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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

CASE NO. 79,303

MIGUEL TITO,

Respondent.

PETITIONER'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Respondent was charged by information in circuit court case no. 88-11577 with possession of cocaine, in violation of Section 893.13(1)(f), Florida Statutes (1987), on August 11, 1988 (A 1-2). He pled guilty and was placed on probation for one year on September 6, 1988 (A 3-4). An affidavit of probation violation was filed on October 4, 1988 (A 5), and, on January 23, 1990, his probation was revoked (A 6), he was adjudicated guilty (A 7-81, and he was placed on community control for two (2) years in both this case and circuit court case no. 89-18732, the terms to run concurrently (A 9-10).

In case no. 89-18732, Respondent was charged by information under the name of Armando Martinez with burglary of a conveyance, in violation of Section 810.02(1) and (3), Florida Statutes (1989), and petit theft, in violation of Section 812.014(2)(d), Florida Statutes (1989), on November 15, 1989 (A 11-12). He pled guilty under that name to both counts (A 13-14), was adjudicated guilty under that name (A 15-16) and was sentenced to time served on the petit theft count under that name (A 17-18), but was placed on community control as aforesaid under the name of Miguel Tito (A 9-10).

On April 2, 1990, an affidavit of violation of community control was filed in both cases (A 19), and Respondent's community control was subsequently revoked in both cases (A 24, 26) based on his admission of the charged violations (A 21).

Meanwhile, on March 27, 1990, Respondent was charged by information under the name of Antonio Oliva in circuit court case

no, 90-4018 with burglary of a conveyance, in violation of Section 810.02(1) and (3), Florida Statutes (1989), on March 10, 1990 (A 28-29). Following a bench trial, Respondent was found guilty as charged (A 20-22).

Respondent was sentenced in all three cases on the same date, May 23, 1990. In case no. 88-11577, he received a five-year prison sentence (A 24-25). In case no. 89-18732, he received a five-year prison sentence to run consecutive to the sentence in case no. 88-11577 (A 26-27). And in case no. 90-4018, he was adjudicated guilty (A 30-31) and was placed on probation for ten (10) years as a habitual felony offender, the probationary term to run consecutive to his prison terms in the other two cases (A 23, 32).

Respondent took a direct appeal, in which he challenged only his sentences. Tito v. State, 593 So.2d 284 (Fla. 2d DCA 1992) (A 33-36). The Second District Court of Appeal held (1) that the trial court should have used the original guidelines scoresheets in determining the sentences in the probation revocation cases "notwithstanding the fact that it is resentencing in these cases at the same time it is imposing an original sentence in another case," id. at 286; (2) that the trial court could not exceed a one-cell bump-up in determining the sentences in the probation revocation cases; and (3) that the habitual felony offender sentence for the new offense was improper because the statutory requirement of two sequential prior convictions was not met.

SUMMARY OF THE ARGUMENT

When more than one offense is pending before the court for sentencing at the same time, a single guidelines scoresheet encompassing all scorable offenses must be utilized, even if one or more of the offenses on which the defendant is now being sentenced are pending for resentencing on revocation of probation or community control.

The trial court may bump the sentence up one cell for each violation of probation or community control when there are multiple such violations, Here, because there were two successive violations of Respondent's probation and commu ity control, the trial court was entitled to utilize a two-cell bump-up.

Sequential felony convictions are no longer necessary for a defendant to meet the definition of a habitual felony offender under Section 775.084(1)(a)1, Florida Statutes (1989).

ARGUMENT

ISSUE I: WHETHER THE SECOND DISTRICT COURT OF APPEAL ERRED IN HOLDING THAT THE TRIAL COURT WAS REQUIRED TO USE THE ORIGINAL GUIDELINES SCORESHEETS IN EACH OF THESE THREE CASES NOTWITHSTANDING THAT THEY WERE BEFORE THE COURT FOR SENTENCING AT THE SAME TIME.

Judge Parker was correct in stating in his dissent to the opinion now before this Court for review that a new and comprehensive guidelines scoresheet must be prepared and utilized when more than one offense is pending before a trial court for sentencing at the same time. Rule 3.701d1, Florida Rules of Criminal Procedure, so provides, and this Court has so held,

Clark v. State, 572 So.2d 1387 (Fla. 1991), as have the First District, Richardson v. State, 564 So.2d 564 (Fla. 1st DCA 1990), the Third District, Earp v. State, 522 So.2d 992 (Fla. 3d DCA 1988), the Fifth District, Gallagher v. State, 476 So.2d 754 (Fla. 5th DCA 1985), and even the Second District itself in prior cases, Bembow v. State, 520 So.2d 312 (Fla. 2d DCA 1987); Boston v. State, 481 So.2d 550 (Fla. 2d DCA 1986); and Render v. State, 516 So.2d 1085 (Fla. 2d DCA 1987).

The decisions of the Fourth District in True v. State, 564 So.2d 1104 (Fla. 4th DCA), rev. denied, 576 So.2d 291 (Fla. 1990), and the Second District in the instant case and in Walker v. State, 593 So.2d 301 (Fla. 2d DCA 1992), are in direct contravention of the applicable rule of criminal procedure and this Court's application thereof. The Second District's opinion in the instant case should be quashed and the holding on this issue in True and Walker disapproved.

ISSUE 11: WHETHER THE TRIAL COURT COULD EXCEED A ONE-CELL BUMP-UP IN SENTENCING WHERE RESPONDENT HAD COMMITTED TWO SUCCESSIVE VIOLATIONS OF PROBATION OR COMMUNITY CONTROL.

At the time the decision below was rendered, it was not clearly in conflict with this Court's decisions. However, this Court has now decided Williams v. State, 594 So.2d 273 (Fla. 1992), in which this Court held that, where there are multiple violations of probation or community control, the sentence may be successively bumped one cell higher for each violation. Under Williams, because there were two violations of probation or community control in the instant case, the trial court was entitled to a two-cell bump-up.

A review of the guidelines scoresheet used in imposing the sentences now before this Court for review (A 27) coupled with the applicable guideline sentence table contained in Rule 3.988(e), Florida Rules of Criminal Procedure, shows that the permitted range with the two-cell bump-up here is 23-53 years, Although the consecutive sentences imposed by the trial court in case nos. 88-11577 and 89-18732 together exceed the guidelines permitted range even with the two-cell bump-up and must therefore still be reversed and remanded for resentencing, the trial court should be permitted to impose a two-cell bump-up on resentencing.

ISSUE 111: WHETHER RESPONDENT'S PRIOR CONVICTIONS MUST BE SEQUENTIAL IN ORDER FOR HIM TO QUALIFY AS A HABITUAL FELONY OFFENDER.

The Second District held in the instant case, in accord with the decision of the First District in Barnes v. State, 576 So.2d 758 (Fla. 1st DCA 1991), that sequential felony convictions were still necessary for a defendant to meet the definition of a habitual felony offender under the 1988 version of Section 775.084(1)(a)1, Florida Statutes. However, this Court has recently quashed the First District's Barnes decision in State v. Barnes, 595 So.2d 22 (Fla. 19921, and held that the habitual felony offender statute currently in effect contains no sequential conviction requirement. Accordingly, Respondent's classification as a habitual felony offender was proper.

There is currently a conflict among the district courts of appeal on the issue of whether a sentence imposed under Section

775.084, Florida Statutes (1989), may consist solely of probation, the Second District holding that it may, McKnight v. State, 595 So.2d 1059 (Fla. 2d DCA 1992), and Bamberg v. State, 17 F.L.W. 1421 (Fla. 2d DCA June 5, 1992), and the Fifth District holding that it may not, State v. Kendrick, 596 So.2d 1153 (Fla. 5th DCA 1992). See also King v. State, 597 So.2d 309 (Fla. 2d DCA 1992).

Petitioner believes that the Second District is correct on this issue. Respondent's contention below that it is incongruous to find a defendant to be a habitual felony offender who is a danger to society and yet place him on probation overlooks the fact that, at least under the trial court's original sentencing scheme, his probationary term would not begin until he had completed serving his prison sentences in the other two cases. By that time, the trial court obviously hoped, Respondent might have become a suitable candidate for probation in lieu of the additional ten years in prison as a habitual felony offender which he could have received.

A holding allowing placement of a defendant on probation as a habitual felony offender would also comport with the principle that the severity of a habitual felony offender sentence is discretionary with the trial court, Burdick v. State, 594 So.2d 267 (Fla. 1992). Moreover, it would allow a longer probationary period than otherwise permissible, thereby providing the trial. court with maximum leverage over the offender at less expense to the taxpayer than a prison sentence would cost, a salutary result in these times of inadequate state budgets and prison bed shortages.

On the other hand, on remand, the trial court may be happy to accommodate Respondent with a prison sentence on his latest offense since, because the court may not depart from the guidelines with the permissible bump-up, Respondent otherwise will not serve as much time in prison as the trial court originally intended.

CONCLUSION

Based on the foregoing facts, argument, and citations of authority, Petitioner respectfully requests that this Honorable Court quash the opinion below and remand with instructions to resentence Respondent utilizing the scoresheet actually used by the trial court at the sentencing under consideration here and to permit imposition of a habitual felony offender sentence in case no. 90-4018.

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 **Deborah K. Brueckheimer, Assistant Public Defender,** P.O. Box 9000--Drawer **PD,** Bartow, **Florida 33830, this** 30th **day** of July **1992.**

Susan D. Dunlevy
OF COUNSEL FOR RESPONDENT