

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.

_____ /

REPLY 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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698 So. 2d 571 (Fla. 1st DCA 1997) 1,2,3

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SUMMARY OF THE ARGUMENT

The effect of the opinion in Spell below robs the word "contemporaneous" of its plain meaning. In the context of the instant case, it allowed Mr. Spell to have almost three years to make his "contemporaneous" objection.

To allow a defendant almost three years to make an objection confers an unfair advantage over a victim who may now be impossible to locate for an evidentiary hearing.

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. The opinion of the Second District Court of Appeal 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 agrees with Respondent's observation that in Fitzhugh v. State, 698 So. 2d. 571 (Fla. 1st DCA 1997) the defendant failed to make any objection before the trial court and raised the issue for the first time on appeal. Petitioner also agrees that in the instant case Mr. Spell objected to the trial court below when he was re-sentenced for the second time for a violation of community control and when a new score sheet was before the court. These distinctions, however accurate, do not address the central issue of concern in the Spell case.

Petitioner State of Florida respectfully suggests that the Second District Court's opinion in Spell ignores the concerns of the Florida Supreme Court as expressed in Montague v. State, 682 So. 2d. 1085 (Fla. 1996).

First of all the effect of the Second District Court of Appeal

opinion in Spell robs the word "contemporaneous" of its plain meaning. In the context of the Spell case, it allows the defendant to have almost three years¹ to make his "contemporaneous" objection, clearly not in contemplation of the time honored position of the Florida Supreme Court that an objection must be made contemporaneously to the harm in order to prevent the very scenario we see in this case.

Secondly, to allow Mr. Spell to have almost three years to raise the issue of the forty victim injury score points, confers an unfair advantage on him over a victim who may now be impossible to locate for an evidentiary hearing. This very concern was at the heart of State v. Montague, 682 So. 2d. 1085 (Fla. 1996).

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 in Spell should be reversed.

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Mr. Spell was originally sentenced on one count of lewd assault on February 3, 1994 where he did not object to the imposition of forty victim injury points. When he was later sentenced in 1996 for a subsequent violation of probation he did not object to the purported error in the original sentence. He raised the issue for the first time prior to sentencing on a violation of community control filed December 9, 1996, almost three years later.

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 February, 1999.

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