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OCT 23 1998
CLERK, SUPREME COURT
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IN THE SUPREME COURT OF FLORIDA

SHEROD DILLARD,

Petitioner,

v. Case No. 92,615

STATE OF FLORIDA,

Respondent.
_____/

MERITS BRIEF OF RESPONDENT

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CERTIFICATE OF SIZE AND STYLE OF FONT

Your undersigned hereby certifies that the size and style of font used in this brief is 12 point Courier New, a font that is not proportionately spaced. And, if footnotes are published, the same size and style of font is used and the footnotes are single spaced.

TABLE OF CITATIONS

OTHER AUTHORITIES

SUMMARY OF THE ARGUMENT

The use of dual scoresheets in the instant case was appropriate in light of pre-existing decisional law and section 921.001 (4)(b), Florida Statutes (1994 Supp.). Moreover, the imposition of consecutive sentences was not improper in view of Rule of Criminal Procedure 3.703 (d)(3) which can be construed as clarifying the legislative intent in enacting section 921.001 (4)(b). The consecutive sentences were also appropriate under the authority of Allen v. State, infra.

ARGUMENT

UNDER EXISTING DECISIONAL LAW IT WAS APPROPRIATE FOR THE TRIAL COURT TO USE TWO SCORESHEETS WHEN SENTENCING THE PETITIONER FOR CRIMES COMMITTED BEFORE AND AFTER THE EFFECTIVE DATE OF THE 1994 SENTENCING GUIDELINES AND IT WAS NOT IMPROPER TO MAKE THE SENTENCE FOR THE PRE-1994 CRIMES CONSECUTIVE TO THE SENTENCE IMPOSED FOR THE POST-1994 CRIME.

The Honorable Court granted discretionary review to consider whether the sentencing procedure used in the instant case conflicts with the rule of Tito v. State, 616 So. 2d 39 (Fla. 1993). That is, in the instant case, the petitioner's offenses fell under the 1983 sentencing guidelines and under the 1994 sentencing guidelines. Two scoresheets were prepared and consecutive sentences were imposed under each version of the guidelines.

This conflicted with the rule of Tito that, when sentencing for a community control or probation violation, separate scoresheets are to be prepared, with the court using the scoresheet recommending the most severe sanction. Tito, however, embraced sentencing procedure under the 1983 guidelines. The state maintains that, in enacting a new set of guidelines, the legislature had made Tito a relic.

The 1994 sentencing guidelines were enacted as a part of the "Safe Streets Initiative of 1994." The revision of the sentencing guidelines was intended to emphasize " ...

incarceration in the state prison system for violent offenders and nonviolent offenders who have repeatedly committed criminal offenses and have demonstrated an inability to comply with less restrictive penalties previously imposed." 93 Laws of Florida 406, 2912. This statement of legislative intent implies that it was not inappropriate to consecutively sentence under the old and new guidelines.

In the district court, the petitioner argued that the trial court improperly relied on Florida Rule of Criminal Procedure 3.703 (d)(3), since this rule was not effective until October 1, 1995. The state responded that the intent in enacting rule 3.703(d)(3) was to clarify judicial procedure in light of section 921.001, Florida Statutes. As amended, section 921.001 reads in pertinent part:

> 1). The guidelines enacted effective October 1, 1983 apply to all felonies, except capital felonies, committed on or after October 1, 1983, and before January 1, 1994;
> ...
> 2). The 1994 guidelines apply to sentencing for all felonies, except capital felonies, committed on or after January 1, 1994.

Fla. Stat. § 921.001 (4)(b) (1994 supp.). Here, because the appellant was being sentenced for felonies committed both before and after January 1, 1994, the trial court was required to use two guideline scoresheets. Norris v. State, 659 So. 2d 1352, 1354 (Fla. 5th DCA 1995). See also Allen v. State, 664 So. 2d 4, 5 (Fla. 3d DCA 1995); Heath v. State, 656 So. 2d 527 (Fla. 1st

DCA 1995).

Moreover, sentencing the petitioner consecutively on the pre-1994 offenses to the maximum six (6) years available as a youthful offender was not error. For example, in Allen the defendant was before the court for sentencing for a violation of probation for a non-capital felony committed in 1993 and for a new substantive offense, a non-capital felony committed in 1994. The Allen court found that the use of separate scoresheets for the probation violation and for the new substantive offense committed in 1994 was appropriate. Id. at 5.

In Allen, as in the instant case, the trial court imposed a consecutive sentence through the use of a separate scoresheet. The Allen defendant argued that the trial court had not imposed a sentence in accordance with her plea bargain of a guideline sentence to which the court responded:

> Contrary to the defendant's point on appeal, the defendant did receive a proper guidelines sentence in accord with the negotiated plea, namely, (1) four and one-half years imprisonment for unlawful possession of cocaine in the violation of probation case, utilizing a 1993 sentencing guidelines scoresheet; and (2) a consecutive term of one year of community control, followed by two years of drug offender probation, for unlawful sale of cocaine in the substantive offense case, utilizing a 1994 sentencing guidelines scoresheet. We, accordingly, affirm.

664 So. 2d at 5. In the instant case, as in Allen, the use of separate scoresheets and the imposition of a consecutive sentence

based upon the separate scoresheets should be affirmed. This result comports with preexisting law. See Fla. Stat. § 921.16 (1) (1993).

The petitioner is hardly in a situation to complain about consecutive sentencing under the old and new guidelines since he demonstrated a complete inability to conform to the requirements of ordered liberty. Allen was controlling precedent at the time the petitioner was sentenced and the trial court was bound to follow that decision. Pardo v. State, 596 So. 2d 665 (Fla. 1992). That is, in the absence of interdistrict conflict, district court decisions bind all Florida trial courts. Id. at 666. The Allen court and the Second District were correct in allowing separate scoresheets and consecutive sentencing. The Allen court merely sentenced according to the legislative intent embodied in the Safe Streets Initiative. There has been no ex post facto application of rule 3.703 (d)(3).

As a matter of state policy the court should approve the sentencing procedure in Allen and the instant case. Tito was applicable to sentencing under the old guidelines, but has been superseded by a new set of guidelines and a stricter sentencing policy. The emphasis is on incarceration for offenders, such as the petitioner, who demonstrate an inability to conform to the law. The court is bound to follow the legislative intent of the 1994 guidelines. The state respectfully requests that the

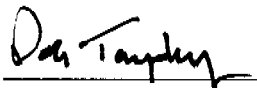
Honorable Court affirm the sentencing under review.

CONCLUSION

In light of the foregoing facts, arguments, and authorities, the sentence appealed from should be affirmed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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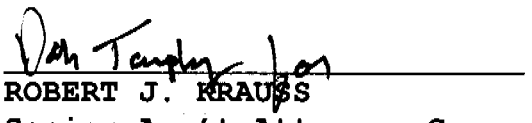

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Julius J. Aulisio, Esq., Assistant Public Defender, P.O. Box 9000—Drawer PD, Bartow, Florida 33831, this 21st day of October, 1998.

Debra Tangeley
OF COUNSEL FOR RESPONDENT

IN THE SUPREME COURT OF FLORIDA

SHEROD DILLARD,

Petitioner,

v. Case No. 92,615

STATE OF FLORIDA,

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_____/

APPENDIX TO

MERITS BRIEF OF RESPONDENT

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IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

SHEROD DILLARD,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

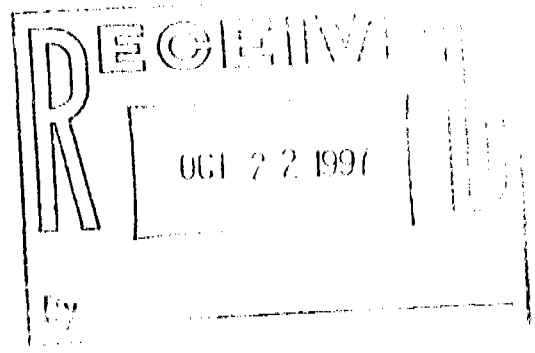
CASE NOS. 96-00724
96-00734

Opinion filed October 22, 1997.

Appeal from the Circuit Court of Lee County; Jay B. Rosman, Judge.

James Marion Moorman, Public Defender, and Thomas P. Crean, Assistant Public Defender, Bartow, for Appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Dale E. Tarpley, Assistant Attorney General, Tampa, for Appellee.



PER CURIAM.

Sherod Dillard challenges his sentences in three separate cases: two 1992 cases involving revocation of community control (circuit court case numbers 92-1719CF

and 92-2687CF) and a 1995 case involving a new substantive offense (circuit court case number 95-412CF). Dillard argues the trial court erred in using two scoresheets when sentencing him for the 1992 cases and the 1995 case. We affirm the sentences because two scoresheets must be used when sentencing at the same hearing for offenses committed prior to January 1, 1994, and for offenses committed on or after January 1, 1994. See Hale v. State, 22 Fla. L. Weekly D691 (Fla. 2d DCA March 12, 1997); Allen v. State, 664 So. 2d 4 (Fla. 3d DCA 1995); Norris v. State, 659 So. 2d 1352 (Fla. 5th DCA 1995).

CAMPBELL, A.C.J., PATTERSON and QUINCE, JJ., Concur.