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Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

CASE NO. 85, 456

VERNON CHARLES RICHARDSON,

Respondent.

_____/

CERTIFIED QUESTION FROM THE SECOND DISTRICT COURT OF APPEAL,
LAKELAND, FLORIDA

INITIAL BRIEF OF PETITIONER

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STATEMENT OF THE CASE AND FACTS

On June 18, 1993, Defendant was charged in a one-count information with burglary of a dwelling with assault or battery alleged to have occurred on May 29, 1993. (R129-130) At the time of the May 29 burglary, Defendant was on probation in the following cases:

Case No. 89-6616, dealing in stolen property;
(R10-16)

Case No. 89-13288, burglary of a structure,
possession of burglary tools; (R36-42)

Case No. 89-13344, dealing in stolen
property; (R61-64)

Case No. 89-13375, dealing in stolen
property; (R80-84)

Case No. 89-14088, burglary of a dwelling,
grand theft third degree; (R103-110).

On July 13, 1993, the State noticed Defendant of its intent to request the court to treat Defendant as a habitual felony offender. (R131) On September 15 and 16, 1993, Defendant was tried in front of a jury for the May 29, 1993, burglary. The jury found Defendant guilty as charged. (T319) Defendant's probation was revoked in Case Nos. 89-6616, 89-13288, 89-13344, 89-13375, and 89-14088. (R329) On October 29, 1993, Defendant was sentenced as follows:

Case No. 89-6616, dealing in stolen property:
15 years;

Case No. 89-13288, count one, burglary of a
structure: 5 years; count three, possession
of burglary tools: 5 years, each count to run
concurrent with the other but consecutive to
89-6616;

Case No. 89-13344, dealing in stolen property: 15 years, consecutive to 89-13288;

Case No. 89-13375, dealing in stolen property: 15 years, consecutive to 89-13344;

Case No. 89-14088, count one, burglary of a dwelling: 15 years; count two, grand theft 3rd degree: 5 years, each count to run concurrent with the other but consecutive to 89-13375;

Case No. 93-6945, burglary of a dwelling with battery: life, consecutive to the sentences imposed in the violation of probation cases. (T394-397, R19-26; 44-53; 65-72; 85-92; 112-121; 158-165)

On appeal to the Second District Court of Appeal, Respondent challenged his conviction. The court affirmed his conviction but reversed his sentences for both the new substantive offense (burglary) and the five violation of probation cases. In sentencing Respondent, the trial court had used a new scoresheet using the burglary as the primary offense and listing the cases for which Respondent was on probation as prior offenses. The new scoresheet called for a sentencing range of 27 years to life imprisonment. The court used this scoresheet in sentencing Respondent as set forth above which resulted in a sentence of 65 years followed by a consecutive life sentence. The Second District found the trial court erred in using the new scoresheet in sentencing Respondent on the violation of probation cases finding that the trial court should have used the original scoresheet in sentencing Respondent on those cases. Using the original scoresheet and including the one cell bump allowed in

sentencing a person after a probation violation, Respondent could have been sentenced up to 27 years for the violation of probation cases. Therefore, the court reasoned, the 65-year sentence was an unauthorized departure.

The District Court further found that the life sentence for the new substantive offense (burglary) imposed consecutively to the 65 years imposed in the violation of probation cases constituted an unauthorized departure sentence where the scoresheet provided for a life sentence. The court remanded the case to the trial court for resentencing but certified the instant question to this Court.¹

¹ This same question is currently pending before this Court in State v. Jimmy Dale Lamar, case number 84, 867 and State v. Sammie Earl Bankston, case number 85,264.

SUMMARY OF THE ARGUMENT

The Second District Court of Appeal erred in finding the trial court was limited to using Respondent's original scoresheet in calculating his sentencing range for the cases for which he was on probation and for his commission of a new substantive offense. Pursuant to this Court's opinion in State v. Tito, 616 So. 2d. 39 (Fla. 1993), the trial court correctly used a single scoresheet in calculating all pending charges. The scoresheet used was the scoresheet resulting in the most severe sentence. The trial court was correct in following this procedure, and the Second District erred in finding the trial court should have used Respondent's original scoresheet in calculating his sentences on the violations of probation.

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. (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)?

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 for Respondent's violation of probation cases (65 years) was within the range provided for in the updated scoresheet (life) as allowed by State v. Tito, and the trial court's sentences in these cases should be reinstated.² (R. 177 - 178) The Second District, however, held that the trial court failed to comply with Grady, and reversed Respondent's sentences in the violation of probation cases.

In Grady, defendant was sentenced for new substantive offenses as well as offenses for which he had been on probation when he committed the new crimes. Defendant was sentenced for

² The District Court's reversal of Respondent's consecutive life sentence imposed for the new substantive offense is not implicated by the certified question.

the new offenses on one date using a new scoresheet and on another date, approximately one week later, on the violation of probation cases, using a different scoresheet. On appeal, Grady claimed he should have been sentenced for all "pending" charges on the same date using a single scoresheet. Grady at 343-344. After stating that Grady was correct that only a single scoresheet should be used in sentencing a defendant for all pending charges, the Second District outlined a sentencing procedure, purportedly in accordance with this Court's opinions in State v. Tito, whereby two scoresheets are used in sentencing a defendant. The court stated:

Under Florida Rule of Criminal Procedure 3.701(d)(3), the scoresheet for the underlying substantive offense will be the scoresheet that is used to determine the maximum total sentence that can be imposed in regard to all cases pending for sentencing only if it is the scoresheet that provides the most severe sanction. Rule 3.701(d)(3), which sets forth the method for determining which offense is the primary offense, requires that a separate scoresheet be prepared for each offense, scoring each offense as the primary offense, with the other offenses scored as additional offenses. The court is then to use that scoresheet which recommends the most severe sanction. 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).

Grady at 344, (Emphasis added.)

Under this procedure, the trial court is to prepare separate scoresheets scoring each offense pending at sentencing (the new substantive offense(s) and the prior offense(s) for which the defendant is on probation) as the primary offense and then use the scoresheet which recommends the most severe sentence. Once this scoresheet is established, the trial court "knows what the maximum total guideline sentence is, and can sentence accordingly for each individual offense within that maximum range." Grady at 344. However, as to the cases for which defendant's probation is being revoked, the trial court is limited to a sentence within the range allowed by the original scoresheet including a one cell bump for each violation of probation. Grady at 344.

The Second District's reasoning has been rejected by this Court in State v. Tito. 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 that the trial court is limited to the range from the original scoresheet plus a one-cell bump for each violation of probation. Tito at 285 - 286. Judge Parker dissented in that case reasoning 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. Judge Parker distinguished the cases relied upon by the majority in that in those cases, the original scoresheet was used because there were no new offenses pending for sentencing at the same time. Tito at 286 - 287. This Court in State v. Tito, 616 So. 2d. at 40, held that the dissenting opinion of Judge Parker 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.

The Second District's reversion to the use of two scoresheets is in error. In the instant case, the updated guidelines scoresheet, prepared in accordance with this Court's reasoning in State v. Tito resulted in a recommended range of life and a permitted range of 27 years to life (R. 177 - 178) The trial court sentenced Respondent to a total of 65 years imprisonment for the five probation cases followed by a consecutive life imprisonment³ 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 65 years imprisonment for the probation offenses was erroneous because it exceeded the range of 27 years (including the one-cell bump) under the original scoresheet filed when Respondent was first put on probation. The sentence imposed by the trial court

³ See footnote 1.

was within the guidelines range authorized by the new comprehensive scoresheet and the Second District erred in requiring the original scoresheet to be used to determine the appropriate sentence in the probation cases.

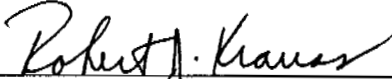
CONCLUSION

Based upon the foregoing, Petitioner asks this Court to answer the certified question as follows:


WHERE A DEFENDANT IS SENTENCED AT THE SAME SENTENCING HEARING FOR A NEW FELONY AND A VIOLATION OF PROBATION GROUNDED UPON THE NEW FELONY, THE TRIAL COURT CAN IMPOSE THE MOST SEVERE SENTENCING SCHEME PERMISSIBLE AS TO BOTH CRIMES AS OUTLINED IN STATE V. TITO, 616 SO. 2D. 39 (FLA. 1993).

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 Isabel Julia-Miles, Esq., 7201 Five Point Circle, Tampa, Florida on this 28th day of April, 1995.



COUNSEL FOR PETITIONER