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 RESPONDENT ON THE MERITS

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

LESLIE SCHREIBER
Florida Bar #0841277
Office of Attorney General
Departmentof Legal Affairs
Post Office Box 013241
Miami, Florida 33101
(305) 377-5441

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES **PAGE**

OTHER AUTHORITY:

INTRODUCTION

The Petitioner at bar, **WILLIAM ROBERTS**, was the Appellant in the Third District Court of Appeal and the Defendant in the trial court. The Respondent, **THE STATE OF FLORIDA**, was the Appellee in the Third District Court of Appeal and the prosecution in the trial court.

The parties will be referred to in this brief as they stood before the trial court.

Third District Court of Appeal Case Nos. 93-229 and 93-320 were consolidated by the district court. "R1" shall reflect the record on appeal in Case No. 93-229; "R2" shall reflect Case No. 93-230; "T" will refer to the transcript.

COMBINED STATEMENT OF THE CASE AND FACTS

In November, 1990 the state filed an information charging the defendant with two counts of burglary of a dwelling, two counts of grand theft and one count of petit theft (R2, p. 4-8), Case No. 90-1827-CF. In January, 1991, the defendant was informed against for committing one count as an accessory after the fact to the placement of a destructive or explosive device, in violation of § 790.162 Fla. Stat. (1991); (R1, p. 4).

On January 29, 1991, the defendant entered into a negotiated plea of nolo contendere in the Monroe County Circuit Court Case No. 90-2049 (R1, p. 21, 27, 28; R2, p. 32-34). He entered a plea of guilty in Case No. 90-1827 for burglary of a dwelling, Count I and Count III, for grand theft (T. January 29, 1991, p. 4). He also plead no contest to Count II in Case No. 90-2049-CF for accessory after the fact.

Sentencing was scheduled for February 8, 1991 before Judge Richard Payne (T. February 8, 1991). The court withheld adjudication, and placed the defendant on two years of community control in Case No. 90-1827-CF for burglary of a dwelling, followed by five years of probation, and for the charge of grand theft, a concurrent term of two years (T. February 8, 1991, p. 13). In Case No. 90-2049-CF, he was placed on three years probation to run concurrently to Count I in Case No. 90-1827 (R2, p. 41; 49-53).

The scoresheet used for the original sentencing used was a Category 5 guidelines scoresheet (Fla. R. Crim. P. 3.988(j).[1] It totaled 46 points, placing the defendant in the first grid, with a recommended and permitted range of any non-state prison sanction (R2, p. 39).

In November, 1992, the defendant violated the technical terms of his supervision (R1, p. 44). The defendant appeared before Circuit Judge Richard Fowler on January 8, 1993, and voluntarily admitted to having violated the terms of his community control on no less than five occasions. These included testing positive for cocaine on February 25, 1991 and April 14, 1992; having been at Friday's on one occasion and at Fantasy Fest on another when he was supposed to be at home; and being in arrears in restitution for a total of $1,230.00 (R1, p. 46, 54; T. Jan 8, at 3-4). On that date, the Department of Corrections recommended 22 months concurrent on both cases (T. January 8, 1993, p. 3). The State disagreed with the recommendation, saying that would be an illegal sentence. The state explained, "[H]e scores three-and-a-half to four-and-a-half. But this is his second violation on these two sets of cases. He is now bumped up two grids to the five-and-a-half to seven-and-a-half grid. In order to give him a 22-month sentence you would have to depart

---

[1] The defendant mistakenly points out in his brief that the scoresheet used was a 3.988(e) guidelines scoresheet. (See Brief on the Merits, p. 2).

down at least three grids." (T. January 8, 1993, p. 6). Over defense objection, a new scoresheet was used which included juvenile record scoring not included on the original scoresheet, with a total of 95 points and a permitted range of two-and-a-half years to five-and-a-half years imprisonment (R1, p. 55; 58; R2, p. 39; 94).

Under this new scoresheet, the court sentenced the defendant to concurrent terms of five years imprisonment (T. January 8, 1993, p. 9; R2, p. 105).

The defendant appealed each case, and the district court consolidated the appeal. The Third District Court of Appeal affirmed the sentence on the authority of (Anthony) Roberts v. State, 611 So. 2d 58 (Fla. 3d DCA 1992), which held 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). The Supreme Court of Florida granted review in (Anthony) Roberts v. State, 611 So. 2d 58 (Fla. 3d DCA 1992), Case No. 81,182 but as of April 7, 1993 it remains pending.

After the Third District Court of Appeal issued its opinion, the defendant filed a Notice to Invoke the Discretionary Jurisdiction in the Florida Supreme Court on October 18, 1993. The Court accepted jurisdiction, and has ordered briefing on the merits. We respond.

POINT ON APPEAL

WHETHER THE TRIAL COURT PROPERLY SCORED THE DEFENDANT USING A REVISED SCORESHEET FOLLOWING FIVE VIOLATIONS OF PROBATION, WHERE HE HAD BEEN PLACED ON COMMUNITY CONTROL FOLLOWING A NEGOTIATED PLEA?

SUMMARY OF THE ARGUMENT

The Third District's application of (Anthony) Roberts v. State in reaching the merits of the case at bar, is correct. The Respondent distinguishes this situation from one where a defendant makes an affirmative misrepresentation or commits a new substantive offense, the noted exceptions for using a second scoresheet. We note the Fifth District's recent reliance on (Anthony) Roberts in Scherwitz v. State, 618 So. 2d 793 (Fla. 5th DCA 1993), as support for our view that using a revised scoresheet was proper in this situation where the defendant admittedly committed five technical violations. Even though the defendant entered into a negotiated plea, that is not enough to distinguish this case from (Anthony Roberts). The defendant essentially breached his contract with the state by committing the violation, and he should not be able to reap the benefits of his self-inflicted criminal acts.

ARGUMENT

THE TRIAL COURT PROPERLY SCORED THE DEFENDANT USING A REVISED SCORESHEET FOLLOWING FIVE VIOLATIONS OF PROBATION, WHERE HE HAD BEEN PLACED ON COMMUNITY CONTROL FOLLOWING A NEGOTIATED PLEA.

The defendant contends that the trial court improperly utilized a new scoresheet in sentencing him on January 8, 1993 following his violations of probation, because on resentencing, it included other convictions inadvertently omitted from the original scoresheet. The state will demonstrate that the appellate court's application of (Anthony) Roberts v. State, 611 So. 2d 58 (Fla. 3d DCA 1992), review granted, Case No. 81, 182 (Fla. July 12, 1993) in reaching the merits of the case at bar, is correct.

The defendant bases its argument that a trial court in sentencing for a violation must employ a scoresheet utilized at the original sentencing by distinguishing what are clear-cut exceptions: (1) where a scoresheet is incorrectly computed because of a defendant's affirmative misrepresentations[2] , or (2) where a separate substantive offense constituting a violation is

---

[2] *Goene v. State*, 577 So. 2d 1306 (Fla. 1991).

pending before the court for sentencing at the time a defendant is sentenced for violation of probation or community control.[3]

Historically, in those situations where the state was unaware of prior convictions, like in the case where a defendant was operating under an alias, it was precluded from using a new scoresheet. See Manuel v. State, 582 So. 2d 823 (Fla. 2d DCA 1991); Jasperson v. State, 605 So. 2d 144 (Fla. 2d DCA 1992); Dennis v. State, 597 So. 2d 942 (Fla. 2d DCA 1992); Harris v. State, 547 So. 2d 1211 (Fla. 2d DCA 1991). The rationale for this exclusion was generally based on the distinction presented in Goene v. State, 577 So. 2d 1306 (Fla. 1991), which was: where a defendant makes affirmative misrepresentations about his identity during original sentencing which results in an inaccurate scoresheet, he can be resentenced to a greater term without violating the prohibitions against double jeopardy.

It appears that in the recent Scherwitz v. State, 618 So. 2d 793 (Fla. 5th DCA 1993) case, the Fifth District deviated from Goene by refocusing its attention, not on whether the defendant made affirmative misrepresentations, but on whether the scoresheet itself was erroneous or not. The Fifth District noted the divergent views between Graham v. State, 559 So. 2d 343 (Fla. 4th DCA 1990) and (Anthony) Roberts v. State, 611 So. 2d 58 (Fla. 3d DCA 1992). The Fifth District sided with the Third District's

---

[3] *State v. Tito*, 616 So. 2d 39 (Fla. 1993); *Stafford v. State*, 593 So. 2d 496 (Fla. 1992).

rationale in (Anthony) Roberts noting that, "[n]either the rules nor the substantive law justifies a defendant receiving the largesse of a judicial error." (Anthony) Roberts at 611 So. 2d 58. The Fifth District also found the defendant's deed of violating probation was what triggered the resentencing. That took defendant out of the realm of being sentenced for precisely the same conduct.

Sub judice, the defendant noted his surprise with the Scherwitz decision, and questioned the court's alignment with (Anthony) Roberts. Contrary to the defendant's assertion that the Scherwitz court did not present any analysis, we believe that by directly quoting from (Anthony) Roberts, the court honored the reasoning of the Third District, and thereby adopted it.[4] This Court should similarly align itself with the Third District's analysis in (Anthony) Roberts v. State, when deciding this particular case.

At bar, the defendant cannot claim surprise at the result of the inclusion of his prior previously scored juvenile convictions and he should not be permitted to benefit from his failure to correct the court's misapprehension as to their correct number. Both (Anthony) Roberts and Scherwitz seem to place less emphasis on a defendant's "expectation of finality" in his sentence. Cf. Goene, 577 So. 2d 1308. A prisoner's

[4] See footnote 2, Petitioner's brief, pg. 7.

expectation of finality should cease when his original sentence is affected by some affirmative act. The instant defendant's "affirmative act" involved committing technical violations of probation.

The defendant asserts that it is the state's burden to score prior records correctly, citing Fla. R. Crim. P. 3.800(a). While this statement may be generally true, there are some obvious exceptions. For example, as is evinced in Goene where a defendant makes affirmative misrepresentations to the court.

Next, the defendant relies on the fact that a plea was entered into at bar as distinguishing this case from (Anthony) Roberts. Further, that entry into a negotiated plea involves an defendant's understanding of the applicable sentencing ranges, citing to cases which stress the defendant's expectation and understanding of the consequences of that particular plea. Contrary to the defendant's assertion that using a second scoresheet would introduce uncertainly and open-endedness into the plea process, we cannot ignore the defendant's input when he opened up Pandora's box, so to speak. An integral factor that the defendant fails to mention is the purpose behind a negotiated plea. That is, a defendant enters into a mutually advantageous agreement with the state. See Novaton v. State, 19 Fla. L. Weekly S136 (Fla. March 24, 1994)(the Court distinguishes between a plea and a plea bargain). When the defendant at bar

technically violated his probation, he undermined the plea agreement. He essentially breached his contract with the state. By adopting the rationale of (Anthony) Roberts and applying it to this set of facts, the defendant at bar should not be able to reap the benefit of his illegal conduct.

Finally, should the matter be remanded for resentencing, the defendant could ultimately face a sentence much greater than he currently does. The trial court should have factored in the five technical violations into its sentencing calculations. The Florida Supreme Court, in Williams v. State, 594 So. 2d 2273, 175 (Fla. 1992) has stated "that in the case of multiple violations of probation, the sentences may be bumped one cell or guideline range for each violation." Therefore, if the defendant is correct in asserting that his original guidelines scoresheet should have been utilized, his score may be bumped a total of five cells for the violations he confessed to at his hearing. These then would permit the trial court to sentence him, under the guidelines scoresheet in effect at the time of his original sentencing hearing, up to a permitted range of four and one-half years to nine years in prison. See also: State v. Tito, 616 So. 2d 39 (Fla. 1993).

CONCLUSION

Based on the foregoing points and authority, the sentence imposed by the trial court when it used a second scoresheet after violations of probation, was proper. The decision in (Anthony) Roberts, 611 So. 2d 58 (Fla. 3d DCA 1992), should be approved.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

Linda S. Katz, FOR!

LESLIE SCHREIBER
Florida Bar #0841277
Assistant Attorney General
Office of the Attorney General
Department of Legal Affairs
P.O. Box 013241
Miami, Florida 33101
(305) 377-5441

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing **BRIEF OF RESPONDENT** was furnished by mail to **Bruce Rosenthal,** Public Defender, Eleventh Judicial Circuit of Florida, 1351 Northwest 12th Street, Miami, Florida on this 15th day of April, 1994.

Linda S. Katz

LESLIE SCHREIBER
Assistant Attorney General

mls/