellant Sheryl Dykstra–Gulick filed a declaratory judgment action against her husband, appellee Douglas Gulick. In the complaint the wife sought damages for injuries she received in an automobile accident which occurred prior to the parties' marriage. The husband filed a motion to dismiss the complaint claiming that the wife's cause of action is barred by the doctrine of interspousal immunity. Upon review of the motion the trial court con-