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IN THE SUPREME COURT OF FLORIDA

CASE NO. 82,612

WILLIAM ROBERTS,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF PETITIONER ON JURISDICTION

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INTRODUCTION

The Petitioner, WILLIAM ROBERTS, was the defendant in the trial court and the Appellant in the Third District Court of Appeal. The Respondent, the State, was the prosecution in the trial court and the Appellee in the Third District. The parties will be referred to as they stood before the trial court.

STATEMENT OF THE CASE AND FACTS

In (Anthony) Roberts v. State, 611 So. 2d 58 (Fla. 3d DCA 1992), the Third District Court of Appeal, in express and direct conflict with every other district court of appeal, held that when a defendant is sentenced on a revocation of probation, a different guidelines scoresheet, containing additional convictions completely omitted from the original scoresheet without fault and without any misrepresentation by the defendant, may be utilized under the sentencing guidelines. This Court has granted review in Roberts, No. 81,182 (Fla. July 12, 1993), and that cause has been fully briefed on the merits.

The Third District Court of Appeal by per curiam decision affirmed the sentence entered on revocation of probation in this case, citing (Anthony) Roberts v. State. (App. 1). The Third District issued its decision on September 21, 1993.

Notice to invoke the discretionary jurisdiction of this Court was timely filed on October 18, 1993.

SUMMARY OF ARGUMENT

Because the per curiam affirmance of sentence (on revocation of probation) in this case cites as controlling authority a decision pending review on the merits in this Court, (Anthony) Roberts v. State, 611 So. 2d 58 (Fla. 3d DCA 1992), review granted, No. 81,182 (Fla. July 12, 1993), the decision below is, under Jollie v. State, 405 So. 2d 418 (Fla. 1981), paired for review and warrants this Court's exercise of jurisdiction and quashal.

ARGUMENT

THE PER CURIAM AFFIRMANCE BY THE LOWER COURT CITES AS CONTROLLING AUTHORITY A CASE PENDING REVIEW ON THE MERITS IN THIS COURT, AND THEREFORE UNDER JOLLIE v. STATE, 405 So. 2d 418 (Fla. 1981), CONSTITUTES PRIMA FACIE EXPRESS AND DIRECT CONFLICT.

In Jollie v. State, 405 So. 2d 418 (Fla. 1981), this Court held that "a district court of appeal per curiam opinion which cites as controlling authority a decision that is . . . pending review in . . . this Court continues to constitute prima facie express conflict and allows this Court to exercise its jurisdiction." Id. at 420. See, e.g., State v. Lofton, 534 So. 2d 1148 (Fla. 1988) (exercising jurisdiction on such basis).

Because under Jollie, the lower court has paired its decision in this case (App. 1) with (Anthony) Roberts v. State, 611 So. 2d 58 (Fla. 3d DCA 1992) (allowing altered scoresheet to be utilized on revocation of probation even where defendant not responsible for original scoresheet omissions, and certifying conflict), review granted, No. 81,182 (Fla. July 12, 1993), this Court should exercise jurisdiction and quash the decision of the lower court.[1]

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[1] (Anthony) Roberts v. State is in conflict with every other district court of appeal on the point. See Pfeiffer v. State, 568 So. 2d 530 (Fla. 1st DCA 1990); Jasperson v. State, 603 So. 2d 144 (Fla. 2d DCA 1992); Dennis v. State, 597 So. 2d 942 (Fla. 2d DCA 1992); Walton v. State, 596 So. 2d 1255 (Fla. 2d DCA 1992), dism., 605 So. 2d 1268 (Fla. 1992); Walker v. State, 593 So. 2d 301 (Fla. 2d DCA 1992); Tillman v. State, 592 So. 2d 767 (Fla. 2d DCA 1992); Manuel v. State, 582 So. 2d 823 (Fla. 2d DCA 1991); Harris v. State, 574 So. 2d 1211 (Fla. 2d DCA 1991), dism., 581 So. 2d 1310 (Fla. 1991); Columbo v. State, 575 So. 2d 1387 (Fla. 4th DCA 1991); Graham v. State, 559 So. 2d 343 (Fla. 4th DCA 1990); Holloman v. State, 600 So. 2d 522 (Fla. 5th DCA 1992).

CONCLUSION

Based on the foregoing argument and authorities cited, this Court should exercise its discretionary review jurisdiction upon authority of Jollie v. State and, on the merits, quash the decision below.

Respectfully submitted,

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit of Florida
1320 Northwest 14th Street
Miami, Florida 33125

By: _____
BRUCE A. ROSENTHAL
Assistant Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to the Office of the Attorney General, 401 Northwest 2nd Avenue, Miami, Florida 33128, this 29th day of October, 1993.

BRUCE A. ROSENTHAL
Assistant Public Defender

IN THE SUPEME COURT OF FLORIDA

CASE NO. 82,612

WILLIAM ROBERTS,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

_____/

APPENDIX

PAGE

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

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 1993

WILLIAM ROBERTS,	**	
Appellant,	**	
vs.	**	CASE NOS. 93-229 93-230
THE STATE OF FLORIDA,	**	
Appellee.	**	

Opinion filed September 21, 1993.

Appeals from the Circuit Court for Monroe County, Richard Payne, Judge.

Bennett H. Brummer, Public Defender, and Bruce A. Rosenthal, Assistant Public Defender, for Appellant.

Robert A. Butterworth, Attorney General, and Giselle D. Lylen, Assistant Attorney General, for Appellee.

BEFORE FERGUSON, COPE and LEVY, JJ.

PER CURIAM.

Affirmed. Roberts v. State, 611 So. 2d 58 (Fla. 3d DCA 1992), rev. granted, No. 81,182 (Fla. July 12, 1993).

section 775.087(1), Florida Statutes (1991), because Torris used a firearm during the commission of the felony. His sentencing guidelines scoresheet was calculated on the basis of a first-degree felony conviction.

The trial court erred in enhancing Torris's conviction to a first-degree felony based on the use of a firearm because the firearm was an essential element of the offense. *Lareau v. State*, 573 So.2d 813, 815 (Fla.1991) (aggravated battery with the use of a deadly weapon not subject to reclassification pursuant to section 775.087(1) because the use of a weapon is an essential element of the crime); *State v. Brown*, 476 So.2d 660, 662 (Fla.1985); § 775.087(1)(a), Fla.Stat. (1991); *see Watson v. State*, 591 So.2d 951 (Fla. 2d DCA 1991). Thus, the conviction, as enhanced to a first-degree felony, may not stand. Accordingly, Torris's sentence is vacated and the cause is remanded for further proceedings.

Conviction reversed; sentence vacated, and cause remanded.

Anthony ROBERTS, Appellant,

v.

The STATE of Florida, Appellee.

No. 92–373.

District Court of Appeal of Florida, Third District.

Dec. 29, 1992.

Probationer appealed sentence imposed by the Circuit Court, Monroe County, Richard Payne, J., for violating probation. The District Court of Appeal, Nesbitt, J., held that sentence for violation of probation could be based on scoresheet containing prior convictions mistakenly omitted from original scoresheet.

Affirmed.

1. Criminal Law ⇐982.9(7)

Sentence for violation of probation could be based on scoresheet containing prior convictions mistakenly omitted from original scoresheet.

2. Double Jeopardy ⇐31

Double jeopardy concerns did not come into play in imposing sentence for violation of probation, since the violation triggered resentencing, and defendant was not being sentenced for precisely the same conduct. U.S.C.A. Const.Amend. 5.

Bennett H. Brummer, Public Defender, and Louis Campbell, Asst. Public Defender, for appellant.

Robert A. Butterworth, Atty. Gen., and Barbara Arlene Fink, Asst. Atty. Gen., for appellee.

Before SCHWARTZ, C.J., and NESBITT and GODERICH, JJ.

NESBITT, Judge.

Anthony Roberts appeals the sentence imposed following a violation of probation. We affirm.

[1] Originally, after a jury trial, the defendant was convicted of selling cocaine, and sentenced to four years in prison followed by six years probation under a scoresheet which mistakenly omitted a number of prior convictions. After appeal, this court affirmed the judgment and sentence. *Roberts v. State*, 565 So.2d 1359 (Fla. 3d DCA 1990).

Thereafter, the defendant violated his probation and, after a hearing, the court sentenced him to nine years in prison. Because the subsequent scoresheet contained the correct number of prior convictions, the sentence imposed upon the defendant was bumped up three cells. The defendant argues that both the Florida Rules of Criminal Procedure as well as the Florida Supreme Court allow for a maximum one-cell increase in a defendant's sentence upon a violation of probation. Fla.R.Crim.P.

3.701(d)(14); *see also State v. Pentaude*, 500 So.2d 526 (Fla.1987). Thus, according to the defendant, the court's failure to use the original scoresheet resulted in a sentence which exceeded the maximum allowed one-cell upward increase.

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, Fla. R.Crim.P. 3.701(d)(1); *accord Lambert v. State*, 545 So.2d 838, 841 (Fla.1989), following the defendant's argument permits him to escape the punishment meted out by the law.

[2] 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. *State v. Payne*, 404 So.2d 1055, 1058 (Fla.1981) (citing *Williams v. Wainwright*, 493 F.Supp. 153, 155–56 (S.D.Fla. 1980).

In the instant case, using the original scoresheet, the court could have imposed a maximum sentence of two and one-half to five and one-half years incarceration after the probation violation. Had the defendant originally been sentenced under a correct scoresheet, however, the trial court could have incarcerated him for a maximum of twelve years after his probation violation. 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.

We certify to the supreme court the apparent conflict between our decision and that of *Graham v. State*, 559 So.2d 343 (Fla. 4th DCA 1990).

Accordingly, the sentence under review is affirmed.

Irma RODRIGUEZ, Appellant,

v.

PRESTRESS DECKING CORP. and Wausau Insurance Co., Appellees.

No. 91–2950.

District Court of Appeal of Florida, First District.

Dec. 30, 1992.

Sister appealed order of Judge of Compensation Claims, Henry Harnage, denying her death benefits for death of her brother in work-related accident. The District Court of Appeal, Kahn, J., held that workers' compensation statute limiting receipt of death benefits to dependents under 18 years of age, or under 22 years of age if dependent is a full-time student, does not violate equal protection and due process rights.

Affirmed.

Constitutional Law ⇐245(4), 301(4)
Workers' Compensation ⇐29

Workers' compensation statute limiting receipt of death benefits by dependents to those under 18 years of age, or under 22 years of age if dependent is a full-time student, does not violate equal protection and due process rights. West's F.S.A. §§ 440.02, 440.16; U.S.C.A. Const.Amend. 14.