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FILED
SID J. WHITE
MAY 26 1992
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

LEE ROBERTSON HAYLES, :

Petitioner, :

v. : CASE NO. 79,743

STATE OF FLORIDA, :

Respondent. :

_____ :

BRIEF OF PETITIONER ON THE MERITS

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BRIEF OF PETITIONER ON THE MERITS

I PRELIMINARY STATEMENT

This is an appeal from the decision of the First District **Court** of Appeal below, Hayles v. State, ____ So.2d ____, 17 FLW D960 (Fla. 1st DCA April 13, 1992) (on motion for rehearing or to certify question), in which the First District certified conflict with another district court.

Petitioner, appellant in the district court and defendant in the circuit court, will be referred to by name or **as** petitioner. Respondent, appellee in **the** district court and prose**cutor** in the circuit court, will be **referred** to **as** the state.

The two-volume **record** on appeal, including transcript, will **be** referred to as "R."

II STATEMENT OF THE CASE AND FACTS

Petitioner, Lee Robertson Hayles, pleaded no contest in Escambia County to two charges of solicitation to first-degree murder, the intended victims alleged to be Pam Hayles, his wife, and Gerald Dean Dunehew, Pam's boyfriend (R-1-3).

The plea agreement was for the state's recommendation that Hayles be sentenced within the recommended range of the guidelines, calculated to be 12 to 17 years, and the state would argue for probation to follow (R-162-65).

Petitioner was sentenced to concurrent terms of 17 years in prison, with credit for 395 **days** time served, followed by 13 years probation (R-219-22). His presumptive guidelines sentence under Category 1 was 12 - 17 years (R-223).

Notice of appeal was timely filed pro **se** April 1, 1991 **(R-264).**

On appeal, the First District Court affirmed Hayles' sentence, rejecting the reasoning of the Fourth District on the same issue in Tarawneh **v.** State, infra, and expressly certifying conflict with the Fourth District, 17 FLW at D960, n.1. Judge Allen, dissenting, agreed with the reasoning of the Fourth in Tarawneh.

Notice to invoke this court's review was timely filed, and **this appeal follows.**

III SUMMARY OF ARGUMENT

The question here is one of statutory construction. Petitioner was convicted of two counts of solicitation to commit first-degree murder. Because they are, in effect, penal statutes, the rules governing the sentencing guidelines *must* be strictly construed. Because Rule 3.701(c), Florida Rules *of* Criminal Procedure, expressly excludes offenses under section 782.04(1)(a) from Category 1, it was reversible error to sentence petitioner using a Category 1 scoresheet.

IV ARGUMENT

ISSUE PRESENTED

THE TRIAL COURT ERRED IN SENTENCING PETITIONER USING A CATEGORY 1, RATHER THAN A CATEGORY 9, **SCORESHEET.**

At its heart, this case involves how to resolve two arguably conflicting pronouncements in Rule 3.701(c), Florida Rules of Criminal Procedure, and its committee note.

Petitioner Lee Hayles pleaded no contest to two counts of the inchoate offense of solicitation to first-degree murder. This offense is defined in sections 782.04(1)(a) (first-degree murder) and 777.04 (attempts, solicitation, conspiracy, generally), Florida Statutes. Hayles was sentenced to the top of the permitted range, 17 years in prison, using a Category 1 scoresheet, He had no prior criminal record.

Rule 3.701(c), Florida Rules of Criminal Procedure, provides in part:

> Offense Categories. Offenses have been grouped into nine (9) offense categories encompassing the following statutes:
>
> Category 1: Murder, manslaughter: Chapter 782 [except subsection 782.04-(1)(a)], and subsection 316.193(3)(c)3, and section 327.351(2)
>
> Category 9: All other felony offenses

The Committee Note to subsection (c) provides, without change since the inception of the guidelines:

> Only one category is proper in any particular case. Category 9, "All Other Felony Offenses," should be used only when the primary offense at conviction is not included in another, more specific category. The guidelines do not apply to capital felonies.

> Inchoate offenses are included within the category of the offense attempted, solicited, or conspired to, as modified by ch. 777.

In other words, as an offense under section 782.04(1)(a), attempted first-degree murder is expressly excluded from Category 1 of the guidelines by Rule 3.701(c), but as an attempt, it is arguably included in Category 1 by the committee note. So, which is it? That is the question here.

In Tarawneh v. State, 588 So.2d 1006 (Fla. 4th DCA 1991), review denied no. 79,195 (Fla. Feb. 17, 1992), the Fourth District Court of Appeal held that, because Rule 3.701(c) expressly excludes offenses under section 782.04(1)(a) from Category 1, it was improper to use a Category 1 scoresheet in sentencing Tarawneh, who was convicted of solicitation and conspiracy to commit first-degree murder. Instead, the Fourth District held, a Category 9 (the residual category) scoresheet should have been used. In the instant case, had a Category 9 scoresheet been used, petitioner's presumptive sentence would be reduced from 12 to 17 years, to 3-1/2 to 4-1/2 years, with a permitted range up to 5-1/2 years.

In the opinion here, the First District reached a contrary result. Hayles v. State, ____ So.2d ____, 17 FLW D960 (Fla. 1st DCA April 13, 1992) (on motion for rehearing or to certify question). The Fifth District has agreed with the First. See Orr v. State, ____ So.2d ____, 17 FLW D866 (Fla. 5th DCA April 3, 1992) (on motion for rehearing).

Petitioner concedes that Tarawneh is not as clear as it could be. Having said that, petitioner believes the Hayles opinion either misstates the holding of Tarawneh, or the holding of Tarawneh was not as narrow as it should have been. The First District said:

> The Fourth District cited Committee Note (c), supra, as support for its conclusion that category 1 was not applicable. The note, however, on its face, seems to indicate that the guidelines would not apply at all to capital felonies.

17 FLW at D960. Petitioner believes the exclusion of capital felonies to which Tarawneh refers is not from the committee note, but rather, is actually the exclusion from Rule 3.701(c) itself. The rule itself lists the offenses included in the various categories and expressly excludes offenses under section 782.04(1)(a) from Category 1. The opinion in Tarawneh is not perfectly clear. If it relied on the committee note rather than the rule itself, it is in error on this paint.

The First District continued thus:

> The Tarawneh court concluded, in light of the requirement that inchoate offenses are included within the category of the offense attempted [sic], that solicitation to commit first degree murder would be excluded from category 1, since first degree murder is itself excluded from category 1.

Hayles, 17 FLW at D960. According to the First,

> [t]his analysis somewhat begs the question of how, if capital murder is excluded altogether from the guidelines, and therefore solicitation to commit capital murder is also excluded, the trial court can be required to sentence under a different category of the very guidelines from which the

defendant's crime, according to Tarawneh, has been excluded.

Id.

Petitioner believes the First District's erroneous reasoning derives from failing to differentiate between the rule and the committee note, or to acknowledge the significance of express exclusion. The rule itself excludes offenses under section 782.04(1)(a) only from Category 1, not from the guidelines altogether. The committee note excludes capital murder from the guidelines altogether. But, as this case shows, there exist offenses under section 782.04(1)(a) - thus expressly excluded from Category 1 - which, because they are not capital felonies, are not excluded from the guidelines by the committee note. Under this circumstance, such an offense is reasonably sentenced under the residual category. There is of course another capital offense - capital sexual battery - which is necessarily excluded from the guidelines (by the committee note if nothing else), whose statute number is not excluded from the "offense categories" by the text of Rule 3.701(c).

There is the further problem of the committee note pronouncement that inchoate offenses are within the category of the offense attempted, solicited, or conspired to. The answer to this purported dilemma is simply that this general "rule" cannot defeat the specific exclusion of all section 782.04-(1)(a) offenses from Category 1. See, e.g., Fletcher v. Fletcher, 573 So.2d 941 (Fla. 1st DCA 1991) (where there is a

general and a specific provision in the same statute, the particular provision will prevail).

The key to resolving the issue here is how to construe the rule. It is axiomatic that penal statutes must be strictly construed. Reino v. State, 352 So.2d 853 (Fla. 1977). See also State v. Waters, 436 So.2d 66 (Fla. 1983); Ferguson v. State, 377 So.2d 709 (Fla. 1979); Earnest v. State, 351 So.2d 957 (Fla. 1977). But, how are the sentencing guidelines to be construed? The rules of criminal procedure themselves provide that they "shall be construed to secure simplicity in procedure and fairness in administration." Rule 3.020, Fla.R.Crim.P. This pronouncement might be useful in a procedural context, but the guidelines are not merely a procedural matter. Further, either construction - included or excluded from Category 1 - is "simple," although both are not necessarily fair. So, Rule 3.020 does not answer the question here.

In section 921.0015, Florida Statutes, the legislature adopted Rules 3.701 and 3.988 as substantive law. This means these rules must be construed in the same way a sentencing statute would be, that is, strictly construed. The U.S. Supreme Court has held, unanimously, that retroactive application of a disadvantageous change to the Florida sentencing guidelines violated the ex post facto clause of the U.S. Constitution. Miller v. Florida, 482 U.S. 423, 107 S.Ct. 2446, 96 L.Ed.2d 351 (1987). The Supreme Court expressly rejected the state's argument that a change to the sentencing guidelines was merely procedural. 482 U.S. at 433-35, 96 L.Ed.2d at 362-63.

A few years after Miller, this court squarely addressed the question whether the guidelines were procedural or substantive in holding the sentencing guidelines were invalid until they were adopted by the legislature July 1, 1984. Smith v. State, 537 So.2d 982 (Fla. 1989). This court said:

> In the final analysis, we are compelled to conclude that the sentencing guidelines, insofar as they limit the length of sentences to be imposed, are substantive in nature. (footnote omitted)

537 So.2d at 986. See also Ray v. State, 556 So.2d 495, 497 (Fla. 1st DCA), review dism. 560 So.2d 234 (Fla. 1990), in which the First District said:

> ...when the Legislature adopted the revisions to Rule 3.701(d)(13) and the committee note thereto...these changes acquired the force and effect of law.

As for the status of committee notes, in State ex rel. Evans v. Chappel, 308 So.2d 1, 3 (Fla. 1975), this court said that "[a]lthough Committee Notes are generally a valuable aid in the application of the [criminal] rules, they are not binding." See also Putt v. State, 527 So.2d 914 (Fla. 3d DCA 1988). It is true that Chappel involved a rule in which this court had expressly declined to adopt the committee notes, but the committee notes in Putt had been adapted by the court. On the other hand, this court has also held that committee notes on the guidelines rules have the same force and effect as the rules themselves. The Florida Bar, Amendment to Rules of Criminal Procedure (3.701, 3.988 - Sentencing Guidelines), 451 So.2d 824 (Fla. 1984). Even if committee notes have the same

force and effect as the rules, however, that principle cannot overcome the express exclusion of section 782.04(1)(a) offenses from Category 1. See Fletcher, supra.

The rule of lenity is an independent ground for reversal, In Lewis v. State, 574 So.2d 245 (Fla. 2d DCA 1991), aff'd on other grounds State v. Worley, 586 So.2d 338 (Fla. 1991), the Second District held that the rule of lenity applied to the guidelines. Lewis concerned the issue whether legal constraint could be scored more than once. This issue was the basis for jurisdiction in the supreme court, where this court affirmed on the basis of its decision in Flowers v. State, 586 So.2d 1058 (Fla. 1991).

The Second District said:

> [Rules] 3.701 and 3.988, do not require the use of a multiplier. Nor do they contain language susceptible of a different construction. Even assuming ambiguity in the rules as to scoring legal constraint, the rule of lenity would bar the use of a multiplier. Section 775.021(1), Florida Statutes (1988), provides: "[t]he provisions of this code and offenses defined by other statute shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused." We construe this statute as applying to the sentencing guidelines rules.

Lewis, 574 So.2d at 246, citing Williams v. State, 528 So.2d 453, 454 (Fla. 5th DCA 1988) (adopting rules of lenity in resolving an ambiguity in the application of the guidelines to a true split sentence); SS921.001 and 921.0015, Fla.Stat. Even if there were an ambiguity here, the rule of lenity requires that the construction most favorable to the accused be upheld.

After criticizing the Tarawneh opinion, the First District in Hayles launched into a justification for its holding. This discussion was to the effect that only completed offenses under section 782.04(1)(a) are excluded from the guidelines, and that is only because there is a mandatory sentence for completed capital crimes. (To remind the court, there is another capital offense - capital sexual battery - which is excluded from the guidelines, although its statute number is not expressly listed in rule 3.701(c) as excluded. This means that, while Category 1 excludes all section 782.04(1)(a) offenses, not all section 782.04(1)(a) offenses are capital, and while the committee note excludes capital offenses, the capital exclusion encompasses more than section 782.04(1)(a) offenses.)

Even though the scheme proposed by the First, that only completed capital felonies are excluded from the guidelines, might make sense, and even though it may be what the guidelines commission intended, it is not, in fact, what the rule **says**.

Rather, the rule expressly excludes from Category 1 all offenses under section 782.04(1)(a). For any court to exclude only completed offenses under section 782.04(1)(a) would be adding something to the rule which it does not in fact contain. A rule concerning the guidelines must be strictly construed. Its committee note may be viewed as secondary, or the general provision of the committee note may be viewed as not overcoming a specific, express exclusion. The rule specifically excludes section 782.04(1)(a) offenses. Section 782.04(1)(a) defines a substantive offense: the crime of solicitation does not exist

without an underlying substantive offense, thus the substantive offense takes precedence over an inchoate offense. By any route, section 782.04(1)(a) offenses are excluded from Category 1.

In Putt, the Third District reported this court as having held "that the guidelines must be read as they are written." 527 So.2d at 915, citing State v. Van Kooten, 522 So.2d 830 (Fla. 1988). This court did not actually say that in Van Kooten, although it was reasonably inferable. What this court did say was:

> The guideline clearly states that the appropriate sentence was community control or incarceration, Any change in that presumptive guideline must occur through appropriate legislative and court rule action, rather than by judicial construction. (emphasis added)

522 So.2d at 831. The First District erred in rewriting the rule to suit its interpretation, even though its interpretation might be reasonable. This court must reverse.

V CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, petitioner requests that this court reverse his sentence and remand for resentencing using a Category 9 scare-sheet.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand-delivery to James W. Rogers, Assistant Attorney General, The Capitol, Tallahassee, Florida; and by U.S. mail to Mr. Lee Robertson Hayles, inmate no. **122021,** Walton Correctional Institution, P.O. Box **5280,** Defuniak Springs, Florida 32433, on this 26 **day of May, 1992.**

KATHLEEN STOVER