IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,	:	
Petitioner,	:	
v.	:	Case No. 95,641
JOHN WAYNE SPELL,	:	
Respondent.	:	
	:	

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

BRIEF OF RESPONDENT ON MERITS

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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STATEMENT CERTIFYING TYPE FONT

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SUMMARY OF THE ARGUMENT

The appellate decision in this case should be affirmed because it is not in conflict with any other decision. The holding in Fitzhugh v. State, 698 So. 2d 571 (Fla. 1st DCA 1997), which the State urges this Court to adopt, is inapplicable to the facts of this case because, unlike in Fitzhugh, the defendant first asserted the error in this case in the trial court, not the appellate court, thus complying with the contemporaneous objection requirement.

ARGUMENT

WHETHER A DEFENDANT IS BARRED FROM RAISING A CLAIM OF KARCHESKY ERROR AT RE-SENTENCING ON A VIOLATION OF COMMUNITY CONTROL WHERE THERE IS A NEW SCORESHEET, WHEN HE FAILED TO OBJECT TO THE IMPOSITION OF FORTY VICTIM INJURY POINTS AT THE ORIGINAL SENTENCING?

The State has urged this Court to adopt the holding in Fitzhugh v. State, 698 So. 2d 571 (Fla. 1st DCA 1997), that an appeal from re-sentencing following a violation of probation is not the proper time to assert an error in the original sentencing guidelines scoresheet. That holding, however, is irrelevant to the facts of this case because (1) this case involved an error in a new scoresheet and (2) that error was first asserted by the defense at the re-sentencing proceedings in the trial court, not during the appeal.

Both Fitzhugh and this case involved the issue of whether forty points for victim injury were improperly included on a scoresheet in light of the decision in Karchesky v. State, 591 So. 2d 930 (Fla. 1992). The defendant in Fitzhugh objected, on appeal from the revocation of his probation, to the inclusion of the forty points on the scoresheet used at his original sentencing. The court in Fitzhugh held that "an appeal from re-

sentencing following violation of probation is not the proper time to assert an error in the original scoresheet." Fitzhugh, 698 So. 2d at 573 (emphasis added).

In contrast to Fitzhugh, the defendant in this case objected, in the trial court, to the forty points included on a new scoresheet prepared for sentencing in 1997 upon revocation of community control. Despite the defendant's objection, the trial court sentenced the defendant pursuant to a scoresheet which included the disputed forty points. On appeal the Second District Court of Appeal reversed, relying on its prior decision in Wright v. State, 707 So. 2d 385 (Fla. 2d DCA 1998), which held that a scoresheet error is reviewable at re-sentencing after a community control violation even if there was no objection at the original sentencing. Spell v. State, 731 So. 2d 9 (Fla. 2d DCA 1999).

Even Judge Altenbernd, who disagreed with the majority's conclusion to reverse for re-sentencing, stated in his dissent, "I agree that [the defendant] can raise this issue for the first time at the 1997 sentencing hearing because the relevant scoresheet is new ...," adding that he doubted that a "meaningful inter-district conflict exists in this record." 731 So. 2d at 11.

The State argues that the appellate decision in this case does not comport with the intent of State v. Montague, 682 So. 2d 1085 (Fla. 1996), that objections be raised in the trial court where additional evidence can be taken, if necessary, to facilitate an intelligent appellate review of the issue. As already mentioned above, however, the objection in this case was first raised in the trial court, but that court denied the objection. Had the trial court entertained the objection, then the proper evidentiary hearing could have been held to determine whether or not the disputed victim injury points were proper.

Thus, the State's expressed concerns about locating witnesses and the freshness of those witnesses' memories are irrelevant here because there was no need for the State to produce those witnesses after the trial court denied the defendant's objection. In fact, there has been no showing in this case that necessary witnesses could not be located or, in fact, that the necessary evidence is not already in the trial court's record.

According to the State's position, on re-sentencing the prosecution could present a newly prepared scoresheet which perpetuates errors from the original scoresheet, even if the scoresheet error were blatant, and the trial court would be

compelled to impose an improper sentence pursuant to the inaccurate scoresheet even in the face of a defense objection.

Although the State has argued that the equitable doctrine of laches supports its position in this case, equity would seem to require that scoresheet errors be corrected upon re-sentencing with a new scoresheet so that a proper and legal sentence can be imposed, rather than requiring the perpetuation of errors and continued improper sentencing.

In summary, the Second District's decision in this case is not in conflict with the decision in Fitzhugh because the facts of the two cases differ significantly. Furthermore, the defense in this case complied with the contemporaneous objection rule by objecting to the inclusion of victim injury points in the new scoresheet prepared after revocation of community control. Finally, equity suggests that the State be required to present the trial court with an accurate scoresheet on re-sentencing rather than being allowed to perpetuate past errors.

CONCLUSION

Respondent respectfully suggests that the decision of the Second District Court of Appeal be affirmed.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Ann Pfeiffer Howe, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on this _____ day of January, 2001.

Respectfully submitted,

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