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IN THE SUPREME COURT OF FLORIDA

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

CASE NO. 82,006

PETITIONER'S BRIEF ON THE MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

LYLE HITCHENS
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ATTORNEY FOR PETITIONER

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STATEMENT OF THE CASE AND FACTS

The facts which were presented at trial are not at issue on this appeal.

In summary fashion: Petitioner, WILLIAM CHARLES SCHERWITZ, was charged in a two count information bearing case number 92-20, with two counts of burglary of a conveyance. (R1) 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 re-sentenced Petitioner to a more severe sentence of 3½ years on Count I, followed by 3½ years on Count II. (R 47, 49, 51) Notice of appeal was thereafter filed. (R 58)

In essence, the 5th District Court of Appeal held it was proper to amend/add to the original scoresheet at a VOP hearing. This conflicts with Graham v. State, 559 So. 2d 343 (Fla. 4th DCA

1990), which held at a VOP hearing the court could not add convictions completely omitted from the original scoresheet.

SUMMARY OF ARGUMENT

The issue 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 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 conflict 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.

ARGUMENT

IT IS IMPROPER TO RECALCULATE A SCORESHEET TO PROVIDE FOR A MORE SEVERE SENTENCE, IN THE ABSENCE OF ANY AFFIRMATIVE MISREPRESENTATION BY THE DEFENDANT.

The Fifth District Court of Appeal held in Scherwitz v. State, 618 So. 2d 793 (Fla. 5th DCA 1993) that it is improper for the defendant to receive the benefit of being sentenced under a scoresheet which mistakenly omitted prior convictions.

The decision of the Fifth DCA is in direct conflict with Graham v. State, 559 So. 2d 343 (Fla. 4th DCA 1990) which held:

> A trial court is without power to consider a corrected scoresheet which contained prior convictions completely omitted from the original scoresheet.
>
> * * *
>
> We agree that a trial judge can correct a miscalculated scoresheet at any time. Lathrop v. State, 521 So. 2d 358 (Fla. 5th DCA 1988). However, what happened in the case at bar was not, for example, an error in arithmetical addition of the numbers apparent from the four corners of the scoresheet. Much more than that occurred. Through some mix-up, the original scoresheet presented to the trial judge did not include several prior convictions at all. In other words, the error was not a miscalculation apparent to any reviewer, it was a total failure to list other convictions in the first place.
>
> We sympathize with the thought that a trial judge should have the ability to impose any sentence which it could lawfully have done originally, Davis v. Wainwright, 408 So. 2d 824 (Fla. 3rd DCA 1982), and would affirm this cause absent an objection. See, Dailey v. State, 488 So. 2d 532 (Fla. 1986). However, an objection was interposed

> subjudice and we find it to be error to consider a whole new scoresheet bearing little resemblance to the original, as distinct from correcting an error made on that original. See, Senior v. State, 502 So. 2d 1360 (Fla. 5th DCA 1987), review denied 511 So. 2d 299 (Fla. 1987). There was simply no miscalculation on the original scoresheet as submitted to the trial judge, and it is too late to correct other errors now.

Appellant would further show that his original sentence was not an illegal sentence which was subject to correction. See, Doe v. State, 492 So. 2d 842 (Fla. 1st DCA 1986) wherein:

> The defendant was arrested and charged with three counts of armed robbery arising out of a Gainesville robbery in May, 1983. He identified himself as Daniel Mailloux of Quebec, Canada. He was subsequently charged with the May, 1983 armed robbery of a Daytona Beach Shores bank.
>
> In September, 1983, defendant entered a negotiated plea argument whereby he pled guilty to two counts of robbery with a firearm. The trial court accepted the negotiated plea on September 26, 1983.
>
> A sentencing hearing was set for November 7, 1983. At that hearing the prosecutor stated he had received information that defendant was not Daniel Mailloux. The court granted the state's request to continue the proceedings.
>
> A second sentencing hearing was held January 16, 1984. At that hearing, the state announced defendant was not Daniel Mailloux. Rather, he had stolen the real Mailloux's identification papers in Canada. The state had been unable to establish defendant's true identity as of the date of sentencing. The state made no further requests for continuance, and the court gave no indication that it wished to delay the proceedings until the true identification was learned. The state requested the defendant be sentenced as John Doe a/k/a Daniel Mailloux and receive

the 4½ year prison sentence recommended by the guideline scoresheet. The court agreed and sentenced appellant to concurrent 4½ year prison terms on each count, the defendant having agreed to be sentenced under the guidelines.

In March, 1984, the state learned defendant's true identity and discovered he had a significant criminal record in Canada. Thereafter, in May, 1984, the state filed a motion to correct an illegal sentence under Florida Rule of Criminal Procedure 3.800(a). The state contended the sentence was illegal as defendant had caused the court to be denied information necessary to properly sentence defendant under the guidelines. The record indicates that the only representation by the defendant as to his prior record is contained in paragraph 8 of the September, 1983 written plea offer which indicated no prior convictions. The defense counsel signed a guidelines scoresheet indicating that it had been reviewed as to accuracy of point totals. There is nothing in the record indicating any representation by the attorney as to the number or nature of prior convictions or record.

Before a ruling on the motion the state obtained a conviction of defendant on perjury charges arising from statements made under oath when he entered the guilty plea.

On March 12, 1985, the judge granted the state's motion to correct the illegal sentence. The judge found in part:

> Without benefit of the true identity of the Defendant, this court was placed in the position of accepting the representation of the Defendant that he had no prior criminal record....

While we do not suggest we condone the kind of conduct shown by this defendant, we cannot accept the conclusion that the trial court was bound or misled by the representation of a known liar at the time of sentencing.

We disagree with the trial court that the original 4½ year sentence was imposed, in

> part, upon the subterfuge of the defendant constituting an illegal sentence that could be corrected under Florida Rule of Criminal Procedure 3.800(a). The term of 4½ years was a legal sentence that fell well within the statutory maximum of life imprisonment. A trial court is without authority to increase a legal sentence. Hinton v. State, 446 So. 2d 712 (Fla. 2d DCA 1983), and Cherry v. State, 439 So. 2d 998 (Fla. 4th DCA 1983).
>
> The facts in this case are quite similar to those in Katz v. State, 335 So. 2d 608 (Fla. 2d DCA 1976). In Katz, the defendant and his wife made false statements to the court in an effort to obtain a light sentence. The court imposed a sentence of 6 to 24 months. Within hours of sentencing, the court learned the statements were false. The next day the court resentenced Katz to 6 to 48 months on the belief that Katz had committed a fraud on the court. The Second District Court of Appeal set aside the second, greater sentence holding that once the defendant began to serve the original sentence, the trial court had no authority to increase the sentence. Such an increase violated double jeopardy principles in that increasing the penalty subjected Katz to double punishment for the same crime. The appeals court suggested a finding of contempt or a criminal charge of perjury was a proper course to punish the defendant for his false statements to the court. We note that Richard Pierre has been tried and convicted of perjury arising from his representations to the trial judge in this case.

Likewise, Appellant herein should not be subjected to the imposition of a more severe sentence. A trial court does not have the authority to increase a legal sentence. Doe, supra, citing Hinton.

CONCLUSION

BASED UPON the foregoing cases, authorities and policies, the appellant requests that this Honorable Court reverse Scherwitz v. State, 618 So. 2d 793 (Fla. 5th DCA 1993) and hold Graham v. State, 559 So. 2d 343 (Fla. 4th DCA 1990) as controlling, to wit: at a probation revocation hearing, the trial court is without power to consider a corrected scoresheet which contains prior convictions completely omitted from the original scoresheet.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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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 Ave., Ste 447, Daytona Beach, FL 32114 via his basket at the Fifth District Court of Appeal on this 19th day of November 1993.

LYLE HITCHENS
ASSISTANT PUBLIC DEFENDER