O/A 9-1-95

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

EZEKIEL PETERSON,

Respondent.

CASE NO. 85,583
4th DCA No. 94-1306

AMENDED

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent was the appellant in the Fourth District Court of Appeal and the defendant in the Nineteenth Judicial Circuit, In and For St. Lucie County, Florida. Petitioner was the appellee and prosecution below. In this brief the parties will be referred to as they appear before this Court.

The symbol "R" will denote the Record on Appeal, which includes the relevant documents filed in the trial court.

The symbol "T" will denote the Transcript.

The symbol "SR" will denote the Supplemental Record on Appeal, which consists of the presentence investigation.

STATEMENT OF THE CASE AND FACTS

Respondent was charged with delivery of cocaine[1] and possession of cocaine[2] (R 1-2). On March 17, 1994, respondent entered open pleas of no contest in exchange for petitioner's agreement to recommend a sentence at the top of the permitted guidelines sentencing range, rather than seek imposition of a habitual offender sentence (R 15-21; T 4). The open plea agreement allowed the court to deviate one grid, up or down, from the permitted sentencing range, without providing written reasons (R 16). Although no scoresheet was prepared prior to the entry of respondent's open pleas, the prosecutor opined that the top of the permitted sentencing range was nine years (T 26).

The court received and reviewed a presentence investigation and a sentencing guideline scoresheet (T 37). The scoresheet, which totaled two hundred and one points and was received without objection, permitted a prison sentence of between five and one-half and twelve years (R 26; T 38). Under prior record the scoresheet listed, among other things, one conviction for delivery of cocaine and two convictions for possession of cocaine (R 27). The presentence investigation revealed that appellant was convicted of possession of cocaine on November 1, 1988, and delivery of cocaine and possession of cocaine on November 3, 1992 (SR 6-7). The November 3, 1992, convictions, which accounted for thirty points, were on appeal to the Fourth District Court of Appeal at the time sentence was imposed on April 21, 1994. Peterson v. State, 651 So. 2d 781, 782 (Fla. 4th DCA 1994). The district court ordered resentencing based upon a

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[1] § 893.13(1)(a), Fla. Stat. (1993).

[2] § 893.13(1)(f), Fla. Stat. (1993).

scoresheet from which the convictions on appeal were deleted. Id. at 783.

SUMMARY OF THE ARGUMENT

POINT I

The district court properly applied long standing precedent in reaching its conclusion that convictions under appeal at the time of sentencing in a subsequent case cannot be scored on a sentencing guidelines scoresheet as prior record. Contrary to petitioner's assertion, the rules of criminal procedure do not address the affect of an appeal upon the use of a prior conviction to enhance a guideline sentence. In addition, each of the cases cited by petitioner in support of its argument that the court erred are distinguishable from the case at bar. Furthermore, petitioner has failed to show that the rule previously announced by this Court, which prohibits the use of a conviction under appeal to enhance the sentence in a subsequent case, has proven more troublesome than beneficial. Accordingly, this Court should adhere to precedent and affirm the decision of the district court.

POINT II

The sentencing error complained of below was apparent from the face of the appellate record, thereby allowing it to be raised on appeal in the absence of an objection at the trial level. Contrary to the argument asserted by petitioner, respondent did not waive any objection he might raise to the improper inclusion of points on his guideline scoresheet. Respondent was entitled to be sentenced by a judge who was relying upon a correctly calculated scoresheet. Therefore, the district court was correct in remanding for resentencing based upon a corrected scoresheet.

ARGUMENT

POINT I

THE DECISION OF THE DISTRICT COURT, HOLDING THAT A CONVICTION UNDER APPEAL CANNOT BE SCORED AS "PRIOR RECORD" ON A SENTENCING GUIDELINE SCORESHEET, WAS CORRECT AND SHOULD BE AFFIRMED.

In Joyner v. State, 158 Fla. 806, 30 So. 2d 304 (Fla. 1947), superseded on other grounds as recognized in State v. Barnes, 595 So. 2d 22 (Fla. 1992), this Court addressed the use of a conviction that was on appeal to enhance the sentence imposed in a subsequent case stating:

> It appears to be very well settled that before a prior conviction may be relied upon to enhance the punishment in a subsequent case such prior conviction must be final. If an appeal has been taken from a judgment of guilty in the trial court that *conviction does not* become final until the judgment of the lower court has been affirmed by the appellate court.

Id. 30 So. 2d at 305.

The definition of conviction supplied by Joyner, which applied to the recidivist statute then in effect,[3] was relied upon by the Fourth District Court of Appeal in Peterson v. State, 651 So. 2d 781 (Fla. 4th DCA 1995), to reverse a guideline sentence the calculation of which was based, in part, upon two prior convictions that were on appeal at the time of sentencing. Id. at 782; See also State v. Villafane, 444 So. 2d 71 (Fla. 4th DCA 1984)(precluding use of conviction under appeal to enhance degree of crime charged).[4]

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[3] § 775.11, Fla. Stat. (1941).

[4] A similar issue is pending before this Court in Snyder v. State, 650 So. 2d 1024 (Fla. 2d DCA 1995) rev. accepted, Case No. 85,202. In Snyder the issue is whether an individual may be convicted of possession of a firearm by a convicted felon during the period that the predicate felony is under appeal. See also Burkett v. State, 518

Petitioner contends that the district court erred by applying the Joyner definition of conviction to the prior record aspect of guideline sentencing. To support its position petitioner relies upon what it terms "the clear and unambiguous meaning of rule 3.701", points out that convictions under appeal are properly relied upon in other situations, argues that guideline sentencing and sentencing under recidivist statutes is so different as to prohibit the application of principles established under one to the other, and asserts that the purpose of scoring prior record on a scoresheet is analogous to the character analysis conducted in death penalty proceedings, which allows reliance upon prior convictions under appeal. Petitioner is mistaken. Accordingly, the decision of the district court should be affirmed.

The rules of criminal procedure define "prior record" as "any past criminal conduct on the part of the offender, resulting in conviction, prior to the commission of the primary offense." Fla. R. Crim. P. 3.701(d)(5). The notes following rule 3.701 further explain that "[p]rior record includes all offenses for which the defendant has been found guilty, regardless of whether adjudication was withheld or the record has been expunged." Fla. R. Crim. P. 3.701(d)(5) Sentencing Guidelines Commission Notes, 1988 Amendments. "Conviction" is defined under the rules as "a determination of guilt resulting from plea or trial, regardless of whether adjudication was withheld or whether imposition of sentence was suspended." Fla. R. Crim. P. 3.701(d)(2).[5]

So. 2d 1363 (Fla. 1st DCA 1988).

[5] Effective January 1, 1994, the legislature defined conviction to mean "a determination of guilt that is the result of a plea or trial, regardless of whether adjudication is withheld." § 9, ch. 93-

While the rule and its accompanying committee notes answer the questions raised by bond forfeitures, Pique v. State, 567 So. 2d 530, 531 (Fla. 5th DCA 1990), withheld adjudications, Ward v. State, 568 So. 2d 452, 454 (Fla. 3rd DCA 1990), suspended sentences, Keeton v. State, 525 So. 2d 912, 916 (Fla. 2d DCA 1988), rev. denied., 534 So. 2d 400 (Fla. 1988) and expunction, § 943.0585(4)(a)2, Fla. Stat. (1993), neither address the affect of scoring, as "prior record", a previous conviction under appeal, see Commonwealth v. Kearns, 528 A. 2d 992, 994 (Pa. Super. Ct. 1987)(definition of prior conviction under sentencing guideline rules rendered meaningless the taking of an appeal); State v. Cobb, 403 N.W. 2d 329, 330 (Minn. Ct. App. 1987)(pardoned felony properly scored under criminal history where pardon statute provided for its use in subsequent judicial proceedings). Therefore, petitioner's assertion that rule 3.701 clearly and unambiguously requires the inclusion of previous convictions, that are on appeal at the time of sentencing, is a conclusion without support.

Petitioner correctly notes that convictions under appeal may be relied upon in other situations. However, the cases cited by petitioner for that proposition are distinguishable from that at bar. Petitioner cites Barber v. State, 413 So. 2d 482 (Fla. 2d DCA 1982), wherein the court said that use of a conviction under appeal to impeach a witness was permissible. Id. at 484; Accord United States v. Klein, 560 F.2d 1236, 1240 (5th Cir. 1977) cert. denied, 434 U.S. 1073, 98 S.Ct. 1259, 55 L.Ed. 2d 777 (1978). Two important

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406, Laws of Florida (1993). The legislative history sheds no light upon the affect of an appeal on the definition of conviction.

distinctions exist between impeachment and sentence enhancement. First, use of a prior conviction under appeal to impeach a witness is clearly authorized by statute, § 90.610(2), Fla. Stat. (1993), and second, impeachment does not involve an increased deprivation of liberty, Cf. Tal-Mason v. State, 515 So. 2d 738, 739 (Fla. 1987) (where deprivation of liberty is at stake different results may be reached). While an impeached party can lessen the impact of a prior conviction by showing that it is on appeal, there is little recourse available to the individual awaiting sentencing that can lessen the impact of the inclusion of additional points on his or her guideline scoresheet.

Next petitioner cites Prudential Insurance Co. v. Baitinger, 452 So. 2d 140 (Fla. 3rd DCA 1984), which held that an adjudication of guilt, regardless of the pendency of an appeal, constituted a final judgment of conviction and was, therefore, sufficient to deprive the named beneficiary of a life insurance policy, who murdered the insured, from receiving any benefits under the policy. Id. at 143. The result reached in Baitinger was dictated by the intent of the legislature to make recovery based upon wrong doing extremely difficult, as evidenced by its deletion of the requirement that a criminal conviction be obtained. Id. at 142-143. In reaching its decision, the Third District stated, "the supreme court's interpretation of 'final judgment of conviction' for purposes of the habitual criminal statute in Joyner is not necessarily controlling in other areas." Id. at 142. Baitinger was, however, a civil matter, the purpose of which was to determine the obligations of an insurance company under a life insurance policy, it was not a criminal sentencing proceeding.

Petitioner also cites Weathers v. State, 56 So. 2d 536 (Fla. 1952) cert. denied., 344 U. S. 896, 73 S. Ct. 276, 97 L. Ed. 2d 92 (1952), in which this Court held "that the 'conviction' of a principal, prerequisite to the conviction of an accessory, means adjudication of guilt irrespective of sentence." Id. at 538. The Court continued stating, "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." Id. Weathers neither addressed the affect of an appeal upon a conviction nor concerned sentence enhancement.

Finally, petitioner relies upon this Court's decision in 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 other grounds, Scull v. State, 533 So. 2d 1137 (Fla. 1988), an appeal from a conviction for first degree murder and the sentence of death, which allowed the use of a murder conviction that was on appeal for the purpose of determining the defendant's character and propensity to commit violent crimes. Id. at 282; See also § 921.141(1) & (5)(b), Fla. Stat. (1993). "'[T]he 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." Ruffin, 397 So. 2d at 282-283 (quoting Elledge v. State, 346 So. 2d 998, 1001 (Fla. 1977)). Determining the presumptive guidelines sentencing range, on the other hand, is not the product of character analysis, see Scott v. State, 508 So. 2d 335, 336 (Fla. 1987); Hendrix

v. State, 475 So. 2d 1218, 1219-1220 (Fla. 1985), but is instead based upon a mathematical calculation derived from "the length and nature of the offender's criminal history", Fla. R. Crim. P. 3.701(b)(4); Accord § 921.001(4)(a)4, Fla. Stat. (1993).[6] In addition, establishment of a prior violent crime under Florida's death penalty scheme does not result in an enhanced sentence, rather it is an aid to determining which of two authorized punishments should be imposed. §§ 775.082(1) & 921.141, Fla. Stat. (1993). Furthermore, even when conviction of a prior violent felony is proven imposition of the death penalty is not automatic. § 921.141(3), Fla. Stat. (1993).

In the aforementioned cases the pendency of an appeal did not preclude reliance upon the conviction from which the appeal was taken. Respondent has no quarrel with those holdings. However, the preceding cases did not involve automatic sentence enhancement. In the case at bar, reliance upon two prior convictions under appeal elevated both the minimum and maximum guideline sentence. Accordingly, the definition of conviction supplied by the preceding cases does not necessarily apply under the present circumstances.

The case most analogous to that at bar is Joyner. Although Joyner concerned the use of a conviction under appeal to enhance a sentence under the recidivist statute, while the instant case involves the use of such a conviction to increase the sentence permitted under the guidelines, that is a distinction without a difference. "[T]he purpose of the habitual offender statute 'is to protect society from habitual criminals who persist in the commission of crime after having

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[6] Determining the appropriate sentence to impose within the specified sentencing range may take into consideration the defendant's character.

been theretofore convicted and punished for crimes previously committed.'" Ruffin, 397 So. 2d at 282. Those persons who persist in committing crimes will receive enhanced sentences. See generally, Ashley v. State, 614 So. 2d 486, 489 (Fla. 1993). The sentencing guidelines also envision the imposition of enhanced sentences based upon persistent criminal activity. Fla. R. Crim. P. 3.701(4)(b); § 921.001(4)(a)4, Fla. Stat. (1993). Thus, as an individuals' criminal record grows, society seeks to protect itself from his or her criminal behavior for longer periods of time by lengthening the sentence available under the guidelines. Accordingly, insofar as length of sentence is concerned, the policy considerations underlying the habitual offender statute and the sentencing guidelines are similar. See Peterson, 651 So. 2d at 783. In addition, the sentencing guidelines and the habitual offender statute do not operate independent of one another. But see § 775.084(4)(e), Fla. Stat. (1993). One sentenced as a habitual offender can be imprisoned to no less than the bottom of the permitted guidelines sentencing range. State v. Rinkins, 646 So. 2d 727, 729 (Fla. 1994). Prohibiting the use of a prior conviction under appeal to establish the predicate for habitualization, yet allowing its use for enhancing the minimum sentence which may be imposed under the habitual offender statute is illogical. Moreover, petitioner's concern that application of Joyner to guidelines sentencing will result in sentencing disparity is unwarranted. Sentencing of all defendant's under the guidelines will be based upon a criminal history that is final. As a result similarly situated defendant's will be treated similarly. The analogous purposes behind habitual offender sentencing and sentencing under the

guidelines, along with the manner of their interaction, requires that the definition of conviction established under one apply to the other. Cf. Nicholson v. State, 600 So. 2d 1101, 1103 (Fla. 1992) (when word is defined in a statute same meaning must be ascribed to it when repeated, unless contrary intent is apparent) cert. denied,. - U. S. - , 113 S. Ct. 625, 121 L. Ed. 2d 557 (1992).

Contrary to the view held by petitioner this Court's holding in Thorp v. State, 555 So. 2d 362 (Fla. 1990), does not require reversal of the decision rendered below. Petitioner's citation to Thorp as repudiating the district court's reliance upon Joyner demonstrates a fundamental misunderstanding of the issue presented in this appeal. The Joyner Court was presented with two questions. The first, which concerned the definition of conviction, was answered as previously discussed in this brief. The second question was one of timing, viz, did the recidivist statute require both the commission and conviction of each predicate offense to precede the subsequent offense. Answering in the affirmative, this Court noted that the purpose of the recidivist statute "contemplated that an opportunity for reformation is to be given after each conviction." Joyner, 30 So. 2d at 306. In Thorp this Court resolved a conflict among the district court's concerning the question whether "prior record", under the guidelines, likewise required commission and conviction of the prior offense to precede the offense awaiting sentencing or whether commission need only precede the primary offense, so long as conviction was obtained before sentencing. Finding that the latter correctly stated the law this Court said:

> 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.

Thorp, 555 So. 2d at 363.

This Court went on to state, "[t]here is little reason why prior record should not include all past crimes for which convictions have been obtained before sentencing." Id. The Thorp Court was concerned with the application of the second issue addressed in Joyner, timing of convictions, to guideline sentencing, not with issue number one, the definition of conviction. Therefore, this Court's statement that considerations relevant to sentencing under a recidivist statute are not pertinent to guidelines sentencing neither extends to the definition of conviction supplied in Joyner nor repudiates the district court's belief that the habitual offender statute and the sentencing guidelines are analogous in their sentencing objectives.

In order for this Court to rule that a conviction under appeal may be scored as prior record on a sentencing guideline scoresheet it must, out of necessity, overrule Joyner. This Court can do just that. However, overruling prior decisions is not something that any court should undertake lightly. State v. Gray, 654 So. 2d 552, 554 (Fla. 1995). "While no one would advocate blind adherence to prior law, certainly a change from that law should be principled." State v. Schopp, 653 So. 2d 1016, 1023 (Fla. 1995)(Harding, J. dissenting). Neither a change in the membership of the Court, id. at 1023, nor "the mere belief that a case was wrongly decided is [ ] justification for overruling a prior decision." Perez v. State, 620 So. 2d 1256, 1259 (Fla. 1993)(Overton, J., concurring). Since 1947 the court's of this

state have followed Joyner. See Breeze v. State, 641 So. 2d 450 (Fla. 1st DCA 1994); Johnson v. State, 613 So. 2d 143 (Fla. 2d DCA 1993); Frazier v. State, 452 So. 2d 1015 (Fla. 5th DCA 1984); Garrett v. State, 335 So. 2d 876 (Fla. 4th DCA 1976). Petitioner has not shown that the application of that rule "has proven more troublesome than beneficial ...." Gray, 20 Fla. L. Weekly S205. Accordingly, Joyner should be reaffirmed.

POINT II

SENTENCING ERRORS, SUCH AS THAT OCCURRING BELOW, MAY BE REVIEWED ON APPEAL, EVEN THOUGH UNOBJECTED TO, WHEN THE ERROR IS APPARENT FROM THE FOUR CORNERS OF THE APPELLATE RECORD.

"Sentencing errors may be reviewed on appeal, even in the absence of a contemporaneous objection, if the errors are apparent from the four corners of the record." Taylor v. State, 601 So. 2d 540, 542 (Fla. 1992)(citations omitted). There is nothing in Taylor to suggest that the improper inclusion of points on a guideline scoresheet must first be raised in the trial court by way of a motion to correct sentence. Since the error committed below is apparent from the appellate record, see Dickerson v. State, 586 So. 2d 477, 478 (Fla. 4th DCA 1991)(supplemental record established that scoresheet improperly contained points for uncounseled convictions), it was properly addressed by the district court, even in the absence of an express reservation or collateral attack.

Petitioner's assertion that respondent explicitly waived the right to challenge the improper inclusion of points on his guideline scoresheet is disingenuous. At no time during either the plea colloquy or the sentencing hearing was there any discussion concerning the propriety of scoring convictions under appeal as "prior record". Respondent could not explicitly waive an objection to the improper inclusion of points on his scoresheet without the court discussing the matter with him. Cf. Upton v. State, 20 Fla. L. Weekly S387 (Fla. July 20, 1995)(court must determine that defendant knowingly and intelligently waived right to jury trial); Coney v. State, 20 Fla. L. Weekly S255, 256 (Fla. Apr. 27, 1995)(court must determine that defendant knowingly and intelligently waived right to be present in

court); Novaton v. State, 634 So. 2d 607, 609 (Fla. 1994)(where defendant agrees to specific sentence as part of plea bargain he can waive double jeopardy objections); Sirmons v. State, 620 So. 2d 1249, 1252 (Fla. 1993)(waiver of right to be sentenced as juvenile must appear on the record); Silverstein v. State, 654 So. 2d 1040, 1041 (Fla. 4th DCA 1995)(waiver of right to jail credit must appear on the record). The court did not discuss with respondent the use of his convictions that were on appeal. Therefore, respondent did not waive any objection to their use.

Respondent entered open pleas of no contest in exchange for petitioner's agreement to recommend a sentence at the top of the permitted guidelines sentencing range, rather than seek imposition of a habitual offender sentence (R 15-21; T 4, 23-25). The agreement permitted the court to deviate one grid, up or down, from that called for under the guidelines without entering written reasons for the departure (R 16).[7] At the time respondent entered his plea neither the parties nor the court knew where he fell on the guideline scoresheet.[8] To argue, as does petitioner, that it was relying upon a particular view of the guideline scoresheet when it extended the open plea offer to respondent and, as a result of its subsequent alteration, it should be given an opportunity to withdraw its offer, is without merit. See Simmons v. State, 611 So. 2d 1250, 1253 (Fla. 2d DCA 1992); Vitiello

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[7] Petitioner's contention that respondent agreed to be sentenced to fifteen years is without merit. Respondent merely acknowledged the court's admonition that second degree felonies are punishable by a statutory maximum of fifteen years (T 29).

[8] The prosecutor expressed his opinion that the top of the permitted range was nine years (T 26) which, ironically, is where respondent falls on the guidelines if the two convictions that were on appeal at the time of sentencing are removed from the scoresheet.

v. State, 609 So. 2d 111, 112 (Fla. 4th DCA 1992). The scoresheet relied upon placed respondent in a permitted sentencing range of five and one-half to twelve years in prison (R 26). Absent the two convictions under appeal respondent fell into a permitted sentencing range of four and one-half to nine years. Fla. R. Crim. P. 3.988(g). Although the open plea agreement entered into by appellant allowed the court to depart upward one sentencing grid without providing written reasons, the court displayed no intent to exercise that option. Respondent was entitled to be sentenced by a judge who exercised her discretion based upon a correctly computed scoresheet. Gibbons v. State, 540 So. 2d 144, 145 (Fla. 4th DCA 1989). Therefore, remand for resentencing based upon a corrected scoresheet is the proper remedy.

CONCLUSION

Based upon the foregoing arguments and the authorities cited therein, respondent respectfully requests this Honorable Court affirm the decision rendered by the district court.

Respectfully submitted,

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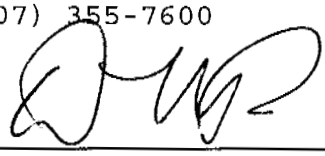

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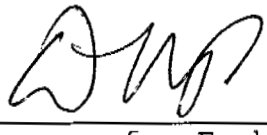
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to MICHELLE A. KONIG, Assistant Attorney General, 1655 Palm Beach Lakes Blvd, Third Street, West Palm Beach, Florida 33401 by courier this 8TH day of AUGUST, 1995.



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