IN THE SUPREME COURT OF FLORIDA

CASE NO. 92,179

THE STATE OF FLORIDA,

Petitioner,

vs.

JOSEPH MACKEY,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF PETITIONER ON THE MERITS

ROBERT A. BUTTERWORTH
Attorney General

RICHARD L. POLIN
Florida Bar No. 0230987
Assistant Attorney General
Office of the Attorney General
Department of Legal Affairs
444 Brickell Avenue, Suite 950
Miami, Florida 33131
(305) 377-5441

TABLE OF CONTENTS

TABLE OF CITATIONS

Other Authorities

STATEMENT OF THE CASE AND FACTS

The defendant, JOSEPH MACKEY,[1] was charged by indictment with one count of first degree murder (premeditated and/or felony murder) and one count of aggravated child abuse. (R. 1). The defendant was charged with having committed those offenses against the two-year old daughter of his girlfriend, with whom he was living at the time.

The State's case consisted of evidence that serious head injuries were inflicted on the victim during a time period in which the victim was in the sole care and custody of the defendant, and that the child died as a result of those inflicted injuries. The incident resulting in the death of the child occurred on April 5, 1994. (T. 903-904, 635-42). The child died on April 7, 1994. (T. 1041). The defendant was convicted as charged on both counts, receiving consecutive sentences of life in prison and 15 years in prison. (R. 385-92; T. 1459-62). The sentence for aggravated child abuse was an upward departure sentence, based upon the fact that the conviction for first degree murder was an unscored capital offense. (R. 387, 392; T. 1462).

In the direct appeal to the Third District Court of Appeal, the defendant raised issues going to both the validity of the convictions and the sentence. With respect to the sentence it was claimed that the sentence for the aggravated child abuse conviction should be reversed because the trial court utilized the wrong scoresheet. The departure sentence was imposed pursuant to a 1991 scoresheet

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[1] The evidence adduced in the trial court reflects that Mackey has used several names, including Joseph Mackey, Ronnie Caloway, Virgil Caloway and Ronald Nelson Threadgil. For purposes of this brief, he will be referred to as Mackey or the defendant.

(R. 392), although the offense occurred in April, 1994. after the effective date for the 1994 guidelines and the 1994 scoresheet. The District Court of Appeal, rejecting the State's argument that the sentencing error in this case was harmless, addressed the issue as follows:

> Finally, Mackey argues that the trial court erred in using a 199 1 scoresheet rather than a 1994 scoresheet in imposing a departure sentence on the aggravated child abuse count. We agree that the court used an incorrect scorcsheet; the crimes were committed in April 1994. "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 recommendedguideline sentence.'" Rubin v. State, 697 So. 2d 161, 162 (Fla. 3d DCA 1997) (quoting Smith v. State, 678 So. 2d 1374, 1376 (Fla. 4th DCA 1996)). As in Rubin, we certify conflict with Hines v. State, 587 So. 2d 620 (Fla. 2d DCA 1991). We, therefore, vacate the sentence only on this count and remand for resentencing.

(R. 440). The convictions were affirmed and the sentence for first degree murder was affirmed. (R. 440). The State then commenced discretionary review proceedings in this Court, based on the certified conflict, seeking review of the certified question.

OUESTION PRESENTED

WHETHER AN UPWARD DEPARTURE SENTENCE IMPOSED PURSTJANT TO AN IMPROPER SCORESHEET CONSTITUTES HARMLESS ERROR WHEN THE IMPROPER SCORESHEET, PURSUANT TO WHICH THE DEPARTURE SENTENCE WAS IMPOSED, WAS THE ONE WHICH WAS MORE BENEFICIAL TO THE DEFENDANT.

SUMMARY OF ARGUMENT

The Third District Court of Appeal adheres to a policy pursuant to which any sentence imposed pursuant to an improper scoresheet constitutes per se reversible error, without consideration as to whether the particular facts regarding that sentence reflect that any such error was harmless. In refusing to subject the facts to harmless error analysis, the lower Court's ruling is contrary to the principles enunciated by this Court, as well as controlling Florida statutes. Furthermore, the facts of this particular case compel the conclusion that the use of an erroneous scoresheet in this case constitutes harmless error, as the erroneous scoresheet was the one which was more beneficial to the defendant and the correct scoresheet recommended a harsher sentence.

ARGUMENT

AN UPWARD DEPARTURE SENTENCE IMPOSED PURSUANT TO AN IMPROPER SCORESHEET CONSTITUTES HARMLESS ERROR WHEN THE IMPROPER SCORESHEET, PURSUANT TO WHICH THE DEPARTURE SENTENCE WAS IMPOSED, WAS THE ONE WHICH WAS MORE BENEFICIAL TO THE DEFENDANT.

The lower Court's opinion effectively holds that any sentence which is imposed pursuant to an improper scoresheet constitutes per se reversible error, refusing to engage in any harmless error analysis as applied to the particular facts of the case. Thus, the lower Court states that the sentence for the aggravated child abuse conviction was reversible because "[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." (R. 440). Such a mechanical application of that principle, without regard to the particular facts of the case, and without regard to harmless error analysis, is contrary to the general principles enunciated by this Court, pertinent statutes and the unique facts of the individual case.

A. Facts Demonstrating Harmless Error

The facts of this particular case compel the conclusion that the use of the erroneous scoresheet herein constituted harmless error. As indicated in the lower Court's opinion, and as confirmed by the record, the trial court imposed the sentence for the aggravated child abuse conviction pursuant to a 1991 guidelines scoresheet, even though the offense herein occurred in April, 1994, subsequent to the effective date of the 1994 guidelines and the 1994 scoresheet. (R. 440,

392.' The scorcsheet which was used resulted in a permitted sentence range of 4 ½ - 9 years. (R. 392). Under the 1994 guidelines, the scorcshcct which should have been used herein is contained in Rule 3.990, Florida Rules of Criminal Procedure. Had that scoresheet been used, the pertinent factual data - all of which can be derived from the erroneously used scoresheet (R. 392) - reflects that the defendant's recommended sentence would have fallen within a range of a minimum of 1 14.3 months (9.5 years) and a maximum of 190.5 months (15.8 years).' What is significant here is that the range under the correct scoresheet is approximately live years higher, at both the minimum and maximum ends, than the 1991 scorcshcet which was utilized. This means that the defendant, at the time of sentencing, received an unwarranted benefit of a scoresheet recommending a lower sentence. Under such circumstances, there is no reasonable basis for believing that the sentencing judge, on the basis of a correct scoresheet with a higher recommended sentence, would have imposed a lesser sentence than the one which was imposed. Since the sentence imposed was a departure sentence, the only reasonable conclusion to infer is that if the judge thought that a recommended sentence of

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[2] See, Amendments to Florida Rules of Criminal Procedure Re Sentencing Guidelines, 628 So. 2d 1084 (Fla. 1993) (holding that new rules 3.702 and 3.990 are effective on January 1, 1994); Chapter 93-406, Laws of Florida (amending section 92 1 .OO 1, Florida Statutes, and creating sections 921.0011 through 921.0014 and 921.0016, Florida Statutes, effective January 1, 1994).

[3] Counsel for Mackey, in the Brief of Appellant in the Third District Court of Appeal, had provided the pertinent calculations. The pertinent excerpt from that brief are included in an Appendix to the State's Brief of Petitioner in this Court. In calculating the correct 1994 scoresheet, the primary offense is aggravated child abuse, a level 8 offense for 74 points. The prior record (ascertainable from the 1991 scoresheet at R. 392) includes one grand theft level 4 (2.4 points), two robberies at level 6 (9.6 points) and one burglary at level 4 (2.4 points). The victim injury would be 60 points and legal status 4 points, resulting in a total of 152.4 points. When multiplied by the factors of .75 and 1.25, for determining the lower and upper ends of the recommended range, the defendant's point total under the 1994 scoresheet would translate into a range of a minimum of 114.3 months or 9.5 years (152.4 x .75) and a maximum of 190.5 months or 15.8 years (152.4 x 1.25).

4 ½ - 9 years necessitated a departure up to 15 years in prison, the judge would likewise have concluded that the same 15 year sentence was warranted for a defendant with a recommended range of 9.5 - 15.5 years - a recommendation which is higher than the one upon which the judge based the sentence. Certainly the defendant with the harsher recommended sentence (with all other factors being equal, as they obviously are) is going to be perceived as requiring a sentence equal to or greater than the sentence imposed by the judge on the defendant with the lower recommended sentence.

B. Controllinp Legal Principles

Sentencing errors, like virtually all other errors, are subject to harmless error analysis. ". . . [R]eversal of a sentence is warranted only if correction of the errors could reasonably result in a different sentence." Barwick v. State, 660 So. 2d 685,697 (Fla. 1995) (quoting Rogers v. State, 5 11 So. 2d 526, 535 (Fla. 1987). See also, Burns v. State, 609 So. 2d 600, 607-608 (Fla. 1992); White v. Dugger, 565 So. 2d 700 (Fla. 1990).

In the context of sentencing guidelines scoresheet errors, harmless error analysis has previously been applied in several contexts. Errors which have left the defendant in the same recommendedcell have been found to constitutcharmless error. See, e.g., Burrows v. State, 649 So. 2d 902 (Fla. 1 st DCA 1995); Ewing v. State, 526 So. 2d 1029 (Fla. 1 st DCA 1988); Holland v. State, 672 So. 2d 566 (Fla. 5th DCA 1996). Similarly, scoresheet errors have been deemed harmless when the sentence imposed was pursuant to a plea, and it was clear that the defendant would have received the same sentence notwithstanding the error. Orsi v. State, 5 15 So. 2d 268 (Fla. 2d DCA 1987).

When departure sentences have been involved. Florida appellate courts have again recognized that harmless error analysis can apply if it is clear that the departure sentence would have been imposed notwithstanding the scoresheet error. Smith v. Singletary, 666 So. 2d 986, 987-88 (Fla. 4th DCA 1996); 1 lines v. State, 587 So. 2d 620 (Fla. 2d DCA 1991); Scott v. State, 469 So. 2d 865, 867 (Fla. 1 st DCA 1985). Similarly, when the wrong scoresheet has been used, District Courts of Appeal other than the Third have demonstrated a willingness to look at the facts to determine whether it is clear that the same sentence would have been imposed with the correct scoresheet. Gibbons v. State, 543 So. 2d 860 (Fla. 2d DCA 1989) (wrong scoreshcct, but since defendant remained in same recommended cell, error was harmless).

Indeed, in situations far more serious than sentencing guidelines scoresheet errors, this Court, in reviewing death sentences, has routinely found that sentencing errors, such as the improper consideration of aggravating factors, can constitute harmless error based upon a careful review of the facts of the case. White v. Dugger, supra; Barwick, supra.

Whereas other Florida appellate courts, in the context of both departure sentences and wrong scoresheets, have evinced a willingness to look to the particular facts to determine whether it is clear that the same sentence would have been imposed but for the error, the Third District has taken a contrary view, finding the use of the wrong scoresheet to constitute per se reversible error, requiring resentencing. What emerges from the foregoing cases, however, is a clear pattern. When the calculation error has been to the detriment of the defendant, harmless error will rarely be found. Thus, in the typical case where scoresheet or calculation errors have resulted in a reversal, the

scoresheet upon which the sentence was based recommended a harsher sentence than the one which would have been recommended based upon a properly calculated or prepared scoresheet. The correct scoresheet, or the correct calculations, in those cases, have routinely placed the defendant in a lower recommended cell or a lower recommended range. See, e.g., Scott, 469 So. 2d at 866-67 (reversal required where scorcshect errors resulted in maximum recommendation of 12 years as opposed to the seven years based on proper calculations); Gregory v. State, 554 So. 2d 1216 (Fla. 2d DCA 1990) (use off wrong scoresheet constituted reversible error where the scoresheet which was used included additional points and harsher recommended sanctions); Yourn v. State, 652 So. 2d 1228 (Fla. 2d DCA 1995) (use of wrong scoresheet required reversal where the 17 year sentence imposed by the judge on basis wrong scoresheet fell at the lower end of the recommended range, whereas the same 17 year sentence would have been at the upper range of a permissible two-cell bump-up on the correct scoresheet); Smith v. Singletary, supra (upward departure sentence required reversal where scoresheet improperly included victim injury points and deletion of excessive points would have resulted in a lower recommended sentence, with a one-cell decrease); Sellers v. State, 578 So. 2d 339,341 (Fla. 1st DCA 1991) (scoresheet error not harmless where deletion of points reduced the recommended sentcncc); Deparvine v. State, 603 So. 2d 679 (Ha. 1 st DCA 1992) (same); Dawson v. State, 532 So. 2d 89 (Fla. 4th DCA 1988) (same); Thompson v. State, 585 So. 2d 1130 (Fla. 3d DCA 1991) (scoresheet error necessitating deletion of excessive points from improper calculations required reversal); Cochran v. State, 592 So. 2d 784 (Fla. 4th DCA 1992) (same)."

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[4] In Stepps v. State, 675 So. 2d 1008 (Fla. 1 st DCA 1996), the use of an improper scoresheet altered the applicable range for a nondeparture sentence. The opinion does not provide detailed facts

Thus, it can readily be seen that when scoresheet errors, including the use of a wrong scoresheet. have been deemed reversible and not harmless, the errors have invariably been of such a nature that the erroneous calculations have been to the detriment of the defendant, resulting in greater point totals and/or harsher recommended sentences. Such errors have not been deemed reversible where the error has been to the benefit of the defendant, as where the error resulted in too few points being included, with a lower recommended sentence.

Apart from the pertinent analysis of cases construing sentencing scoresheet errors, it should further be noted that the sentencing occurred in this case on April 17, 1996 (R. 385), with the direct appeal having been filed on May 16, 1996 (R. 403), with both dates predating the effective date (July 1, 1996), of section 924.05 1(7), Florida Statutes (Supp. 1996), which provides that a sentence may not be reversed absent an express finding that a prejudicial error occurred in the trial court. Prejudicial error is defined, in section 924.05 l(l), Fla. Stat. (Supp. 1996), as an error in the trial court that harmfully affected the sentence. The per se approach, adopted by the Third District herein, pursuant to which an erroneous scoresheet necessitates a reversal without considering the differing factual scenarios outlined above, is clearly inconsistent with the general legal principles enunciated by this Court, the overwhelming body of case law from other District Courts of Appeal, the mandate of the legislature, and the facts of the instant case.

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comparing the scores on the improperly and the properly calculated scoresheets, but the only reasonable inference from the opinion is that the correct scoresheet resulted in the lesser range.

CONCLUSION

Based on the foregoing, the Petitioner requests that this Court quash the decision of the lower Court and hold that the use of an improper sentencing guidelines scoresheet constitutes harmless error, where the sentence imposed is an upward departure sentence, and the correct scoresheet would have resulted in a harsher recommended sentence than the improper scoresheet.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General

RICHARD L. POLIN
Florida Bar No. 0230987
Assistant Attorney General
Office of the Attorney General
Department of Legal Affairs
444 Brickell Avenue, Suite 950
Miami, Florida 33 13 1
(305) 377-544 1
(305) 377-5655 (fax)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Petitioner on the Merits was mailed this 9th day of February, 1998, to MART1 ROTHENBERG, Assistant Public Defender, Office of the Public Defcndcr, 1320 N.W. 14th Street, Miami, Florida 33125.

RICHARD L. POLIN