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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.
_____/

Discretionary Review of the Decision of the
District Court of Appeal,
Second District of Florida

BRIEF OF PETITIONER ON JURISDICTION

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TABLE OF CITATIONS

STATEMENT OF THE CASE AND OF THE FACTS

Petitioner State of Florida will rely on the Statement of the Case and Facts as set forth in Mr. Spell's Statement of the Case and Facts, Second District Court of Appeal Case No. 97-00572, a copy of which is attached hereto and incorporated by reference in Petitioner's Appendix, Exhibit 2.

SUMMARY OF THE ARGUMENT

Where a party seeks discretionary review of a district court of appeal decision in this Court based on conflict, it must be shown that the decision reviewed expressly and directly conflicts with the decision of another district court of appeal or this Court on the same question of law. Rule 9.030(2)(iv) Florida Rules of Appellate Procedure.

Petitioner State of Florida has demonstrated the conflict between Spell v. State, 24 Fla. L. Weekly 205B (Fla. 2d DCA January 15, 1999) and Fitzhugh v. State, 698 So. 2d. 571 (Fla. 1st DCA 1997), as recognized by the appellate court's opinion in Spell.

Petitioner's request to grant discretionary review should be granted.

ARGUMENT

ISSUE I

WHETHER THIS COURT SHOULD EXERCISE ITS DISCRETIONARY JURISDICTION TO DETERMINE WHETHER THE OPINION OF THE DISTRICT COURT IN SPELL V. STATE, 24 FLA. L. WEEKLY 205B(FLA. 2D DCA JANUARY 15, 1999) EXPRESSLY AND DIRECTLY CONFLICTS WITH FITZHUGH V. STATE, 698 So. 2d. 571 (FLA. 1ST DCA 1997).

Pursuant to Article V, Sections 3(b)(3) and (4) the supreme court may review decisions of a district court of appeal which expressly and directly conflict with a decision of another district court of appeal. In the instant case the Second District Court of Appeal in Spell v. State, 24 Fla. L. Weekly 205B (Fla. 2d DCA January 15, 1999) "recognize[d] that the decision is in conflict with the First District Court of Appeal in Fitzhugh v. State, 698 So. 2d. 571 (Fla. 1st DCA 1997)." However, the Second District Court did not certify the conflict and Judge Altenbernd in his dissenting opinion stated that he "doubted that a meaningful inter-district conflict existed."

Despite the dissenting opinion, Petitioner seeks discretionary review of the supreme court on the basis of express and direct conflict between the two cases.

In Spell v. State, 24 Fla. L. Weekly 205B (Fla. 2d DCA January 15, 1999) the Appellant challenged the imposition of forty victim injury points on the score sheet prepared on resentencing after his violation of community control. The Second District Court of

Appeal reversed finding that the trial court could have corrected Mr. Spell's scoresheet by the deletion of the victim injury points. Mr. Spell relied upon the Second District Court's opinion in Wright v. State, 707 So. 2d. 385 (Fla. 2d DCA 1998) to assert that a scoresheet error is reviewable at re-sentencing after a community control violation, even when there was no objection at the original sentencing. Finding that Mr. Spell's case was indistinguishable from Wright, the court ruled that Mr. Spell must be sentenced under a scoresheet that does not include these victim injury points.

In Fitzhugh v. State, 698 So. 2d. 571 (Fla. 1st DCA 1997), the Appellant appealed his judgment and sentence after a violation of probation. Citing Karchesky v. State, 561 So. 2d. 930 (Fla. 1992) Appellant contended that his original guidelines sentence was incorrect in that it erroneously included forty points for victim injury. The First District Court of Appeal affirmed pointing out that an appeal from resentencing following violation of probation is not the proper time to assert an error in the original scoresheet. The court cited to State v. Montague, 682 So. 2d. 1085 (Fla. 1996) in support of its decision. (In order to preserve a Karchesky sentencing error for appellate review, a contemporaneous objection to the addition of victim injury points must be made at the time of sentencing.)

Petitioner State of Florida respectfully requests this honorable Court to grant review on the conflict that exists between

the Spell and Fitzhugh cases which concerns an issue frequently raised in the trial courts which has not as yet been definitively resolved.

CONCLUSION

Based on the foregoing facts, arguments and authorities, this Court should grant discretionary jurisdiction since there is an express and direct conflict of decisions.

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 2d day of June, 1999.

Ann Pfeiffer Hawe
COUNSEL FOR PETITIONER

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

JOHN WAYNE SPELL,

Respondent.

_____/

FSC CASE NO. 95,641
2nd DCA Case No. 97-00572

PETITIONER'S APPENDIX

APPENDIX:

A-1 Decision Spell v. State, 24 Fla. L. Weekly 205B (Fla. 2d DCA January 15, 1999)

A-2 Mr. Spell's Statement of Case and Facts, Spell v. State, Case No. 97-00572

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, P. O. Box 9000, Drawer PD, Bartow, Florida 33831 this 21 day of June, 1999.

Ann Pfeiffer Hamel
OF COUNSEL FOR PETITIONER

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

JOHN WAYNE SPELL,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 97-00572

Opinion filed January 15, 1999.

Appeal from the Circuit Court for Collier County; William L. Blackwell, Judge.

James Marion Moorman, Public Defender, and Patricia A. Paterson, Assistant Public Defender, Bartow, for Appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Ann Pfeiffer Corcoran, Assistant Attorney General, Tampa, for Appellee.

PER CURIAM.

John Wayne Spell challenges the imposition of forty victim injury points on the scoresheet prepared on resentencing after his violation of community control.

Because we find that the trial court should have corrected Spell's scoresheet by deletion of the victim injury points, we reverse.

Spell relies on this court's opinion in Wright v. State, 707 So. 2d 385 (Fla. 2d DCA 1998), to advance his argument that a scoresheet error is reviewable at resentencing after a community control violation, even when there was no objection at the original sentencing. This case is indistinguishable from Wright; therefore, Spell must be sentenced under a scoresheet that does not include these victim injury points.

We recognize that this decision is in conflict with the First District Court of Appeal's opinion in Fitzhugh v. State, 698 So. 2d 571 (Fla. 1st DCA 1997). In Fitzhugh the defendant, citing Karchesky,[1] challenged the imposition of forty points for victim injury on his original guidelines scoresheet. In reliance on State v. Montague, 682 So. 2d 1085 (Fla. 1996), the court affirmed the imposition of the points, reasoning that "an appeal from re-sentencing following violation of probation is not the proper time to assert an error in the original scoresheet."

Therefore, we reverse the sentence imposed and remand for resentencing with a corrected scoresheet.

PARKER, C.J., and QUINCE, PEGGY A. Associate Judge, Concur.
ALTENBERND, J., Dissents with opinion.

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[1] Karchesky v. State, 591 So. 2d 930 (Fla. 1992).

ALTENBERND, Judge, Dissenting.

The record in this case is quite confusing. In February 1994, Mr. Spell received a sentence of 2 years' imprisonment followed by 5 years' probation. In case numbers 93-422 and 93-423, he apparently was sentenced on two separate informations alleging lewd and lascivious conduct. The only scoresheet available to this court from that time includes 80 points for victim injury and scores the charges from both informations. Our record includes a judgment and sentence for only one of those two charges. That sentence was entered on a plea of nolo contendere, and it appears to be a substantial downward departure.

In January 1997, Mr. Spell was sentenced on a violation of community control. Apparently, sometime between 1994 and 1997, Mr. Spell violated his probation and received a sentence of community control. The 1997 sentence relates only to case number 93-423. The scoresheet prepared in 1997 omits points for case number 93-422 and contains only 40 points for victim injury. That scoresheet totals 198 points and claims that it permits a sentence between 4½ and 9 years. Actually, the permitted range is lower; including a one-cell increase for violation of community control, the permitted range would be 2½ to 5½ years' imprisonment. The trial court imposed a sentence of 3½ years' imprisonment with credit for all prior time served, followed by 2 years' probation.

The only preserved error concerns the 40 points for victim injury on the newer scoresheet. Mr. Spell never alleged, much less testified, that the victim did not receive injuries allowing for these points. I agree that he can raise this issue for the first

time at the 1997 sentencing hearing because the relevant scoresheet is new, but I believe he is bound by the prior rulings in his existing case unless he can demonstrate that the earlier scoresheet was factually incorrect. On this strange record, I find no reversible error.

As a practical matter, Mr. Spell has fully served this term of imprisonment, and there is nothing erroneous concerning the term of probation. Although it might be useful to have a correct scoresheet in this record, I do not see what can be accomplished at resentencing, and I doubt that a meaningful inter-district conflict exists in this record.

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

JOHN WAYNE SPELL, :

Appellant, :

v. : Case No. 97-00572

STATE OF FLORIDA, :

Appellee. :

_____ :

APPEAL FROM THE CIRCUIT COURT
IN AND FOR COLLIER COUNTY
STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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ATTORNEYS FOR APPELLANT

STATEMENT OF THE CASE AND FACTS

This is an appeal from a revocation of community control. John Wayne Spell was originally 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) (R. 24). 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 . . . " (R. 24).

On February 3, 1994, Spell was sentenced to two years in prison, followed by five years on probation (R. 26). A warrant for violation of probation was issued on April 9, 1996 (R. 27). Subsequently Spell was found to have violated probation and was placed on community control for one year, followed by three years of probation (R. 1). On September 12, 1996, a warrant was issued for violation of community control (R. 1).

Prior to sentencing on the violation of community control, Spell filed a motion to correct scoresheet on December 9, 1996 (R. 4-5), alleging that the scoresheet prepared for the violation of community control included 40 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 40 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 the penetration" (R. 5).

The trial court heard argument on the motion at a hearing held on December 16, 1996 (R. 63-71). [The argument was combined with argument on an identical motion filed in a similar case pending before the same trial court (R. 67), the appeal from which is also pending before this court in Bogan v. State, Appeal No. 97-00574.] The defense argued that victim injury points should not be included on the scoresheet under Karchesky because there was no ascertainable physical injury (R. 68). 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 (R. 69). The defense responded that the objection then being voiced was a contemporaneous objection to the new scoresheet prepared for the violation (R. 70).

At the hearing, the trial court reserved ruling (R. 70). 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" (R. 34). [This court can take judicial notice of the record in the Bogan appeal where, at R. 6, the trial court issued

its order on December 18, 1996, denying the motion to correct the scoresheet in that case "on the authority of State v. Montague. . . . If the record at the time of sentencing reflects an objection to the scoring of 20 points for victim injury, the Defendant may reassert this motion."]

Bogan pleaded no contest to the violation of community control on January 6, 1997 (R. 34-39). 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 (R. 60). The guidelines scoresheet included 40 points for victim injury (R. 22).

A timely notice of appeal was filed on January 27, 1997 (R. 8).