IN THE SUPREME COURT OF FLORIDA

CASE No. 85,583

STATE OF FLORIDA,

Petitioner,

vs.

EZEKIAL PETERSON,

Respondent.

****

ON DISCRETIONARY REVIEW FROM DISTRICT COURT OPINION

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PETITIONER'S INITIAL BRIEF

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PRELIMINARY STATEMENT

Petitioner, the State of Florida, will be referred to herein as "the State." Respondent, Ezekial Peterson, was the defendant in the trial court and the Appellant in the district court of appeal, he will be referred to herein as "Respondent."

The following symbols will be used in this brief:

"R" = Record on Appeal

"T" = Transcript of Proceedings

"A" = Exhibit A of the appendix

"B" = Exhibit B of the appendix

STATEMENT OF THE CASE AND FACTS

Proceedings in The Case That was Pending on Appeal When Respondent Pled to the Instant Case:

On November 12, 1992, in Circuit court case number C92-1093 CF and Fourth District Court of Appeal case number 92-3443, an information was filed charging Respondent with sale and delivery of cocaine and possession of cocaine. The information charged that these crimes took place on May 12, 1992 (A 1-2).

On November 3, 1992, Respondent was convicted and sentenced (A 3-6). Respondent filed a notice of appeal to the Fourth District Court of Appeal on November 16, 1992 (A 7).

On February 4, 1993, Respondent requested an extension of time to file his answer brief (A 14-15). On March 1, 1993, Respondent filed a Motion to Supplement the Record on Appeal, requesting a portion of the trial transcript which he had not previously requested (A 17-18). On March 31, 1993, Respondent filed his initial brief (A 19-39); The State filed its answer brief on April 21, 1993 (A 40-60).

Over a year later, On May 20, 1994, Respondent filed a motion for leave to file a supplemental brief so that he could address an issue which he had previously neglected to raise (A 61-62); Five days later the court issued an opinion affirming Respondent's conviction (A 63-64). On June 6, 1994, the court granted Respondent's motion and sua sponte withdrew its May 25 opinion (A 65).

On October 26, 1994, the Fourth District Court of Appeal issued a new opinion affirming Respondent's conviction (A 74-75). On November 10, 1994, Respondent filed a motion for

Rehearing and Certification (A 76-80). The Motion was denied, and on January 13, 1995, more than two years after Appellant's conviction, Mandate was issued (A 84-85).

Proceedings in the Instant Case:

On January 6, 1994, an information was filed in the instant case, charging Respondent with Delivery of a controlled substance and possession of cocaine (R 1-2). The information alleged that the crime had taken place on December 9, 1993 (R 1-2).

On March 17, 1994, Respondent entered a no contest plea (R 15-21). The sworn petition reflects that Respondent agreed to plea in exchange for the State's agreement not to seek habitualization, as well as an understanding that the State would recommend that Respondent be sentenced at the top end of the permitted range (R 16; T 3-4).

At the change of plea hearing, defense counsel noted that Respondent had been videotaped during the drug transaction; Counsel concluded that identification was clear and Respondent did not have an entrapment defense (T 7-8). The prosecutor explained that he was more than willing to take the case to trial in order to seek an habitual offender sentence:

> We have got well within our time limits if we had to take it to trial.
>
> Just for the record, if I can add, Ms. Ross [defense counsel] did call. I indicated that-that the plea offer was off--off the table at that time because we had passed the docket stage. She did very effectively intervene on his behalf because, quite frankly, what I was intending to do is send this gentleman for as long a period of time is [sic] possible, but I did not. She had a good argument to the effect that

> he should not be denied the benefit of the plea bargain because of the switch around. She certainly, in my opinion, effectively represented him, in fast, saved him probably 30 years as an (inaudible), as far as I am concerned any ways.

(T 9-10). Respondent swore that he had read the entire plea petition and understood its contents (T 20-21). Respondent also swore that he understood the following: The State was going to request the greatest possible sentence under the permitted range (T 25); The agreement with the State was only a recommendation for sentencing and the court may or may not accept that recommendation (T 27-29); Regardless of whether the court accepted the recommended sentence, Respondent would be held to his plea (T 21-22); And, he could be sentenced to up to fifteen (15) years on the delivery charge and up to five (5) years on the possession charge (T 27-29).

When the parties discussed what Respondent's possible score would be, the prosecutor noted that Respondent's most recent conviction appeared to have been in 1993 (T 27). Respondent expressed concern about how far back the PSI went, and defense counsel explained that the PSI could go all the way back, unless there was a ten year break between crimes committed prior to the instant offense (T 29-30)

Sentencing took place on April 21, 1994. At the hearing, Respondent stated that he agreed with the guidelines scoresheet:

> THE COURT: I have received, read and considered a presentence investigation report together with the score sheet totalling 201 points, placing the defendant in the recommended sentencing range of seven to nine years.

> Is there any legal cause why I should not proceed with sentencing at this time?
>
> MS. ROSS: None, Your Honor.
>
> THE COURT: Both counsel in agreement with the scoresheet?
>
> MR. BAKKEDAHL: No Objection from the State, Your Honor.
>
> MS. ROSS: Or the defense, Your Honor.

(T 37-38). Defense counsel stated that Respondent fell within a permitted range of five-and-a-half to twelve years, and requested that Respondent be sentenced to eight years incarceration (T 39). The Prosecutor responded:

> Your Honor, I can only say in a word that the defendant's attorney, for all intents and purposes, worked out one of the sweetest deals he is ever going to get in his life, quite frankly.
>
> I agreed to stand by the recommendation that was made. We did so and, in doing, there was no--the Court--the State was not going to seek enhanced penalties to the Habitual Offender Statute.
>
> So, clearly, he has gotten all the break I think he should get from the system, with respect to this particular case. We are talking about a guy starting back in 1961 who has been arrested over 65 times. He has had run-ins with the law and I am just counting the arrests. Obviously, you cannot consider for purposes of sentencing, arrests alone if there are no ensuing convictions. But the guy's scoresheet shows out at 201 points in the Drug Category Offense which leads him to the permitted range of 12 years.
>
> I don't think that anybody in the world would take issue with the court's sentencing of this defendant if you

> were to sentence him to 12 years. Clearly, if anybody deserves it, he deserves it.

(T 40). Respondent was sentenced to twelve years incarceration on count I and Time Served on Count II (R 30-35; T 42).

One hundred and twenty eight (128) of the two hundred and one (201) points on the guidelines scoresheet stemmed from Respondent's prior record, which included 57 separate counts (R 26-27). Thirty (30) of those points were based on the convictions which were still on appeal in case number 92-3443. (R 26-27) See Fla. R. Crim. P. 3.988(g).

On May 2, 1994 Respondent filed a Notice of Appeal of the Judgment and Sentence (R 37). In the Statement of Judicial Acts to be Reviewed, Respondent alleged that the trial court had issued an illegal sentence (R 40).

In his initial brief, Respondent argued that the trial court had "erred by sentencing Respondent based upon a guidelines scoresheet which included points, under prior record, for convictions which because they were on appeal at the time of sentencing were not yet final." Initial Brief on Appeal at 3. In its answer brief, the State made the following arguments: The appellate court did not have jurisdiction to consider Respondent's direct appeal from a plea; Respondent had waived his claim by failing to raise a contemporaneous objection; Even if the scoresheet had been incorrect, the trial court still could have entered the same sentence; And, Respondent's claim was meritless, because "prior record" includes all offenses for which a defendant has been found guilty, regardless of whether they are on appeal.

The appellate court concluded that it could review Respondent's claim because

> [s]entencing errors that result in a departure from the presumptive guidelines and are apparent from the face of the record on appeal are reviewable even in the absence of a contemporaneous objection below. Taylor v. State, 601 So. 2d 540 (Fla. 1992)....
>
> [W]e conclude that a departure sentence apparent from the record was imposed and this court has jurisdiction.

(B 3-4). On the merits, the court noted that there did not appear to be any case law on point with the facts of this case. (B 4). The court relied on a line of habitual offender cases, concluding, that prior convictions which have not yet been affirmed on appeal cannot be used to enhance a defendant's sentence, because they are not "final."

The instant appeal follows.

SUMMARY OF ARGUMENT

I. The Fourth District Court of Appeal erred in concluding that Respondent's guideline scoresheet was erroneous because some of Respondent's prior convictions had not yet been affirmed on appeal. Fla. R. Crim. P. 3.701(d) defines conviction as "a determination of guilt," and does not require that the conviction be affirmed on appeal; The appellate court should have followed the clear and unambiguous directive of rule 3.701.

Moreover, the appellate court incorrectly concluded that the policy behind the sentencing guidelines is the same as the policy behind the habitual offender statute. Thus, the court wrongly applied cases which interpreted the habitual offender statute.

II. Respondent's claim could not be raised on a direct appeal, because Respondent's sentence was part of a plea bargain and was not illegal. Even if this Court were to determine that Respondent has raised a meritorious claim on appeal, Respondent would not be entitled to resentencing, because the State's agreement to the plea was based on a mutual understanding that all of Respondent's prior convictions would be entered on the scoresheet. Thus, the only possible relief would be withdrawal of the plea.

ARGUMENT

POINT I

RESPONDENT'S GUIDELINE SCORESHEET CORRECTLY INCLUDED CONVICTIONS WHICH WERE PENDING APPEAL.

Fla. R. Crim. P. 3.701(d) provides in pertinent part:

> (2) "Conviction" means a determination of guilt resulting from plea or trial, regardless of whether adjudication was withheld or whether imposition of sentence was suspended.
>
> ...
>
> (5) "Prior record" refers to any past criminal conduct on the part of the offender, resulting in conviction, prior to the commission of the primary offense...

The committee notes to the 1988 Amendments (d)(5) state:

> Prior record includes all offenses for which the defendant has been found guilty, regardless of whether adjudication was withheld or the record was expunged.

Based on the clear and unambiguous meaning of rule 3.701 Respondent's convictions were properly included under "prior record," because Respondent was "found guilty" of those offenses." The opinion of the Fourth District Court of Appeal was wrongly decided because Rule 3.701 does not require "finality[1]."

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[1] For purpose of this brief, the State will use the term "finality," as it was defined by the appellate court - to connote convictions which have been affirmed on appeal. However, the State maintains that convictions are "final" when they are rendered. See §924.06(1)(a)(a defendant may appeal from a "final judgment of conviction...")

The fact that Rule 3.701 uses the term "conviction" does not impose a requirement of "finality." In Barber v. State, 413 So. 2d 482 (Fla. 2d DCA 1982), the court reasoned that a defendant could be impeached based on a prior "conviction" even if the conviction was still pending appeal. Thus, a defendant can be "convicted" even if his appeal is not yet "final." See also U.S. v. Klein, 560 So. 2d 1236 (U.S. 5th Cir. 1977), cert. denied.434 U.S. 1073 (1978); Prudential Ins. Co. v. Baitinger, 452 So. 2d 140 (Fla. 3d DCA 1984); and Weathers v. State, 56 So. 2d 536 (Fla. 1952)("one is convicted when the jury returns a verdict of guilty and the judge clinches the finding by adjudicating the guilt though the prisoner may never be punished...[t]he finding by jury and adjudication by court settle the fact of guilt...")

In the opinion on review, the Fourth District Court of Appeal erroneously concluded that the instant case is analogous to cases interpreting the habitual offender statute. The court reasoned that the situations were analogous because "the policy of the habitual offender statute is similar to that of scoring prior records":

> "the purpose of the habitual offender statute 'is to protect society from habitual criminals who persist in the commission of crime after having been therefore convicted and punished for crimes previously committed.'" Thus, it is essential that the conviction be "final" before being used to impose a habitualized sentence. Id.

(B 5-6)(quoting Ruffin v. State, 397 So. 2d 277, 282 (Fla. 1981), cert. denied, 454 U.S. 882, 102 S. Ct. 368, 70 L. Ed. 2d 194 (1981), receded from on different grounds, Scull v. State, 533 So. 2d 1137 (Fla. 1988)).

The Fourth District Court of Appeal's conclusion, that convictions could not be placed on a scoresheet unless the defendant had already been punished for the prior convictions, is directly contrary to this Court's opinion in Thorp v. State, 555 So. 2d 361 (Fla. 1990). In Thorp this Court held that prior criminal conduct must be factored into a scoresheet for sentencing purposes, even if the conviction is not obtained until after commission of the offense for which sentence is being imposed:

> There is little reason why prior record should not include all past crimes for which convictions have been obtained before sentencing. To hold otherwise would encourage needless departures predicated upon unscored convictions.

555 So. 2d at 363. In Thorp, this Court explained why considerations involved in recidivist statutes, such as the habitual offender statute, do not apply to sentencing under the guidelines:

> The theory of giving the criminal an opportunity to reform which requires that the conviction of the prior crime predate the commission of the subject offense before it can be considered in sentencing under a recidivist statute, *Joyner v. State*, 158 Fla. 806, 30 So.2d 304 (1947), is not pertinent to sentencing under the guidelines. The use of the guidelines presupposes that all pertinent information concerning the defendant has been considered in determining the proper length of his sentence.

Id. (quoting Falzone v. State, 496 So. 2d 894,896 (Fla. 2d DCA 1986).

As this Court noted in Thorp, "the guidelines contemplate substantial uniformity in sentencing." 555 So. 2d at 363. See Fla. R. Crim. P. 3.701(b). If this Court were to require that a defendant exhaust all appeals before a conviction could be placed on the scoresheet, the result would be extremely disparate sentencing. For example, if Respondent had committed all of the same crimes as a similarly sentenced defendant, but the similar defendant had not taken an appeal, or the similar defendant's appeal had come to a swifter conclusion, the similar defendant would have received a longer sentence than Respondent, even though their criminal conduct was identical.[2] Moreover, requiring "finality" would encourage defendants to delay non-meritorious appeals in order to avoid having convictions appear on their scoresheets.

Another stated purpose of the sentencing guidelines is, that, "[t]he severity of the sanction should increase with the history and length of the offender's criminal history." Fla. R. Crim. P. 3.701(b)(4). The rule recognizes that defendants who have a propensity to commit crimes should be subject to harsher penalties than defendants who do not.

In Ruffin v. State, 397 So. 2d 282 (Fla. 1981), cert. denied, 454 U.S. 882, 102 S. Ct. 368, 70 L. Ed. 2d 194 (1981), receded from on different grounds, Scull v. State, 533 So. 2d 1137 (Fla. 1988) this Court concluded that the fact that a

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[2] Repeat offenders that entered pleas would receive the harshest sentences, since their cases would become final far sooner than those of defendants that went to trial and then explored all possible avenues of appeal.

defendant's murder conviction was on appeal, did not bar its consideration as an aggravating factor for imposition of the death penalty, reasoning:

> Ruffin, at the time of sentencing had been adjudged guilty of Coburn's murder, and the fact that this conviction was on appeal did not affect its consideration for determining Ruffin's character and propensity to commit violent crimes. In *Joyner v. State*, we held that before a prior conviction may be used to enhance punishment under the habitual offender statute, the prior conviction must be final and, if an appeal is taken from a judgment of guilty, the conviction is not final until the judgment of the lower court is affirmed on appeal. But we explained that the purpose of the habitual offender statute "is to protect society from habitual criminals who persist in the commission of crime after having been theretofore convicted and punished for crimes previously committed." 30 So.2d at 306.
>
> On the other hand, the purpose of considering previous violent convictions in capital cases differs from the purpose of the habitual offender statute. In *Elledge v. State*, 346 So.2d 998, 1001 (Fla. 1977), we said, "the purpose for considering aggravating and mitigating circumstances is to engage in character analysis of the defendant to ascertain whether the ultimate penalty is called for in his or her particular case. Propensity to commit violent crimes surely must be a valid consideration for the jury and the judge."

397 So. 2d at 282-283. The purpose of including "prior record' on a scoresheet is analogous to the purpose of considering the prior conviction in Ruffin - to develop appropriate sentences based on a defendant's background and history. As this Court stated in Thorp infra, "the use of the guidelines presupposes

that all pertinent information concerning the defendant has been considered in determining the proper length of his sentence." 555 So. 2d at 363. This purpose is completely distinguishable from the purpose of the habitual offender statute which is to protect the public by separately sentencing defendants who have persisted in their criminal behavior after being punished. See Joyner v. State, 30 So. 2d 304, 306 (Fla. 1947).

Finally, the distinction between the purposes of the sentencing guidelines and the habitual offender statute can be illustrated by the following example: Under the guidelines, a defendant with no prior record who was being sentenced for multiple crimes would get a harsher sentence than a defendant who was only being sentenced for a single crime. Thus, the multiple offender's sentence would be enhanced based on the number of his offenses even though he was never given an opportunity to be rehabilitated. However, such a multiple offender, could not be habitualized, regardless of how many crimes he had committed, because, he was not a *recidivist*, and therefore would not fall within the purpose of the habitual offender statute.

In conclusion, the Fourth District Court of Appeal erred by failing to follow the plain meaning of Rule 3.701 and by concluding that the instant case was analogous to the habitual offender cases.

POINT II

RESPONDENT'S CLAIM WAS NOT COGNIZABLE ON A DIRECT APPEAL FOLLOWING A PLEA BARGAIN.

Section 924.06(3), Florida Statutes (1991) provides:

> A defendant who pleads guilty or nolo contendere with no express reservation of right to appeal shall have no right to a direct appeal. Such a defendant shall obtain review by means of collateral attack.

See also Fla. R. App. P. 9.140(b); Ford v. State, 556 So. 2d 483, 484 (Fla. 2d DCA 1990). The Fourth District Court of Appeal did not have jurisdiction to review this case because Respondent did not reserve a right to appeal and did not file a collateral attack.

When Respondent entered his plea it was with the understanding that the guidelines scoresheet would contain all of his past convictions, including convictions obtained in 1993. (T 27, 29-30). This understanding was corroborated when the parties explicitly accepted the sentencing scoresheet, which included that convictions then on appeal. Respondent explicitly waived any right to challenge this agreement when he entered his plea in exchange for the State's agreement not to seek habitual offender sentencing (R 18). See Stano v. State, 520 So. 2d 278 (Fla. 1988); Elledge v. State, 432 So. 2d 35 (Fla. 1983); Robinson v. State, 373 So. 2d 898 (Fla. 1979).

Moreover, Respondent's explicitly agreed that the court could sentence him to up to fifteen years (T 27-29), and Respondent's twelve year sentence was not illegal because it did not exceed the statutory maximum:

> That [Respondent's] sentence may exceed the recommended guideline sentence is of no consequence since the plea bargain is in itself a valid reason for imposing a departure sentence.

Jauregui v. State, 20 Fla. L. Weekly D717 (Fla. 3d DCA March 22, 1995).

Even if this Court were to determine that Respondent has raised a meritorious claim on appeal, it should still determine that the appellate court improperly remanded the case for resentencing: As the State's agreement to the plea was based on the mutual understanding that all of Respondent's prior convictions would be entered on the scoresheet, the State cannot be held to the agreement if those convictions are removed from the scoresheet. Thus, the only possible relief would be to allow Respondent the opportunity to withdraw his plea.

CONCLUSION

Based upon the foregoing reasons and citations of authority it is respectfully requested that this Honorable Court REVERSE the decision of the Fourth District Court of Appeal, filed March 8, 1995, REVERSING and REMANDING for resentencing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Answer Brief has been furnished by courier to: DAVID MCPHERRIN, Assistant Public Defender, Criminal Justice Building, 421 3rd Street/6th Floor, West Palm Beach, Florida 33401, this 19th day of July, 1995.

Of Counsel