IN THE SUPREME COURT
STATE OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

Case. No. 95,641
(2d DCA Case No.
97-00572)

JOHN WAYNE SPELL,

Respondent.
_____/

BRIEF OF PETITIONER ON MERITS

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STATEMENT REGARDING TYPE

The size and style of type used in this brief is 12-point Courier New, a font that is not proportionately spaced.

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OTHER AUTHORITY

STATEMENT OF THE CASE AND OF THE FACTS

This case was originally an appeal from a revocation of community control. John Wayne Spell was charged by information on March 24, 1993 in Collier County, Florida with one count of lewd assault, in violation of section 800.04, Florida Statutes (1991). (R24) The information alleged that between June 1 and September 30, 1992, Spell "did unlawfully handle, fondle, or make an assault upon a child under the age of sixteen (16) years, in a lewd, lascivious or indecent manner, by placing his hand or fingers on or upon her vagina..." (R24)

On February 3, 1994, Spell was sentenced to two years in prison, followed by five years probation. (R26) A warrant for violation of probation was issued on April 9, 1996. (R27) Subsequently Spell was found to have violated probation and was placed on community control for one year, followed by three years of probation. (R1) On September 12, 19996 a warrant was issued for violation of community control. (R1)

Prior to sentencing on the violation of community control, Spell filed a motion to correct sentence on December 9, 1996 (R4-5), alleging that the scoresheet prepared for the violation of community control included forty points for victim injury which should not have been scored, pursuant to Karchesky v. State, 591

So. 2d. 930 (Fla. 1992). The motion asked that the forty points be deleted or that an evidentiary hearing be held "on the issue of physical injury if the State is alleging ascertainable physical injury separate from penetration." (R5)

The trial court heard argument on the motion at a hearing held on December 16, 1996. (R63-71) [The argument was combined with argument on an identical motion filed in a similar case pending before the same trial court (R67), the appeal from which was decided in Bogan v. State, 725 So. 2d. 1216 (Fla. 2d DCA 1999), which reversed and remanded for further proceedings.] The State argued that under State v. Montague, 682 So. 2d. 1085 (Fla. 1996), a contemporaneous objection to the scoresheet had to have been made when the defendant was originally sentenced or the issue is not preserved for appellate review. (R69) The defense responded that the objection then being voiced was a contemporaneous objection to the new scoresheet prepared for the violation. (R70)

At the hearing, the trial court reserved ruling. (R70) On January 6, 1997, at the plea hearing, the court announced that its ruling would be "the same in this motion as it was in the Bogan case." (R34)

Mr. Spell pleaded no contest to the violation of community control on January 6, 1997. (R34-35) The trial court imposed a

sentence of three and one half years in prison, with credit for time previously served, followed by two years of probation. (R60) The guidelines scoresheet included forty points for victim injury. (R22)

A timely notice of appeal was filed January 27, 1997 (R.8) The Second District Court of Appeal rendered its opinion on January 15, 1999. The appellate court reversed and remanded for re-sentencing with a corrected scoresheet, J. Altenbernd dissenting with opinion.

SUMMARY OF THE ARGUMENT

The correct view is that of Fitzhugh v. State, 698 So. 2d. 571 (Fla. 1st DCA 1997) (an appeal from re-sentencing following a violation of probation is not the proper time to assert an error in the original sentencing) rather than Wright v. State, 707 So. 2d. 385 (Fla. 2d DCA 1998) (the question of how many points should be scored for victim injury is a question of law which may be raised at any time).

The Fitzhugh opinion is consonant with the concerns of the Florida Supreme Court in State v. Montague, 682 So. 2d. 1085 (Fla. 1996). The problems of locating witnesses and the freshness of memory become more acute as the time elapses between the original sentencing and re-sentencing. The Wright opinion virtually ignores these concerns.

The Second District Court of Appeal opinion in Spell should be reversed.

ARGUMENT

ISSUE I

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.

(As Stated by Petitioner)

Petitioner State of Florida respectfully submits that the view expressed in Fitzhugh v. State, 698 So. 2d. 571 (Fla. 1st DCA 1997), finding that an appeal from re-sentencing following violation of probation is not the proper time to assert an error in the original scoresheet, is the correct view.

Appellant John Wayne Spell raised for the first time at a *third* proceeding, i.e., re-sentencing for violation of community control, a claim of error in his original scoresheet which imposed forty points for victim injury.

The trial court did not err in denying Mr. Spell's motion to correct the sentencing guidelines scoresheet.

Appellant failed to raise the issue at his original sentencing for one count of lewd and lascivious assault on a child under sixteen, for which he received a sentence of two years Florida State Prison and five years probation on February 3, 1994.

Appellant subsequently violated probation and was placed on

community control for a year, followed by three years of probation. Again, he failed to raise the issue at sentencing.

Appellant was subsequently charged with violation of community control and for the first time filed a motion to correct scoresheet shortly before the sentencing hearing, alleging that it was error to impose forty points for victim injury where there was no ascertainable physical injury.[1]

Appellee State of Florida asserts that the trial court did not err in denying Appellant's motion to correct scoresheet based on State v. Montague, 682 So. 2d. 1085 (Fla. 1996) which held that contemporaneous objection is necessary to preserve for appellate review an alleged error under the Florida Supreme Court decision in Karchesky and that the sentencing hearing is the appropriate time to object to alleged sentencing errors based on disputed factual matters.

In Montague, the Florida Supreme Court stated:

> "We have addressed the contemporaneous objection issue in its varying forms for well over a decade. The enduring policy rationale in our decisions is that there is an appropriate time and forum for

[1] In Karchesky v. State, 591 So. 2d. 930 (Fla. 1992) the Florida Supreme Court held that victim-injury points could not be assessed for penetration in calculating sentencing guidelines scoresheet for conviction of the offense of carnal intercourse with unmarried person under 18 years absent specifically identified physical injury or trauma occurring as the result of intercourse.

> making objections to alleged sentencing errors. E.g. State v. Rhoden, 448 So. 2d. 1013, 1016 (Fla. 1984) ('The primary purpose of the contemporaneous objection rule is to ensure that objections are made when the recollections of witnesses are freshest and not years later in a subsequent trial or a post-conviction relief proceeding.') Thus as we stated in Dailey v. State, 'it is incumbent upon defense counsel to raise, at the trial level, any objections to underlying factual matters supporting the factors in the scoresheet.' 488 So. 2d. at 533 (quoting with approval from Dailey v. State, 471 So. 2d. 1349, 1351 (Fla. 1st DCA 1985)). As the Second District noted , "Had such an objection been raised, it would have alerted the trial court ***to the necessity of receiving additional evidence*** at the sentencing hearing regarding the extent of victim injury..." Montague, 656 So. 2d. at 509 (emphasis added) Therefore the resulting evidentiary determination would have 'facilitate[d] an intelligent appellate review,' Rhoden, 448 So. 2d. at 1016 of any alleged sentencing errors. As further noted by the district court, defense counsel's lack of objection leaves us with a barren record on the issue of whether the victim actually suffered physical injury. Montague, 656 So. 2d. at 509." (emphasis supplied)

The Florida Supreme Court also noted that the Court has repeatedly held that absent an illegal sentence or an unauthorized departure from the sentencing guidelines, only serious errors "*apparent on the face of the record* do not require a contemporaneous objection in order to be preserved for review." (Emphasis added) Taylor v. State, 601 So. 2d. 540, 541 (Fla. 1992) Appellant has not demonstrated that the instant case falls into any of these three categories. This case does not concern a true "error on the face of

the record" but an underlying factual matter for which we have, as in Montague, a "barren record."

The facts in the appellate record indicate that Appellant neither objected at the original hearing in 1993 nor at his revocation of probation hearing in 1994, and raised the issue for the first time before his sentencing hearing on his violation of community control, in December 1996, more than three years later. Laches is sustainable in a criminal case where there has been a lack of due diligence on the part of the defendant in bringing forth the claim and prejudice to the state. See Blatch v. State, 389 So. 2d. 669, 672 (Fla. 3d DCA 1980); Remp v. State, 248 So. 2d. 677, 679 (Fla. 1st DCA 1970) Here Appellant's lack of due diligence in waiting more than three years to raise the issue, coupled with prejudice to the state in the difficulties of locating a victim witness more than three years later for an evidentiary hearing supports the conclusion that Appellant should be barred from relief by the doctrine of laches.

In Wright v. State, 707 So. 2d. 385 (Fla. 2d DCA 1998)[2] the Second District Court of Appeal held that the "question of how many points should be scored for victim injury is a question of law which

[2]The opinion in Spell found the case indistinguishable from Wright.

may be raised at any time," quoting Daum v. State, 544 So. 2d. 1035, 1036 (Fla. 2d DCA 1986). However, the court leaves virtually untouched the problems of so much concern to the Florida Supreme Court in Montague locating a witness and the freshness of witness memory. The longer the period of time between the original sentencing and the time when a defendant raises an issue on a Karchesky error, the more acute the problems become in locating a victim witness. The argument that the objection is contemporaneous to a new scoresheet simply ignores the real concerns of Montague.

Petitioner State of Florida asserts that Fitzhugh v. State, 698 So. 2d. 571 (Fla. 1st DCA 1997) is more consonant with the concerns of timeliness voiced by the Florida Supreme Court in Montague and is the correct view. The opinion of the Second District Court of Appeal should be reversed in the instant case.

CONCLUSION

Based on the foregoing facts, arguments and authorities, the Second District Court of Appeal opinion in the instant case should be reversed.

Respectfully submitted,

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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 Patricia A. Paterson, Esquire, Public Defender's Office, Post Office Box 9000, Drawer PD, Bartow, Florida 33831 on this _____ day of November, 1999.

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COUNSEL FOR PETITIONER