IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 84,867

JIMMY DALE LAMAR,

Respondent.

_____/

CERTIFIED QUESTION FROM
THE DISTRICT COURT OF APPEALS
IN AND FOR THE SECOND DISTRICT
LAKELAND, FLORIDA

INITIAL BRIEF OF PETITIONER

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STATEMENT OF THE CASE AND FACTS

Respondent, Jimmy Dale Lamar, was initially charged in case 92-085 with burglary of a dwelling with intent to commit a battery (Count 1) and sexual battery (Count 2) (R34-35). On July 8, 1992, Mr. Lamar entered a plea of nolo contendere to the sexual battery charge and the burglary charged was nolle prossed by the state (R39). The guidelines scoresheet filed at the time the plea was entered reflected a recommended range of 3 1/2 - 4 1/2 years and a permitted range of 2 1/2 - 5 1/2 years (R43). He was sentenced to 10 years probation, a downward departure sentence pursuant to a plea agreement (R41-47).

An Affidavit for Violation of Probation was subsequently filed against Mr. Lamar based upon a new sexual battery offense which allegedly occurred on July 14, 1992 and a technical violation (R51). He was charged by information 92-461 with this new sexual battery offense (R65-66). He was tried by a jury and found guilty of the lesser included offense of attempted sexual battery on this new offense (R68).

Sentencing on the new offense (92-461) and for violation of probation on the prior offense (92-085) was held on December 22, 1992. A new guidelines scoresheet was prepared scoring the new attempted sexual battery conviction (92-461) as the primary offense and his prior sexual battery conviction for which Mr. Lamar was on probation as a prior record (R59). The recommended range was 9 -12 years and the permitted range was 7 - 17 years.

The trial court revoked respondent's probation in case 92-085 and sentenced him to 15 years imprisonment on in that case (R54-58, 60). On the new conviction for attempted sexual battery (92-461) he was sentenced to 2 years imprisonment followed by 3 years probation, this sentence to run consecutive to the 15 year sentence imposed in case 92-085 (R70-74, 76-79).

The Second District Court of Appeals reversed and remanded the case for resentencing. The appellate court reasoned that although both offenses were properly scored under a single guideline scoresheet with the new offense of attempted sexual battery scored as the primary offense and the probationary offense along with other prior offenses scored as prior record in order to secure the most severe sanction in accordance with State v. Tito, 616 So.2d 39 (Fla. 1993), the trial court erred in not using the original scoresheet in the probation case in order to determine the appropriate sentence in that case with the one cell bump up for violation of probation based upon its reasoning in Grady v. State, 618 So.2d 341 (Fla. 2d DCA 1993). The appellate court certified the following question as one of great public importance:

> WHERE A DEFENDANT IS SENTENCED AT THE SAME SENTENCING HEARING FOR A NEW FELONY AND A VIOLATION OF PROBATION GROUNDED UPON THE NEW FELONY, IS THE TRIAL COURT LIMITED TO A ONE-CELL INCREASE FROM THE ORIGINAL SCORESHEET UNDER THE SENTENCING GUIDELINES FOR THE VIOLATION OF PROBATION, PURSUANT TO GRADY V. STATE, 618 SO.2D 381 (FLA. 2D DCA 1993), OR CAN THE TRIAL COURT IMPOSE THE MOST SEVERE SENTENCING SCHEME PERMISSIBLE AS TO BOTH CRIMES AS OUTLINED IN STATE V. TITO, 616 SO.2D 39 (FLA. 1993)?

Respondent, the state of Florida, filed its notice requesting the Florida Supreme Court to accept discretionary review in this instant case based upon the certified question and pursuant to this Court's ORDER POSTPONING DECISION ON JURISDICTION AND BRIEFING SCHEDULE, rendered on December 22, 1994 file this brief on the merits.

SUMMARY OF THE ARGUMENT

When sentencing a defendant at the same sentencing hearing for a new felony and a violation of probation the trial court is not limited to a one cell increase from the original scoresheet when sentencing for the probation offense. The trial court must use only a single scoresheet for all sentencing purposes. The scoresheet which provides for the most severe sentence range. The trial court is not authorized to revert to the original scoresheet in the probation case to determine the sentence to be imposed for the probation case. The trial court may sentence the defendant within the maximum range provided by the new cumulative scoresheet for both the probation offense and the new felony. The bump up for violation of probation is applied under the new scoresheet and effects both the probation offense and the new offense.

ARGUMENT

ISSUE

WHERE A DEFENDANT IS SENTENCED AT THE SAME SENTENCING HEARING FOR A NEW FELONY AND A VIOLATION OF PROBATION GROUNDED UPON THE NEW FELONY, IS THE TRIAL COURT LIMITED TO A ONE-CELL INCREASE FROM THE ORIGINAL SCORESHEET UNDER THE SENTENCING GUIDELINES FOR THE VIOLATION OF PROBATION, PURSUANT TO GRADY V. STATE, 618 SO.2D 381 (FLA. 2D DCA 1993), OR CAN THE TRIAL COURT IMPOSE THE MOST SEVERE SENTENCING SCHEME PERMISSIBLE AS TO BOTH CRIMES AS OUTLINED IN STATE V. TITO, 616 SO.2D 39 (FLA. 1993)? (Certified Question)

Respondent submits that the decision of the Second District Court of Appeals in Grady v. State, 618 So.2d 341 (Fla. 2d DCA 1993) conflicts with this Court's decision in State v. Tito, 616 So.2d 39 (Fla. 1993). In the instant case, the sentence imposed by the trial falls within the maximum provided in the permitted under the updated scoresheet (without even applying any bump up for violation of probation) (R59).

The Second District, however, has held that although the trial court complied with State v. Tito, supra, it failed to comply with Grady v. State, supra. The Second District in Grady v. State, 618 So.2d at 344 acknowledges that the trial court, in accordance with Fla. R. Crim. Pro. 3.701(d)3 (1992), and as clarified by this Court's reasoning in State v. Stafford, 593 So.2d 496 (Fla. 1992) is to prepare separate scoresheets scoring each offense pending at sentencing (the new substantive offense and the prior offense for which the defendant is on probation) as the primary offense and then use that scoresheet which recommends

the most severe sentence. The Second District acknowledges that, "once the appropriate scoresheet is selected and scored, the court knows what the maximum total guideline sentence is, and can sentence accordingly for each individual offense within that maximum range. " Id.

At that point, however, the second court reverts back to using the original scoresheet in the probation case to determine what the appropriate sentence should be for the underlying probation case:

> Once the appropriate scoresheet is selected and scored, the court knows what the maximum total guideline sentence is, and can sentence accordingly for each individual offense within that maximum range. IN THAT REGARD, THE TOTAL SENTENCE IMPOSED FOR ANY VIOLATION OF PROBATION WILL BE THE RECOMMENDED SENTENCE AS TAKEN FROM THE ORIGINAL SCORESHEET ON THE UNDERLYING SUBSTANTIVE OFFENSE, PLUS THE ALLOWED ONE-CELL BUMP UP FOR EACH VIOLATION OF PROBATION. Sentencing on the other offenses will proceed likewise according to the guidelines and other applicable statutes.. We believe this procedure is in accord with the supreme court's recent pronouncement in State v. Tito, 616 So.2d 39 (Fla. 1993). See also State v. Stafford, 593 So.2d 496 (Fla. 1992). Id. (Emphasis added)

The Second District's reversion to the use of two scoresheets is in error. The trial court is not limited to a one cell increase from the original scoresheet under the sentencing guidelines for the violation of probation. To the contrary, the one cell increase is applied to the new scoresheet. This Court set forth that ruling in Peters v. State, 531 So. 121 (Fla. 1988). As this court stated in Peters v. State, 531 So.2d at 122-123:

> [P]eters is being sentenced at the same time both for crimes for which he was previously on probation and for the new crimes. In the preparation of a single scoresheet, points may be added for legal restraint because the new crimes were committed at a time when Peters was on probation. MOREOVER, THE JUDGE IS AT LIBERTY TO "BUMP" THE SENTENCE ONE CELL ABOVE THE GUIDELINES RANGE BECAUSE PETERS IS ALSO BEING SENTENCED FOR THE CRIMES FOR WHICH HE WAS ORIGINALLY PLACED ON COMMUNITY CONTROL BUT HAS NOW VIOLATED. (Emphasis added)

The Fifth District Court of Appeals in Washington v. State, 564 So.2d 168, at 169 (Fla. 5th DCA 1990) reiterated the reasoning in Peters:

> However, in Peters v. State, 531 So.2d 121 (Fla. 1988), the supreme court....held that when a defendant on probation as to one offense violates that probation by committing a new substantive offense and is sentenced for both offenses, because of the "one scoresheet" concept of the sentencing guidelines, the defendant's sentence range may be increased one cell (one range) for the offense for which he was on probation and also for the new or substantive offense which violated the probation.

This Court in Peters went on to say, " If there is any overriding purpose behind the guidelines it is that the guidelines be used to punish repeat offenders more severely than first time offenders". Peters v. State, 531 So.2d at 123.

The Second District's reasoning has also been implicitly overruled by this court in State v. Tito, supra. The Second District in Tito v. State, 593 So.2d 284 (Fla. 2d DCA 1992) held that the trial court must use the original scoresheet to determine what sentence must be imposed for the probation

violation cases and is limited to a one cell bump. Tito v. State, 593 So.2d at 285-286. The dissent in that case reasoned that the court must use a new and comprehensive scoresheet when more than one offense is pending before the court for sentencing at the same time and distinguished the cases relied upon by the majority in those cases where the original scoresheet was used because there were no new offenses pending for sentencing at the same time. Tito v. State, 593 So.2d at 286-287. This Court in State v. Tito, 616 So.2d at 40 held that the dissenting opinion of Judge Parker in Tito v. State, supra was correct:

> Once the scoresheet with the most severe sanction is determined, that is the scoresheet to be used. The dissent in the case under review was correct on this issue, and only one scoresheet should be used.

In the instant case, Judge Parker's dissent is correct and should be adopted by this Court.

In the instant case, the updated guidelines scoresheet, prepared in accordance with this Court's reasoning in Stafford v. State, supra, resulted in a recommended range of 9-12 and a permitted range of 7-17 (R59). The trial court did not even use the discretionary once bump up but sentenced respondent to 15 years imprisonment for the probation violation followed by a consecutive 2 years imprisonment for the new offense. Although this sentence complied with the guidelines range set forth in the updated scoresheet, the Second District felt that the sentence of 15 years imprisonment for the probation offense was erroneous

because it exceeded the one cell bump under the original scoresheet filed when respondent was first put on probation.

The Second District's reversion to the use of two scoresheets prevents the trial court from imposing consecutive sentences in order to reach the maximum sentence authorized by the updated scoresheet. See Fla. R. Crim. Pro. 3.701(d)12 (1992):

> 12. Sentencing for Separate Offenses: A sentence must be imposed for each offense. However, the total sentence cannot exceed the total guideline sentence unless a written reason is given.

There is nothing in the sentencing guidelines which would justify using a cumulative scoresheet as required by Rule 3.701(d)3 and then reverting to the prior probation scoresheet for purposes of sentencing on the probation case. This Court in State v. Stafford, supra, recognized the legality of using a single scoresheet scoring both new offenses and probation revocation offenses pending before the court for sentencing. Rule 3.701(d)3 (b) (1992) provides:

> b) The guidelines scoresheet which recommends the most severe sentence range shall be the scoresheet utilized by the sentencing court pursuant to these guidelines.

Rule 3.701(d)14 (1992) provides:

> 12. Sentences imposed after revocation of probation or community control must be in accordance with the guidelines. The sentence imposed after revocation or probation or community 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.

When these two provisions of the sentencing guidelines provisions are read in para materia, there is simply no implicit, much less any explicit authority, justifying the use of two scoresheets, nor is there any authorization to revert to the prior scoresheet originally prepared in the probation case to determine the appropriate sentence for the probation offense.

The sentence imposed by the trial court was within the guidelines range authorized by the new comprehensive scoresheet and the Second District erred in reverting to the original scoresheet in the probation case to determine the appropriate sentence on the probation case.

CONCLUSION

Based upon the foregoing facts, arguments and authorities, the judgment and sentence of the trial court should affirmed. This Court should answer the certified question by ruling that in sentencing fora probation violation and a new felony the trial court may impose the most severe sentence sentencing scheme authorized by the updated scoresheet as prepared in accordance with State v. Stafford, supra to both the probation offense and the new felony and is limited only by maximum sentence authorized by the updated guideline scoresheet. Furthermore the bump up for probation violation applies to both the new felony and the probation offense in accordance with Peters v. State, supra.

Respectfully submitted,

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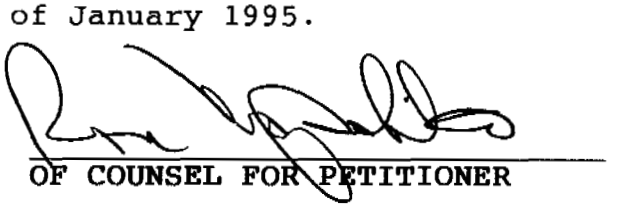
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Gary R. Gossett, Jr., Esq., Attorney for Appellant, 1755 U.S. 27 South, Sebring, Florida 33870, on this 24th day of January 1995.



OF COUNSEL FOR PETITIONER