

FILED

SID J. WHITE

AUG 18 1993

IN THE SUPREME COURT OF THE STATE OF FLORIDA, CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

WILLIAM C. SCHERWITZ,
Petitioner,

v.

Case No. 82,006

STATE OF FLORIDA,
Respondent.

ON DISCRETIONARY REVIEW FROM THE
DISTRICT COURT OF APPEAL, FIFTH DISTRICT

RESPONDENT'S BRIEF ON JURISDICTION

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SUMMARY OF ARGUMENT

Although there is a split of authority on this point of law among the district courts, this court should decline to accept jurisdiction in this case because this precise issue is currently pending in another case. Roberts v. State, Case No. 81,182
(Jurisdiction accepted, July 12, 1993)

ARGUMENT

THIS COURT SHOULD DECLINE TO ACCEPT
JURISDICTION BECAUSE THE CONFLICT
WILL BE RESOLVED IN A CASE PENDING
BEFORE THIS COURT.

In the decision below, the fifth district aligned itself with the third district on the issue of whether an erroneous scoresheet can be corrected after violation of community control or probation. The lower court accepted the rationale that "(n)either 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 law." Scherwitz v. State, 618 So. 2d 793, 794 (Fla. 5th DCA 1993), quoting Roberts v. State, 611 So. 2d 58, 59 (Fla. 3d DCA 1993). The decisions in this case and the Roberts case conflict with the decision in Graham v. State, 559 So. 2d 343 (Fla. 4th DCA 1990).

This court has accepted jurisdiction in the Roberts case by order dated July 12, 1993. Roberts v. State, Case No. 81,182. It is apparent that this court will resolve this split of authority in the Roberts case. Therefore, respondent contends that this court should not exercise its jurisdiction in this case as the issue will be decided.

In Jollie v. State, 405 So.2d 418 (Fla. 1981), this court held that when a district court issues a decision where the controlling precedent is presently pending in this court, there is "prima facie express conflict (which) allows this court to

exercise its jurisdiction." Id. at 420. Jollie suggests that in this situation, the appropriate course is to consolidate the cases. Id. Respondent contends alternatively that should this court exercise its jurisdiction in this case, it should be consolidated with the Roberts case presently pending in this court.

CONCLUSION

Based upon the argument and authority presented, respondent respectfully requests this honorable court to decline to accept jurisdiction in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing brief on jurisdiction has been furnished, by delivery to Assistant Public Defender Lyle Hitchens counsel for petitioner, 112 A Orange Avenue, Suite A, Daytona Beach, FL 32114, at the basket at the District Court of Appeal, Fifth District, this 17th day of August, 1993.

Belle B. Turner

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ASSISTANT ATTORNEY GENERAL

IN THE SUPREME COURT OF THE STATE OF FLORIDA

WILLIAM C. SCHERWITZ,

Petitioner,

v.

Case No. 82,006

STATE OF FLORIDA,

Respondent.

ON DISCRETIONARY REVIEW FROM THE
DISTRICT COURT OF APPEAL, FIFTH DISTRICT

APPENDIX TO RESPONDENT'S BRIEF ON JURISDICTION

Scherwitz v. State, 618 So. 2d 793 (Fla. 5th DCA 1993)

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McKay, Appellant,
v.
State of Florida, Appellee.
No. 93-448.
District Court of Appeal of Florida,
Fifth District.
May 28, 1993.

year probationary term. While on probation, appellant committed two new substantive offenses. After entering a negotiated plea to both charges, appellant was sentenced to 5 years imprisonment on each offense. Additionally, the court sentenced appellant to 5 years imprisonment for his violation of probation on the robbery conviction. The three sentences were ordered to run concurrently.

Weinberg, J., sentencing him after violation of community control. The District Court of Appeal, Cobb, J., held that erroneous scoresheet could be corrected, resulting in more severe sentence, after violation of community control, even in absence of any affirmative misrepresentations to court by defendant.

Affirmed.

filed a motion to correct imposed upon the revocation of the Circuit Court, Brevard County, J. Richardson, J., denied probationer appealed. The District Court of Appeal, Diamantis, J., probationer was entitled to time spent in prison on the robbery conviction against the defendant for the probation violation. Appellant is entitled to credit for that sentence imposed for the robbery offense, even though all probation had run concurrently.

Appellant contends that he is entitled to receive credit for the 4½ years he served in prison on the robbery conviction against each of the three sentences. Appellant is not entitled to credit on the two new substantive offenses because time served on a prior offense is not credited against sentences for new substantive offenses even when they are ordered to run concurrent with the sentence imposed for a violation of probation. See *State v. Smith*, 525 So.2d 461 (Fla. 1st DCA 1988). Appellant is entitled, however, to 4½ years credit against the sentence imposed for the violation of probation on the robbery conviction. See *Thomas v. State*, 612 So.2d 684 (Fla. 5th DCA 1993); *Wilson v. State*, 603 So.2d 93 (Fla. 5th DCA 1992); *Meintzer v. State*, 399 So.2d 133 (Fla. 5th DCA 1981). See *Springer v. State*, 616 So.2d 1105 (Fla. 5th DCA 1993). Accordingly, we remand for proceedings consistent with this opinion.

Criminal Law ⇨982.9(7)

Erroneous scoresheet could be corrected, resulting in more severe sentence, after violation of community control, even in absence of any affirmative misrepresentations to court by defendant.

part; reversed in part; re-

James B. Gibson, Public Defender, and Lyle Hitchens, Asst. Public Defender, Daytona Beach, for appellant.

⇨982.9(7), 1216.1(2)

was entitled to credit for sentence imposed for on, but was not entitled to time against sentences imposed for substantive offenses, even sentences upon revocation of been ordered to run concur-

Robert A. Butterworth, Atty. Gen., Tallahassee, and Belle B. Turner, Asst. Atty. Gen., Daytona Beach, for appellee.

COBB, Judge.

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).

AFFIRMED in part; REVERSED in part; REMANDED.

DAUKSCH and COBB, JJ., concur.



McKay, pro se.
for appellee.

William C. SCHERWITZ, Appellant,

v.

STATE of Florida, Appellee.

No. 92-2372.

District Court of Appeal of Florida,
Fifth District.

May 28, 1993.

Judge.

peal from the denial of ap- to correct the sentence im- a revocation of probation. 800(a). We affirm in part part.

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):

s convicted of robbery and, ½ years in prison on this released subject to a three-

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 score-

Defendant appealed from order of the Circuit Court, St. Johns County, Richard G.

sheet 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, C.J., and DAUKSCH, J.,
concur.



**R.D.M.H., INC. and Rudolph
Hardick, Appellants,**

v.

Richard J. DEMPSEY, Appellee.

No. 92-1146.

District Court of Appeal of Florida,
Fifth District.

May 28, 1993.

Defendant in suit for breach of contract appealed from final judgment of the

Circuit Court, Brevard County, Lawrence V. Johnston, III, J., awarding plaintiff compensatory and punitive damages. The District Court of Appeal, White, A.B., Associate Judge, held that: (1) award of compensatory damages for both breach of contract and fraud was erroneous where plaintiff failed to establish that he sustained compensatory damages based on fraud which were in any way separate or distinguishable from compensatory damage award for breach of contract, and (2) because compensatory damages for fraud were not properly recoverable, award of punitive damages could not stand.

Affirmed in part; reversed in part and remanded.

Fraud ⚖️32

Award of compensatory damages for both breach of contract and fraud was erroneous where plaintiff failed to establish that he sustained compensatory damages based on fraud were in any way separate or distinguishable from compensatory damage award for breach of contract.

Marcia K. Lippincott of Marcia K. Lippincott, P.A., Orlando, for appellants.

Richard A. Manzo and Roy A. Prayer of Law Offices of Manzo & Prayer, P.A., Titusville, for appellee.

WHITE, A.B., Associate Judge.

Finding no error in the trial court's evidentiary rulings and the existence of substantial competent evidence to establish a breach of contract, we affirm that portion of the final judgment awarding the plaintiff \$88,617.00 in compensatory damages under Count I of the complaint.

However, we reverse the remaining award of compensatory damages for fraud and the associated punitive damage award. An award of compensatory damages for both breach of contract and fraud is erro-