IN THE SUPREME COURT OF FLORIDA

SHEROD DILLARD, :

Petitioner, :

vs. : Case No.

STATE OF FLORIDA, :

Respondent. :
_____:

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

AMENDED
BRIEF OF PETITIONER ON JURISDICTION

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TENTH JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

Petitioner, Sherod Dillard, was the Appellant in the Second District Court of Appeal and the defendant in the trial court. Respondent, the State of Florida, was the Appellee in the Second District Court of Appeal. The appendix to this brief contains a copy of the decision rendered July 2, 1997, the opinion issued on rehearing on October 22, 1997, and the denial, of the motion rehearing, filed on January 30, 1998. There were two cases handled in the appellate decision in this case. For purposes of page references case 96-0724 will be referred to as case A and 96-0734 will be referred to as case B.

STATEMENT OF THE CASE AND FACTS

Petitioner had two cases on appeal encompassing the same sentencing issue. Both appellate cases, which are the subject of this jurisdictional brief, were handled together in the same opinions issued by the Second District Court of Appeal.

On July 23, 1992, the state attorney of the Twentieth Judicial Circuit in Lee County filed a two count petition in trial case number 92-1719CF charging Petitioner, Sherod Dillard, with attempted armed robbery with a fire arm in violation of section 812.13, Florida Statutes (1991); and shooting into an occupied vehicle in violation of Section 790.19, Florida Statutes (1991). (AV1, R5) Both crimes allegedly occurred on May 3, 1992. (AV1, R5) On December 3, 1992 the state attorney filed a three count information in case number 92-2687Cf charging Petitioner with burglary of a dwelling in violation of Section 810.02, Florida Statutes (1991); grand theft and grand theft of a firearm in violation of section 812.014, Florida Statutes (1991). (BV1, R5, 6) These offenses allegedly occurred on May 7, 1992. (BV1, R5) Petitioner who was born on April 15, 1977, was fifteen years old at the time of these offenses. (BV1, R5)

On March 25, 1993, Petitioner entered no contest pleas to a lesser included offense on the armed robbery with a firearm charge and as charged on all other offenses. (AV1, R9-12; BV1, R10-13) Petitioner was sentenced as an adult, concurrently on all charges,

to six months community control followed by five years probation, which was a downward departure from the sentencing guidelines. (AV1, R13-19; BV1, R14, 19-22)

In September 1993, Petitioner admitted to violating his community control. (AV2, R32; BV2, R34) Petitioner was sentenced as a youthful offender, again concurrently, to four years imprisonment followed by two years community control. (AV2, R35-42; BV2, R34, 38-45)

On December 22, 1994 an affidavit of violation of community control was filed because there was a new law violation in trial case number 95-412CF. (AV2, R53, 54) Petitioner was convicted at trial on the new charges in case number 95-412CF. (AV3, R72)

At the sentencing hearing in 95-412CF on December 22, 1995, Petitioner admitted to violating his community control and sought to be sentenced for the violation at that time. (AV3, R83-84, 90-91; BV3, R83-86, 92-93) The sentencing guidelines in 95-412CF, under a new version of the scoresheet, called for a permitted range sentence between 75 and 125.2 months imprisonment. (AV3, R75) Judge Rosman sentenced Petitioner in 95-412CF to the maximum sentence under the guidelines of 125.2 months imprisonment, to be followed by 20 years probation. (AV3, R81) The old version of the scoresheet used in the two violation of community control cases called for a permitted range sentence of between 4 1/2 and 9 years imprisonment. (AV3, R110) Petitioner's attorney argued that any sentence imposed

for the violation in 92-1719CF and 92-2687CF would have to be run concurrent with the maximum guideline sentence imposed in 95-412CF, because while separate scoresheets are considered, the maximum guideline sentence for all cases pending for sentencing is that reflected in the worst scoresheet. (AV3, R86) The trial judge continued the sentencing in the two violation cases to "look at the issue." (AV3, R88)

On January 19, 1995, the trial court revoked Petitioner's community control and sentenced him concurrently on both violation cases to six years imprisonment to run consecutively to the prison term imposed in 95-412CF. (AV3, R105-106) Petitioner appealed the consecutive sentences imposed on the two violation cases. (AV4, R121-122; BV4, R123-124) The Second District Court of Appeal issued an initial opinion reversing the case for resentencing to use a single scoresheet based on the decision in State v. Lamar, 659 So. 2d 262 (Fla. 1995). In the initial opinion the court indicated that because of their decision, Petitioner's argument against consecutive sentences was moot. (Appendix 1)

After rehearing, The Second District Court of appeal withdrew their initial opinion and issued a new opinion affirming the sentence where two scoresheets were used. (Appendix 2) Although at this point the consecutive sentencing issue was no longer moot, the Second District Court of Appeal did not address the consecutive sentence issue in their new opinion. (Appendix 2) Petitioner filed

a motion for rehearing pointing out that the consecutive sentencing issue was no longer moot and that under Tito v. State, 616 So. 2d 39 (Fla. 1993), since Petitioner received a maximum guidelines punishment in the new law offense case, the sentences on the violation cases needed to be concurrent with the new law offense case. Petitioner's motion for rehearing was denied on January 30, 1998. (Appendix 3)

SUMMARY OF THE ARGUMENT

The Second District Court of Appeal's decision is in conflict with the Florida Supreme Court where it held that it was illegal to impose consecutive sentences, which resulted in a harsher sentence than the most severe scoresheet, on two violation of community control cases pending for sentencing at the same time as a new law offense case. The Florida Supreme Court Held in Tito that when these two types of cases are pending for sentencing before the same court, the most severe guideline scoresheet is to be used. In the instant case it was error to use two separate scoresheets and impose consecutive sentences which exceeded the harshest sentence recommended by the most severe scoresheet.

ARGUMENT

ISSUE I

WHETHER THE DECISIONS IN Dillard v. State, Case Nos. 96-0724 and 96-0734 (Fla. 2d DCA October 22, 1997), CONFLICTS WITH THE FLORIDA SUPREME COURT OPINION THAT THE SCORESHEET WHICH ALLOWS THE MOST SEVERE SANCTION IS TO BE USED WHEN SENTENCING VIOLATION CASES IN CONJUNCTION WITH A NEW LAW OFFENSE CASE?

Petitioner was before the trial court for sentencing on a new law offense that occurred after the new guidelines took effect January 1, 1994, and for violations of community control for offenses which occurred prior to January 1, 1994. Two separate scoresheets were used in sentencing Petitioner. Petitioner received a maximum guideline sentence on the new law offense and then the trial court imposed a consecutive six year sentence on the violation of community control cases.

Petitioner agrees that two separate scoresheets are to be utilized where there are offenses that occurred both prior to and after January 1, 1994. The Second District Court of Appeal's initial opinion said the consecutive sentencing issue was moot because they had reversed the case for a new sentence using one scoresheet. After rehearing, the Second District Court of Appeal reversed their initial decision and affirmed the sentencing of the trial court. This final opinion which failed to address the consecutive sentencing issue conflicts with the opinion of the Florida Supreme Court in Tito v. State, 616 So. 2d 39 (Fla. 1993).

The opinion in Tito is still good law and should apply in Mr. Dillard's case. This Court in Tito held:

> When probation violation cases are being sentenced in conjunction with new substantive offenses, multiple scoresheets are to be prepared to determine the most severe sanction. Once the scoresheet with the most severe sanction is determined, that is the scoresheet to be used.

Id. at 40. Thus even though two scoresheets can be considered in Mr. Dillard's case, the total sentence imposed on all cases pending for sentencing at the same time could not exceed the sentence proscribed by the most severe scoresheet.

The sentence Petitioner received in the instant case violated the law set forth in Tito because his sentence, for all cases pending before the court for sentencing, exceeded the sentence proscribed by the most severe scoresheet which was 125.2 months imprisonment. Florida Rule of Criminal Procedure 3.703 (d) (3) which allows the court to prepare and use separate scoresheets and impose concurrent or consecutive sentences in the situation involved in the instant case is a change in the controlling law set forth in Tito. Rule 3.703 (d) (3) became effective on October 1, 1995. Since Petitioner's offenses were committed on May 3, 1992 and December 14, 1994, Tito was the controlling law in this case.

Since Tito was the controlling law at the time of Petitioner's sentencing, the trial court's imposition of consecutive sentences using two separate scoresheets resulted in an increased punishment

greater than the most severe scoresheet. This was an ex-post facto application of the law which is prohibited by the United States and Florida Constitutions. Trotter v. State, 690 So. 2d 1234 (Fla. 1996). It was error for Petitioner to receive a sentence that exceeded the maximum sentence of 125.2 months as proscribed by the most severe scoresheet.

CONCLUSION

Based on the foregoing arguments and authorities, Petitioner has demonstrated that conflict does exist with the instant decision and The Florida Supreme Court so as to invoke discretionary review.

APPENDIX

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Dale E. Tarpley, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on this _____ day of March, 1999.

Respectfully submitted,

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