IN THE SUPREME COURT OF FLORIDA

ANTHONY ROBERTS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

_____/

STATE CASE NO. 81,182

DCA CASE NO. 92-373

ON PETITION FOR DISCRETIONARY REVIEW

ANSWER BRIEF OF RESPONDENT

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TABLE OF CONTENTS

PAGES:

AUTHORITIES CITED

CASES: PAGES:

OTHER AUTHORITIES:

SUMMARY OF ARGUMENT

The instant case can be reconciled with Graham v. State, 559 So. 2d 343 (Fla. 4th DCA 1990) because Graham's probation violation did not include a conviction for an underlying substantive offense, as does the instant action. As a result of the underlying substantive offense, a new scoresheet was correctly prepared. Double jeopardy considerations do not come into play when the petitioner knowingly commits an act which would subject him to more prison time, thereby eliminating any expectation he may have in the finality of his original sentence.

ARGUMENT

THE TRIAL COURT PROPERLY SENTENCED THE DEFENDANT FOR REVOCATION OF PROBATION AND THE UNDERLYING SUBSTANTIVE OFFENSE LEADING TO REVOCATION USING A NEW SCORESHEET.

According to Rule 3.701 (d) (14) Fla. R. Crim. P.:

> Sentences imposed after revocation of probation or community control must be in accordance with the guidelines. The sentence imposed after revocation of probation or community control may be included within the original cell (guidelines range) or may be increased to the next highest cell (guidelines range) without requiring a reason for departure.

In keeping with this rule, the Fourth District determined in Graham v. State, 559 So. 2d 343 (Fla. 4th DCA 1990) that a defendant found in violation of probation had to be sentenced under the original scoresheet. This decision, however, is silent as to whether there was an additional substantive offense underlying the violation or whether the defendant was violated on technical grounds.

More recently, the First District determined that where a defendant committed a new substantive offense, "the state correctly prepared a new scoresheet pursuant to Fla. R. Crim. P. 3.701(d)(1)." Reynolds v. State, 598 So. 2d 188, 191 (Fla. 1st DCA 1992) reversed on other grounds, 598 So. 2d 305 (Fla. 1st DCA 1992).

Sub judice the defendant was tried simultaneously for both the substantive charge and the violation of probation. In accordance with Rule 3.701 (d) (1) Fla. R. Crim. P., one

guideline sheet was utilized covering all offenses pending before the court for sentencing. Because the petitioner committed a new substantive offense, the state properly prepared a new scoresheet. Clark v. State, 572 So. 2d 1387, 1391 (Fla. 1991); Render v. State, 516 So. 2d 1085 (Fla. 2nd DCA 1987); Alvarez v. State, 600 So. 2d 559 (Fla. 5th DCA 1992).

The case at bar differs from Pfeiffer v. State, 568 So. 2d 530 (Fla. 1st DCA 1990) in that Pfeiffer holds that the State cannot correct an error on a score sheet via a Rule 3.800 motion. The case does not address the issue of whether a new score sheet can be prepared when a defendant commits a new crime while on probation, and one score sheet is used in sentencing for both the underlying substantive offense and the probation violation. As a result, affirming the instant conviction would not necessarily reverse Pfeiffer.

The defense also analogizes the case at bar to Holloman v. State, 600 So. 2d 522 (Fla. 5th DCA 1992). Holloman was decided on June 12, 1992. From the four corners of the text, it is apparent that two different score sheets were used in sentencing the defendant-one for the violation of probation and a second for the underlying offense. One week later, on June 19, 1992, the Fifth District held that one scoresheet must be used in sentencing a defendant for all offenses pending in a particular county. Alvarez, 600 So. 2d 559. Any disagreement between these two cases must be resolved in favor of the more recent decision. Since only one scoresheet can be used to sentence on offenses pending in a particular county, it would be absurd to force the

State to use an incorrect scoresheet when sentencing on new substantive offenses being heard in concert with the violation of probation proceedings.

The defense further argues that use of the new scoresheet violates the defendant's Constitutionally protected right against double jeopardy. This right is triggered when a defendant is sentenced and then resentenced for "precisely the same conduct." Williams v. Wainwright, 493 F. Supp. 153, 155 - 56 (S. D. Fla. 1980). The sentence sub judice was based on the defendant's intervening conduct and does not "offend the safeguards of the Fifth Amendment." State v. Payne, 404 So. 2d 1055, 1058 - 59 (Fla. 1981). Further, it is well settled that double jeopardy does not bar an increased sentence when resentencing a felon, as long as vindictiveness plays no role in the new sentence. North Carolina v. Pearce, 409 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969). Instantly, the defense has neither alleged nor proven vindictiveness.

The defense cites to Geone v. State, 577 So. 2d 1306 (Fla. 1991), to stand for the proposition that a defendant has a "legitimate expectation of finality" in his sentence. Geone, 577 So. 2d 1308. While this may be true in a typical case, the prisoner's legitimate expectation of finality ceases when his original sentence is affected by some affirmative act on his part. Geone, 577 So. 2d 1306. Geone's "affirmative act" involved misrepresentation of his prior record; the instant defendant's "affirmative act" involved committing a subsequent crime while on probation. (The instant record is silent as to

whether the State or the defendant is culpable for the error on the original scoresheet). Just as the Geone court found that the misrepresentation eliminated any double jeopardy claim, this court should find the subsequent offense also waives any Fifth Amendment claim. The decision of the Third District must be affirmed.

CONCLUSION

Based on the aforestated points and legal authorities, the Respondent, THE STATE OF FLORIDA, respectfully requests that this court affirm the decision of the THIRD DISTRICT and uphold the sentence below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Response to Petition for Discretionary Review has been furnished by U. S. Mail to Louis Campbell, Assistant Public Defender, 1351 N. W. 12th Street, Miami, FL 33125, on this 30th day of March, 1993.

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