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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 AND THE
SEVENTH JUDICIAL CIRCUIT FOR ST. JOHNS COUNTY, FLORIDA

RESPONDENT'S BRIEF ON THE MERITS

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SUMMARY OF ARGUMENT

The sole issue in this case is whether or not a scoresheet can be corrected, resulting in a more severe sentence, after a violation of probation or community control in the absence of any affirmative misrepresentation by the defendant. The state requests this honorable court to adopt the position taken by the fifth and third districts on this issue. Accepting the petitioner's argument permits him to escape the punishment meted out by the law. Allowing an inaccurate scoresheet to stand unjustly benefits the defendant by allowing his prior convictions to have no adverse impact at all just because they were mistakenly omitted the first time.

ARGUMENT

WHEN ADDITIONAL, ADMITTEDLY VALID
PRIOR CONVICTIONS ARE MISTAKENLY
OMITTED FROM THE SCORESHEET, UPON
VIOLATION OF PROBATION OR COMMUNITY
CONTROL, THE SCORESHEET CAN BE
CORRECTED TO REFLECT THE LAWFUL
SENTENCE WHICH SHOULD BE IMPOSED.

The issue in this case is whether or not a scoresheet can be corrected, resulting in a more severe sentence, after a violation of probation or community control in the absence of any affirmative misrepresentation by the defendant. The Fifth District aligned itself with the Third District, in opposition to the Fourth and Second Districts on this issue. See, Graham v. State, 559 So. 2d 343 (Fla. 4th DCA 1990); Roberts v. State, 611 So. 2d 58 (Fla. 3d DCA 1992); Manuel v. State, 582 So. 2d 823 (Fla. 2d DCA 1991); Scherwitz v. State, 618 So. 2d 793 (Fla. 5th DCA 1993). The petitioner's brief on the merits relies extensively on the Graham decision. Roberts is currently pending before this court as case number 81,182. This court denied respondent's motion to consolidate this case with the Roberts case.

The state urges this honorable court to accept and adopt the fifth and third district's rationale on this point of law. The petitioner's argument in essence is that once a mistake is made and his admittedly valid prior convictions are omitted from the scoresheet, the error can never be corrected. The entire concept of the sentencing guidelines is to eliminate sentencing disparity by factoring in points for variables, including the

defendant's prior criminal history. By permitting the defendant to benefit from a judicial error, even after violation of probation of community control, he escapes the punishment meted out by law. In no other instance would a silent fraud upon the court be tolerated by a party, and this court should not endorse a position so offensive justice and basic fairness. While the state recognizes that a defendant cannot be compelled to correct an error such as this, on the other hand, if the state or the court realizes the mistake, the error should be corrected and the defendant should be sentenced under a lawfully computed scoresheet.

There is no time limit for filing a motion to correct an illegal sentence under Florida Rule of Criminal Procedure 3.800(a). A sentence based upon a scoresheet which is incorrect is illegal. There should be no impediment to the trial court, upon discovering the illegality of the sentence, correcting the scoresheet to reflect the true and lawful recommended sanction.

Although this court has not addressed this precise issue, there are analgous situations which the state suggests further support its position on this issue. In Goene v. State, 577 So. 2d 1306 (Fla. 1991), this court held that where a defendant affirmatively misrepresents his identity and is sentenced using a scoresheet which omits prior convictions under aliases, the trial court may resentence the defendant using a correct scoresheet, even after the defendant has begun serving the illegal sentence. The same policy considerations motivating that decision are

equally applicable here. Whether the misrepresentation is express as in *Goene* or just an implied misrepresentation as here, the result should be the same: once the mistake is discovered, the trial court should be permitted to correct it. There is no legitimate expectation of finality in a sentence known to be based upon an incorrectly scored scoresheet.

Similarly, in *State v. Tito*, 616 So. 2d 39 (Fla. 1993) and *State v. Stafford*, 593 So. 2d 496 (Fla. 1992), this court held that when a defendant has violated probation by committing new substantive offenses, multiple scoresheets should be prepared, and the scoresheet with the most severe sanction should be used. The same reasoning is applicable here. If the original scoresheet was incorrect, another scoresheet should be prepared, which correctly reflects the true score, and which ever sheet recommends the most severe sanction should be used.


The fifth and third districts have correctly resolved this question, and respondent respectfully requests this honorable court to adopt their rationale.

CONCLUSION

Based upon the argument and authority presented, respondent respectfully requests this honorable court to affirm the judgment and sentence in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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


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