IN THE SUPREME COURT OF FLORIDA

MARCUS SANDERS,	:	
Petitioner,	:	
vs.	:	Case No. SC09-1729
STATE OF FLORIDA,	:	
Respondent.	:	

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

INITIAL BRIEF OF PETITIONER ON THE MERITS

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TENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE AND FACTS

I. THE CERTIFIED QUESTION

The district court certified the following question to be 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?

Sanders v. State, 16 So. 3d 232, 235-36 (Fla. 2d DCA 2009).

II. SUMMARY STATEMENT OF FACTS

A detailed statement of facts, with record citations, is contained in section IV below. This section contains a summary of the facts, taken primarily from the district court opinion. Id. at 233.

There are three lower court cases here. Five offenses were charged, three third-degree felonies and two second-degree felonies. In 2003, Petitioner pled no contest to all five counts and was sentenced to concurrent terms of three years in prison followed by probation. On the third-degree felonies, he received two-year terms of probation; three-year terms were imposed on the second-degree felonies.

After Petitioner completed the two-year probationary terms on the third-degree felonies, but before he had completed the probation on the second-degree felonies, the State initiated

violation of probation ("VOP") proceedings. Petitioner admitted the violations. The trial court revoked his probation in all three cases and sentenced him to concurrent 108-month terms on all five counts. This was a slight downward departure from the lowest permissible sentence of 111.6 months on his Criminal Punishment Code ("CPC") scoresheet. The scoresheet listed one of the second-degree felonies as the primary offense; the other four offenses were listed as additional offenses.

III. THE DISTRICT COURT OPINION

Petitioner made two arguments in the district court. These arguments were preserved in a Rule 3.800(b) motion, which was deemed to be denied because the trial court did not rule upon it within the 60-day limit imposed by that rule. 3STR-332-33, 369.[1]

First, he argued that the trial court erred in revoking the probation and sentencing him on the third-degree felony counts because he had completed the probation terms on those counts before the VOP proceedings were initiated; thus, the trial court no longer had jurisdiction over those counts. The State conceded error on this point and the district court agreed. 16 So. 3d at 234.

Second, Petitioner argued that he had to be resentenced on the second-degree felonies because he was sentenced under a miscalculated CPC scoresheet and that error was not harmless.

[1] "3STR" refers to the supplement labeled "3rd supplemental transcript of record on appeal."

Petitioner reasoned as follows: 1) the CPC scoresheet included the third-degree felonies as additional offenses; 2) as defined in the applicable statutes and rules, additional offenses are offenses that are "pending before the court for sentencing"; 3) since the court had lost jurisdiction over the third-degree felonies by the time of the VOP sentencing, those offenses were no longer pending before the court for sentencing and thus were not additional offenses under the CPC (but rather would have to be scored under the prior record category, assuming they otherwise met that definition); 4) the erroneous inclusion of the third-degree felonies as additional offenses increased Petitioner's CPC score and raised the lowest permissible sentence; and 5) since Petitioner was sentenced to a sentence slightly below the lowest permissible sentence, the erroneous inclusion of the third-degree felonies as additional offenses was harmful because it was not clear that the same sentence would have been imposed under an accurate scoresheet.

The district court rejected this argument and concluded resentencing was not required:

> At the time Sanders was originally sentenced in 2000, his scoresheet correctly listed the third-degree felonies as additional offenses.... Technically, these same third-degree felony offenses would fail to meet the definition of additional offenses on a recalculated scoresheet prepared for [VOP] sentencing [because] the trial court was without jurisdiction to revoke Sanders' probation on those offenses. Because only the second-degree felonies were before the trial court for sentencing after revocation of Sanders' probation, the third-degree felonies could not be listed as additional offenses on a recalculated scoresheet.

> The only other way these offenses might be scored on a recalculated scoresheet would be as prior record....
>
> However, 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 this probation. We do not agree with this presumption.[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, Moses v. State, [13 So. 3d 490 (Fla. 4th DCA 2009)].... In order for the court to have the same sentencing options at resentencing after revocation as it did at the original sentencing, use of Sanders' 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 ensure that Sanders faced upon the revocation of his probation the same sentence for the second-degree offenses that he might have originally faced on those counts. We, therefore, affirm the trial court's denial of the motion to correct sentence.
>
> In summary, we affirm the trial court's use, at the [VOP] resentencing ..., of Sanders' original scoresheet listing all the third-degree felonies ... as additional offenses....
>
> [2] We are aware that under limited circumstances, the trial court may correct an error that appears on the original scoresheet at [a VOP] resentencing ..., 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 defendant is resentenced after a [VOP]). 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.

16 So. 3d at 234-35 (citations omitted).

IV. DETAILED STATEMENT OF FACTS WITH RECORD CITATIONS

There are three lower court case numbers here. In January 2003, Petitioner pled no contest to all counts and was sentenced to the following concurrent sentences:

#00-CF-614

FELONY CRIMINAL MISCHIEF; three years imprisonment followed by two years probation. RI-1, 7-11, 29-30.

#00-CF-1964

ATTEMPTED BURGLARY OF AN UNOCCUPIED DWELLING; same sentence. RI-3, 12-16, 31-32.

#00-CF-2894

I. Robbery; three years imprisonment followed by three years probation;

II. Aggravated battery with a deadly weapon; same as count I;

III. AGGRAVATED ASSAULT WITH A FIREARM; three years imprisonment followed by two years probation. RI-5-6, 17-25, 33-34.

The emphasized offenses are third-degree felonies; the other two are second-degree felonies.

Petitioner completed the prison terms and began his probation. Several violation affidavits were filed in 2005. 2SRI-266-289; 2SRII-322-24.[2] Petitioner admitted these violations and the probation in all cases was modified. RI-35-37; RII-38-40; 2SRII-315-18, 322-24. The court did not revoke the probation on these occasions and did not extend the terms of probation beyond

[2] "2SRI" and "2SRII" refer to the two volumes labeled "2nd Supplemental Transcript of Record on Appeal."

the original two or three years. Although orders modifying the probation were entered on both occasions (RI-35-37; RII-38-40), no new probation orders were entered on either occasion.

Violation affidavits filed on May 10, 2006, alleged several violations. RII-49-51. On November 8, 2006, Petitioner entered an open admission to the charged violations. SRI-256-63.[3] At the sentencing on December 8, 2006, the trial court revoked Petitioner's probation in all cases and sentenced him under the CPC to a slight downward departure sentence of 108 months, concurrent on all counts. RIV-148-49; RV-156-69.[4]

On December 21, 2006, Petitioner's trial counsel filed a motion to correct sentencing error, which alleged:

> 1. The nine-year sentences on the third degree felonies were illegal because they exceeded the statutory maximum of five years; and
>
> 2. The scoresheet was inaccurate because the third degree felonies should have been scored as prior record, not additional offenses, and scoring them in this way would reduce the lowest permissible sentence to 97.8 months.

RV-173-74.

The State agreed to the first correction, i.e., reducing the sentence on the third-degree felonies to five years. RV-181; RVI-189-208. The second issue was abandoned by the defense.

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[3] "SRI" refers to the volume labeled "Supplemental Transcript of Record on Appeal."

Amended violation affidavits, filed on December 8, 2006, were dismissed about three weeks later. RIII-67-78; RV-175-77.

[4] The lowest permissible sentence was 111.6 months. RIV-82-90. The State did not object to the departure.

After the notice of appeal was filed, appellate counsel filed a Rule 3.800(b) motion that made the argument raised in this appeal. 3STR-332-33. The trial court constructively denied the motion by taking no action on it during the 60-day time period provided in Rule 3.800(b). 3STR-369.

SUMMARY OF THE ARGUMENT

The certified question should be answered as follows: At a VOP sentencing, offenses that are no longer pending before the court for sentencing because the defendant has finished the term of probation on those counts cannot be scored as additional offenses on a CPC scoresheet, but rather must be scored as prior offenses, assuming they otherwise meet that definition. This conclusion follows from a plain reading of the applicable statutes and rules. Those statutes and rules require that a new scoresheet be prepared at a VOP sentencing, and that only offenses that are currently pending before the court for sentencing are to be included as additional offenses.

The district court avoided this conclusion by citing 1) section 948.06(1), which says a court can “impose any sentence which it might have originally imposed before placing the probationer on probation" at a VOP sentencing, and 2) district court case law that says a court must use the same scoresheet at a VOP sentencing that it used at the original sentencing. Neither authority supports the district court’s position.

As to section 948.06(1): In cases like this a court will never be able to impose the same total or aggregate sentence it could have originally imposed because the court can no longer impose a sentence on those counts for which the probation terms have been completed. Conversely, with respect to those counts still pending for sentencing, a court can always impose the same

per-count sentence at a VOP sentencing that it could have imposed originally, i.e., a sentence up to the statutory maximum. Nothing in section 948.06(1) requires that the plain wording of the applicable CPC statutes and rules be ignored.

As to the use-the-same-scoresheet cases: Those cases, which originated under the first version of the pre-CPC guidelines, not only conflict with the applicable rules and statutes, they cannot be read literally in any event. A court never uses precisely the same scoresheet at a VOP sentencing, if for no other reason than that points for the VOP (not on the original scoresheet) are always added at a VOP sentencing. Further, any errors on the original scoresheet must be corrected at a VOP sentencing. Although the district court correctly noted that the issue here does not involve the correction of an error, the applicable rules and statutes contemplate that a new scoresheet must be prepared for a VOP sentencing, and the same definitions apply as at an original sentencing. Assuming there ever was such a thing as the same-scoresheet rule under the pre-CPC guidelines (a dubious proposition), the plain wording of the applicable CPC rules and statutes override it.

ARGUMENT

ISSUE

WHETHER IT WAS ERROR TO INCLUDE AS "ADDITIONAL OFFENSES" ON PETITIONER'S CPC SCORESHEET OFFENSES THAT WERE NO LONGER "PENDING BEFORE THE COURT FOR SENTENCING" BECAUSE PETITIONER HAD COMPLETED THE TERMS OF PROBATION ON THOSE OFFENSES

"The construction of a statute is an issue of law subject to de novo review." Aramark Uniform and Career Apparel, Inc. v. Eastern, 894 So. 2d 20, 23 (Fla. 2004).

The certified question should be answered as follows: At a VOP sentencing, only those offenses currently pending before the court for sentencing should be scored as additional offenses. If the defendant was originally placed on probation for several offenses but has completed the probationary term on some of those offenses before the VOP proceeding is initiated, at the VOP sentencing those offenses should not be scored as additional offenses but rather as prior record, if they so qualify.

Although there are no reported decisions on point, the answer to the certified question can be found in the plain language of the applicable statutes and rules. Section 921.0021, Florida Statutes (1999) provides the following definitions to be used under the CPC:

> (1) "Additional offense" means any offense other than the primary offense for which an offender is convicted and 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 as severe as, or more severe than, the sanction recommended for any other 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, as an adult or a juvenile, prior to the time of the primary offense.... [Emphasis added].

The applicable rules parallel the statute. Rule 3.704 provides the following definitions:

> (7) “Primary offense” means the offense at conviction pending before the court for sentencing for which the total sentence points recommend a sanction that is as severe as, or more severe than, the sanction recommended for any other offense committed by the offender and pending before the court at sentencing. Only one count of one offense before the court for sentencing shall be classified as the primary offense.
>
> (8) “Additional offense” means any offense other than the primary offense for which an offender is convicted and which is pending before the court for sentencing at the time of the primary offense.
>
> . . .
>
> (14) “Prior record” refers to any conviction for an offense committed by the offender prior to the commission of the primary offense. [Emphasis added].

In the present case, the third-degree felonies were not pending before the court for sentencing at the VOP sentencing because Petitioner had already completed the probation terms on those offenses. Those offenses should have been scored (if at all) under the prior record category, rather than as additional offenses.

The district court rejected this conclusion because it

rejected the underlying presumption that “a recalculated scoresheet should have been prepared after the revocation of this probation.” 16 So. 3d at 235. The district court rejected that presumption for two reasons.

First, the district court cited section 948.06(1), which states: "If probation ... is revoked, the court shall ... impose any sentence which it might have originally imposed before placing the probationer on probation." Thus, according to the district court, “[i]n order for the court to have the same sentencing options at resentencing after revocation as it did at the original sentencing, use of Sanders' original scoresheet would be necessary”; and “the scoring of the third-degree felonies as additional offenses ... would be the only possible way to ensure that Sanders faced upon the revocation of his probation the same sentence for the second-degree offenses that he might have originally faced on those counts.” 16 So. 3d at 235.

Second, "[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." Id. (citation omitted).

Neither reason withstands close scrutiny.

I. SECTION 948.06(1) DOES NOT REQUIRE THAT OFFENSES NO LONGER PENDING FOR SENTENCING MUST STILL BE SCORED AS ADDITIONAL OFFENSES AT VOP SENTENCINGS

In one sense, a trial court will never have the same sentencing options it did at the original sentencing in cases like this. At the original sentencing, the court could have imposed a total sentence of forty-five years, fifteen years on the two second-degree felonies and five years on each of the three third-degree felonies, to run consecutive. Sec. 921.0024(2), Fla. Stat. (1999). At the VOP sentencing, the court could not impose the five-year sentences because Petitioner had already completed the probation terms on the third-degree felonies. Thus, if we interpret the phrase “sentence which it might have originally imposed" as meaning the same total sentence, a court will never have the same sentencing options at a VOP that it did originally in cases like this.

If we interpret “sentence which it might have originally imposed" as referring to per-count sentences, with regard to the second-degree felonies that were pending for sentencing at the VOP sentencing, the court had the same option it did at the original sentencing: two 15-year terms, running consecutive.

The only option that would change here is the option of the lowest permissible sentence that could have been imposed without a departure. If the third-degree felonies were scored as prior record rather than additional offenses, the lowest permissible sentence would be lower. But the court was not required to impose

the lowest permissible sentence. The court could have imposed the sentences it did even if the scoresheet had been, by Petitioner's argument, correctly calculated. As to the second-degree felonies, the court had precisely the same options it had originally, except it could have imposed a slightly lower sentence without giving reasons for departure.

Thus, it is not accurate to say that, "[i]n order for the court to have the same sentencing options at resentencing ..., use of Sanders' original scoresheet would be necessary"; or that "the scoring of the third-degree felonies as additional offenses ... would be the only possible way to ensure that Sanders faced ... the same sentence for the second-degree offenses that he might have originally faced ...." 16 So. 3d at 235. Section 948.06(1) does not require the continued scoring of the third-degree felonies as additional offenses.[5]

[5] The only way a court would not have the same per-count sentencing options at a VOP sentencing would be if the CPC scoresheet used at the original sentencing allowed the court to exceed the statutory maximum (under section 921.0024(2)) but, at the VOP sentencing, the deletion of the additional offenses points lowered the scoresheet total to eliminate that option. We have no such facts here; Petitioner's scoresheet total at the original sentencing did not authorize that above-maximum option. RIV-84-90.

II. A COURT IS NOT REQUIRED TO USE THE ORIGINAL SCORESHEET AT A VOP SENTENCING

As to the "use the same scoresheet" argument: Although numerous district court opinions contain language that might support this argument, close examination of the cases reveals there is no such rule. And no such rule is found in the applicable CPC rules and statutes. To the contrary, those rules and statutes require the use of a new scoresheet at every sentencing, and the same definitions apply.

The initial problem here is what is meant by "the same scoresheet." This phrase could be interpreted two ways: Start with the same blank scoresheet or use the same already-filled-in scoresheet.

If it means use the same blank scoresheet, this would not authorize the inclusion of additional offenses that were not pending before the court for sentencing at the VOP sentencing. As discussed below, the statutes and rules contemplate the preparation of a new scoresheet at every sentencing, VOP or original, and the same definitions apply in both proceedings. Further, as also discussed below, the same blank scoresheet is not to be used if it was error to use that scoresheet at the original sentencing.

Equally clear, "the same scoresheet" does not mean the same filled-in scoresheet. At the least, community sanction violation points are added at a VOP sentencing. Further, if the defendant

is simultaneously sentenced on VOP offenses and new offenses, and all those offenses were committed under the same sentencing scheme (whether pre-CPC guidelines or CPC), a new scoresheet must be prepared that includes all the offenses.[6] Further, as discussed below, it is well settled that errors on the original scoresheet (including the error of using the wrong scoresheet) can be corrected at a VOP sentencing.

The Adekunle case the district court cited in the present case is one of a series of same-scoresheet cases from the district courts. These cases originated under the original version of the sentencing guidelines. The earliest cases all addressed a common issue: At a VOP sentencing, the State discovers the defendant had more prior convictions than had been known at the original sentencing and includes those additional priors on the VOP scoresheet. Several district courts concluded this was improper, although the precise reason for this conclusion is unclear.[7] When the Third District reached a

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[6] State v. Lamar, 659 So. 2d 262 (Fla. 1995); Moses v. State, 13 So. 3d 490 (Fla. 4th DCA 2009). The same rule applies if the defendant is placed on probation for one offense, is later placed on probation in a second case at a separate sentencing, and then later violates the probation in both cases and is simultaneously sentenced in both cases. State v. Alberto, 847 So. 2d 1091 (Fla. 4th DCA 2003).

[7] See, e.g., Harris v. State, 574 So. 2d 1211 (Fla. 2d DCA 1991); Pfeiffer v. State, 568 So. 2d 530 (Fla. 1st DCA 1990); Graham v. State, 559 So. 2d 343 (Fla. 4th DCA 1990).

It appears Graham is the first case to expressly adopt this same-scoresheet logic in VOP sentencings. Although agreeing that "a trial judge can correct a miscalculated scoresheet at any time" (citing Rule 3.800(a)), the court concluded it was "error

contrary conclusion and certified the conflict, this Court concluded that such errors can be corrected at a VOP sentencing because the Court saw "no reason to perpetuate the error. Justice is not served by awarding a defendant something to which he is not entitled." Roberts v. State, 644 So. 2d 81, 82 (Fla. 1994).

Following Roberts, the district courts have concluded that other errors can also be corrected at VOP sentencings, including

(..continued)
to consider a whole new scoresheet bearing little resemblance to the original, as distinct from correcting an error made on that original.... There simply was no miscalculation on the original scoresheet ..., and it is too late to correct the error now." 559 So. 2d at 343-44. The court cited no authority for this "too late to correct" conclusion.

Pfeiffer also noted that miscalculations could be corrected at any time, but said there was a difference between errors of fact and errors of law. Only the latter, which are apparent on the face of the record, can be corrected; factual errors "cannot be corrected on appeal or by 3.800(a) motion." 568 So. 2d at 531 (citations omitted). The court did not seem to recognize that the error in that case had been corrected in the trial court, at a de novo sentencing following a VOP; thus, the cases it cited for the quoted language were inapplicable.

Harris cited these two cases and noted trial courts can determine a defendant's prior record at the original sentencing by ordering a presentence report or by questioning the defendant under oath, with a perjury charge being used to enforce truthfulness. 547 So. 2d at 1212. Again, the court did not explain why the same scoresheet must be used at the VOP.

In Tito v. State, 593 So. 2d 284 (Fla. 2d DCA 1992), the court indicated the reason for the same-scoresheet rule: Under the original version of the guidelines in effect during this time, the rules provided (and still provide) that, upon a VOP, "a trial court may not impose a sentence exceeding the one cell upward increase permitted by [Rule] 3.701(d)(14) and that no further departure ... is allowed except for valid reasons which existed at the time the defendant was placed on probation"; thus, "[i]n determining the one cell bump-up ..., the trial court must use the original guidelines scoresheet ...." Id. at 285-86.

Even if this logic was valid under the old guidelines, it would not apply under the CPC.

the scoring of the primary offense,[8] the scoring of victim injury points,[9] and the use of the wrong scoresheet.[10] It has also been recognized that a court can use a discretionary multiplier at a VOP sentencing even though that was not used at the original sentencing,[11] and a court must delete points that were originally properly added if there has been a change in the law by the time of the VOP.[12]

Thus, the same-scoresheet rule is not really a rule at all; or at least it is a rule so riddled with exceptions it is essentially meaningless.

In the present case, the district court distinguished Roberts in a footnote:

> 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 a revocation of probation, even where the error increases the scoresheet total. See Roberts .... 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.

The district court cited no authority for the proposition that "any such correction would still require the use of an

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[8] Brasfield v. State, 657 So. 2d 1191 (Fla. 5th DCA 1995).
[9] Merkt v. State, 764 So. 2d 865 (Fla. 4th DCA 2000).
[10] Atkins v. State, 787 So. 2d 57 (Fla. 2d DCA 2001).
[11] Carrigan v. State, 873 So. 2d 605 (Fla. 5th DCA 2004).
[12] Holmes v. State, 722 So. 2d 240 (Fla. 5th DCA 1998)(holding it was error to include firearm points on a VOP scoresheet, even though those points were properly added at the original sentencing under then-extant district court case law, when this Court disapproved that prior case law after the VOP sentencing but while the VOP appeal was pending).

otherwise originally calculated scoresheet." The district court did not explain how a case that allows errors in the original scoresheet to be corrected at a VOP sentencing also requires scoring errors to be made in a VOP scoresheet, provided that scoring was not error in the original scoresheet.

Nothing in Roberts suggests that a court is required to use precisely the same "originally calculated scoresheet," except for any error correction allowed by that case. Nor is there anything in the applicable CPC statues or rules to support such a conclusion. To the contrary, the statues and rules require the preparation of a new scoresheet at every sentencing, original or VOP.

Section 921.0024 provides:

> (3) A single scoresheet shall be prepared for each defendant to determine the permissible range for the sentence that the court may impose .... The scoresheet ... must cover all the defendant's offenses pending before the court for sentencing. The state attorney shall prepare the scoresheet ..., which must be presented to the defense counsel for review for accuracy in all cases unless the judge directs otherwise. The defendant's scoresheet or scoresheets must be approved and signed by the sentencing judge.
>
> . . .
>
> (6) The clerk of the circuit court shall transmit a complete, accurate, and legible copy of the Criminal Punishment Code scoresheet used in each sentencing proceeding to the Department of Corrections....
>
> (7) A sentencing scoresheet must be prepared for every defendant who is sentenced for a felony offense.... [Emphasis added].

Similarly, Rule 3.704 provides:

> (1) One or more Criminal Punishment Code scoresheets must be prepared for each offender covering all offenses pending before the court for sentencing .... The office of the state attorney must prepare the scoresheets and present them to defense counsel for review as to accuracy....
>
> (2) One scoresheet must be prepared for all offenses committed under any single version or revision of the guidelines or Criminal Punishment Code pending before the court for sentencing.... [Emphasis added].

The statutes make no specific provision for VOP sentencings, other than defining the term "community sanction violation" and providing for the scoring of points for such. Secs. 921.0021(6) and 921.0024((1)(b), Fla. Stat. (1999). Rule 3.704(d)(16) contains similar provisions. Rule 3.704(d)(28) provides: "Sentences imposed after revocation of probation or community control must be imposed according to the sentencing law applicable at the time of the commission of the original offense." There are no other provisions in the statues or rules regarding VOP sentencings.

These rules and statutes clearly require that a scoresheet be prepared for all sentencings, original or VOP. Further, there is nothing in the statutes or rules that indicates a scoresheet for a VOP sentencing is to be prepared any differently than a scoresheet for an original sentencing. The same definitions apply. Only offenses "pending before the court for sentencing" are to be included as additional offenses.

Thus, the same-scoresheet rule (assuming there is such a thing) does not authorize the scoring, as "additional offenses,"

offenses that are no longer “pending before the court for sentencing” at a VOP sentencing.

“If the language of a statute or rule is plain and unambiguous, it must be enforced according to its plain meaning.... Legislative history is not needed to determine intent when the language is clear.” Mitchell v. State, 911 So. 2d 1211, 1214 (Fla. 2005)(citation omitted). The language “pending before the court for sentencing” is clear, as is the language quoted above that directs the preparation of a new scoresheet for every sentencing. It was error to score the third-degree felonies as additional offenses on Petitioner’s CPC scoresheet.

And, since this scoring increased the lowest permissible sentence and Petitioner was sentenced to a slight downward departure sentence, the error was harmful. State v. Anderson, 905 So. 2d 111 (Fla. 2005)

CONCLUSION

The district court opinion should be quashed.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Bill McCollum, Concourse Center #4, 3507 E. Frontage Rd. - Suite 200, Tampa, FL 33607, (813) 287-7900, on this _____ day of November, 2009.

CERTIFICATION OF FONT SIZE

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Respectfully submitted,

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APPENDIX

PAGE NO.

1. Sanders v. State, 16 So. 3d 232 (Fla. 2d DCA 2009) A-1-5