IN THE SUPREME COURT OF FLORIDA

MARCUS SANDERS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC09-1729

ON PETITION FOR REVIEW FROM
THE SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA

ANSWER BRIEF OF RESPONDENT

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STATEMENT OF THE CASE AND FACTS

Petitioner was charged in Lee County case 00-CF-614 with the offense of Felony Criminal Mischief [Fel.3], D.O.O. Feb. 16,2000 (v1/R1-2); in lee County case 00-CF-1964 with Attempted Burglary Of A Dwelling [Fel.3], D.O.O. May 26, 2000 (v1/R3-4) and in Lee County case 00-CF-2894 with robbery [Fel.2], Aggravated Battery With A Deadly Weapon [bat or other blunt object] [Fel.2], and Aggravated Assault With A Firearm [Fel.3], D.O.O. August 13, 2000 (v1/R5-6).

On January 16, 2003, petitioner was sentenced in ball three cases as follows as follows:

00-CF-614: Criminal Mischief [Fel.3] as a habitual felony offender to 3 years FSP followed by 2 years probation; concurrent with 00-CF-1964 &00-CF-2894 (v1/R7-11)

00-CF-1964: Attempted Burglary Dwelling [Fel.3] as a habitual felony offender to 3 years FSP followed by 2 years probation; concurrent with 00-CF-64 & 00-CF-2894 (v1/R12-16)

00-CF-2894: Robbery [Fel.2] as a habitual felony offender to 3 years FSP followed by 3 years probation; Aggravated Battery [Fel.2] as a habitual felony offender to 3 years FSP followed by 3 years probation concurrent with ct.1; Aggravated Assault With A Firearm [Fel.3] 3 years FSP followed by 2 years probation, concurrent with cts. 1 & 2,; sentences in 00-CF-2894 also concurrent with sentences in 00-CF-614 & 00-CF-1964 (v1/R17-25).

The petitioner's criminal punishment code scoresheet reflected a lowest permissible sentence of 102.6 months [8.55 years] and a maximum sentence of 45 years (v1/R26-28)

1st. VOP: Petitioner was charged with violating his probation in all three cases violated in March of 2005 [technical violations]

(2Supp/R275-289). On March 28, 2005, petitioner admitted the violations and by agreement his conditions of probation were modified to include successful completion of the Ruth Cooper Center Residential Drug Treatment Program in all three cases [(3Supp/T313-319; Order of Modification of Probation (v1/R35-37)].

2nd VOP: Petitioner was charged with violating his probation in all three cases in September of 2005 - 2 technical violations and a new substantive offense of battery [on girlfriend] (2Supp/R299-307). On December 6, 2005, it was announced that the petitioner agreed to admit the violation and that his probation would be modified to include entrance in and successful completion of the "Bridge Program" in Orlando (2Supp/T320-326; Order of Modification of Probation (v2/R38-40)

3rd VOP: Petitioner was charged with violating his probation in all three cases in March of 2006 (v2/R49-51). It was alleged that he violated condition 3 - changing residence without procuring consent of his probation officer in that petitioner is alleged to have left his residence at "Bridges of America Drug Treatment Program; that he violated special condition of modification of probation by failing to complete or remain in the drug/alcohol treatment program until the provider determined that residential treatment was no longer necessary because the petitioner was unsuccessfully discharged from the Bridges Drug Treatment Program on March 31, 2006. (v2/R49-51). On November 8, 2006, defense counsel announced

that the petitioner wished to admit the violation and requested a sentencing date for an opportunity to mitigation testimony (1Supp/T256-257). The prosecutor advised the court that the appellant scored out to about 111 months[1] (1Supp/T257). The case was continued for sentencing to December 8, 2009 (1Supp/T262).

At the sentencing hearing on December 8, 2006, defense counsel stated that he would be asking the court to consider modifying the petitioner's probation and that he be sentenced to 1 year in the Lee County Jail and to complete the CORE drug program at the county jail (v4/T108-109). The prosecutor stated the court that the State was asking the court to impose a minimum guideline sentence which would be 111.6 months (v4/T110). After hearing testimony, the court stated:

> Well, I'd like to sentence him to the year in the county jail in the drug program but he's let me down too many times. He's violated his probation. We've bent over backwards for him.
>
> * * * *
>
> This isn't as bad as it seems, at least in my figuring. That's why I was figuring the time served. (Inaudible). I'm going to roughly sentence him to the guidelines. I'm a rounder-offer so this is slightly below. I'm going to sentence him to nine years in the Department of Corrections, which is 108 months. I thinks that's enough to do it.
>
> As I figure that, though, he's got nine years and he's served three, that drops him down to

[1] C.P.C. scoresheet in appellate record at (v4/R82-84) showing a lowest permissible sentence of 111.6 months [9.3 years]

> six, and he's got another four months. And if he's a good prisoner, he gets a – he'll serve eighty-five percent of that, it'll be around, a little less than four years. So totally, it's not nearly as bad as it seems.

(v4/T147-149)

The court stated that it was sentencing the petitioner to 9 years with credit for time served and was revoking and terminating the petitioner's probation (v4/T149)

The trial court signed written judgments and sentences in each case on December 8, 2006, that were subsequently filed with the Clerk of the Court reflecting the following:

00-CF-614: Criminal Mischief [Fel.3] 9 years FSP concurrent with 00-CF-2894 & 00- CF-1964(v5/R156-159)

00-CF-1964: Attempted Burglary of a Dwelling [Fel.3] 9 years FSP concurrent with 00-CF-2894 & 00-CF-614 (v5/R160-163)

00-CF-2894: Robbery {Fel.2] 9 years FSP, concurrent with ct.s 2&3; Aggravated Battery [Fel.2] 9 years FSP concurrent with cts. 1&3; Aggravated Assault With Firearm [Fel.3] 9 years concurrent with cts. 1&2; sentences in this case concurrent with sentences in 00-CF-614 & 00-CF-1964 (v5/R164-169).

On December 21, 2006, petitioner filed a "Motion To Correct Sentencing And To Modify Sentence (v5/R173-174). The motion alleged in pertinent part that the 9 year prison terms imposed in cases 00-CF-614 & 00-CF-1964 were illegal as those cases were third degree felonies and the maximum penalty was 5 years. Petitioner proposed that the sentences be corrected in 00-CF-614 & 00-CF-1964 to 5 years concurrent with each other and concurrent with the other sentences imposed (v5/T173). Petitioner further argued that the

guidelines scoresheet was inaccurate in that the third degree felonies in cases 00-CF-614 & 00-CF-1964 and count 3 of 00-CF-2894, also a third degree felony, should be scored as “Prior Record”. He argued that moving those convictions to “Prior Record” creates total sentencing points of 158.4 and a lowest permissible sentence of 97.8 months [8.15 years]. Petitioner proposed that the sentences for counts 1 and 2 in 00-CF-2894 be modified to 97.8 months to run concurrent with each other and other sentence imposed.

On March 12, 2007, a “Stipulation to Correct Sentence” was filed signed by the prosecutor and defense counsel (v5/R181). The stipulation reflects in pertinent part that the 9 year sentences imposed in cases 00-CF-614 and 00-CF-1964 and count 3 of 00-CF-2894 were illegal as those offenses were third degree felonies with a maximum penalty of 5 years and that the a correction should be made to reflect sentences of 5 years in cases 00-CR-614 and 00-CF-1964 and count 3 of 00-CF-2894 to run concurrent with each other and any other sentence imposed. Petitioner acknowledges in his initial brief before this Court that “the second issue was abandoned by the defense” (petitioner’s brief at p. 6).

On March 12, 2007, the court signed an ”Order Granting Stipulation [filed with the clerk of the court on March 12, 2007] (v6/R182).

On March 14, 2007, a notice of appeal was filed appealing the stipulated modified sentences (v6/R183).

On March 21,2007, a judgment and modified sentence, dated March 12, 2007, nunc pro tunc to March 12, 2007, was filed in case 00-CF-2984, reflected sentences of 9 years FSP on counts 1 Robbery [Fel.2]) and Aggravated Battery [Fel.2] and 5 year FSP on count 3 Aggravated Assault with firearm (v6/R189-194). On March 22, 2007, a judgment and modified sentence, dated December 8, 2006, was filed in the same case, 00-CF-2894 reflecting the same changes (v6/R195-199). On March 28, 2007 a judgment and modified sentence, dated March 12, 2997 nunc pro tunc to Match 19, 2007, was filed in case 00-CF614, reflecting a sentence of 5 years FSP for the offense of Criminal Mischief [Fel.3] (v6/R201-204). Also on March 28, 2007, a judgment and modified sentence, dated March 12, 2007 nunc pro tunc to December 8, 2006, was filed in case 00-CF-614, reflecting a sentence of 5 years FSP for the offense of Attempted Burglary of A Dwelling [Fel.3] (v6/R205-208).

On November 15, 2007, while the case was pending on direct appeal, the petitioner filed a rule 3.800(b)(2) motion to correct sentencing error (3Supp/R328-370). The motion alleged two sentencing errors. First, it was argued that petitioner had completed serving the 2 year probation terms for the third degree felonies in case 00-CF-614 (Felony Criminal Mischief), case 00-CF-1964 (Attempted Burglary of a Dwelling) and count 3 of 00-CF-2894 (Aggravated Assault with a Firearm) and therefore the trial court erred

in revoking his probation for those offenses and sentencing him ultimately to concurrent 5 year prison terms for those offenses. Secondly, petitioner argued because he was not legally before the court for violating his probation on the third degree felonies, the scoresheet used at the probation revocation hearing was inaccurate in that those third degree felonies should not have been scored as "additional offenses" because those offenses were not "pending before the court for sentencing". Petitioner argued that those third degree felonies should have been scored as "Prior Record", and that only the third degree felonies in cases 00-CF-614 and 00-CF-1964 should be scored. He argued that the third degree felony in case 00-CF-2894 does not qualify as a "Prior Record" because the offense did not occur "prior to the commission of the primary offense [count 1, aggravated battery] as required by Fla. R. Crim. P. 3.704(14). Petitioner argued that the proper scoring of these third degree felonies would have significantly reduced the petitioner's lowest permissible sentence under the criminal punishment code and that since the trial court imposed " a slight downward departure sentence" it could not be said that the trial court would have imposed the same sentence under an accurate scoresheet. Petitioner asked that the sentences for the third degree felonies be vacated and that he be re-sentenced on the second degree felonies based upon an accurate scoresheet. The trial court failed to render an order on the rule 3.800(b)(2) motion (3Supp/R369) and the motion

was deemed denied pursuant to Fla. R. Crim. P. 3.800(b)(2)(B).

On direct appeal, the petitioner made the same legal arguments as set forth in and preserved by his rule 3.800(b)(2) motion. The respondent conceded the first issue - that petitioner had completed the originally imposed 2 year probation terms for his third degree felonies prior to the filing of the most recent [3rd VOP] affidavit. Sanders v. State, 16 So.3d 232, 234 (Fla. 2d DCA 2009). The Second district Court of Appeals, affirmed the revocation of probation and the sentences imposed for the second degree felonies of Robbery [ct.1] and Aggravated Battery [ct.2] in case 00-CF-2894 and reversed and remanded with instructions for the trial court to strike the orders of revocation of probation and vacate petitioner's sentences for the counts in cases 00-CF-614 and 00-CF-1964 and the third degree felony in case 00-CF-2894. *Id.*

The Second District rejected the petitioner's argument that the scoresheet used at the revocation of probation was inaccurate in scoring the third degree felonies as "Additional Offenses". The Second District affirmed the trial court's use of petitioner's original listing of all the third degree felonies as "additional offenses" at re-sentencing after revocation of probation. *Id.* at 235. The Second District certified the following question as one of great public importance:

> WHEN A DEFENDANT IS TO BE RESENTENCED AFTER THE TRIAL COURT REVOKES HIS OR HER PROBATION AND PRIOR TO THAT REVOCATION THE TRIAL COURT'S JURISDICTION OVER ONE OR MORE OF THE ORIGI-

NALLY SENTENCED OFFENSES HAS EXPIRED, SHOULD THESE OFFENSES OVER WHICH THE TRIAL COURT NO LONGER HAS JURISDICTION BE SCORED AS PRIOR RECORD ON A RECALCULATED SCORESHEET OR SHOULD THE TRIAL COURT EMPLOY THE ORIGINAL SCORESHEET ON WHICH THOSE OFFENSES WERE SCORED AS ADDITIONAL OFFENSES.

SUMMARY OF THE ARGUMENT

When a defendant is being sentenced upon revocation of probation and prior to that revocation the trial court's jurisdiction over one or several of the offenses originally scored as "additional offenses" has expired, the trial court should employ the original scoresheet on which those offenses were scored as "additional offenses" and not use a recalculated scoresheet where those offenses would re-scored as "prior record". Re-scoring those offenses as prior record would result in changing the original options available to the trial court in that the lowest permissible prison term which the trial court could legally impose without giving reasons for a downward departure would be reduced thereby rewarding a defendant with an unearned windfall.

ARGUMENT

ISSUE I (CERTIFIED QUESTION OF GREAT PUBLIC IMPORTANCE)

> WHEN A DEFENDANT IS TO BE RESENTENCED AFTER THE TRIAL COURT REVOKES HIS OR HER PROBATION AND PRIOR TO THAT REVOCATION THE TRIAL COURT'S JURISDICTION OVER ONE OR MORE OF THE ORIGINALLY SENTENCED OFFENSES HAS EXPIRED, SHOULD THESE OFFENSES OVER WHICH THE TRIAL COURT NO LONGER HAS JURISDICTION BE SCORED AS PRIOR RECORD ON A RECALCULATED SCORESHEET OR SHOULD THE TRIAL COURT EMPLOY THE ORIGINAL SCORESHEET ON WHICH THOSE OFFENSES WERE SCORED AS ADDITIONAL OFFENSES.

The standard of review is de novo.

This Court should answer the certified question by adopting the reasoning espoused by the Second District. The Second District, in holding that the third degree felonies, which were no longer before the court for sentencing at the revocation of probation because the sentences had been completed, should still be scored as "additional offenses", reasoned:

> ...Sanders argument that his third degree offenses should be listed as prior record on a recalculated scoresheet presumes that a recalculated scoresheet should have been prepared after the revocation of probation. We do not agree with this presumption [fn.2]. Section 948.06(1) states: "If probation... is revoked, the court shall...impose any sentence which it might have originally imposed before placing the probationer on probation..." Furthermore, "[t]he law is well-settled that following revocation of probation the trial court must use the original scoresheet used at the time the defendant was placed on probation." *Adekunle v. State*, 916 So.2d 950, 952 (Fla. 4th DCA 2005), *receded from on other grounds*, *Mo-*

ses v. State, 13 So.2d 490, 490 (Fla. 4th DCA 2009) (receding from *Adekunle* "to the extent that it suggests that VOP offenses sentenced as the same time as a new, primary offense must be scored as a prior record and not as an additional offense"). In order for the court to have the same sentencing options at resentencing after revocation of probation as it did at the original sentencing, use of Sander's original scoresheet would be necessary. Accordingly, the scoring of the third degree felonies as additional offenses would not be in error and, in fact, would be the only possible way to insure that Sanders faced upon revocation of his probation the same sentence for the second-degree felonies that he might have originally faced on those counts. We, therefore, affirm the trial court's denial of the motion to correct sentence.

> Fn2. We are aware that under limited circumstances, the trial court may correct an error that appears on the original scoresheet at the time of resentencing after revocation of probation, even where the error increases the scoresheet total. *See Roberts v. State*, 644 So.2d 81, 82-83 (Fla. 1994) (holding that prior record mistakenly left off original scoresheet may be added to that scoresheet when the defendant is resentenced after revocation of probation). Sanders, however, does not argue that his original scoresheet was erroneous. Furthermore, we conclude that any such correction would still require the use of an otherwise originally calculated scoresheet.

In summary, we affirm the trial court's use, at the resentencing after revocation of probation, of Sander's original scoresheet listing all the third-degree felonies for which he was originally sentenced as additional offenses.

Sanders, 16 So.3d at 235

The Second District was correct in its legal analysis. Respondent recognizes that §921.0021(1), Fla. Stat. (2000) sets forth the following definition of terms:

> (1) "Additional Offenses" means any offense other than the primary offense for which an offender is convicted an which is pending before the court for sentencing at the time of the primary offense.
>
> * * * *
>
> (4) "Primary Offense" means the offense at conviction pending before the court for sentencing for which the total sentence points recommend a sanction that is severe as, or more severe, than the sanction recommended for any offense committed by the offender and pending before the court at sentencing...
>
> (5)"Prior Record" means a conviction for a crime committed by the offender...prior to the time of the primary offense...

Respondent further recognizes that the definitions set forth in Fla. R. Crim. P. 3.704(d)(7),(8), and (14) (2000) the applicable rules of criminal procedure contain the same definitions verbatim.

Nevertheless, because the third degree felonies were no longer before the court for "resentencing" at the time of the revocation of probation for the two remaining second degree felonies, does not mean that they should now be re-scored as "prior record" as opposed as originally scored as "additional offenses". Respondent submits when defining the terms set forth above, that the Legislature and this Court were contemplating the original sentencing hearing not a subsequent re-sentencing hearing as a result of a revocation of

probation when there no new substantive offenses that need to be scored.

Petitioner argues that the basis for using the original score-sheet was to preserve the original sentencing options available to the court and that under the criminal punishment code the trial court would have the same sentencing options if a revised score-sheet was used because he would still face the same maximum penalty - 15 years for each second degree felony - under the criminal punishment code regardless of whether the third degree felonies are scored as "additional offenses" or "prior record", re-scoring the third degree felonies as "prior record". Contrary to petitioner's argument, respondent submits that to revise the scoresheet and re-score the third degree felonies as "prior record" instead of as "additional offenses" as originally *properly* scored would be an unearned windfall to the petitioner or any defendant who violates his probation.

It would be an unearned windfall because now the offender would be facing a shorter "lowest permissible prison sanction" even though he or she has shown a flagrant disregard for the rule of law by violating his or her probation. While the legislature has given the trial court the discretion to sentence a defendant up to the statutory maximum under the criminal punishment code with having to give any reasons any reasons, *see* Neeld v. State, 977 So.2d 740. 743 (Fla. 2d DCA 2008) ("With the enactment of the Criminal Pun-

ishment Code the concept of an ‘upward departure” sentence effectively disappeared. *see* §921.0024(2)...”), the code sets a lowest permissible prison term which must be imposed absent any valid reason for a [downward] departure sentence. Reducing this lowest permissible prison sentence by re-scoring the third degree felonies from “additional offenses” to “prior record” at the time of revocation of probation rewards the offender by reducing the minimum prison sentence which must be imposed absent grounds for departure giving the trial court more discretion than was intended by the legislature when it enacted the code. Just as in Tito v. State, 593 So.2d 284 (Fla. 2d DCA 1992) where the Second District reasoned that the trial court must use the original guidelines scoresheet in order to determine the limit of a one-cell bump up for violation of probation, so under the criminal punishment code, respondent submits that the trial court must use the original scoresheet in order to maintain the lowest permissible prison sentence that the trial court must impose absent a finding valid reason[s] for a downward departure, when there are no new substantive offenses to be factored into the scoresheet. When there are new substantive offenses being considered at the revocation of probation - and there were none in the instant case - then multiple scoresheets must be prepared to determine how to score the new substantive offense in relation to probation offenses, in order to, “...obtain[] the most severe lowest permissible sentence possible for the defendant,

which is clearly the intent of the statutes and rules. (Citation omitted)."

Respondent acknowledges that at the time of the revocation of probation re-sentencing hearing, the original scoresheet can be updated to include additional points for community sanction violation - this was the petitioner's third violation of probation - and to correct "*errors*" in the original scoresheet. *See* Roberts v. State, 644 So.2d 81 (Fla. 1994). However, in the instant case there were no errors in the original scoresheet and, therefore, as Fourth District stated in Adekunle, *supra* at 952:

> The law is well-settled that following a revocation of probation the trial court must use the original scoresheet used at the time the defendant was originally placed on probation. *Jefferson v. State*, 830 So.2d 195, 198 (Fla. 4th DCA 2002); *Harris v. State*, 771 So.2d 565, 567 (Fla. 5th DCA 2000), *rev. denied,* 790 So.2d So.2d 1104 (Fla. 2001); *see also Roberts v. State*, 644 So.2d 81 (Fla. 81 (Fla. 1994)...
>
> This rule is consistent with the probation statute which provides that following a revocation of probation the court may "impose any sentence which it might have *originally* imposed before placing the defendant on probation." §948.06(1), Fla. Stat. (1997) (emphasis added).
>
> * * * *
>
> ...[t]he trial court should have sentenced Adeknule using the original separate scoresheets with additional points scored for a community sanction violation. *see* Fla. R. Crim. P. 3.703(d)(17)

CONCLUSION

Respondent respectfully requests that this Court answer the certified question by holding that when a defendant is being sentenced upon revocation of probation and prior to that revocation the trial court's jurisdiction over one or several of the offenses originally scored as "additional offenses" has expired, the trial court should employ the original scoresheet on which those offenses were scored as "additional offenses" and not use a recalculated scoresheet where those offenses would re-scored as "prior record".

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Assistant Public Defender Richard Sanders, Office of the Public Defender, Polk County Courthouse, P.O. Box 9000 - - Drawer PD, Bartow, Florida 33831 this 7th day of December 2009.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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