IN THE SUPREME COURT OF FLORIDA

CASE NO. 91,270

THE STATE OF FLORIDA,

Petitioner,

v.

STEVEN RUBIN,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

SUPPLEMENTAL BRIEF OF RESPONDENT ON THE MERITS

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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 (R34-48). On May 30, 1996, following a jury trial, the Defendant was found guilty as charged (R225-232).

Following the return of the verdicts, the Court ordered a pre-sentence investigation prepared for the Defendant (R199). The pre-sentence investigation, which was completed on July 11, 1996, was filed with the Court on August 12, 1996 (R272-282). As part of the pre-sentence investigation report, the probation officer prepared a sentencing guideline score sheet which, as the State now concedes, **correctly calculated** the Defendant's score at 58.6 points, equivalent to 30.6 months in the State prison, with a minimum of 22.9 months and a maximum of 38.2 months in State prison. (R281-282). In her assessment and recommendation to the Court, the probation officer reiterated her correct score sheet calculation stating:

> The Defendant, Steven Rubin, does not have any adult or juvenile prior convictions and adjudications. According to the Sentencing Guidelines the Defendant scores a total of 58.6 points equivalent to 30.6 months State prison with a minimum of 22.9 months State prison and a maximum of 38.2 months State prison.

(R280).

Meanwhile, the State Attorney's Office submitted its own Sentencing Guideline Score Sheet in which the State **erroneously calculated** the Defendant's sentence points at 70.38, equivalent to 42.38 months in the State prison, with a minimum 31.785 months and a maximum of 52.975 months in State prison. (R351-352). The State now concedes

that this Sentencing Guideline Score Sheet was incorrect. On August 9, 1996, three days prior to the date of sentencing, defense counsel filed a "Notice of Objection to Sentencing Guideline Calculations, Jeopardy Barred" in which defense counsel objected to the guideline calculations contained on the State's Score Sheet and took the position "that the sentence months are approximately 30.88 with a minimum of 23.16, and a maximum of 38.6 as to Steven Rubin...." (R249-50).

At the time of sentencing, on August 12, 1996, the trial court clearly had before it the guideline score sheet which was correctly calculated by the probation office (R281-82) and which was referenced in the assessment and recommendation section of the PSI (R280), as well as the State Attorney prepared score sheet which incorrectly calculated the guideline sentence (R351-52). Despite the fact that **both** sets of calculations were before the trial court, the trial court explicitly relied upon the guideline score sheet which was incorrectly calculated by the State Attorney's Office in imposing sentence:

> The PSI reflects that he has a place to live, he owns two condos, he has 10 acres in Ocala. He was making Eight Thousand a year in his DJ business and making a good salary at the school. He had no reason to commit the crimes he committed other than for greed.
>
> I think you have to look at also what they score and the nature of the convictions. Al Rubin scores non-State prison. He could receive a sentence anywhere from probation up to a year in the Dade County Jail.
>
> Under the guideline Steve Rubin **according to the State's calculations** scores 31.785 points to 52.975 months, which is roughly 2-1/2 years, to just under 4-1/2 years.

(R426).

In the District Court of Appeal, one of the issues raised by the Respondent was the claim that the Defendant was entitled to be re-sentenced where the trial judge had relied upon the improperly calculated score sheet prepared by the State Attorney's Office. (Defendant's Supplemental Appendix, Initial Brief at pp.41-42). The State of Florida, in its Answer Brief **never** contended that this issue had not properly been preserved in the trial court. (State's Supplemental Appendix). In its opinion, the District Court of Appeal agreed with the Respondent holding that his departure sentence must be vacated and that he must be re-sentenced, where the trial court relied upon an incorrectly calculated score sheet. (R460). Even in requesting re-hearing and/or certification, the State of Florida **never** argued that this issue had not properly been preserved and the District Court, in fact, certified this precise question to this Court as being in conflict with *Hines v. State*, 587 So.2d 20 (Fla. 2d DCA 1991). (R464). It has not until this Court, on its own Motion, ordered the parties to provide supplemental briefing in this case that the State of Florida argued the waiver question.

QUESTION PRESENTED

WHETHER THIS COURT SHOULD REVERSE THE DECISION OF THE DISTRICT COURT OF APPEAL HOLDING THAT THE DEFENDANT MUST BE RESENTENCED WHERE THE TRIAL COURT RELIED UPON AN INCORRECTLY CALCULATED SCORE SHEET ON THE GROUNDS THAT THIS ISSUE HAD NOT BEEN PRESERVED FOR REVIEW, WHERE (1) PRIOR TO SENTENCING OBJECTIONS WERE MADE TO THE STATE'S GUIDELINE COMPUTATIONS AND THE TRIAL COURT HAD THE BENEFIT OF A CORRECTLY CALCULATED GUIDELINE SCORE SHEET WHICH WAS PREPARED BY THE PROBATION OFFICE AND NOT FOLLOWED BY THE COURT AND (2) WHERE THE STATE FAILED TO PRESERVE THE WAIVER ISSUE BY FAILING TO ARGUE IT IN THE DISTRICT COURT OF APPEAL?

SUMMARY OF THE ARGUMENT

A correctly calculated score sheet was prepared by the probation office, made part of the Respondent's Pre-Sentence Investigation Report and specifically referenced by the probation officer in her "Assessment & Recommendation" section of the PSI. (R280-82). The record establishes that the trial judge read the PSI prior to sentencing (R426) and, therefore, was "fairly apprised" of what the correct guideline score sheet calculations were in this case. Notwithstanding this, the trial judge utilized an incorrectly calculated score sheet prepared by the State Attorney's Office (R351-52), despite the fact that prior to sentencing, defense counsel filed written objections to those sentencing guideline calculations (R249-51). Under these circumstances, the Defendant submits that the sentencing error was "preserved" as that term is defined in Section 924.051(1)(b) Florida Statutes (1997).

Additionally, the State of Florida **never** raised the waiver issue in the District Court of Appeal. This amounts to a waiver by the State. *Wike v. State*, 698 So.2d 817 (Fla. 1997); *Thomas v. State*, 599 So.2d 158, 160-61, n.1 (Fla. 1st DCA 1992) Rev. Den. 604 So.2d 458 (Fla. 1992). This Court should not consider and decide a question which was not addressed by the District Court of Appeal. *Rebitz v. Baya*, 355 So.2d 1178 (Fla. 1997).

Finally, since the State now concedes that the trial judge not only used an improperly calculated score sheet, but also that the Defendant "should be **entitled** to file in the trial court a Rule 3.800(a) Motion which allows the trial court to correct at any time an incorrect calculation made by in a sentencing guideline score sheet", (State's Supplemental Brief at p.7) the State is, in effect, abandoning the harmless error argument

which it made in its initial brief and which forms the sole basis for this Court's invocation of conflict jurisdiction pursuant to District Court's certification of conflict.

ARGUMENT

THIS COURT SHOULD NOT REVERSE THE DECISION OF THE DISTRICT COURT OF APPEAL HOLDING THAT THE DEFENDANT MUST BE RESENTENCED WHERE THE TRIAL COURT RELIED UPON AN INCORRECTLY CALCULATED SCORE SHEET ON THE GROUNDS THAT THIS ISSUE HAD NOT BEEN PRESERVED FOR REVIEW, WHERE (1) PRIOR TO SENTENCING OBJECTIONS WERE MADE TO THE STATE'S GUIDELINE COMPUTATIONS AND THE TRIAL COURT HAD THE BENEFIT OF A CORRECTLY CALCULATED GUIDELINE SCORE SHEET WHICH WAS PREPARED BY THE PROBATION OFFICE AND NOT FOLLOWED BY THE COURT AND (2) WHERE THE STATE FAILED TO PRESERVE THE WAIVER ISSUE BY FAILING TO ARGUE IT IN THE DISTRICT COURT OF APPEAL

Section 924.051(3) Florida Statutes (1997) provides:

> (3) An appeal may not be taken from a judgment or order of a trial court unless a prejudicial error is alleged and is properly preserved or, if not properly preserved, would constitute fundamental error. A judgment or a sentence may be reversed on appeal only when an appellate court determines after a review of the complete record that prejudicial error occurred and was properly preserved in the trial court or, if not properly preserved, would constitute fundamental error.

The term "preserved" as utilized in this Statute is defined in Section 924.051(1)(b) Florida Statutes (1997) as follows:

> (b) "Preserved" means that an issue, legal argument, or objection to evidence was timely raised before, and ruled on by, the trial court, and that the issue, legal argument, or objection to evidence was sufficiently precise that it fairly apprised the trial court of the relief sought and the grounds therefore.

Pursuant to this Statute, this Court amended Rule 9.140(d) Fla.R.App.P., so that it now reads:

> (d) Sentencing Errors. A sentencing error may not be raised on appeal unless the alleged error has first been brought to the attention of the lower tribunal;
>
> (1) At the time of sentencing; or
>
> (2) By motion pursuant to Florida Rule of Criminal Procedure 3.800(b).

As the State of Florida points out in its Supplemental Brief, Fla.R.Crim.P. 3.800(b) permits the defendant to file a motion to correct sentencing error "within thirty days after the rendition of the sentence", whereas pursuant to Rule 3.800(a) Fla.R.Crim.P., "a court may **at any time** correct an illegal sentence imposed by it or an incorrect calculation made by it in a sentencing guideline score sheet." (Emphasis supplied).

In this case, it is the position of the Respondent that the sentencing score sheet error which formed the basis of the District Court's decision reversing Respondent's sentence and remanding this cause for re-sentencing was properly "preserved" as that term is utilized in this Statute. It is undisputed that a correctly calculated score sheet was prepared by the probation office, made part of the Respondent's Presentence Investigation Report and specifically referenced by the probation officer in her "Assessment & Recommendation" section of the PSI. (R280-82). It is also clear that the trial judge read the PSI prior to sentencing (R426) and, therefore, was "fairly apprised" of what the correct guideline score sheet calculations were in this case. It is also clear that the trial judge utilized the incorrectly calculated score sheet prepared by the State Attorney's Office (R351-52), notwithstanding the fact that prior to sentencing, defense counsel filed written

objections to those sentencing guideline calculations (R249-51). Under these circumstances, neither the Statute nor the rule required the defendant to raise this question post-sentencing. See *Thomas v. State*, 599 So.2d 158 (Fla. 1st DCA 1992), Rev. Den. 604 So.2d 458 (Fla. 1992); *Webb v. Priest*, 413 So.2d 43 (Fla. 3d DCA 1982) (appellant not required to renew an objection in what would have been an obviously futile gesture).

Moreover, this Court must be cognizant to the fact that the State of Florida **never** raised the waiver issue in the District Court of Appeal. It is well established that this Court will not address an issue raised by the State where the State fails to preserve the issue for review. *Wike v. State*, 698 So.2d 817 (Fla. 1997). Thus, where the State of Florida fails to raise a waiver issue in its Answer Brief, the Court of Appeals should not address it. See *Thomas v. State*, supra at 160-61, n.1 ("we reject the State's contention that appellant waived his objection to this evidence, not only because the State improperly attempts to insert this issue for the first time on motion for rehearing, but also because this contention is not supported by the record"). Here, the State's failure to raise the issue in the District Court of Appeal clearly amounts to a waiver on the State's part, particularly in light of decisions of this Court holding that this Court will not consider and decide a question which was not addressed by the District Court of Appeal. See *Rebitz v. Baya*, 355 So.2d 1170 (Fla. 1977).

Finally, in light of the arguments presented by the State in its Supplemental Brief, the Respondent can only reiterate his opening observation from his Initial Brief, which is that he is not sure why this case is before this Court. In concluding its Supplemental Brief,

the State of Florida concedes that the trial judge used an improperly calculated score sheet and states that the Defendant "should be **entitled** to file in the trial court a Rule 3.800(a) motion which allows the trial court to correct at any time an incorrect calculation made by it in a sentencing guideline score sheet." (State's Supplemental Brief at p.7, emphasis supplied). In effect, this is exactly the same relief ordered by the District Court in its decision which remanded the case back to the trial court so that the Respondent could be "re-sentenced under a properly calculated score sheet." (R460). Thus, the State appears to be abandoning the harmless error analysis which it made in its Initial Brief on the Merits and which form the **sole basis** for this Court's invocation of conflict jurisdiction pursuant to the District Court's certification of conflict. Certainly, in light of the fact that the State sought and obtained a certification of conflict jurisdiction from the District Court of Appeal in order to resolve what the State perceived to be a conflict among the various districts of this State, it seems anomalous for the State now to seek a reversal of the District Court's decision based upon a procedural argument which they did not make in the District Court and which, if accepted by this Court, will leave the conflict among the Districts unresolved.

CONCLUSION

Based on the foregoing reasons and citations of authority, the Respondent respectfully requests that this Court either affirm the decision of the District Court below or, in the alternative, dismiss the State's Petition for Discretionary Review.

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 mail this 2nd day of June, 1998, to: Michael Neimand, Assistant Attorney General, Office of the Attorney General, Department of Legal Affairs, Rivergate Plaza - Suite 950, 444 Brickell Avenue, Miami, FL 33131.

_____
IRA N. LOEWY, ESQ.