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IN THE SUPREME COURT OF FLORIDA

CLERK, SUPREME COURT
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STATE OF FLORIDA, :
 :
 Petitioner, :
 :
 vs. :
 :
 SAMMIE EARL BANKSTON, :
 :
 Respondent. :
 _____ :

Case No. 85,264

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

ANSWER BRIEF OF RESPONDENT ON THE MERITS

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE AND FACTS

Respondent adopts the Statement of Case and Facts as stated in the Brief of Petitioner on the Merits with the additional facts stated herein and such other facts as Respondent may cite in the Argument.

In the first opinion, the Second District Court of Appeal reversed both the sentencing for past convictions after revocation of probation and for new convictions which violated the probation. In reversing the sentencing for past convictions, the court noted the certified question in Lamar v. State, 19 Fla. L. Weekly D2578 (Fla. 2d DCA Dec. 9, 1994). In reversing the sentencing for the new convictions, the court certified a question of great public importance:

WHETHER A TRIAL COURT MAY EMPLOY A ONE-CELL
BUMP ON A NEW SCORESHEET WHEN SENTENCING
SIMULTANEOUSLY FOR A NEW OFFENSE AND A VIOLA-
TION OF PROBATION OR WHETHER THE BUMP IS ONLY
PERMITTED ON THE ORIGINAL SCORESHEET.

Bankston v. State, 20 Fla. L. Weekly D77 (Fla. 2d DCA Dec. 28, 1994).

Following a Motion for Rehearing filed by the state, the court issued a new opinion. In the revised opinion, the court affirmed the sentencing for the new convictions citing Peters v. State, 531 So. 2d 121 (Fla. 1988). The court reversed the sentencing for prior convictions and certified the question previously certified in Lamar. Bankston v. State, 20 Fla. L. Weekly D520 (Fla. 2d DCA Feb. 22, 1995).

SUMMARY OF THE ARGUMENT

The Florida legislature specifically expressed intent that, after revocation of probation, the defendant shall be sentenced to the sentence which might have originally been imposed before the defendant was placed on probation. The legislature adopted the sentencing guidelines which indicated that, after revocation of probation, the defendant shall be sentenced within the original guidelines range or increased to the next cell. One guidelines scoresheet shall be used to cover all the convictions being sentenced.

Petitioner argues that, when sentenced together, new convictions and prior convictions when probation is revoked are to be sentenced alike and controlled by only the one new scoresheet. Tito. Respondent argues that the convictions are different at sentencing. The total sentence is controlled by the new scoresheet, but the post-probation sentences are still controlled by the original scoresheet. Grady.

In answer to the certified question, this Court should endorse the Second Appellate District's Grady decision that the original scoresheet be used to temper the Tito one-scoresheet rule and reconcile the conflicting legislative intent.

Further, this Court should prohibit the application of sentencing enhancements to convictions which do not otherwise qualify to be enhanced, but for simultaneous sentencing with the other class of conviction. New convictions should not be bumped and past convictions were not committed under legal constraint.

ARGUMENT

ISSUE I

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)

The question before this Court is seeking clarification of the procedures to be followed when, in the same hearing, the court sentences for both past convictions after revocation of probation and the new charges which violated the probation. In the initial decision issued by the Second District Court of Appeal, the court certified a question regarding application of the one-cell bump sentencing enhancement for violation of probation to the new scoresheet which was also applicable to convictions which had not been previously sentenced to probation. The court also took notice of a question previously certified in Lamar v. State, 19 Fla. L. Weekly D2578 (Fla. 2d DCA Dec. 9, 1994) regarding the sentencing of previous convictions after violation of probation. Bankston v. State, 20 Fla. L. Weekly D77 (Fla. 2d DCA Dec. 28, 1994). In a revised opinion, the court certified only the Lamar question. Bankston v. State, 20 Fla. L. Weekly D520 (Fla. 2d DCA Feb. 22,

1995). Respondent seeks clarification of the proper procedure for the combined prior and new conviction sentencing procedure.

When violation of probation is alleged, then admitted or proven, and the probation is revoked, the court is to "impose any sentence which it might have originally imposed before placing the defendant on probation." (emphasis added) § 948.06(1), Fla. Stat. (1991). The legislative intent in this statute appears to clearly be that, when the probation is revoked, the defendant is sentenced to what he could have originally received at the time of the initial sentencing had he not received probation.

"[T]he intent of a statute is the law, and by that the courts must be guided in the application thereof." Kovak v. Ake, 3 So. 2d 120 (Fla. 1941). "The Supreme Court is authorized to promulgate rules of procedure. However, only the legislature may enact substantive law." (citations omitted) Smith v. State, 537 So. 2d 982 (Fla. 1989). "The provision of criminal penalties and of limitations upon the application of such penalties is a matter of predominantly substantive law and, as such is a matter properly addressed by the Legislature." § 921.001(1), Fla. Stat. (1991). The legislature adopted Florida Rules of Criminal Procedure 3.701 and 3.988. § 921.0015, Fla. Stat. (1991).

This Court's adopted rule appears consistent with the Section 948.06(1), Fla. Stat. (1991), intent: "The sentence imposed after revocation of probation or community control may be included within the original cell (guidelines range) or may increase to the next higher cell (guidelines range) without requiring a reason for

departure." (emphasis added) Fla. R. Crim. P. 3.701(d)(14). The rules of statutory construction require courts to strictly construe criminal statutes , and that "when the language is susceptible to differing constructions, it shall be construed most favorable to the accused." § 775.021(1), Fla. Stat. (1991).

The complexity on the issue at bar arises when other charges are pending initial sentencing at the same time of the sentencing for prior convictions after revocation of probation. The defendant is entitled to a single sentencing hearing as long as it does not require unreasonable delay in a sentencing. Clark v. State, 572 So. 2d 1387 (Fla. 1991). Also, "One guideline scoresheet shall be utilized for each defendant covering all offenses pending before the court for sentencing." Fla. R. Crim. P. 3.701(d)(1).

When, as in the instant case, both sentencings are taking place in the same hearing, a conflict arises between the legislative intent in Section 948.06(1), Fla. Stat. (1991), and the single scoresheet rule. There is conflict if the sentences following revocation of probation must be sentenced to a greater sanction pursuant to the new single scoresheet rather than to the sentence which it might have originally been imposed before the defendant was placed on probation.

"A separate guidelines scoresheet shall be prepared scoring each offense at conviction as the "primary offense at conviction" with the other offenses at conviction scored as "additional offenses at conviction." Fla. R. Crim P. 3.701(d)(3)(A). The Sentencing Guidelines Commission originally recognized a difference

in sentencing status from the new convictions and noted that the convictions that were being sentenced after revocation of probation (based upon new convictions being sentenced at the same time) are to be scored as "prior record" and specifically not as "additional offense." Fla. R. Crim. P. 3.701(committee note (d)(5)).

In State v. Stafford, 593 So. 2d 496 (Fla. 1992), this Court established an additional scoring option for the previous convictions when sentencing after revocation of probation. This Court found that a scoresheet shall be prepared scoring such previous convictions as "primary offense at conviction" rather than "prior record" for use at sentencing if it permits the "most severe sentencing range." Fla. R. Crim. P. 3.701(d)(3). The previous convictions remain recognized as different from the new convictions. Both are now potentially scorable as "primary offense," but only the new convictions are scorable as "additional offense." Post-probation convictions are otherwise scorable only as "prior record." Stafford recognizes that the two classes of convictions are to be treated differently.

In State v. Tito, 616 So. 2d 39 (Fla. 1993), this Court found that, when the multiple scoresheets are prepared, only a single scoresheet is to be used for the sentencing. A conflict appears to have been established between the legislative intent in Section 948.06(1), Fla. Stat. (1991), and the procedure as set forth in Stafford and Tito. If the scoresheet used at sentencing has a previous conviction as the "primary offense" or the previous convictions are only scored as "prior record" [as in the instant

case (R117)], conflict exists if it would require sentencing for the previous convictions different from the sentence which could have originally been imposed before placing the defendant on probation. It did so in the instant case.

In Grady v. State, 618 So. 2d 341 (Fla. 2d DCA 1993), the Second District Court of Appeal found that the Clark, Stafford, and Tito rule establishes that there is to be a single scoresheet covering all offenses pending before the court for sentencing. "However, this rule that only one scoresheet may be used must be tempered by a second rule ... that when sentencing on a violation of probation, the court must use the original scoresheet."

Once the appropriate scoresheet is selected and scored, the court then knows what the maximum total guidelines sentence is, and can sentence accordingly for each individual offense within that total 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 for each violation of probation. Sentencing on other offenses will proceed likewise according to the guidelines and other applicable statutes.

Grady, 618 So. 2d at 344.

The "tempering" done by the Grady second rule has the effect of reconciliation between the one scoresheet rule and the legislative intent in § 948.06(1), Fla. Stat. (1991), when there is both sentencing after revocation of probation and for the violation new convictions. In the dissenting opinion in Stafford, Justice Kogan recognized the conflicting legislative intent and proposed a two scoresheet system as "the only one authorized by Florida statutes"

and as cure for the worst case factual scenario given as example in the primary opinion in Stafford, 593 So. 2d at 498-500. Conflict in the application of one-cell bump was also recognized. Stafford (dissenting opinion); See, Lambert v. State, 545 So. 2d 838, 841 (Fla. 1989) (double-dipping and legislative intent for punishment after violation of probation).

In addressing a related sentencing problem, this Court has since found that, "where a defendant is sentenced to prison to be followed by probation for multiple offenses, and ultimately violates that probation, that defendant's cumulative sentence may not exceed the guidelines range of the original scoresheet." (emphasis added) Cook v. State, 19 Fla. L. Weekly S608 at 609 (Fla. Nov. 23. 1994); also see, Tripp v. State, 622 So. 2d 941 (Fla. 1993) (cited in Cook). In Lamar, the court found that "Support for Grady can be found in Williams v. State, 594 So. 2d 273 (Fla. 1992), where the supreme court concluded that upon revocation of probation, the sentence for violation of probation is limited to an increase to the next higher cell in the sentencing guidelines for each violation of probation." Lamar, 19 Fla. L. Weekly at D2579.

In the Brief on the Merits, Petitioner's arguments rely heavily upon Peters v. State, 531 So. 2d 121 (Fla. 1988). Peters decision used one scoresheet for both the convictions for which he was previously on probation and the new convictions. Peters, 531 So. 2d at 122-123. Peters approved the double enhancement for violation of probation in the form of both "legal constraint"

points enhancing the recommended sentence and the one-cell bump for violation of probation further enhancing the already enhanced recommended sentence.

Though the defendant was not under legal constraint when the original crimes were committed, the permitted sentence for these crimes is enhanced by legal constraint points. Though the defendant was not previously on probation for the new convictions, the permitted sentence is enhanced one-cell because they are sentenced at the same time as the other crimes where probation was revoked. The emphasis in Peters quoted by Petitioner is the policy that the "overriding purpose behind the sentencing guidelines is that the guidelines be used to punish repeat offenders more severely than first-time offenders." Peters, 531 So. 2d at 123. Brief of Petitioner on the Merits, Pg. 8. See, Lambert, 545 So.2d at 841; Stafford, 593 So. 2d at 499 (dissenting opinion), (application sentencing enhancements for violation of probation).

After Peters, this Court has expressed other public policy in regard to the post-probation sentencing procedures. This court has addressed the "severe punishment not for the original crime but for the subsequent conduct that constitutes the violation of probation." Williams, 594 So. 2d at 274. This Court has ruled in cases involving multiple problems generated by the sentencing after revocation of probation where the original intent of the guidelines and the intent of § 948.06(1), Fla. Stat. (1991), was circumvented. Tripp; Cook; Williams.

"The purpose of the sentencing guidelines is to establish a uniform set of standards to guide the sentencing judge in the sentencing decision-making process so as to eliminate unwarranted variation in sentencing." Fla. R. Crim. P. 3.701(b). Petitioner argues that the convictions are to be sentenced alike--controlled by only the one new scoresheet at the combined sentencing as per Tito. Respondent argues that the convictions are different at sentencing. The intent of the Florida legislature is that the post-probation convictions be sentenced as per the original scoresheet (with one-cell bump). The total sentence is controlled by the new scoresheet as per Grady. Conflicts in the interpretation of legislative intent through differing constructions of the rules and statutes are to be construed most favorable to the accused. § 775.021, Fla. Stat. (1991).

Respondent requests this Court respond to the certified question by endorsing the "tempered" rule in Grady as a uniform standard for sentencing after revocation of probation and as reconciliation between the § 948.06(1), Fla. Stat. (1991), legislative intent and the Tito one-scoresheet rule. Respondent further requests this Court address the applicability of both the "legal constraint" guidelines scoring enhancement compounded with the one-cell bump enhancement in light of the post-Peters cases. This Court should prohibit the application of both enhancements to convictions which would not otherwise be enhanced by a particular factor, but for simultaneous sentencing with the other class of conviction.

CONCLUSION

Based upon the cases, statutes, and rules cited and the arguments presented herein, Respondent respectfully request that this Honorable Court answer the certified question by finding consistent with Grady v. State, supra, that the State v. Tito, supra, one-scoresheet rule must be tempered by the use of the original permitted sentence when sentencing for previous convictions after revocation of probation. Furthermore, Respondent requests this Court readdress and prohibit the application of the violation of probation enhancements to new convictions as previously permitted in Peters v. State, supra.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Ann P. Corcoran, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 17th day of April, 1995.

Respectfully submitted,



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