

Supreme Court of Florida

MONDAY, JUNE 29, 1987

FLORIDA RULES OF CRIMINAL)
PROCEDURE re SENTENCING) No. 69,411
GUIDELINES (rules 3.701)
and 3.988).)

In view of legislative action during the recent session our opinion filed April 2, 1987 is hereby withdrawn, and the following opinion is substituted therefor.

McDONALD, C.J., and OVERTON, EHRLICH, SHAW, GRIMES and KOGAN, JJ.,
Concur
BARKETT, J., Concurs in part and dissents in part with an opinion

A True Copy

TEST:

Sid J. White
Clerk Supreme Court.

JB

cc: Leonard Holton, Esquire
Hon. Erwin Fleet
Hon. Norman R. Wolfinger
Alan C. Sundberg, Esquire
Hon. Hugh S. Glickstein
Hon. J. Marion Moorman
Howard Babb, Jr., Esquire

Supreme Court of Florida

No. 69,411

FLORIDA RULES OF CRIMINAL PROCEDURE
re SENTENCING GUIDELINES (rules 3.701 and 3.988).

[June 29, 1987]

PER CURIAM.

Pursuant to subsection 921.001(4) (b), Florida Statutes (1983), the Sentencing Guidelines Commission presented to this Court proposed amendments to Florida Rules of Criminal Procedure 3.701 and 3.988. After considering the commission's proposals, we adopted some of them, modified and then adopted others, and rejected still others in an opinion filed April 2, 1987.¹ The legislature considered sentencing guidelines in its 1987 regular session and specifically adopted two parts of our April 2 opinion.² The legislature rejected the other recommendations made in that opinion, and we hereby withdraw it except for parts III and VI, which we include herein.

¹ The Court accepted the following proposals: 1) increasing the points for burglaries; 2) redefining "prior record" to include misdemeanor convictions for violating local ordinances that are also violations of state law; and 3) expanding a cell and adopting an additional factor to be scored as tools to fight the use of "crack" cocaine. The Court modified and then adopted the commission's proposals regarding scoring victim injury, both physical and psychic, and regarding widening the cells in all categories. The Court rejected 1) reducing the level of proof needed to support reasons for departure; 2) sustaining a departure sentence where at least one of multiple reasons for departure is valid; 3) revising the committee note regarding habitual offenders; and 4) abolishing appellate review of departures.

² CS for SBs 35, 437, 894, and 933, § 1.

III.

This requested change relates to amending the definition of prior record to include misdemeanor convictions for violating local ordinances that are also violations of state statutes. This is reasonable, and we approve it.

VI.

The next issue to be considered relates to victim injury. The present guidelines score physical victim injury if that injury is an essential element of the crime for which the defendant is convicted. They exclude nonphysical injury and physical injury if the injury is not an element of the crime. The commission recommends that victim injury be scored whether or not it is an element of the crime if, in fact, injury occurred during the offense which led to the conviction. It also seeks to include psychic as well as physical trauma in victim injury.

We see merit in scoring physical injury if a defendant physically injures the victim of the offense during the course of a criminal episode, regardless of whether the injury is an element of the crime, but do not believe it wise to extend the definition of injury to include psychic injury. There are too many variables and too many subjective factors to score psychic injury objectively. This type of injury has been recognized as a legitimate ground for departure in some circumstances; it is better to allow psychic injury as a consideration for departure in appropriate cases than to enter the jungle of confusion by attempting to quantify psychic victim injury. Additionally, we feel it is appropriate for victim injury to be scored for each victim injured during a criminal episode. We therefore amend rule 3.701.d.7 to read: "Victim injury shall be scored for each victim physically injured during a criminal episode or transaction."

The legislature also adopted numerous amendments to section 921.001. We have not considered those amendments and make no ruling as to their validity in this opinion.

The amendments to rule 3.701 are appended to this opinion and will be effective at 12:01 a.m., July 1, 1987.

It is so ordered.

McDONALD, C.J., and OVERTON, EHRLICH, SHAW, GRIMES and KOGAN, JJ.,
Concur
BARKETT, J., Concurs in part and dissents in part with an opinion

Paragraph d.5.a) of rule 3.701 is amended as follows:

5. a) "Prior record" refers to any past criminal conduct on the part of the offender, resulting in conviction, prior to the commission of the primary offense. Prior record includes all prior Florida, federal, out-of-state, military, and foreign convictions, as well as convictions for violation of municipal or county ordinances that bring within the municipal or county code the violation of a state statute or statutes.

Paragraph d.7 of rule 3.701 is amended as follows:

7. Victim injury shall be scored if it is an element of any offenses at conviction. Victim injury shall be scored for each victim physically injured during a criminal episode or transaction.

Paragraph (d) (7) of the committee note to rule 3.701 is amended as follows:

(d) (7) This provision implements the intention of the commission that points for victim injury be added for each victim injured during a criminal transaction or episode. The injury need not be an element of the crime for which the defendant is convicted, but is limited to physical trauma. However, if the victim injury is the result of a crime for which the defendant has been acquitted, it shall not be scored. only when the defendant is convicted of an offense (scored as either primary or additional offense) which includes physical impact or contact. Victim injury is to be scored for each victim for whom the defendant is convicted of injuring and is limited to physical trauma.

BARKETT, J., concurring in part, dissenting in part.

I dissent from the recommendation requiring the scoring of victim injury for two reasons.

First, I agree that a sentencing judge should be permitted to consider the manner in which a crime was committed as well as the nature and extent of the harm inflicted. Particular crimes can be committed in disparate ways, leading to vastly different injuries. Aggravated battery, for example, can be slight or gratuitously cruel. The injuries inflicted can be trivial or heinous. Accordingly, I am sympathetic with the concerns expressed in Recommendation VI. However, these differences are extremely difficult to quantify. I thus would prefer that victim injury, when an element of any offense for which the defendant has been convicted or admitted guilt, not be scored at all but left to the discretion of the sentencing judge as an appropriate area of departure.

Second, I strongly disagree with the expression of an official policy in Recommendation VI that is the antithesis of due process. My specific objection is with the scoring of victim injury when it is not an element of a crime for which the defendant has either admitted guilt or been convicted. As the court said in State v. Womack, 319 N.W.2d 17, 19 (Minn. 1982):

It is one thing for the sentencing court to look at the conduct underlying the offense to which the defendant pled guilty if the defendant admits that the underlying conduct occurred, but it is quite another thing when the defendant denies that such conduct occurred.

When there is evidence to support additional offenses resulting in victim injury, then the state's due-process obligation is to charge and prove that crime beyond a reasonable doubt if the defendant denies the charges or raises potential affirmative defenses. The defendant has a right to a jury determination of guilt on such factual issues. Although the majority's approach may be emotionally satisfying, I can see no logical reason to suspend the state's obligation or the defendant's right to a jury trial on the issue of guilt prior to enhanced punishment. This policy defies due process by subjecting defendants to punishment for unconvicted crimes.

Accordingly, I strongly dissent from Recommendation VI.

Original Proceeding - Florida Rules of Criminal Procedure

Leonard Holton, Director, Sentencing Guidelines Commission,
Tallahassee, Florida; Erwin Fleet, Circuit Judge, First Judicial
Circuit of Florida, Shalimar, Florida; and Norman R. Wolfinger,
State Attorney for the Eighteenth Judicial Circuit of Florida,
Titusville, Florida,

for Petitioner

Alan C. Sundberg, Tallahassee, Florida; Hugh S. Glickstein,
Judge, Fourth District Court of Appeal, West Palm Beach, Florida; and
J. Marion Moorman, Public Defender, Tenth Judicial Circuit,
Bartow, Florida

for Respondents

Howard Babb, Jr., President, Florida Association of Public
Defenders, Tavares, Florida,

for Respondents