IN THE SUPREME COURT OF FLORIDA

JAMIE LEE TASKER,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.
_____/

CASE NO. SC09-1281

First DCA No. 1D07-3072

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

JURISDICTIONAL BRIEF OF PETITIONER

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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STATEMENT OF THE CASE AND FACTS

In December 2004, Tasker pled no contest to lewd or lascivious battery and felony child abuse. In January 2005, he was sentenced to six months in county jail, followed by 10 years on sex offender probation. He did not contest inclusion of 40 points for sexual contact on his Criminal Punishment Code (CPC) scoresheet; his sentence was a downward departure from the CPC minimum of 72.15 months in prison. In 2007, Tasker admitted violating probation and received a 10-year CPC sentence. He 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 the original conviction of lewd or lascivious battery. The motion was denied. 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, 34 Fla. L. Weekly D1284 (Fla. 1st DCA June 24, 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 2009), and Bogan v. State, 725 So. 2d 1216 (Fla. 2d DCA 1999).

SUMMARY OF THE ARGUMENT

The certified conflict enables this Court to resolve an issue that has divided the First and Second Districts for more than a decade: May a challenge to victim injury points appearing in a scoresheet for the original sentencing and again after probation revocation be made for the first time in the probation revocation proceeding.

The First District first answered this question in the negative in 1997, and reaffirmed its position in another case in 2008 and again in this case in 2009. In contrast, the Second District held in 1998 that failure to challenge victim injury scoring during the original sentencing hearing does not permanently waive the issue. In subsequent decisions, that court reaffirmed that the challenge could be made after the original sentencing hearing and addressed scoresheet challenges made initially in probation revocation proceedings. In certifying conflict with three of the Second District decisions in this line of precedent, the First District recognized that the decade-long conflict should be resolved. A decision by this Court will unify the state court system on whether a challenge to victim injury scoring may be made for the first time in an appeal from the sentence imposed upon probation revocation. This Court should accept the First District's invitation to resolve this certified conflict.

ARGUMENT

THIS COURT SHOULD RESOLVE A DECADE-LONG CONFLICT BETWEEN THE FIRST AND SECOND DISTRICTS AND DETERMINE WHETHER A DEFENDANT CAN PRESERVE A CHALLENGE TO VICTIM INJURY POINTS BY SEEKING TO CORRECT THE ERROR DURING AN APPEAL FROM THE SENTENCE IMPOSED UPON PROBATION REVOCATION.

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, 32 Fla. L. Weekly D1284 (Fla. 1st DCA June 24, 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, Tasker, the First District adhered to its precedent and acknowledged a contrary line of case law from the Second District. The earliest Second District decision cited in Tasker 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 sentence was imposed pursuant to a plea agreement. The district court rejected the state's argument that Wright waived the issue by failing to object at the original sentencing hearing. Id. at 385. In Bogan v. State, 725 So. 2d 1216 (Fla. 2d DCA 1999), the Second District followed its precedent in Wright. Although the court "recognize[d]" conflict with Fitzhugh, the state apparently did not seek review by this Court. 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. The state did not seek review. Finally, 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 claim that the challenges were waived because they were not made in the original sentencing hearing, the court stated:

> Here, there is 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. The state did not seek review.

The First District's certification of conflict with Stubbs, Spell, and Bogan marks the sixth time that the First or Second District has identified the conflict issue of whether a scoresheet error may be raised initially in a probation revocation proceeding even though it first occurred in the original sentencing hearing. In the five previous cases, the loser sought discretionary review only once, and this Court dismissed the case.

This case presents a second opportunity to resolve the certified conflict, eliminate the now decade-long disparity in treatment of this issue in the two districts, and give litigants throughout the state concrete notice as to when scoresheet challenges may be made. For these reasons, the Court should grant discretionary review.

CONCLUSION

Based on the arguments contained herein and the authorities cited in support thereof, the petitioner requests that this Honorable Court accept this case for discretionary review and direct briefing on the merits.

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 July, 2009. I hereby certify that this brief has been prepared using Times New Roman 14 point font.

Respectfully submitted,

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