

FILED ^{U.V.S}

SID J. WHITE

JUL 8 1993

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

WILLIAM C. SCHERWITZ,)
)
 Petitioner,)
)
 vs.)
)
 STATE OF FLORIDA,)
)
 Respondent.)
 _____)

CASE NO. 82,006

PETITIONER'S JURISDICTIONAL BRIEF

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

LYLE HITCHENS
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 0147370
112-A Orange Avenue
Daytona Beach, Florida 32114
(904)252-3367

ATTORNEY FOR PETITIONER

TABLE OF CONTENTS

	<u>PAGE NO.</u>
TABLE OF CONTENTS	i
TABLE OF CITATIONS	ii
STATEMENT OF THE CASE AND FACTS	1
SUMMARY OF ARGUMENT	2
JURISDICTIONAL STATEMENT	3
ARGUMENT	4
<p>THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL IN THIS CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL IN <u>GRAHAM V. STATE</u>, 559 SO.2d 343 (FLA. 4TH DCA 1990).</p>	
CONCLUSION	5
CERTIFICATE OF SERVICE	6

TABLE OF CITATIONS

PAGE NO.

CASES CITED:

Graham v. State
559 So.2d 343 (Fla. 4th DCA 1990) 1,2,4

OTHER AUTHORITIES:

Article V, Section 3(b)(3), Florida Constitution (1980) 3

Rule 9.303(a)(2)(a)(iv), Florida Rule of Appellate Proc. 3

STATEMENT OF THE CASE AND FACTS

Petitioner, WILLIAM CHARLES SCHERWITZ, was charged in a two count information bearing case number 92-20, with two counts of burglary of a conveyance. (R 1) Petitioner had entered a plea of nolo contendere and was placed on community control, followed by probation. (R 22-30) Petitioner's scoresheet totaled 55 points, for a second cell permitted range of 1 to 3½ years incarceration. (R 30) Affidavits were subsequently filed alleging Petitioner had violated his community control. (R 31-32) The court then sentenced Petitioner to 3½ years on Count I, followed by 3½ years on Count II, consecutive. (R 47,49,51) Notice of appeal was thereafter filed. (R 58).

The issue was whether an erroneous scoresheet could be corrected, resulting in a more severe sentence, after violation of community control in the absence of any affirmative misrepresentation to the court by the defendant.

The Fifth District Court of Appeal held that allowing an inaccurate scoresheet to stand would unjustly benefit the defendant by allowing his prior convictions to pass unnoticed, merely because they were mistakenly omitted the first time. The Fifth District Court of Appeal acknowledged their opinion conflicted with Graham v. State, 559 So.2d 343 (Fla. 4th DCA 1990), which held that the trial court is without power to consider a new scoresheet, over objection, containing prior convictions completely omitted from the original scoresheet.

SUMMARY OF ARGUMENT

The Fifth District Court of Appeal acknowledged conflict with Graham v. State, 559 So.2d 343 (Fla. 4th DCA 1990). Graham held that the trial court is without power to consider a new scoresheet, over objection, containing prior convictions completely omitted from the original.

Whereas the decision of the Fifth District Court of Appeal, in the case at bar, authorizes the trial court to compute a new scoresheet.

JURISDICTIONAL STATEMENT

The Florida Supreme Court has discretionary jurisdiction to review a decision of a District Court of Appeal that expressly and directly conflicts with a decision of the Supreme Court or another District Court of Appeal on the same point of law. Art.V, § 3(b)(3), Fla. Const. (1980); F.R.App.P. 9.030(a)(2)(a)(iv).

POINT I

THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL IN THIS CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL IN GRAHAM V. STATE, 559 SO.2d 343 (FLA. 4TH DCA 1990).

The Fifth District Court of Appeal decided that an erroneous scoresheet could be corrected, resulting in a more severe sentence, after violation of community control even where there were no affirmative misrepresentations to the court by the defendant.

In Graham v. State, 559 So.2d 343 (Fla. 4th DCA 1990), the Fourth District Court held that a trial court is without power to consider a corrected scoresheet under these circumstances.

CONCLUSION

Based on the foregoing cases, argument and authorities, Appellant respectfully requests this Honorable Court accept jurisdiction in this case.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT



LYLE HITCHENS
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 147370
112-A Orange Avenue
Daytona Beach, Fla. 32114
(904) 252-3367

ATTORNEY FOR PETITIONER

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 Avenue, Suite 447, Daytona Beach, Florida 32114 in his basket at the Fifth District Court of Appeal and mailed to Mr. William C. Scherwitz, 545 Colee Street, St. Augustine, FL 32095 on this 6th day of July, 1993.



LYLE HITCHENS
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF FLORIDA

WILLIAM C. SCHERWITZ,)
)
 Petitioner,)
)
 vs.)
)
 STATE OF FLORIDA,)
)
 Respondent.)
 _____)

CASE NO. 82,006

APPENDIX

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

LYLE HITCHENS
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 0147370
112-A Orange Avenue
Daytona Beach, Florida 32114
(904)252-3367

ATTORNEY FOR PETITIONER

92849
LJH

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

JANUARY TERM 1993

WILLIAM C. SCHERWITZ,
Appellant,

NOT FINAL UNTIL THE TIME EXPIRES
TO FILE REHEARING MOTION, AND,
IF FILED, DISPOSED OF.

v.

CASE NO.: 92-2372

STATE OF FLORIDA,
Appellee.

RECEIVED

MAY 23 1993

PUBLIC DEFENDER'S OFFICE
7th CIR. APP. DIV.

Opinion filed May 28, 1993

Appeal from the Circuit Court
for St. Johns County,
Richard G. Weinberg, Judge.

James B. Gibson, Public Defender,
and Lyle Hitchens, Assistant Public
Defender, Daytona Beach, for Appellant.

Robert A. Butterworth, Attorney General,
Tallahassee, and Belle B. Turner,
Assistant Attorney General, Daytona
Beach, for Appellee.

COBB, J.

The issue here is whether an erroneous scoresheet can be corrected, resulting in a more severe sentence, after violation of community control in the absence of any affirmative misrepresentations to the court by the defendant. Cf. Goene v. State, 577 So. 2d 1306 (Fla. 1991).

In Graham v. State, 559 So. 2d 343 (Fla. 4th DCA 1990), the Fourth District held that a trial court is without power to consider a corrected scoresheet under these circumstances. The Third District recently has come to a contrary conclusion in Roberts v. State, 611 So. 2d 58 (Fla. 3d DCA 1992):

The defendant cites to Graham v. State, 559 So. 2d 343 (Fla. 4th DCA 1990) for the proposition that a trial court is without power to consider a new scoresheet, over objection, containing prior convictions completely omitted from the original. The contention then is that the defendant be sentenced under a scoresheet that is simply not based upon the truth. Consequently, we do not agree with Graham because to follow it literally, the defendant receives the benefit of being sentenced under a scoresheet which mistakenly omits prior convictions. Neither the rules nor the substantive law justifies a defendant receiving the largesse of a judicial error. Since only one guidelines scoresheet may be used for each defendant covering all offenses pending before the court at sentencing, following the defendant's argument permits him to escape the punishment meted out by the law.

Furthermore, since the defendant's violation of probation triggered the resentencing, the defendant is not being sentenced for "precisely the same conduct," and double jeopardy concerns do not come into play.

...Allowing the inaccurate scoresheet to stand unjustly benefits the defendant by allowing his prior convictions to pass unnoticed merely because they were mistakenly omitted the first time. (Citations omitted).

Roberts at 611 So.2d 58, 59.

We agree with the rationale of the Third District and affirm the instant sentence. We acknowledge conflict with Graham.

AFFIRMED.

GOSHORN, CJ. and DAUKSCH, J., concur.