IN THE SUPREME COURT OF FLORIDA

JAMIE LEE TASKER,

Petitioner,

v.

CASE NO. SC09-1281

STATE OF FLORIDA,

Respondent.
_____/

ON DISCRETIONARY REVIEW OF THE DECISION
OF THE FIRST DISTRICT COURT OF APPEAL

INITIAL BRIEF OF PETITIONER ON THE MERITS

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PRELIMINARY STATEMENT

The certified conflict issue in this case is whether a defendant can challenge victim injury scoring in a Criminal Punishment Code scoresheet for the first time in a rule 3.800(b)(2) motion preceding the appeal from a revocation of probation, even if the points first appeared in the scoresheet during the original sentencing proceeding.

The record is a patchwork. Herein, "Record Volume I" is designated "R," the April 12, 2007, probation violation hearing transcript in "Record Volume II" is designated "07VOP," and the May 10, 2007, sentencing transcript in Record Volume III is designated "07S." "Supplemental Record Volume I," which contains documents and no transcripts, is designated "SR." The December 13, 2005, probation violation hearing transcript contained in a second "Supplemental Record Volume I" is designated "05VOP." The January 11, 2005, sentencing transcript contained in "Supplemental Record Volume II" is designated "05S." Finally, the record generated from the motion to correct sentencing error, labeled "Supplemental #1," is designated "CSE."

STATEMENT OF THE CASE AND FACTS

In an information filed October 4, 2004, the state charged Tasker with one count of lewd or lascivious molestation under section 800.04(5), Florida Statutes (2002), and one count of felony child abuse. (SR.1) Count I alleged that on June 1, 2003, Tasker "intentionally touch[ed] in a lewd or lascivious manner the breasts, genitals, genital area, or buttocks, or the clothing covering them, of" the victim. Count II alleged that between March 1, 2004 and June 30, 2004, Tasker provided a child alcohol, cocaine "and/or [had] her rub ice on her breasts or vagina." The underlying arrest report reflects that Tasker rubbed, touched, or fondled the alleged victims' stomachs or legs near but not on their breast and crotch areas, and had one alleged victim rub an ice cube on her exposed breasts. (I.79-80)

In December 2004, Tasker pled guilty to both counts as charged. (R.1, CSE.15-21) The transcript of that hearing contains no discussion of the facts underlying the charges or the victim injury scoring on the guidelines scoresheet. The trial court, in accepting the plea, stated that it found a factual basis "contained in the court file and/or discovery taken in the case that would support the taking of the plea." (CSE.20)

In January 2005, adjudication was withheld and Tasker received a negotiated sanction of 10 years of sex offender probation on Count I, concurrent with 5 years on probation on Count II, following six months in county jail. (05S.9, R.14-16)

The Criminal Punishment Code scoresheet included 40 points for sex contact, which if not for the negotiated sentence would have yielded a minimum sentence of 72.15 months in prison. (R.10-11)

Tasker twice admitted violating probation in 2005, resulting in county jail terms and resumption of probation. During the second probation revocation hearing, in December 2005, Tasker spoke in mitigation:

> First I would like to point out that [the prosecutor] mentioned that I was convicted of this original crime. In fact, in the discovery evidence it says clearly that my daughter stated repeatedly in the discovery evidence no contact actually of the genital areas whatsoever.

(05VOP.21) The court imposed adjudication of guilt and revoked but then reinstated probation with an added condition of 240 days in jail. (SR.8, 05VOP.29)

Finally, in April 2007, Tasker again admitted violating probation, by testing positive for drugs,. (R.40, 07VOP.10-14) The court accepted the admission. (07VOP.14) In a May 10, 2007, sentencing hearing, the court revoked Tasker's probation and sentenced him to 10 years in prison on Count I and a concurrent term of 3 years in prison on Count 2. (07S.47, R.59, 62-71) The Criminal Punishment Code scoresheet again included 40 points for "sex contact," resulting in a minimum sentence of 85.65 months in state prison. (R72-73)

Tasker appealed. Before filing the initial brief, appellate counsel moved to correct the sentencing error of assessment of 40 victim injury points for sexual

contact arising from offense of lewd or lascivious molestation in Count I. (CSE.1-5) The trial court denied the motion on the merits in a written order. (CSE.27-30)

The First District Court of Appeal affirmed, concluding that the motion to correct sentencing error filed during the appeal from the sentence imposed following probation revocation did not preserve the issue. Tasker v. State, 12 So. 2d 889 (Fla. 1st DCA 2009). In so ruling, the First District followed its precedent in Bowman v. State, 974 So. 2d 1205 (Fla. 1st DCA 2008), and Fitzhugh v. State, 698 So. 2d 571 (Fla. 1st DCA 2007). Acknowledging that other districts "have held to the contrary," the First District certified conflict with Stubbs v. State, 951 So. 2d 910 (Fla. 2d DCA 2007), Spell v. State, 731 So. 2d 9 (Fla. 2d DCA 1999), and Bogan v. State, 725 So. 2d 1216 (Fla. 2d DCA 1999).

This Court granted discretionary review.

SUMMARY OF THE ARGUMENT

I. Error in scoring victim injury, which first occurs in the original sentencing hearing but does not then affect the sentence, should be cognizable when challenged initially in a motion to correct sentencing error following probation revocation proceedings. Five reasons support this conclusion.

First, a proceeding on a motion to correct sentencing error is a sentencing proceeding. When victim injury scoring is challenged in a rule 3.800(b) motion, which is an authorized use of the motion, the error should be deemed preserved in the same manner as if it were raised in the VOP sentencing hearing. Second, a probation revocation proceeding is an extended sentencing proceedings. A challenge made at that stage is properly deemed a challenge to sentencing error. Third, just as the omission of victim injury scoring may be rectified initially in probation revocation proceedings, error in assessing victim injury points should also be cognizable then. Fourth, a defendant like Tasker who receives a downward departure including probation pursuant to a plea agreement has no reason to challenge victim injury scoring until probation revocation raises the prospect of a prison sentence. Fifth, error of this nature is cognizable in postconviction proceedings under rule 3.800(b) or 3.850. Fairness and judicial efficiency favor addressing the issue at the earlier stage of a rule 3.800(b)(2) motion during direct appeal, when most defendants are still represented by counsel.

II. Section 921.0011(7)(b)(2), Florida Statutes, authorizes scoring of victim injury points on a CPC scoresheet for any offense "involving sexual contact." Because the information in this case alleged, in the alternative, a touching of clothing covering sexual body parts, the offense in this case does not necessarily involve sexual contact. Precedent supports sex contact points for contact through clothing, but does not hold that touching a victim's clothing covering specific body parts, without an accompanying touching of the body parts themselves, constitutes sexual contact which may be scored on a CPC scoresheet. Under the rule of lenity, any ambiguity in the construction of the statute as it applies to the defendant must be resolved in his favor.

The alternative allegation of a touching of clothing covering the victim's body makes this case analogous to Mann v. State, 974 So. 2d 552 (Fla. 5th DCA 2008). There the Fifth DCA ruled that the trial court erred in scoring victim injury points for penetration following a guilty plea to counts of lewd or lascivious battery or molestation that alleged alternatives of union or penetration. The court relied on a Fourth District decision that "arose in a jury trial context," but concluded that "the same principle applies in a plea case." Id. at 554.

Because Tasker's plea did not admit sex contact and the state did not produce evidence supporting sex contact, the victim injury scoring was in error.

ARGUMENT

I. ERROR IN VICTIM INJURY SCORING WHICH FIRST OCCURRED DURING AN EARLIER SENTENCING PROCEEDING IS COGNIZABLE WHEN RAISED INITIALLY IN A MOTION TO CORRECT A SENTENCING ERROR FOLLOWING PROBATION REVOCATION.

Standard of review: Broadly stated, the conflict issue is whether an error that was not raised when it first appeared is cognizable when it is raised later in the same case. An issue of this nature involves solely legal determinations, making the standard of review de novo. See generally Williams v. State, 957 So. 2d 595, 598 (Fla. 2007).

Merits: The three-judge First District panel in this case declined to address Tasker's claim that victim injury points were erroneously assessed, ruling that

> [u]nder our case authority, appellant has not preserved the issue of the assessment of victim injury points. As we explained in Fitzhugh v. State, 698 So. 2d 571, 573 (Fla. 1st DCA 1997), "an appeal from resentencing following violation of probation is not the proper time to assert an error in the original scoresheet." See also Bowman v. State, 974 So. 2d 1205 (Fla. 1st DCA 2008).

Tasker v. State, 12 So. 3d 889, 890 (Fla. 1st DCA 2009). In Fitzhugh, the court ruled that a challenge to victim injury scoring raised initially during briefing in the appeal from probation revocation was untimely. In Bowman, an appeal from probation revocation, the First District cited Fitzhugh in declining to address scoresheet errors reaching back to the original sentencing hearing. 974 So. 2d at

1207. The court cited Stubbs v. State, 951 So. 2d 910, 911 (Fla. 2d DCA 2007) (discussed below) as contrary authority, but Bowman did not seek conflict review by this Court.

In this case, the First District followed its precedent and acknowledged a contrary line of case law from the Second District. The earliest Second District decision cited is Wright v. State, 707 So. 2d 385 (Fla. 2d DCA 1998). There the defendant did not challenge victim injury scoring until sentencing for violation of probation. The scoresheet was irrelevant during the original sentencing hearing because the sentence conformed to a plea agreement. The district court rejected the state's argument that Wright waived the error by failing to object at that point. Id. at 385. In Bogan v. State, 725 So. 2d 1216 (Fla. 2d DCA 1999), the Second District followed Wright and recognized conflict with Fitzhugh. In Spell v. State, 731 So. 2d 9 (Fla. 2d DCA 1999), the Second District again followed Wright and certified conflict with Fitzhugh. This Court granted and then dismissed review. State v. Spell, 775 So. 2d 291 (Fla. 2001).

In Routenberg v. State, 802 So. 2d 361 (Fla. 2d DCA 2001), the Second District reversed the denial of a motion to correct an illegal sentence challenging victim injury scoring. The court cited Spell and Bogan and noted that it "has declined to follow Fitzhugh." Id. at 362. In Stubbs v. State, 951 So. 2d 910 (Fla. 2d DCA 2007), the Second District reversed a trial court ruling declining to

address challenges to scoresheet points for legal constraint violation and victim injury made initially during sentencing following revocation of probation. Addressing the state's claim that the challenges were waived because they were not made in the original sentencing hearing, the court found

> no indication in the record that Stubbs agreed as part of his negotiated plea to the inclusion of victim injury and legal constraint points. Accordingly, the trial court erred when it refused to permit Stubbs to challenge the inclusion of victim injury and legal constraint points at sentencing following revocation of probation.

Id. at 911. The court cited Spell and Bogan and again recognized conflict with Fitzhugh.

In this case, the First District certified conflict with Stubbs, Spell, and Bogan, but did not identify the conflict issue with the clarity sometimes provided in a certified question. Nonetheless, the precise conflict issue can be discerned from the procedural postures in this case and Stubbs. The opinions in Spell and Bogan do not specify when the challenge was made, but the defendant in Stubbs raised the issue during the sentencing hearing after probation was revoked. 951 So. 2d at 911. Tasker involves a challenge first made in a rule 3.800(b)(2) motion filed after he commenced an appeal from probation revocation but before he filed the initial brief in the First District.

Legally and practically, the rule 3.800(b) proceedings in this case were sentencing proceedings rather than appellate proceedings. A motion to correct

sentencing error is filed in the trial court, either before ((b)(1)) or after ((b)(2))the notice of appeal. Rule 3.800(b)(1)(B) provides for an evidentiary hearing. A resentencing hearing may also ensue, and if it does, the defendant has a right to be present if the court exercises sentencing discretion. Rivers v. State, 980 So. 2d 599, 600–01 (Fla. 2d DCA 2008). Successful rule 3.800(b) motions can render appeals superfluous and lead to their dismissal. Accordingly, whether initiated before or after commencement of an appeal, rule 3.800(b) proceedings are sentencing proceedings, both legally and practically.

Because a rule 3.800(b)(2) proceeding is tantamount to a sentencing proceeding, Tasker and Stubbs are in conflict on whether an error in victim injury scoring that first appeared during the original sentencing proceeding may be preserved during a subsequent sentencing proceeding upon violation of probation or community control.

The First District's conclusion that the issue is unpreserved rests on the view that Tasker's rule 3.800(b)(2) motion was part of an appellate proceeding:

> It was only after Tasker's probation was revoked and this appeal filed that the issue of the scoring victim injury points for sexual contact was raised. During the pendency of this appeal, appellate counsel filed a motion to correct sentence, pursuant to rule 3.800(b)(2), Florida Rules of Criminal Procedure, challenging the assessment of forty points. ...
>
> Under our case authority, appellant has not preserved the issue of the assessment of victim injury

> points. As we explained in Fitzhugh v. State, 698 So. 2d 571, 573 (Fla. 1st DCA 1997), "an appeal from resentencing following violation of probation is not the proper time to assert an error in the original scoresheet." See also Bowman v. State, 974 So.2d 1205 (Fla. 1st DCA 2008). Importantly, section 924.06(2), Florida Statutes (2007), provides that "an appeal of an order revoking probation may review only proceedings after the order of probation."

Tasker, 12 So. 3d at 890 (emphasis supplied). Both Fitzhugh and the excerpt from section 924.06(2) predate motions to correct sentencing error under rule 3.800(b). Neither supports the First District's conclusion that Tasker's rule 3.800(b)(2) motion failed to preserve this issue for appeal. Because rule 3.800(b)(2) proceedings are sentencing proceedings, a rule 3.800(b)(2) motion preserves error in scoring victim injury.

Probation revocation proceedings are also sentencing proceedings. See Green v. State, 463 So. 2d 1139, 1140 (Fla.1985) (referring to the revocation process as deferred sentencing); Jones v. State, 876 So. 2d 642 (Fla. 1st DCA 2004)(characterizing probation revocation proceeding as "merely an extension of the sentencing process" subject to the preservation requirements of a timely objection at sentencing or timely rule 3.800(b) motion). Consequently, when scoresheet error from the original sentencing proceeding recurs during probation revocation proceedings, the error is preserved by a timely rule 3.800(b)(2) motion filed after commencement of an appeal from the probation revocation. The motion

in this case was timely filed before the initial brief, and the scoresheet error it identifies is cognizable under rule 3.800(b). See Jackson v. State, 983 So. 2d 562, 572 (Fla. 2008); State v. Anderson, 905 So. 2d 111, 118 (Fla. 2005).

Allowing a challenge to victim injury scoring via rule 3.800(b)(2) in this case is consistent with precedent authorizing an initial scoring of victim injury during probation revocation proceedings. In both Robinson v. State, 985 So. 2d 1192, 1193 (Fla. 4th DCA 2008), and Merkt v. State, 764 So. 2d 865 (Fla. 4th DCA 2000), the district courts rejected defendants' challenges to points for injury to the victim of the original offense, first added to the scoresheet in probation revocation proceedings. As the Fifth District observed in an opinion citing Merkt, "[s]coresheet corrections sometime benefit the defendant and sometime benefit the State." June v. State, 784 So. 2d 1257, 1259 (Fla. 5th DCA 2001). Allowing both assessment of victim injury points in probation revocation proceedings and a challenge to victim injury points carried over from the original scoresheet will create a level playing field.

The greater focus given victim injury scoring by both the state and defense during probation revocation proceedings in some of these cases reflects that when a defendant plea bargains for a sanction that includes probation, victim injury is often irrelevant until probation is violated. For example, in Merkt, the defendant originally plea bargained for two years in prison plus two years in community

control plus 10 years on probation, although his median guidelines sentence was 36 months without the victim injury points the state subsequently sought to add. Id. at 866. In Aponte v. State, 810 So. 2d 1008 (Fla. 4th DCA 2002), which relies on Merkt, victim injury points were not originally assessed because the parties negotiated a downward departure sentence, but were scored upon probation revocation. Id. at 1009-10. An example from the defense perspective is Wright, in which the Second District noted that during the original sentencing proceeding, there was "no discussion of the scoresheet because the State had an agreement that Wright would serve eight years of probation in exchange for his plea." 707 So. 2d at 386. In this case, Tasker accepted a plea bargain for a downward departure of a county jail term plus probation. (R.10-11, 05S.9, R.14-16) Only when the prospect of a lengthy prison sentence under the CPC became concrete did he have any cause to raise the error in scoring victim injury.

Policy goals of judicial economy and essential fairness are served by permitting a challenge to victim injury scoring in a rule 3.800(b) motion following probation revocation. Florida Rule of Criminal Procedure 3.800(a), allows a court to rectify an incorrect scoresheet calculation "at any time." This includes an error in scoring victim injury. See Companioni v. State, 971 So. 2d 883, 884 (Fla. 3d DCA 2007). Further, failure to object to victim injury scoring when the assessment affects the sentence constitutes ineffective assistance of counsel under

Florida Rule of Criminal Procedure 3.850. See McClendon v. State, 977 So. 2d 695, 697 (Fla. 1st DCA 2008). However, a defendant does not have a Sixth Amendment right to counsel in rule 3.800(a) and rule 3.850 proceedings. Challenges to victim injury scoring during probation revocation proceedings should be resolved when raised during 3.800(b) proceedings, a stage when most defendants have counsel, and not deferred to pro se postconviction litigation.

For these reasons, this Court should quash the decision of the First District in this case, approve Stubbs, Spell, and Bogan, and address the merits of Tasker's challenge to victim in jury scoring.

II. TASKER WAS ERRONEOUSLY SENTENCED PURSUANT TO A SCORESHEET WHICH INCLUDED 40 POINTS FOR SEX CONTACT ALTHOUGH HE PLED GUILTY AS CHARGED TO AN OFFENSE IN WHICH CONTACT WAS ALLEGED IN THE ALTERNATIVE.

The trial court reached this issue on the merits, but the First District ruled it procedurally barred. If this Court agrees with the argument in Point I that the First District was mistaken, it may reach the merits or remand for the First District to do so. Cf. Feller v. State, 637 So. 2d 911, 914 (Fla. 1994) (stating that the Court has jurisdiction "over all issues" in a certified question case).

Standard of review: The issue is whether a guilty plea as charged to a count charging a sex offense via contact with sexual body parts "or the clothing covering" those body parts justifies victim injury scoring for sexual contact. "The standard of review of the legality of the court's assessment of victim injury points is de novo." Brown v. State, 34 Fla. L. Weekly D1359 (Fla. 4th DCA July 1, 2009), citing Jupiter v. State, 833 So. 2d 169, 170 (Fla. 1st DCA 2002).

Merits: Section 921.0011(7)(b)(2), Florida Statutes (2002), authorizes scoring of victim injury points on a CPC scoresheet for any offense "involving sexual contact." Because the information in this case alleged, in the alternative, a touching of clothing covering specified body parts, the offense in this case does not necessarily involve sexual contact. Further the defendant did not admit and the state did not prove sexual contact.

Appellate courts have upheld scoring of victim injury points for contact with sexual body parts through clothing. See, e.g., Altman v. State, 852 So. 2d 870, 873 (Fla. 4th DCA 2003) (affirming scoring of sexual contact points for defendant's "act of lying on top of the victim with his clothed genitals pressed against hers and 'humping her'"); Louis v. State, 764 So. 2d 930, 932 (Fla. 4th DCA 2000) (ruling that touching victim's chest through her shirt, along with touching her stomach and genital area, involved sexual contact); Blackburn v. State, 762 So. 2d 989, 990 (Fla. 5th DCA 2000) (ruling that defendant's act of rubbing his erect penis on the victim's clothed back constituted sexual contact for victim injury scoring).

None of the cases cited in the preceding paragraph hold that touching a victim's clothing covering specific body parts, without an accompanying touching of the body parts themselves, constitutes sexual contact which may be scored on a CPC scoresheet. As it pertains to a touching of clothing covering body parts rather than a touching of body parts through clothing, section 921.0011(7)(b)(2) is ambiguous. Under section 775.021(1), Florida Statutes, that ambiguity must be resolved in Tasker's favor. Cf. Borjas v. State, 790 So. 2d 1114, 1115 (Fla. 4th DCA 2001) (applying rule of lenity in section 775.021(1) to preclude contact points based on conclusion that "an ordinary person of common intelligence would [not] understand that fondling buttocks is sexual contact where there is no

definition of sexual contact in the statute scoring of victim injury for sexual contact").

In denying Tasker's motion to correct sentencing error raising this issue, the circuit court relied on Fredette v. State, 786 So. 2d 27 (Fla. 5th DCA 2001), and Fretwell v. State, 852 So. 2d 292 (Fla. 4th DCA 2003). The court in Fredette speculated that "[e]ven if one assumed arguendo that the sexual contact was over [the victim's] clothes," the sex contact points could still be scored. 786 So. 2d at 28 n.2. In Fretwell, the court concluded that "if touching the clothed buttocks of a child is lewd behavior, it is by definition, sexual behavior, and as such, can constitute sexual contact for the purpose of assessing victim injury points." 852 So. 2d at 293. The statement in Fredette is dicta, and neither Fredette nor Fretwell cover an allegation of touching the clothes covering sexual body parts without any contact with the body parts themselves. An offender may violate section 800.04(5) by touching a dress covering genitalia or a blouse covering breasts without also causing contact with the body parts covered by the clothing. Similarly, the arrest report narrative corresponding to the charge in Count I in this case reflects that the "victim used a pillow to keep defendant from touching her breasts or vaginal area." (R.79) None of the acts detailed in the arrest report reflect physical contact, either directly or through clothing, with the alleged victims' breasts or genitalia. (R.79-80) The guilty plea may have forfeited an opportunity to contest whether these

facts constituted a lewd or lascivious touching of clothing covering sexual body parts under section 800.04(5), but did not justify sexual contact points under section 921.0011(7)(b)(2).

The alternative allegation of a touching of clothing covering the victim's body makes this case analogous to Mann v. State, 974 So. 2d 552 (Fla. 5th DCA 2008). There the Fifth District ruled that the trial court erred in scoring victim injury points for penetration following a guilty plea to counts of lewd or lascivious battery or molestation that alleged alternatives of union or penetration. The court relied on a Fourth District decision that "arose in a jury trial context," but concluded that "the same principle applies in a plea case." Id. at 554.

Consequently, the inclusion of 40 points on Tasker's CPC scoresheet based solely on a guilty plea to a sexual offense charging a touching of clothing covering sexual body parts, in the alternative to contact with the body parts themselves, was in error. See Stubbs, 951 So. 2d at 910 (remanding for further proceedings on whether victim injury points were properly scored after finding "no indication in the record" that defendant agreed to victim injury points).[1]

1. In its order denying the motion to correct sentencing error, the trial court correctly noted that appellant had overstated the relief granted in Stubbs. (CSE.29-30) The trial court in Stubbs remanded for further proceedings on the lawfulness of victim injury scoring and did not order resentencing on a scoresheet from which points for penetration were deleted.

The circuit court imposed a 10-year sentence based on a scoresheet that included 40 points for sexual contact and yielded a minimum sentence of 85.65 months in prison. In light of the absence of conduct constituting sex contact in the arrest report, the error in scoring the 40 points could not have been harmless. Subtraction of 40 points from Tasker's scoresheet yields a minimum CPC sentence of 55.65 months in prison. Because it is unclear whether the circuit court would impose the same 120-month sentence based on a scoresheet yielding a minimum sentence less than half that long, Tasker should be resentenced pursuant to a corrected scoresheet. In the alternative, this Court may order an evidentiary hearing on whether victim injury points were properly scored, as in Stubbs.

CONCLUSION

Based on the arguments contained herein and the authorities cited in support thereof, the petitioner requests that this Honorable Court quash the decision of the district court and remand with directions to vacate Tasker's sentence and either resentence him pursuant to a scoresheet that does not include victim injury scoring or conduct a hearing on victim injury scoring.

CERTIFICATES OF SERVICE AND FONT SIZE

I hereby certify that a copy of the foregoing has been furnished by U.S. Mail to Heather Flanagan Ross, Office of the Attorney General, the Capitol, PL-01, Tallahassee, FL 32399-1050, on this ____ day of October, 2009. I hereby certify that this brief has been prepared using Times New Roman 14 point font.

Respectfully submitted,

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