IN THE SUPREME COURT
STATE OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

SAMMIE EARL BANKSTON,

Respondent

_____/

85,264

Case No. ~~82,264~~
District Court of Appeal
Second District - No. 92-03352

Certified Question from the
District Court of Appeal, in and for the
Second District Lakeland, Florida

BRIEF OF PETITIONER ON THE MERITS

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OTHER AUTHORITIES:

STATEMENT OF THE CASE AND FACTS

Respondent, Sammie Earl Bankston, was charged by information in Case Number 90-9992 with carrying a concealed weapon. (R. 7-8) On November 16, 1990, Respondent pled guilty and was sentenced within the "any nonstate prison sanction" recommendation of the sentencing guidelines, and pursuant to a plea agreement, to five years probation. Adjudication was withheld. (R. 10-14) Adult sanctions were ordered to be imposed. (R. 17)

On January 17, 1992, an affidavit was filed alleging violation of probation by violation of the law while on probation. (R. 19) Respondent was charged by information in Case Number 92-544 with the robbery of Steven Black and Kimberly Jackson and burglary of their dwelling on January 2, 1992. The information alleged that Respondent was armed with a firearm during both offenses. (R. 44-45, 50-52) Respondent filed a Notice of Alibi on April 24, 1992, alleging that he was playing cards all night with Antonio Johnson. (R. 25-26) Respondent was tried by jury before the Honorable M. William Graybill on May 26-27, 1992. (R. 55-56, T. 1-251) The jury returned verdicts of guilty as charged on both counts. (R. 83-84, T. 222-224)

Respondent, pro se, filed a motion for retrial on June 4, 1992, arguing failure of his counsel to present his defense. (R. 85-86, 88) Before the same court and judge on June 30, 1992, the court denied a motion to withdraw filed by Respondent's counsel based upon Respondent's request that new counsel be appointed. (R. 5, 39, T. 253-264) On July 2, 1992, Judge Graybill recused

himself for the purpose of allowing another judge to decide the proper scoresheet to be applied in connection with Respondent's cases. (R. 5, 39-40, 88-89, 267) On August 11, 1992, an evidentiary hearing was held before the Honorable Barbara Fleischer to determine Respondent's prior record. Testimony and evidence was received, and then the case was transferred back to Judge Graybill for sentencing. (R. 6, 40-41, 93-94) An order determining Respondent's prior record was filed on August 20, 1992. (R. 96-97) It indicated Respondent had previously been adjudicated delinquent in Case 89-1389-A, Case 88-10096-A (grand theft motor vehicle), Case 88-10236-A (burglary of a conveyance), Case 88-10239-A (Grand theft motor vehicle, obstructing an officer without violence), Case 89-3471 (aggravated battery); and previous sentences as an adult with withhold of adjudication in Case 90-9992 (carrying a concealed firearm) and Case 91-11360 (battery, petit theft). (R. 96-97)

At sentencing before Judge Graybill on August 21, 1992, Respondent's probation was revoked and he was adjudicated guilty in both cases as charged. Respondent was sentenced to twenty years prison followed by two years community control followed by life probation in each count of Case Number 92-544 to be served concurrently. He was sentenced to five years in prison in Case Number 90-9992 to be served concurrently with the other sentence. (R. 6, 28-35, 41, 99-113, T. 286-287) Respondent's sentencing guidelines scoresheet at this sentencing permitted sentencing to seven to seventeen years with a one cell bump for violation of

probation. (R. 117, T. 267-268) This increased the maximum permitted sentence to twenty-two years.

On December 28, 1994, the Second District Court of Appeal rendered an opinion. In response to the State's Motion for Rehearing, the court withdrew its opinion and substituted its opinion of February 22, 1995 in which it affirmed the sentence in Case No. 92-554. Based on the reasoning in Grady v. State, 618 So. 2d 341 (Fla. 2d DCA 1993), the court reversed the sentence for five years in Case No. 90-9992 and remanded for resentencing. The appellate court reasoned that the sentence violated its holding in Grady v. State, 618 So. 2d 341 (Fla. 2d DCA 1993) in which the court held that the maximum sentence on a violation of probation is the sentence authorized by the original scoresheet with a one-cell bump, even when the new scoresheet authorizes a longer sentence. Despite the fact that the 5 year sentence in Case No. 90-9992 was well within the 22-year permitted range on the new scoresheet properly selected by the trial judge, it exceeded the 3-½ year limit on the original scoresheet with a one-cell bump.[1]

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[1] In its substituted opinion, the Second District Court of Appeal stated in reference to the original sentence on Case No. 90-9992, "at that sentencing hearing, his scoresheet totalled 29 points which placed Mr. Bankston's permitted sentence within the second cell of a category 8 scoresheet." Bankston v. State, 20 Fla. L. Weekly D520 (Fla. 2d DCA February 22, 1995). Examination of the scoresheet in the record shows that 29 points would place Mr. Bankston in the first cell of a category 8 scoresheet. A one cell bump from 29 points would place Mr. Bankston in the second cell (community control or 12-30 months incarceration) rather than the third cell (3 years incarceration [2½-3½ years]).

As the court had done in Lamar v. State, 19 Fla. L. Weekly D2578 (Fla. 2d DCA December 9, 1994) the court certified the following question to the Supreme Court:

> 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)?

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 affects both the probation offense and the new offense.

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)

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 court falls within the maximum provided in the permitted range under the updated scoresheet. (R. 59)

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. P. 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 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. 2d 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, was prepared in accordance with this Court's reasoning in Stafford v. State, supra, resulting in a permitted range of seven to seventeen years with a one cell bump-up to twenty-two years. The trial court sentenced Respondent to 5 years imprisonment for the probation violation to run concurrently with sentence on Case No. 92-554 which was 20 years imprisonment followed by two years community control followed by life probation. Although this sentence complied with the guidelines range set forth in the updated scoresheet, the Second District felt that the sentence of

five years imprisonment for the probation offense was erroneous because it exceeded the 3½ year limit on the original scoresheet filed when Respondent was first put on probation.[2]

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:

> 14. 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 control may be included within the original 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

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[2] It would appear that the opinion of the Second District Court of Appeal misread the scoresheet used at the original sentencing for Case No. 90-9992. See Petitioner's Brief on the Merits, Statement of the Case and Facts, footnote 1.

prior scoresheet originally prepared in the probation case to determine the appropriate sentence for the probation offense.

The State's position is consistent with this Court's analysis in Cook v. State, 19 Fla. L. Weekly S608, notes 3 and 5 (Fla. November 17, 1994).

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 be affirmed. This Court should answer the certified question by ruling that in sentencing for a probation violation and a new felony the trial court may impose the most severe sentence 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 John T. Kilcrease, Esquire, Public Defender's Office, P. O. Box 9000 - Drawer PD, Bartow, Florida 33830 on this 28th day of March, 1995.

Ann P. Cocoran

OF COUNSEL FOR PETITIONER