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IN THE SUPREME COURT OF FLORIDA

CASE NO. **91,270**

THE STATE OF FLORIDA,

Petitioner,

-vs-

STEVEN RUBIN,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF PETITIONER ON THE MERITS

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INTRODUCTION

The Petitioner, the **STATE OF FLORIDA**, was the Appellee below. The Respondent, **STEVEN RUBIN**, was the Appellant below. The parties will be referred to as the State and the Defendant. The symbol "R" will designate the record on appeal, the symbol "T" will designate the transcript of proceedings and the symbol "A" will designate the Appendix to this brief.

STATEMENT OF THE CASE AND FACTS

The Defendant was charged in a sixteen count information with two counts of burglary of on occupied structure, one count of burglary of an unoccupied structure, seven counts of grand theft third degree, two counts of petit theft, two counts of felony criminal mischief, one count of misdemeanor criminal mischief, and one count of conspiracy to commit burglary. (R. 34-48). After a jury trial the Defendant was found guilty as charged. (R. 225-232).

At sentencing the trial court used an incorrect score sheet. This score sheet totaled 70.38 points equivalent to 42.38 months State prison, with a minimum of 31.785 months in State prison and a maximum of 52.975 months State prison. (R. 351-352). The correct score sheet totaled 58.6 points equivalent to 30.6 months State prison, with a minimum of 22.9 months in State prison and a maximum of 38.2 months State prison. (R. 280-282). The trial court then upwardly departed from the guidelines and imposed an 8 year sentence where the maximum permitted by law was 15 years. (R. 370-373).

On appeal the Third District reversed the Defendant's departure sentence on the ground that the trial court relied upon an incorrectly calculated score sheet. (A. 2). On rehearing the Third District certified that the foregoing holding expressly and directly conflicts with *Hines v. State*, 587 So. 2d 620 (Fla. 2nd DCA 1991), which holds that an upward departure based on an incorrect score sheet is subject to the harmless error doctrine. (A. 4).

The Third District then stayed its mandate and this petition for review followed.

QUESTION PRESENTED

WHETHER THE USE OF AN INCORRECT SENTENCING GUIDELINES SCORE SHEET IS HARMLESS ERROR WHERE THE SCORE SHEET ERROR IS IN THE STATE'S FAVOR AND THE TRIAL COURT SENTENCE IS AN UPWARD DEPARTURE FROM THE GUIDELINES SENTENCE.

SUMMARY OF THE ARGUMENT

The Third District held that where there is a score sheet error, it could not apply a harmless error analysis to uphold the sentence even where it is found that beyond a reasonable doubt that the record establishes that the trial judge would have imposed the same departure sentence notwithstanding the score sheet error. The State submits that the Third District's decision should be quashed since it is out of step with the current view of harmless error in criminal cases.

This Court has held that a per se reversible error rule is only appropriate for those errors that vitiate the right to a fair trial and therefore are always harmful. This Court no longer bases a per se reversible error rule on the assumption that an appellate court can not be certain that all other types of error are harmful. This Court now holds that where a reviewing court can say beyond a reasonable doubt that the defendant was not prejudiced by the error it was harmless.

Therefore, the same legal principle should be applied where, despite an incorrect score sheet, the trial court departs from the sentencing guidelines. This type of error does not vitiate the right to a fair trial and thus is subject to the harmless error doctrine.

ARGUMENT

THE USE OF AN INCORRECT SENTENCING GUIDELINES SCORE SHEET IS HARMLESS ERROR WHERE THE SCORE SHEET ERROR IS IN THE STATE'S FAVOR AND THE TRIAL COURT SENTENCE IS AN UPWARD DEPARTURE FROM THE GUIDELINES SENTENCE.

The proper procedure for imposing a guidelines sentence requires the sentencing judge to consider the applicable recommended range before exercising the discretion to deviate therefrom. See Fla.R.Crim.P. 3.701(d)8. The purpose of this rule is consistent with the theory of the guidelines that a correct calculation of the score sheet is essential to establish a valid base for the trial court's exercise of its discretion in determining an appropriate sentence under the guidelines. Smith v. State, 678 So. 2d 1374 (Fla. 4th DCA 1996).

Ordinarily, the trial court's use of an incorrectly calculated score sheet requires the trial court to resentence with the use of a properly calculated score sheet. Dawson v. State, 532 So. 2d 89 (Fla. 4th DCA 1988). Thus, a score sheet error is not subject to the harmless error rule when the deletion of improperly included points in the guideline score sheet results in a reduction of one or more cells. Deparvine v. State, 603 So. 2d 679 (Fla. 1st DCA 1992).

However, in circumstances where the appellate court is clearly convinced that the defendant would have received the same sentence not withstanding the score sheet error, the sentences been affirmed under the harmless error doctrine despite the erroneous score. Sellers v. State, 578 So. 2d 339 (Fla. 1st DCA 1991). A score

sheet error has been found to be harmless when the corrected score sheet would place the defendant in the same cell, Burrows v. State, 649 So. 2d 902 (Fla. 1st DCA 1995), or where the sentence was imposed in accordance with a valid plea agreement. Orsi v. State, 515 So. 2d 268 (Fla. 2nd DCA 1987). The rationale behind these holdings is that the error would not change the result because it either did not effect the cell in which the defendant was placed or the sentence would have been imposed regardless of the score sheet because it was the result of a plea. In each instance the sentence is upheld because it is evident that the defendant would have received the same sentence notwithstanding the error in the score sheet and the error is deemed harmless.

This same legal principle has been applied to departure sentences, where despite a score sheet error, the appellate court found that beyond a reasonable doubt the record establishes that the trial judge would have imposed the same departure sentence notwithstanding the score sheet error. Smith v. Singletary, 666 So. 2d 986 (Fla 4th DCA 1996); Hines v. State, 587 So. 2d 620 (Fla 2nd DCA 1991); Scott v. State, 469 So. 2d 865 (Fla 1st DCA 1985). The Third District herein disagreed with the foregoing legal principle.

The State submits that the Third District's decision should be quashed since it is out of step with the current view of harmless error in criminal cases. Section 924.051(7), Fla. Stat., (Supp. 1996) provides that a sentence may not be reversed absent an express finding that a prejudicial error occurred in the trial court. Section 924.051(1), Fla. Stat. (Supp. 1996) defines prejudicial error as an error in the trial

court that harmfully affected the sentence.

This Court in State v. Schopp, 653 So. 2d 1016 (Fla. 1995) reiterated the principle that a per se reversible error rule is only appropriate for those errors that vitiate the right to a fair trial and therefore are always harmful. This Court then recognized that the per se reversible error rule for failing to hold a Richardson[1] hearing was not based on the fact that the failure to hold such a hearing always resulted in an unfair trial but the rule was based on the assumption that an appellate court can not be certain that errors of this type are harmful. This Court then receded from the per se reversible error rule by finding that while the foregoing assumption holds true in the majority of cases, there are cases where a reviewing court can say beyond a reasonable doubt that the defendant was not prejudiced by the underlying violation and thus the failure to hold the hearing was harmless error. See Arizona v. Fulminante, 499 U.S. 279 (1991) (only those federal constitutional violations which are structural defects in the constitution of the trial mechanism are not subject to a harmless error analysis).

The State submits that a departure sentence which starts with an incorrect score sheet, is also one of those errors that does not vitiate the defendant's right to a fair trial and therefore should be subject to the harmless error doctrine. Just like a Richardson violation, the assumption that an appellate court can not be certain that errors of this type are harmful holds true in the majority of cases where a departure

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[1] Richardson v. State, 246 So. 2d 771 (Fla. 1971).

sentence starts with an incorrect score sheet. However there are cases where a reviewing court can say beyond a reasonable doubt that the defendant was not prejudiced by the use of the incorrect score sheet since the record supports beyond a reasonable doubt the trial judge would have imposed the same departure sentence notwithstanding the score sheet error and thus the failure to hold the hearing was harmless error. Therefore, this Court should hold that departure sentences which contain an incorrect score sheet are subject to the harmless error doctrine.

The instant case is clearly one of those cases where this Court can say beyond a reasonable doubt that the Defendant was not prejudiced by the use of an incorrect score sheet since record establishes beyond a reasonable doubt that the trial judge would have imposed the same departure sentence notwithstanding the score sheet error. The record reflects that the trial court, after reviewing the incorrect score sheet which reflected a longer sentence than the correct score sheet, felt that the recommended guidelines did not reflect the nature of the offenses.

> I feel however the recommended guidelines do not reflect the nature of those offenses. There is clearly a difference in my mind between a grand theft and the kind of thefts that were committed in this case.
>
> I think that there is clearly a difference between someone who goes into a store and tries to pass a fraudulent check and someone who defrauds their employer and their position of trust. I think there is clearly a

difference between someone who goes in and steals a pair of pants from Burdines, something of that nature and someone who actually goes to these extremes to commit a theft by painting graffiti and hateful words, not only anti-Semitic but other racial symbols and words upon the school in order to accomplish this deed.

I think that is not taken into consideration in the sentencing guidelines. But it is something that this Court must consider.

The burglaries too are different than probably most burglaries. The object was the same. It was to commit a theft, it was to steal. However it was not to just steal property once on the grounds.

It was to commit the theft and camouflage it so that it would draw suspicion away from Steven Rubin and Al Rubin so that it would basically allow the defendant to commit this crime without being detected.

I think that that is important. I think it's also important that the criminal mischief was not criminal mischief that was done out of anger or out of hatred or out of any retaliation because he did not like his workplace or felt he had been passed over by someone else for a

promotion.

It was done for no other reason than to camouflage his own acts and greed at the expense of fourteen hundred students and staff and I believe the community as well.

We don't know who it was, whether it was he himself or accomplices that did the damage in the March of 1994 incident. But clearly the May 1995 incident he did know in advance that juveniles were going to be used.

There was testimony at trial that Michael Brown told him that he -- Michael Brown was supposed to have committed these acts on a particular date. When that didn't happen Steven Rubin actually went to Michael Brown and said, why didn't you do what we had planned on doing?

And Mr. Brown said he basically chickened out or didn't want to do it. Then they discussed hiring the juveniles. The defendant agreed and approved the hiring of the juveniles and knew the juveniles were going to be used to carry out his acts.

That when the juveniles went back on the fourteenth and only slashed the two hundred and sixty seats in the buses that wasn't enough, that he went back and told

Michael Brown, the thousand dollars I promised you I'm only going to give you six hundred dollars because the job was not completed.

And you can receive the four hundred dollars remaining as soon as they go back and finished the job. And these kids were sent back two days later in order to paint the graffiti because that's what Steven Rubin ultimately wanted done.

That to me was egregious. He knew full well he was soliciting the help of minors. Those minors were charged in this case and dealt with in the juvenile system.

I think the crimes were committed not only against the school, the students and the staff but the crimes were committed against the community at large.

We as a community struggle every day to try and fight bigotry and racism and anti Semitism and other hatred in our community. It divides us all on a daily basis. We struggle to try to bind all people together.

I even noted that some of the jurors in this case felt that they could not even sit and give the defendants a fair trial when they heard what the allegations were.

That it instills great anger in people and pain and

emotions in the people of the community. So I believe the crime was also a crime that affected the entire community.

I believe there are grounds for departure in both Al and Steven Rubin's cases....

(R 426-429).

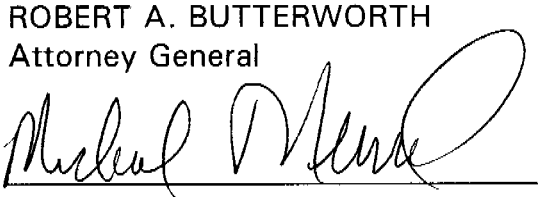
The foregoing portions of the record clearly establishes that the trial court was not satisfied with the guideline sentence under the incorrect score sheet, which was in the State's favor. Clearly the trial court was going to depart from the guidelines if the proper score sheet was used which would have provided a lesser sentence. As such, the record is clear beyond a reasonable doubt that the trial judge would have departed from the guidelines notwithstanding the incorrect score sheet.

CONCLUSION

Based on the foregoing, Petitioner requests this Court quash the decision of the District Court and hold that the use of an incorrect sentencing guidelines score sheet is harmless error where the score sheet error is in the state's favor and the trial court sentence is an upward departure from the guidelines sentence..

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **PETITIONER'S BRIEF ON THE MERITS** was furnished by mail to **IRA N. LOEWY,** Attorney for Respondent, Penthouse Two, 800 Brickell Avenue, Miami, Florida 33131 on this 6 day of November, 1997.

MICHAEL J. NEIMAND
Assistant Attorney General

IN THE SUPREME COURT OF FLORIDA

CASE NO. **91,270**

THE STATE OF FLORIDA,

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vs.

STEVEN RUBIN,

Respondent.
_____/

APPENDIX

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L96-1-2219-E

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JANUARY TERM, A.D. 1997

STEVEN RUBIN and AL RUBIN, **

Appellants, **

vs. ** CASE NO. 96-2724

THE STATE OF FLORIDA, ** LOWER TRIBUNAL NO. 97-23086

Appellee. **

Opinion filed June 4, 1997.

An appeal from the Circuit Court for Dade County, Leslie B. Rothenberg, Judge.

Bierman, Shohat, Loewy, Perry & Klein, P.A. and Ira N. Loewy, for appellants.

Robert A. Butterworth, Attorney General and Michael J. Neimand, Assistant Attorney General, for appellee.

Before COPE and GREEN, JJ. and BARKDULL, Senior Judge.

PER CURIAM.

This is a joint appeal after a jury trial. Appellant, Steven

Rubin appeals his convictions and sentences for burglary of an occupied structure, grand theft, petit theft, criminal mischief, burglary to a conveyance, and conspiracy to commit burglary. Appellant, Al Rubin appeals his convictions and sentences for grand theft and petit theft. We affirm in part and reverse and remand in part.

We first find no error in the trial court's denial of Steven Rubin's motion for judgment of acquittal. Based upon our review of the record, we conclude that the evidence adduced by the State was legally sufficient to support his convictions for criminal mischief and burglary of an occupied structure. See State v. Law, 559 So. 2d 187, 188-89 (Fla. 1989).

We agree with Steven Rubin, however, that his departure sentence must be vacated and that he must be resentenced where the trial court relied upon an incorrectly calculated score sheet. A "trial court must have the benefit of a properly prepared scoresheet before it can make a fully informed decision on whether to depart from the recommended guideline sentence." See Smith v. State, 678 So. 2d 1374, 1376 (Fla. 4th DCA 1996) (quoting Dawson v. State, 532 So. 2d 89 (Fla. 4th DCA 1988)); see also Moore v. State, 519 So. 2d 22, 23 (Fla. 3d DCA 1987); Davis v. State, 493 So. 2d 82, 83 (Fla. 1st DCA 1986). In light of the fact that we must remand this cause for Steven Rubin to be resentenced under a properly calculated score sheet, our need to address his further challenges to the court's reasons for departure is obviated at this

time.

Next, Al Rubin challenges the validity of the two cited reasons for his departure sentence, i.e., substantial economic hardship to the victim and the painting of offensive anti-Semitic symbols on the victim's property during the commission of the thefts. We agree that the first reason was invalid in the absence of a preponderance of proof that the victim indeed sustained a "substantial economic hardship." A court cannot use an inherent component of the crime in question to justify departure. See State v. Mischler, 488 So. 2d 523, 525 (Fla. 1986), superseded by statute on other grounds, Felts v. State, 537 So. 2d 995 (Fla. 1st DCA 1988); Dixon v. State, 492 So. 2d 410, 411 (Fla. 5th DCA 1986); Steiner v. State, 469 So. 2d 179, 181 (Fla. 3d DCA), review denied, 479 So. 2d 118 (Fla. 1985); Baker v. State 466 So. 2d 1144, 1145 (Fla. 3d DCA 1985). Since economic loss is an inherent component of every theft, the amount of the loss itself cannot alone justify a reason for departure. As to the remaining reason for departure, the state correctly concedes that it is invalid and inapplicable where Al Rubin was never charged or convicted with criminal mischief. See Fla. R. Crim. P. 3.701(d)(11); Welch v. State, 639 So. 2d 1068, 1069 (Fla. 4th DCA 1994); Pennant v. State, 600 So. 2d 526, 527 (Fla. 2d DCA 1992); Brown v. State, 587 So. 2d 563, 566-67 (Fla. 1st DCA 1991). We thus vacate Al Rubin's departure sentence and remand with instructions that he be resentenced within the guidelines.

Finally, we find no merit to the remaining issues raised by the appellants on this appeal.

Affirmed in part, reversed and remanded in part with directions.

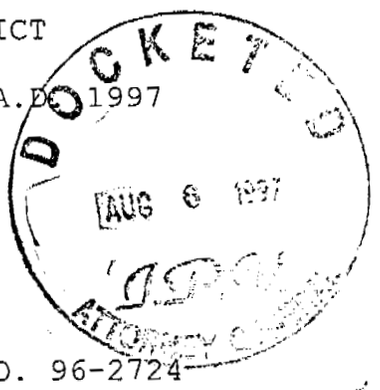
L96-1.6219.E

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 1997



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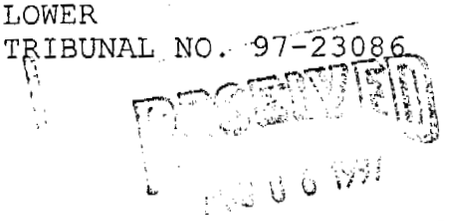

Opinion filed August 6, 1997.

An appeal from the Circuit Court for Dade County, Leslie B. Rothenberg, Judge.

Bierman, Shohat, Loewy, Perry & Klein, P.A. and Ira N. Loewy, for appellants.

Robert A. Butterworth, Attorney General and Michael J. Neimand, Assistant Attorney General, for appellee.

Before COPE and GREEN, JJ. and BARKDULL, Senior Judge.

PER CURIAM.

ON MOTION FOR REHEARING AND/OR CERTIFICATION

Upon consideration of Appellee's motion for rehearing, this

court adds the following to its opinion issued on June 4, 1997: That its holding, with respect to the score sheet error, expressly and directly conflicts with Hines v. State, 587 So. 2d 620 (Fla. 2nd DCA 1991), thus, we certify conflict with this decision.

Appellee's motion for rehearing on the remaining matters is denied.