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IN THE SUPREME COURT OF FLORIDA

RILEY BERNARD SMITH,)
)
 Petitioner,)
)
 vs.)
)
 STATE OF FLORIDA,)
)
 Respondent.)
 _____)

CASE NO. 72,077

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PETITIONER'S BRIEF ON THE MERITS

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 Petitioner,)
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 STATE OF FLORIDA,)
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PETITIONER'S BRIEF ON THE MERITS

STATEMENT OF THE CASE AND FACTS

Smith was charged with and convicted of the November 7, 1985 armed robbery of a restaurant. Originally, a sentencing guideline scoresheet was prepared, indicating a recommended range of three and one-half to four and one-half years imprisonment. The trial judge departed from the recommended sentence and imposed a six year sentence. Smith appealed to the District Court of Appeal, Fifth District on March 31, 1986, and by opinion dated October 9, 1986, the Fifth District Court reversed, finding none of the reasons given for departure were valid and "remanded for resentencing within the presumptive guideline range." Smith v. State, 495 So.2d 876 (Fla. 5th DCA 1986)

Meanwhile, by informations filed in Lake County in January, February and March 1986, Smith was charged with five other armed robberies which had been committed before the instant

robbery. On September 2, 1986, while the appeal to the District Court was still pending, Smith entered guilty pleas to all five charges and was sentenced to concurrent seven and one-half year terms on each.

Upon remand of the instant matter, the state prepared a new sentencing guideline scoresheet which included the five Lake County convictions as "prior offenses." This resulted in a recommended sentence of life imprisonment. After hearing argument on the issue, the trial court felt compelled to sentence Smith to life imprisonment. (R10-11,17-21) Smith v. State, 518 So.2d 1336 (Fla. 5th DCA 1987).

Smith again appealed to the Fifth District Court of Appeal on December 10, 1986. (R25) By opinion dated December 24, 1987, the court affirmed the sentence imposed. However, in light of the language in Shull v. Dugger, 515 So.2d 748 (Fla. 1987), the District Court, pursuant to Florida Rule of Appellate Procedure 9.030(a)(2)(A)(v) certified the following question to this Court:

DOES THE PRINCIPLE THAT GENERALLY, UPON REVERSAL OF A DEPARTURE SENTENCE, RESENTENCING MUST BE WITHIN THE PRESUMPTIVE GUIDELINE RANGE, BAR IMPOSITION OF A GREATER PRESUMPTIVE SENTENCE BASED UPON A REVISED SCORESHEET REFLECTING AS "PRIOR RECORD" ADDITIONAL CONVICTIONS OBTAINED AFTER THE FIRST APPEAL WAS TAKEN AND PRIOR TO RESENTENCING FOR CRIMINAL CONDUCT COMMITTED PRIOR TO THE INSTANT CRIME?

SUMMARY OF ARGUMENT

The trial court originally sentenced Petitioner to a six-year departure sentence. Petitioner filed a notice of appeal challenging that sentence. While the appeal was pending, the state filed charges in another county (same circuit) to which Petitioner pled guilty and received a concurrent seven year sentence. The Fifth District Court of Appeal found the reasons for departure in the previous appeal to be invalid. The court remanded for resentencing within the presumptive guideline range of 3½ to 4½ years. At the resentencing a new scoresheet was prepared and the subsequent convictions were scored as prior record. This resulted in a recommended life sentence. The Fifth District Court of Appeal affirmed the life sentence but certified a question to this Court. Based on a variety of arguments, Petitioner contends that his sentence was increased unfairly.

ARGUMENT

THE TRIAL COURT ABRIDGED APPELLANT'S
CONSTITUTIONAL RIGHTS REGARDING DOUBLE
JEOPARDY BY RESENTENCING HIM TO LIFE
IMPRISONMENT FOLLOWING HIS SUCCESSFUL
APPEAL OF THE PREVIOUSLY IMPOSED DEPART-
TURE SENTENCE OF SIX YEARS IMPRISONMENT.

Introduction

The trial court originally sentenced Smith to six years incarceration which constituted a departure sentence. This departure sentence was imposed at the urging of the state. The trial judge provided written reasons in an attempt to justify the departure from the recommended range of 3½ to 4½ years. Petitioner chose to challenge this departure sentence on appeal, as is his right to do. The District Court of Appeal, Fifth District, found the written reasons to be insufficient and remanded for resentencing within the presumptive guideline range. Smith v. State, 495 So.2d 876 (Fla. 5th DCA 1986). While that appeal was pending, Petitioner entered guilty pleas to five Lake County robberies for what he probably thought was a convenient sentence of seven years which was ordered to run concurrent to the six year departure sentence imposed on the Marion County case that was the subject of the first appeal. Pursuant to the mandate of the District Court, Petitioner appeared for resentencing after winning the first appeal and the trial court resentedenced him to life imprisonment. This was pursuant to a new scoresheet prepared which included the robbery convictions that were obtained while the first appeal was pending. The result of Petitioner's successful appeal of his illegal departure sentence was a life

sentence rather than his original six year sentence. The District Court of Appeal, Fifth District, then affirmed Petitioner's life sentence following a second appeal but certified the question to this Court.

A. The Applicability of Shull v. Dugger

The only real concern of the Fifth District Court of Appeal was the applicability of Shull v. Dugger, 515 So.2d 748 (Fla. 1987) to the instant set of facts. The certified question specifically asks if Shull v. Dugger, bars imposition of a greater presumptive sentence based upon the revised scoresheet after the first appeal. The revised scoresheet reflected additional convictions scored under "prior record" that were obtained after the first appeal was taken and prior to resentencing on remand.

Shull v. Dugger, established the general rule that, when all the reasons stated by the trial court in support of departure are found invalid, resentencing following the remand must be within the presumptive guideline sentence. This Court refused to make an exception to that general rule merely because the illegal departure was based upon only one invalid reason rather than several. This Court pointed out:

We believe the better policy requires the trial court to articulate all of the reasons for departure in the original order. To hold otherwise may needlessly subject the defendant to unwarranted efforts to justify the original sentence and also might lead to absurd results. One can envision numerous resentencings as, one by one, reasons are rejected in multiple appeals.

Shull v. Dugger, supra at 750.

Petitioner submits that on remand, he should have stood before the trial court as he did at the initial sentencing, that is, with a presumptive range of 3½ to 4½ years of incarceration. To hold otherwise has led to an absurd result as this Court warned in Shull v. Dugger. In essence, Riley Smith has been punished for winning his initial appeal. This type of absurd result would have been avoided if the original scoresheet had been used on resentencing. Petitioner submits that the trial court is prohibited from recalculating a new scoresheet when a defendant appears for resentencing after a successful appeal.

To hold otherwise constitutes a chilling effect on an individual's right to appeal an illegal sentence. If the result reached in the instant case is allowed to stand, a defendant will be required to think long and hard before filing a notice of appeal from a departure guideline sentence. He would certainly have to be cognizant of all pending charges, warrants or holds from other jurisdictions. He would also have to be aware of crimes that he had committed but for which he had not yet been caught. Furthermore, it would be impossible to gauge whether law enforcement authorities might suspect a particular defendant of other crimes. A defendant would not necessarily be aware of the suspicions, especially for offenses that he did not commit. However, he could be forced into a plea of convenience on a charge which he did not commit which could later be scored as prior record during a subsequent resentencing after the successful appeal from an unjustly imposed departure sentence. Such a

result is patently unfair. It seems dramatically unfair that the trial court was able to increase a departure sentence which he should had not have imposed in the first place. This Court should not permit such an unjust result. See Tibbs v. State, 397 So.2d 1120 (Fla. 1981).

B. Res Judicata, Collateral Estoppel, and Law of the Case

On October 9, 1986, the Fifth District Court pointed out that none of the reasons for departing from the presumptive guideline sentence given by the lower court presents a valid basis for departure. (R15) The Court ordered, "this case is remanded for resentencing within the presumptive guideline range." (R15) (emphasis added). Petitioner submits that the trial court was required to resentence within the presumptive range (3½ - 4½ years) as calculated by the scoresheet originally prepared prior to the initial sentencing. Petitioner submits that the scoresheet that was initially prepared in the instant case becomes the law of the case in this regard, and should have been utilized at the resentencing.

The law of the case is a principle adhered to by courts to avoid reconsideration of points of law which were, or should have been, adjudicated in a former appeal of the same case; its purpose is to lend stability to judicial decisions, to avoid piecemeal appeals, and to bring litigation to an end as expeditiously as possible. Strazzulla v. Hendrick, 177 So.2d 1 (Fla. 1965). It is not necessary that the legal point raised in the latter appeal be presented precisely as it was in the former appeal; the law of the case principle is also applied where the

issue could have been but was not raised, Airvac, Inc. v. Ranger Ins. Co., 330 So.2d 467 (Fla. 1976), or where the question was decided by implication. Alford v. Summerlin, 423 So.2d 482 (Fla. 1st DCA 1982). The doctrine does apply to criminal cases as well. Gaskins v. State, 12 FLW 657 (Fla. 2d DCA, February 25, 1987).

Petitioner's prior record computed into the scoresheet constitutes a factual matter that was determined in his favor on the initial scoresheet. The Lake County robberies which were committed prior to the instant offense should have been disposed of prior to Petitioner's initial sentencing if the state intended to use them in the computation of the guideline sentence. Since the state chose not to pursue the Lake County offenses until after Petitioner had already filed his first notice of appeal in the instant case, Petitioner submits that the state is collaterally estopped from seeking the inclusion of the Lake County offenses in the computation of Petitioner's sentence in the instant case. See Senior v. State, 502 So.2d 1360 (Fla. 5th DCA 1987).

Senior, supra, involved a situation where the defendant misrepresented his prior record during the pre-sentence investigation. After he began serving his sentence, the state filed a motion to correct the sentence which the trial court then granted and increased Senior's sentence during a resentencing proceeding. The Fifth District Court of Appeal Court agreed with Senior's contention that the trial court had no power to correct a legal sentence that is already being served. The Lake County offenses

which were computed as prior record at Petitioner's resentencing, were committed prior to the instant offense. Petitioner submits that the failure of the state to orchestrate his prosecutions in Marion and Lake Counties prohibits them from the reorchestrating scoresheet points obtained after the Petitioner had already filed the initial notice of appeal in the Marion County case. The Lake County charges were not pending prior to the filing of Petitioner's initial notice of appeal. By filing his notice of appeal, Petitioner detrimentally relied upon the state's failure to pursue the Lake County charges. An analogous type of orchestration of charges by the state was criticized in Clark v. State, 519 So.2d 1095 (Fla. 1st DCA 1988).

In holding that Smith's life sentence does not violate North Carolina v. Pearce, 395 U.S. 711 (1969), the Fifth District Court of Appeal stated in a foot note:

Under Florida law, a trial court is barred from increasing a legal sentence, Senior v. State, 502 So.2d 1360 (Fla. 5th DCA 1987); Hinton v. State, 446 So.2d 712 (Fla. 2d DCA 1984), but this principle has no application here since Smith's initial sentence violated the sentencing guidelines.

Smith 518 So.2d 1338. The language in this footnote overlooks the logical corolary that a trial court should not be permitted to impose a more severe sentence than it would have been permitted to originally impose, simply because the trial court initially sentenced the defendant to an illegal rather than a legal sentence. Such an inequitable result should not be allowed to stand.

Alternatively, Petitioner submits that the initial six year departure sentence imposed by the trial court was not an illegal sentence. Rather it was a voidable sentence, that is, a legal sentence subject to scrutiny on appeal. When the appellate court finds the departure reasons cited by the trial court to be invalid ones, remand should be ordered for sentencing within the presumptive guideline range. The proceedings do not begin anew and thus, a new scoresheet should not be prepared. Miller v. Florida, 482 U.S. __, 96 L.Ed.2d 351, 107 S.Ct. __ (1987) and Shull v. Dugger, supra, both seem to require such a result. It makes no sense that a trial court can increase an improperly imposed departure but cannot increase a legal sentence.

C. The Applicable Rule of Criminal Procedure

Prior to its amendment, Florida Rule of Criminal Procedure 3.701(d)(5)(a) defined prior record for purposes of the sentencing guidelines as follows:

"Prior record" refers to any past criminal conduct on the part of the offender, resulting in conviction, disposed of prior to the commission of the instant offense. (emphasis added).

The logical interpretation of this would prohibit the scoring of the Lake County offenses for the purpose of Petitioner's resentencing in the instant case. The District Court of Appeal First District, pointed out that the above rule prohibits consideration of past criminal conduct for which convictions were not obtained prior to the commission of the primary offense for purposes of scoring under the prior record category. Hunt v. State, 468

So.2d 1100 (Fla. 1st DCA 1985). The court pointed out however that a trial court can consider that conviction for purposes of departure.

In Frank v. State, 490 So.2d 190 (Fla. 2d DCA 1986), the Second District Court of Appeal construed the rule at issue to mean that any crime committed prior to the subject offense should be factored into the guidelines so long as the conviction of the prior crime takes place before the sentencing for rather than the commission of the subject offense. Frank, supra, was decided on the premise that the words "disposed of" had been eliminated from the rule because the Supreme Court had amended the rule to this effect. The Florida Bar: Amendment to Rules of Criminal Procedure, (3.701, 3.988 - Sentencing Guidelines, 468 So.2d 220 (Fla. 1985). The legislature did not act on the rule in 1985. On December 19, 1985, the Supreme Court passed a similar amendment which the legislature approved in the 1986 session. In amending the rule, the Supreme Court stated in a footnote:

(b) Rule 3.701(d)(5)(a) is revised by the elimination of the words "disposed of". These words are not susceptible of definition within the context of the rule and have generated confusion. The elimination of this wording does not alter the intent of this section.

468 So.2d at 221. In discussing this issue, the Second District Court of Appeal concluded that there was no reason why the rule would seek to exclude from guidelines computation those convictions which occur between the commission of the subject offense and the sentencing for that offense. Falzone v. State, 496 So.2d

894, 896 (Fla. 2d DCA 1986). The court pointed out that the theory of giving the criminal an opportunity to reform which requires that the conviction of the prior crime predate the commission of the subject offense before it can be considered in sentencing under a recidivist statute is not pertinent to sentencing under the guidelines. Id. In reaching this conclusion, it is important to note that the Second District Court of Appeals stated, "the use of the guidelines presupposed that all pertinent information concerning the defendant has been considered in determining the proper length of the sentence. Id. A defendant is entitled to preparation of a scoresheet covering all offenses pending before the court for sentencing. Rule 3.701(d)(1), Fla.R.Crim.P. 3.701(d)(1).

Thus there appears to be a conflict as to the application of this rule. The District Court of Appeal, First District, believes that convictions obtained after the subject offense cannot be scored, but may be used as a basis for departure. Pugh v. State, 12 FLW 138 (Fla. 1st DCA 1986) and Hunt v. State, 468 So.2d 1100 (Fla. 1st DCA 1985). The Fourth and Fifth District Courts of Appeal interpret the rule in the same manner as the First District Court of Appeal. Prince v. State, 461 So.2d 1015 (Fla. 4th DCA 1985) and Davis v. State, 455 So.2d 602 (Fla. 5th DCA 1984). In contrast, as previously mentioned the Second District Court of Appeal has held that convictions which occur between the commission of the subject offense and the sentencing for that offense should be computed on the scoresheet. Falzone v. State, 496 So.2d 894 (Fla. 2d DCA 1986). This apparent

conflict should eventually be resolved by the Supreme Court of Florida, perhaps in the instant case.


In Smith v. State, 518 So.2d 1336 (Fla. 5th DCA 1987), the District Court of Appeal, Fifth District, concurred with the Second District's decisions that there is no logical reason why convictions obtained between commission of the primary offense and sentencing (or in this case resentencing) cannot be considered as prior record. The District Court glossed over the apparent conflict by pointing out that Prince and Davis dealt with crimes actually committed after the primary offense and are therefore distinguishable. The District Court did admit that the decisions in Pugh and Hunt do not explicitly state whether the crimes took place before the primary offense. Petitioner submits that a conflict or, at the very least, an ambiguity does exist on this issue and it should be resolved.

CONCLUSION

Based upon the foregoing cases, authorities and policies, Petitioner respectfully requests that this Honorable Court answer the certified question affirmatively and remand for imposition of a sentence between 3½ to 4½ years incarceration.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Robert A. Butterworth, Attorney General, 125 N. Ridgewood Avenue, 4th Floor, Daytona Beach, Fla. 32014 in his basket at the Fifth District Court of Appeal and mailed to Riley Bernard Smith, #104074, P.O. Box 1500, Cross City, Fla. 32628 on this 5th day of April 1988.



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