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

REPLY BRIEF OF PETITIONER

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PRELIMINARY STATEMENT

In this brief, record citations follow the format used in the initial brief. The initial and answer briefs are identified as "IB" and "AB."

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.

In a decision issued shortly before the state filed its answer brief, the Fourth District aligned itself with the Second District on this issue. See Bryant v. State, 35 Fla. L. Weekly D62 (Fla. 4th DCA Dec. 30, 2009). Bryant first objected during probation revocation proceedings to scoring of prior offenses carried forward from the scoresheet used in his initial sentencing hearing, then renewed the objection via Florida Rule of Criminal Procedure 3.800(b)(2). Relying on Florida Rule of Appellate Procedure 9.140(e), which requires preservation of a sentencing error either at the time of sentencing or rule via 3.800(b), the Fourth District pronounced the issue "ripe" and held

> that a defendant who fails to challenge the inclusion of prior offenses on a scoresheet at his original sentencing may raise the challenge after his violation of probation. If we were to hold otherwise, the defendant still could raise the alleged sentencing error through postconviction motions. Under rule 3.800, the defendant could file a motion to correct sentencing error, even while an appeal is pending. Brooks v. State, 969 So. 2d 238, 241 (Fla. 2007). Under rule 3.850, the defendant could file a motion raising a sentencing error within two years after the sentence becomes final. Id. Given the opportunity to file these motions, we see no legal or practical reason why a defendant who fails to raise the challenge at his

> original sentencing cannot raise the challenge after his violation of probation. In the interests of justice and judicial economy, however, defendants obviously should raise the challenge at the earliest opportunity. See id. at 243 (recognizing "policy of encouraging defendants to seek an early remedy so that sentencing errors may be corrected as soon as possible -- especially when those errors appear on the face of the record"). Of course, once a court has ruled upon the challenge on its merits, the defendant cannot repeat the challenge in a successive motion.

35 Fla. L. Weekly at D62. Bryant concerned scoring of prior offenses rather than victim injury, but is otherwise directly on point and directly in conflict with the First District's decision in this case. The "red herring" argument derided by respondent (AB19) is now the law of the Fourth District.

In arguing for a procedural bar, respondent echoes the First District's invocation of section 924.06(2), Florida Statutes (2007), which provides in part that "[a]n appeal of an order revoking probation may review only proceedings after the order of probation." (AB10-12) The provision is not implicated by Tasker's challenge, which seeks review of sentencing proceedings that followed probation revocation, which are necessarily "after the order of probation." Further, as explained in the initial brief, the rule 3.800(b) proceedings in this case were a continuation of sentencing for probation violation which preceded the appeal, not part of the appeal itself.

The opinion in Bryant reflects the same perspective. Although it did not address section 924.06(2), the Fourth District noted that in moving to correct the sentencing error, the defendant "effectively stay[ed]" and then "resumed" his appeal. 35 Fla. L. Weekly at D62. Because a rule 3.800(b)(2) motion is a continuation of the sentencing for probation violation, permitting a challenge to victim injury scoring at this stage does not create a conflict with the prohibition in section 924.06(2) on raising matters occurring before entry of the probation order in an appeal from probation revocation.

The state raises the prospect of evidentiary hearings requiring testimony by victims of sex crimes years after imposition of sentence if challenges such as Tasker's are permitted. Four points are warranted in reply. First, probation by its nature extends the sentencing process in a way that accommodates revision to the CPC minimum. The state can add both prior-record and victim-injury points initially in probation revocation proceedings. See Robinson v. State, 985 So. 2d 1192, 1193 (Fla. 4th DCA 2008); Merkt v. State, 764 So. 2d 865 (Fla. 4th DCA 2000) ; June v. State, 784 So. 2d 1257 (Fla. 5th DCA 2001). Reciprocally, a defendant should be permitted to challenge prior record scoring, as in Bryant, and victim injury scoring, as in this case, initially in probation revocation proceedings. If a trial court wishes to foreclose either option, it may forgo probation.

Second, as the Fourth District observed in Bryant, rue 3.800(b) is only one of several ways a defendant may challenge victim injury scoring after probation revocation. Rule 3.850 relief is also available on a motion filed up to two years after a sentence imposed upon probation revocation is final on appeal. 35 Fla. L. Weekly at D62. Foreclosing relief via rule 3.800(b)(2) while the appeal from probation revocation is stayed merely pushes the victim-injury litigation even later.

Third, elimination of victim injury scoring affects only the minimum CPC sentence. Apart from the rare instance when the CPC minimum trumps the statutory maximum sentence under Florida Rule of Criminal Procedure 3.704(d)(25), the trial court may still impose the sentence it would otherwise have imposed. Finally, when faced with a meritorious challenge, the state can choose to stipulate to elimination of the victim injury and risk the possibility of a sentence reduction rather than compel the victim to "testify (basically relive) the whole horrible and horrifying experience again." (AB16)[1]

Consistent with Stubbs and Bryant and contrary to the First District's determination in this case, a challenge to victim injury scored made initially in a

1. Emotional trauma from an evidentiary hearing on victim injury scoring in this case appears unlikely. The victim is Tasker's daughter "L.T.", who was 16 when Tasker was sentenced for probation violation on December 13, 2005, making her 20 or 21 in 2010. (05VOP.24) During that hearing, Tasker stated without contradiction by the state that "my daughter stated repeatedly in the discovery evidence [that] no contact actually of the genital areas [occurred] whatsoever." (05VOP.21)

defendant's first sentencing hearing is cognizable when raised initially in a motion to correct sentencing error following probation revocation.

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.

Respondent's reliance on Seagrave v. State, 802 So. 2d 281 (Fla. 2001), is misplaced. The 1997 version of section 800.04, Florida Statutes, under which Seagraves was charged did not include an alternative element of a touching of clothing covering genitalia, as does the 2003 version of section 800.04(5)(a), Florida Statutes, under which Tasker was charged. The other opinions discussed in the initial and answer briefs which affirm sex contact scoring for touching of genitalia through clothing do not dictate victim injury scoring for any violation of section 800.04(5)(a).

The State is mistaken in its assertion that lewd or lascivious molestation cannot be committed without sexual contact. (AB23) Consequently, a stipulation to a factual basis for the plea, i.e., that facts exist which correspond to the elements of the crime, is not necessarily a stipulation to a factual basis for scoring of sex contact points on the CPC scoresheet. In this case, the statement in the arrest report that the victim "used a pillow to keep defendant from touching her breasts and vaginal area," (I.79-8) did not create a factual basis to find sexual contact through clothing. As noted in the initial brief, decisions such as Altman v. State, 852 So. 2d 870 (Fla. 4th DCA 2003), Louis v. State, 764 So. 2d 930 (Fla. 4th

DCA 2000), Blackburn v. State, 762 So. 2d 989 (Fla. 5th DCA 2000), and Fredette v. State, 786 So. 2d 27 (Fla. 5th DCA 2001), and Fretwell v. State, 852 So. 2d 292 (Fla. 4th DCA 2003), are distinguishable on the crucial distinction between contact with genitalia through clothing and contact with clothing covering genitalia.

In Stubbs, the Second District remanded for "further proceedings on the issue of whether the victim injury and legal constraint points were properly scored." 951 So. 2d at 911. In Bryant, the Fourth District remanded for an evidentiary hearing in which the state will be required to produce competent evidence of the prior offenses on the defendant's scoresheet, and to reconsider the sentence if scoresheet error is confirmed. 35 Fla. L. Weekly at D62-63. Comparable relief is warranted here. On remand, the state should be given an opportunity to support the victim injury scoring with competent evidence. If such evidence does not appear, Tasker should be resentenced pursuant to a revised scoresheet.

CONCLUSION

Based on the arguments contained in this brief and the initial brief, 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 appropriate to its disposition of the issues.

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 February, 2010. I hereby certify that this brief has been prepared using Times New Roman 14 point font.

Respectfully submitted,

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