

IN THE SUPREME COURT OF THE STATE OF FLORIDA

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FILED

SID J. WHITE

OCT 19 1998

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

IN RE: ADOPTION OF FLORIDA
RULES OF CRIMINAL PROCEDURE
3.704 AND 3.992 TO
IMPLEMENT THE FLORIDA
CRIMINAL PUNISHMENT CODE.

CASE NO. 93,774

COMMENTS ABOUT RULE 3.704 AND 3.992

COMES NOW undersigned counsel, Blaise Trettis, and respectfully submits the following two comments about Florida Rule of Criminal Procedure 3.704 and the criminal punishment code scoresheet in rule 3.992.

I.

In the scoresheet rule, this sentence follows the "reasons for departure-mitigating circumstances" portion of the scoresheet:

Pursuant to 921.0026(3) the defendant's substance abuse or addiction does not justify a downward departure from the lowest permissible sentence.

Undersigned counsel submits that this sentence should be deleted because it is unnecessary, out of place in the scoresheet, and, most importantly, appears to be a subtle criticism of the judiciary. On October 1, 1998,

undersigned counsel attended a criminal punishment code training session presented by Ms. Joann Leznoff who was described as the Florida Department of Corrections Probation and Parole Dep't. resident expert on the sentencing guidelines. Ms. Leznoff stated that the sentence above was included in the scoresheet form at the prompting of the assistant state attorney from Dade County who authored the criminal punishment code. This sentence is unnecessarily included in the scoresheet form. Undersigned counsel surmises that it is included only because of a prosecutor's chagrin that the judiciary ever accepted drug addiction as a reason to depart from the recommended guideline sentence range. There certainly has not been a problem of judges continuing to impose departure sentences based on drug addiction after s. 921.0026(3) became effective. Indeed, the enactment of this law was well publicized throughout Florida even before it became effective and its existence has been common knowledge in the criminal divisions of the state courts. Additionally, the sentence is out of place in the scoresheet. The sentence is included in the portion of the scoresheet listing reasons for downward departures - which it of course is not.

II.

Undersigned counsel submits that the portion of rule 3.704 that address community sanction violation points should be amended because: (1) The language in the proposed rule differs substantially from the pertinent language in the criminal punishment code statute; (2) Rather than tracking the language of the statute, the more expansive language in the rule is based on the personal belief of certain people that a person on probation should be penalized for previous allegations of probation violations no matter what decision the court reached concerning the previous allegation.

The relevant language concerning community sanction violation points in the criminal punishment code statute is:

Community sanction violation points are assessed when a community sanction violation is before the court for sentencing. Six (6) sentence points are assessed for each community sanction violation, and each successive community sanction violation; however, if the community sanction violation includes a new felony conviction before the sentencing court, twelve (12) community sanction violation points are assessed for such violation, and for each successive community sanction violation involving a new felony conviction.

assessment of community sanction violation points.

(Ch. 98-204, s. 6 at 1960, Laws of Fla.)

FS 921.0024
(1)(b)
P. 2388

However, the language in rule 3.704 is much more expansive in its explanation of community sanction points. The language in the proposed rule states:

Community sanction violation points are assessed when a community sanction violation is before the court for sentencing. Six community sanction violation points must be assessed for each violation or if the violation results from a new felony conviction, 12 community sanction violation points must be assessed. Where there are multiple violations, points may be assessed only for each successive violation that follows a continuation of supervision, or modification or revocation of the community sanction before the court for sentencing and are not to be assessed for violation of several conditions of a single community sanction. Multiple counts of community sanction violations before the sentencing court may not be the basis for multiplying the assessment of community sanction violation points. (emphasis supplied).

At the criminal punishment code training session attending by undersigned counsel, Ms. Leznoff explained that the rule reflects the belief that a probationer should be punished for previous allegations of probation violation no matter if the judge continues probation, reinstates probation, modifies probation or revokes probation. This

personal belief is not reflected in the language used by the legislature in the criminal punishment code statute. The inclusion of the language in the rules of criminal procedure results in the denial of due process of law. For example, a trial judge may dismiss a violation of probation warrant after a violation of probation evidentiary hearing because the evidence establishes that the defendant did not violate the probation terms. In such a case, the defendant is still on probation and there is a "continuation of supervision" after the probation officer has "violated probation" by submitting an affidavit of violation of probation. Thus, as currently worded, the rule mandates that additional points (i.e. additional prison time) be imposed against a probationer for a past allegation of a violation even though the trial court found that there was no violation.

The same due process violation would occur if the trial court were to "modify" probation conditions after a violation is alleged. In Hunt v. State, 685 So.2d 964 (Fla. 3rd DCA 1996), review denied 693 So.2d 33, the court held that the trial court can modify the terms of probation rather than revoke probation. A modification of probation might occur when a probationer is unable to satisfy a particular condition of probation but is otherwise

complying with probation in all respects. For example, a probationer who is making restitution payments to a victim may become disabled in a car accident and therefore is unable to continue making the payments through no fault of his own. The probation officer does not have the authority to excuse the nonpayment or change the terms of the payments so the probation is "violated" when the officer submits the affidavit of violation. In such a case, the trial judge is likely to not make any findings at all whether or not the probationer has violated probation. Instead, the court might order probation be reinstated or continued with lower restitution payments, or order the payments to be suspended while the probationer recovers, or convert the restitution to a civil judgement in favor of the victim. Whatever action the judge might take, probation has been modified and continued after a "violation" that is no fault of the probationer. Due process of law would be violated if community sanction points were assessed for this type of violation.

Undersigned counsel submits that the Court should change the wording of rule 3.704. The appellate courts, on a case by case basis, should be allowed to decide the law regarding sentencing points in violation of probation cases. The committee responsible for writing the proposed

rule is apparently attempting to have the Florida Supreme Court make law that is consistent with a particular philosophy or viewpoint through the promulgation of a rule of procedure in an area that is unsettled and subject to great differences in interpretation due to the vagueness and uncertainty of the language in the criminal punishment code statute. Undersigned counsel submits that the Court should simply track the language of the criminal punishment code and let the appellate courts determine what the law will be after the issue is thoroughly argued by advocates representing the state's interests and the defendant's interests. Therefore, undersigned counsel respectfully submits that the community sanction points portion of rule 3.704 be amended as follows:

Community sanction violation points are assessed when a community sanction violation is before the court for sentencing. Six community sanction violation points must be assessed for each violation or if the violation results from a new felony conviction, 12 community sanction violation points must be assessed. Where there are multiple violations, points may be assessed only for each successive violation ~~that follows a continuation of supervision, or modification or revocation of the community sanction~~ before the court for sentencing and are not to be assessed for violation of several conditions of a single community sanction. Multiple counts of community sanction violations before the sentencing court may not be the basis for

multiplying the assessment of community
sanction violation points.

Respectfully submitted,

A handwritten signature in cursive script that reads "Blaise Trettis".

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