W00A

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 THE MERITS

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Eleventh Judicial Circuit
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FLORIDA RULES OF CRIMINAL PROCEDURE

INTRODUCTION

The Petitioner, WILLIAM ROBERTS, was the appellant in the Third District Court of Appeal and the defendant in the trial court. The Respondent, the State, was the Appellee in the district court and the prosecution in the trial court. The parties will be referred to in this brief as they stood before the trial court. The two appeals below, DCA Case Nos. 93-229 and 93-320, involved the same issue and were consolidated for decision by the district court. The designation "R-1." will refer to the record on appeal in DCA Case No. 93-229; the designation "R-2." will refer to the record on appeal in DCA Case No. 93-230; and the designation "Tr. [date]" will refer to the corresponding transcript of proceedings.

STATEMENT OF THE CASE AND FACTS

On January 8, 1993, the defendant, who was on community control following a negotiated plea of nolo contendere in Monroe Circuit Case No. 90-2049 to one count of accessory after the fact and in Circuit Case No. 90-1827 to one count of burglary (Count I) and one count of grand theft (Count II) (R-1. 4-6, 20, 21-22, 26, 27, 32; R-2. 4-7, 32-33, 34, 49-51), appeared before Circuit Judge Richard Fowler and entered a plea to technical violations of the terms of supervision. (Tr. Jan. 8, 1993 at 3-4).[1]

When the defendant was initially placed on community control, the category five (Fla. R. Crim. P. 3.988(e)) guidelines scoresheet which had been filed scored a total of 46 points, placing the defendant in the first grid, with a recommended and permitted range of any non-state prison sanction. (R-2. 39).

The Department of Corrections recommendation on the community control violation was twenty-two months imprisonment, concurrent on both cases. (Tr. Jan. 8, 1993 at 3, 5). Over defense objection that in sentencing for the violation it was required to use the original scoresheet, the trial court utilized a new scoresheet filed by the State, which included juvenile record scoring not included on the original scoresheet, with a new total of 95 points and a permitted range of two-and-a-half years to five-and-a-half

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[1] The defendant admitted the following violations: having tested positive for cocaine; having been at Friday's restaurant on one occasion and at Fantasy Fest on another when he was supposed to have been at home; and being in arrears in restitution. (R-1. 46, 54; R-2. 83, 96; Tr. Jan. 8, 1993 at 3-4).

years imprisonment, three cells above the original scoresheet cell. (Tr. Jan. 8, 1993 at 6-8; R-1. 55, 58; R-2. 39, 94); Fla. R. Crim. P. 3.988(e)). Under the new scoresheet, the trial court sentenced the defendant to concurrent terms of five years imprisonment. (Tr. Jan. 8, 1993 at 9; R-1. 58; R-2. 105).

On consolidated appeal, the district court affirmed the sentence on the authority of (Anthony) Roberts v. State, 611 So. 2d 58 (Fla. 3d DCA 1992), in which it had held, in express and direct conflict with every other district court of appeal, that when a defendant is sentenced on a revocation of probation, a different guidelines scoresheet, containing additional convictions omitted from the original scoresheet without fault of and without any misrepresentation by the defendant, may be utilized under the sentencing guidelines. (William) Roberts v. State, 623 So. 2d 870 (Fla. 3d DCA 1993). Review in (Anthony) Roberts v. State has been granted by this Court. Case No. 81,182 (Fla. July 12, 1993).

The Third District issued its decision on September 21, 1993. Notice to invoke the discretionary review jurisdiction of this Court was timely filed on October 18, 1993, and by order dated February 15, 1994, this Court accepted jurisdiction, dispensed with oral argument, and ordered briefing on the merits.

SUMMARY OF ARGUMENT

The trial court erred in utilizing a revised scoresheet in sentencing the defendant for violation of community control rather than sentencing under the original scoresheet. Except where a defendant affirmatively misrepresents information related to prior convictions, see Goene v. State, 577 So. 2d 1306 (Fla. 1991), or where a new substantive case (constituting a violation) is also pending for sentencing, State v. Stafford, 593 So. 2d 496 (Fla. 1992), the guidelines by their express terms contemplate the use of the original scoresheet at sentencing upon a violation; Fla. R. Crim. P. 3.800(a) authorizes an after-the-fact revision of a scoresheet at the State's behest only when there are computational errors apparent on the face of the scoresheet or otherwise apparent from the "four corners" of the record, not where the State has mistakenly omitted convictions. Further, use of a different scoresheet at revocation would impede the finality of trial court rulings and engender multiple appeals, in violation of the policy of Shull v. Dugger, 515 So. 2d 748 (Fla. 1987).

The decision in (Anthony) Roberts v. State, 611 So. 2d 58 (Fla. 3d DCA 1992), review granted, Case No. 81,182 (Fla. July 12, 1993), allowing use at a violation sentencing of a different scoresheet encompassing convictions omitted from the original scoresheet, is contrary to the foregoing and to the decisions of every other district court of appeal on the point. Moreover, Roberts is distinguishable from the instant case because the defendant herein was placed on community control following a plea,

unlike the defendant in Roberts who was placed on supervision following a conviction after trial by jury. A plea involves the additional considerations of expectations shaped by an agreement and due process protections. If a different scoresheet is allowed to be employed upon violation of supervision imposed following to a negotiated plea, the implicit or express terms of such a plea are altered and a defendant would have to be given the right to withdraw the plea prior to being sentenced on such a basis. That approach undermines the policies of efficient and final case resolution underlying pleas, and has the effect of returning a case to "square one" long after the original disposition. Accordingly, Roberts should be disapproved, or, at minimum, held limited to sentencing for violation of supervision which was imposed following a trial conviction only and not a plea.

ARGUMENT

WHERE A DEFENDANT, PLACED ON COMMUNITY CONTROL OR PROBATION PURSUANT TO A PLEA, IS BEFORE A TRIAL COURT FOR SENTENCING ON A VIOLATION AND THERE IS NEITHER A NEW SUBSTANTIVE CASE (CONSTITUTING A VIOLATION) PENDING FOR SENTENCING BEFORE THE COURT AT THE SAME TIME NOR DID THE DEFENDANT MISLEAD THE STATE OR COURT WITH RESPECT TO THE ORIGINAL SCORESHEET, THE TRIAL COURT IS PROPERLY REQUIRED TO UTILIZE THE ORIGINAL SCORESHEET IN SENTENCING THE DEFENDANT ON THE VIOLATION.

Except for a scoresheet incorrectly computed because of a defendant's affirmative misrepresentations, see, e.g., Goene v. State, 577 So. 2d 1306 (Fla. 1991), or where a separate substantive offense (constituting a violation) is pending before the court for sentencing at the time a defendant is sentenced for violation of probation or community control, see, e.g., State v. Tito, 616 So. 2d 39 (Fla. 1993); State v. Stafford, 593 So. 2d 496 (Fla. 1992), a trial court in sentencing for a violation must employ the scoresheet utilized at the original sentencing, as each of the other district courts of appeal has so held.

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), dismissed, 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).[2]

The same principle precludes use of a different scoresheet following an appellate sentencing reversal, Harris v. State, 600 So. 2d 548 (Fla. 2d DCA 1992); Pittman v. State, 604 So. 2d 1263 (Fla. 4th DCA 1992); Braddy v. State, 593 So. 2d 1225 (Fla. 4th DCA 1992), and precludes resentencing upon a State motion to correct sentence under Fla.R.Crim.P. 3.800(a), for a sentence under an initial scoresheet which through no fault of the defendant did not fully score a prior record is neither an "illegal" sentence nor one involving "an incorrect calculation(.)". Senior v. State, 502 So. 2d 1360 (Fla. 5th DCA 1987), rev. den., 577 So. 2d 1306 (Fla. 1987).

The contrary decision in (Anthony) Roberts v. State, 611 So. 2d 58 (Fla. 3d DCA 1992), review granted, Case No. 81,182 (Fla. July 12, 1993), allowing a court in sentencing for a violation to use a different scoresheet encompassing convictions omitted on the initial scoresheet, should be disapproved for the several reasons which follow. Further, as will also be discussed, there is a pertinent factual distinction between Roberts and this case.

First, the sentencing guidelines themselves by their express

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[2] A panel of the Fifth District has, inexplicably without acknowledging or referring to Holloman v. State, subsequently aligned itself with the lower court. Scherwitz v. State, 618 So. 2d 793 (Fla. 5th DCA 1993). Because Scherwitz did not present any analysis of the issue but merely quoted the decision below, and the latter is fully discussed herein, it (Scherwitz) will not be separately discussed.

terms contemplate use of the original scoresheet in sentencing on a violation of probation or community control: "The sentence imposed after revocation of probation or community control may be included within the original cell (guidelines range) or may be increased to the next higher cell (guidelines range) without requiring a reason for departure." Fla. R. Crim. P. 3.701(d)(14) [emphasis added].

Second, it is the State's burden to score prior record correctly, and the rules of criminal procedure by their express terms (Fla. R. Crim. P. 3.800(a)) state that it is miscalculations (i.e., errors on the face of a scoresheet or determinable from the "four corners" of the record, see, e.g., Senior v. State, supra), that are subject to correction at any time, and not errors of omission.

Third, allowing re-scoring at any time precludes a single, determinative appellate resolution of scoring disputes and provides for multiplication of sentencing scoring appeals, violating the principle of Shull v. Dugger, 515 So. 2d 748 (Fla. 1987), which prohibited enunciation of new reasons for departure sentencing after earlier reasons had been reversed by an appellate court. As stated by the unanimous Shull court:

> We believe the better policy requires the trial court to articulate all of the reasons for departure in the original order. To hold otherwise may needlessly subject the defendant to unwarranted efforts to justify the original sentence and also might lead to absurd results. One can envision numerous resentencings as, one by one, reasons are rejected in multiple appeals.

515 So. 2d at 750.

To paraphrase Shull, if a scoresheet different from the original one may typically be employed at revocation proceedings, one can envision numerous resentencings as, one by one, scoring attributions or errors are rejected in multiple appeals. To the contrary of such a repetitive, burdensome, and indeterminate process, the better policy requires that where (as here) the defendant has not misled the State or the court, see Goene v. State, and no substantive offense (constituting a violation) is also pending for sentencing with the violation, see State v. Tito, that the State be held to its burden of scoring all other offenses properly at the initial sentencing or be barred thereafter.

Indeed, in State v. Tito, which involved a question of scoresheet procedure where a substantive offense (constituting a violation) is pending for sentencing when a judge sentences for a violation, this Court recognized as correct Judge Parker's partial dissent from the district court opinion [Tito v. State, 593 So. 2d 284, 286 (Fla. 2d DCA 1992)]. See State v. Tito, 616 So. 2d at 40. In that partial dissent, Judge Parker observed that where a sentence is imposed for a violation of community control or probation and "no new criminal charges [are] pending for sentencing" the trial judge "must utilize the original scoresheet." 593 So. 2d at 287.

Moreover, if the foregoing were not sufficient enough to warrant disapproval of Roberts, that case is in any event distinguishable because it involved an initial sentencing upon a

conviction following a jury trial. Here, in contrast, the defendant was initially placed on community control following a negotiated plea. Every such plea involves at least implicitly, and usually expressly, an expectation and understanding as to the applicable sentencing ranges. See, e.g., Fla. R. Crim. P. 3.172(c)(iii), (requiring a trial court as part of a plea colloquy to inform the defendant of the applicable penalties).

See also Ashley v. State, 614 So. 2d 486, 488 (Fla. 1993) ("Before a trial judge can accept a plea of guilty or nolo contendere, there must be 'an affirmative showing that it was intelligent and voluntary,' [quoting from Boykin v. Alabama, 395 U.S. 238 (1969)] for '[w]hat is at stake for an accused facing death or imprisonment demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence.' . . . Accordingly, before a court may accept a guilty or nolo plea it must determine on the record that the defendant is aware of the 'maximum possible penalty provided by law' that may be imposed for the crime. Maximum penalties for most felonies are determined according to the sentencing guidelines, which establish recommended (and now, permitted) ranges of punishment.").

Such expectations are afforded due process protection, and before a defendant may be sentenced contrary to them, he must be given an opportunity to withdraw his plea. See, e.g., Kirkman v. State, 559 So. 2d 695 (Fla. 3d DCA 1990); Deprycker v. State, 486

So. 2d 57 (Fla. 3d DCA 1986); Small v. State, 600 So. 2d 518 (Fla. 5th DCA 1992); Mantle v. State, 592 So. 2d 1190 (Fla. 5th DCA 1992); Gainer v. State, 590 So. 2d 1001 (Fla. 1st DCA 1991); McCollun v. State, 586 So. 2d 490 (Fla. 1st DCA 1991); Edwards v. State, 575 So. 2d 297 (Fla. 4th DCA 1991); Johnson v. State, 547 So. 2d 238 (Fla. 1st DCA 1989); Johnson v. State, 541 So. 2d 1213 (Fla. 2d DCA 1989).

The policies of efficiency and finality underlying resolution of cases by pleas are significantly undermined if different scoresheets may be freely substituted at sentencing upon a violation, which would engender the then-concomitant constitutional requirement of opportunity to withdraw the plea, sending a case back to, in the words of Small v. State, 600 So. 2d at 520, "square one." There is no cogent justification for introducing such uncertainty and open-endedness into the plea process, and, accordingly, except for the Goene v. State and State v. Stafford exceptions, in sentencing for a violation a trial court must use the original scoresheet.

The soundness of this conclusion is underscored by the case of Thomas v. State, 593 So. 2d 219 (Fla. 1992), in which the State had urged its unawareness of the defendant's prior record as a ground to excuse its non-compliance with the terms of a negotiated plea. This Court, although not adjudicating the merits of that contention because concluding that the defendant was nevertheless entitled to withdraw his plea, noted that "[t]he State controls the plea bargaining process and need not enter a plea agreement

until it is satisfied that it has obtained all the pertinent information regarding a defendant's prior record." 593 So. 2d at 221 n.2.

Accordingly, the trial court should not have utilized a different scoresheet at sentencing on the revocation, and should have sentenced according to the original scoresheet. (R-2. 39). Further, the fact this was the second violation of community control merely permitted, but did not, as incorrectly argued by the State below [Tr. Jan. 8, 1993 at 6] require, the trial court to employ multiple "bump-ups."

While Williams v. State, 594 So. 2d 273 (Fla. 1992) makes available sequential bump-ups for sequential violations, a trial court is not obligated to employ them. See id. at 275 ("[I]n the case of multiple violations of probation, the sentences may be bumped one cell or guideline range for each violation." [emphasis supplied]); State v. Roa, 599 So. 2d 995, 996 (Fla. 1992) (Under Williams, "the trial court was not obligated to bump Roa's sentence.").

Nor can it be assumed that the trial court would have employed such bump-ups had it utilized the correct scoresheet. See Desue v. State, 605 So. 2d 933, 935 (Fla. 1st DCA 1992) ("Although the lower court did have such option, the court did not employ a three-cell bump-up at sentencing; therefore, it would be speculative for us to assume that it would have done so had appellant's scoresheet been correctly scored(.)"). See also Korynes v. State, 613 So. 2d 116 (Fla. 2d DCA 1993) (fact of numerous prior violations of

probation held improper basis for departure, and in remanding for resentencing, appellate court noted that even though numerous bump-ups were available to the trial court the sentence would still have to be less than that which was actually imposed).

CONCLUSION

BASED on the foregoing argument and authorities cited, the sentence imposed by the trial court was erroneous because based on an improperly substituted scoresheet, and the cause should be remanded for resentencing under the original scoresheet. The decision in (Anthony) Roberts v. State, 611 So. 2d 58 (Fla. 3d DCA 1992), should be disapproved. Alternatively, for the reasons stated, Roberts v. State has no application where, as here, a plea was involved.

Respectfully submitted,

BENNETT H. BRUMMER
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Eleventh Judicial Circuit of Florida
1351 Northwest 12th Street
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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 23rd day of March, 1994.

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

Shea & Gould, Jay D. Schwartz, Elizabeth S. Baker and Alberto A. Macia, Miami, for appellant.

Robert A. Butterworth, Atty. Gen., and Giselle D. Lylen, Asst. Atty. Gen., for appellee.

Before COPE, LEVY and GODERICH, JJ.

ON CONFESSION OF ERROR

PER CURIAM.

As the State of Florida correctly concedes, the trial court erred in not complying with the provisions of Rule 3.840 of the Florida Rules of Criminal Procedure when the trial court found the appellant to be guilty of indirect criminal contempt. Accordingly, that adjudication of contempt must be reversed. *See Goral v. State*, 553 So.2d 1282 (Fla. 3d DCA 1989).

Said reversal is without prejudice to the initiation of any further contempt proceedings that the trial court may deem appropriate. In view of the State's confession of error as to issue one in this case, the remaining issues are rendered moot.

Reversed and remanded.

1

Luckner BOURJOLLY, Appellant,

v.

The STATE of Florida, Appellee.

No. 92-2326.

District Court of Appeal of Florida, Third District.

Sept. 21, 1993.

An Appeal from the Circuit Court for Dade County; Martin D. Kahn, Judge.

Luckner Bourjolly, in pro. per.

Robert A. Butterworth, Atty. Gen., and Richard L. Polin, Asst. Atty. Gen., for appellee.

Before FERGUSON, COPE and GODERICH, JJ.

PER CURIAM.

As there is no appeal from an order denying a motion to mitigate under Florida Rule of Criminal Procedure 3.800(b), the appeal is dismissed. *Daniels v. State*, 568 So.2d 63 (Fla. 1st DCA 1990).

Appeal dismissed.

2

William ROBERTS, Appellant,

v.

The STATE of Florida, Appellee.

Nos. 93-229, 93-230.

District Court of Appeal of Florida, Third District.

Sept. 21, 1993.

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

Bennett H. Brummer, Public Defender, and Bruce A. Rosenthal, Asst. Public Defender, for appellant.

Robert A. Butterworth, Atty. Gen., and Giselle D. Lylen, Asst. Atty. Gen., for appellee.

Before FERGUSON, COPE and LEVY, JJ.

PER CURIAM.

Affirmed. *Roberts v. State*, 611 So.2d 58 (Fla. 3d DCA 1992), *rev. granted*, 624 So.2d 268 (Fla.1993).

1

R.I.G., a juvenile, Appellant,

v.

The STATE of Florida, Appellee.

No. 93–1117.

District Court of Appeal of Florida, Third District.

Sept. 21, 1993.

An Appeal from the Circuit Court of Monroe County; Richard G. Payne, Judge.

Bennett H. Brummer, Public Defender and Rosa C. Figarola, Asst. Public Defender, for appellant.

Robert A. Butterworth, Atty. Gen. and Richard A. Polin, Asst. Atty. Gen., for appellee.

Before JORGENSON, LEVY and GODERICH, JJ.

CONFESSION OF ERROR

PER CURIAM.

Upon the State's proper confession of error, the judgment and sentence is hereby reversed. *See Brown v. State*, 537 So.2d 180 (Fla. 3d DCA 1989).

2

William JABBA, Appellant,

v.

The CADLE COMPANY, Appellee.

No. 93–320.

District Court of Appeal of Florida, Third District.

Sept. 21, 1993.

An Appeal from the Circuit Court for Dade County; Jonathan T. Colby, Judge.

Luis E. Rivera–Montalvo, Santurce, PR, for appellant.

Steve M. Glerum, Ft. Lauderdale, for appellee.

Before FERGUSON, COPE and GODERICH, JJ.

PER CURIAM.

Affirmed. *Brunswick Corp. v. Creel*, 471 So.2d 617 (Fla. 5th DCA 1985); *Kodel v. Beacon Leasing Corp.*, 422 So.2d 90 (Fla.3d DCA 1982).

3

Harry CONYERS, Petitioner,

v.

STATE of Florida, Respondent.

No. 92–3543.

District Court of Appeal of Florida, First District.

Sept. 22, 1993.

Petition for Writ of Certiorari—Original Jurisdiction.

Nancy A. Daniels, Public Defender, and P. Douglas Brinkmeyer, Asst. Public Defender, Tallahassee, for petitioner.

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.