

ORIGINAL

IN THE SUPREME COURT OF FLORIDA

CASE NO. 91,270

THE STATE OF FLORIDA,

Petitioner,

-vs-

STEVEN RUBIN,

Respondent.

FILED

SID J. WHITE

MAY 21 1998

CLERK, SUPREME COURT
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Chief Deputy Clerk

ON PETITION FOR DISCRETIONARY REVIEW

SUPPLEMENTAL
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

On May 28, 1996, the Defendant was charged in a sixteen count information with crimes committed in March, 1994 and May, 1995. (R. 34-48). After A jury trial was held in May, 1996 and on May 30, 1996, the Defendant was found guilty as charged. (R. 225-232).

At sentencing, which occurred in August, 1996, the trial court used an incorrect score sheet. This scoresheet 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 scoresheet 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).

The Defendant did not object to the use of the improperly calculated scoresheet. The Defendant did not file, with the trial court, a Rule 3.800(b) motion to correct the score sheet error.

QUESTION PRESENTED

WHETHER THE ISSUE OF 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 HAS NOT BEEN
PRESERVED FOR REVIEW.

SUMMARY OF THE ARGUMENT

In the instant case, the Defendant did not object to the sentencing error either at trial or in a Rule 3.800(b) motion. Since the sentence imposed is within the maximum allowed by law, fundamental error does not appear on the face of the record and thus the sentence should be affirmed. However, since Defendant is complaining about an improperly calculated scoresheet, he should be entitled to file in the trial court a Rule 3.800(a) motion which allows a trial court to correct at any time an incorrect calculation made by it in a sentencing guidelines scoresheet.

ARGUMENT

THE ISSUE OF 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 HAS NOT BEEN PRESERVED FOR REVIEW.

On July 1, 1996 the Criminal Appeals Reform Act of 1996 (Act) became law. Pursuant to § 924.051(1)(b), *Fla. Stat.* 1997, all issues must be presented to the trial court before it can be raised on appeal. In conjunction therewith Florida Rule of Criminal Procedure 3.800(b) was amended and created a new rule which required a defendant, in order to preserve a sentencing error for appeal, to file a motion within 10 days to correct a sentence with the trial court. The rule has subsequently been amended to give a defendant 30 days within which to file the motion.

Although the Defendant's crimes and trial occurred prior to the enactment of the Criminal Appeals Reform Act, he was sentenced after the Act became law. Thus, the Act's application hereto is not barred by the doctrine of retroactivity. *Neal v. State*, 688 So. 2d 392 (Fla. 1st DCA 1997).

In *Neal*, the defendant committed his crimes before the enactment of the Act, but he was sentenced after the Act became law. On appeal, the State contended that his sentencing issue was not preserved for review since, pursuant to the Act, he failed to file a Rule 3.800(b) motion. In response, the defendant asserted

that application of the Act to him would involve a retroactive application of the statute because his crime was committed before the effective date of the Act. Thus, applying the Act to him would violate the prohibition against ex post facto laws.

The First District rejected the defendant's assertion. The court, citing to *Gwong v. Singletary*, 683 So. 2d 109,112 (Fla. 1996), found that in criminal law a law violates the ex post facto clause only if it (1) operates retrospectively and (2) alters the definition of criminal conduct or increases the penalty by which a crime is punishable. The court held that even if the Act operates retrospectively, it does not violate the ex post facto clause since it neither alters the definition of criminal conduct nor increases the penalty by which a crime is punishable. The court found the Act to be merely a procedural amendment because it did not change the legal consequences of the acts the defendant committed before its effective date. Thus, the court found that the defendant did not preserve his sentencing error and affirmed the sentence since fundamental error was not established.

In *Williams v. State*, 697 So. 2d 164 (Fla. 1st DCA 1997), the Act was applied to the same fact pattern as herein. The defendant claimed that her scoresheet was incorrectly calculated. The sentence was affirmed because the defendant failed to raise the error either at sentencing, or in a timely motion under Rule 3.800(b), and no fundamental error appeared on the record.

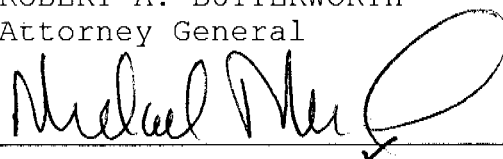
In the instant case, the Defendant did not object to the sentencing error either at trial or in a Rule 3.800(b) motion. Since the sentence imposed is within the maximum allowed by law, fundamental error does not appear on the face of the record and thus the sentence should be affirmed. However, since Defendant is complaining about an improperly calculated scoresheet, he should be entitled to file in the trial court a Rule 3.800(a) motion which allows a trial court to correct at any time an incorrect calculation made by it in a sentencing guidelines scoresheet. *Burkhalter v. State*, 578 So. 2d 345 (Fla. 1st DCA 1991).

CONCLUSION

Based on the foregoing, Petitioner requests this Court quash the decision of the District Court and affirm the departure sentence with directions for the Defendant to challenge the score sheet error in the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing SUPPLEMENTAL 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 19 day of May, 1998.



MICHAEL J. NEIMAND
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