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FILED

SID J. WHITE

AUG 31 1992

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

CASE NO. 80,244

HERMAN ROTH

Appellant,

-vs-

THE STATE OF FLORIDA,

Appellee.

APPEAL FROM THE THIRD DISTRICT COURT OF THE
APPEALS OF FLORIDA

APPELLANT'S INITIAL BRIEF ON THE MERITS

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INTRODUCTION

The Appellant, HERMAN ROTH, was the defendant below. The Appellee, THE STATE OF FLORIDA, was the prosecution below. The parties will be referred to as they stood in the lower court. The symbol "R" will be used to designate the record on appeal, and the symbol "T" will be used to designate the transcript of proceedings. All emphasis is supplied, unless otherwise indicated.

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~~CLERK, SUPREME COURT.~~

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POINT ON APPEAL

THE TRIAL COURT ERRED IN DENYING APPELLANT'S
MOTION TO CORRECT SENTENCE WHERE THE WRONG
SCORESHEET WAS USED TO CALCULATE HIS SENTENCE

STATEMENT OF THE CASE AND FACTS

This is an appeal from the denial of a Motion to Correct Illegal Sentence (R. 63).

Appellant pled guilty to attempted first degree murder and witness tampering (R. 5 - 8). Appellant's sentence **was** calculated on the guidelines scoresheet for Category 1, murder and manslaughter (R. 9). **The** calculated guidelines range was 12 to 17 **years** in prison. Appellant was sentenced to 12 years **state prison** for the attempted first **degree** murder charge, **and** 5 years concurrent on the **witness tampering charge**.

Appellant's subsequent Motion to Correct Illegal Sentence alleged that it was erroneous to use the Category 1 guidelines scoresheet rather than the Category 9 scoresheet, **designated** "all other felony offenses" (R. 41). The **trial** court denied the Motion; its written order on the Motion was filed June 19, 1991. **Appeal to** the Third District was **filed** July 16, 1991; the trial court's **decision was affirmed** June 23, 1992. This appeal followed based on conflict with Tarawneh v. State, 16 FLW D1610 (4th DCA 10/4/91).

SUMMARY OF ARGUMENT

Appellant was sentenced for attempted first degree murder and witness tampering. His sentence was calculated under Guidelines Category 1, which specifically excludes first degree murder. A guidelines Committee Note brings Appellant's inchoate offense within the category 1 exclusion of first degree murder. Therefore, he should have been sentenced under Category 9, "all other felony offenses." The proper scoresheet would have resulted in a much lower sentence. The trial court erred in denying Appellant's Motion to Correct Illegal Sentence which requested resentencing under Category 9.

ARGUMENT

THE TRIAL COURT ERRED IN DENYING APPELLANT'S
MOTION TO CORRECT SENTENCE WHERE THE **WRONG**
SCORESHEET WAS **USED** TO CALCULATE HIS SENTENCE

Appellant was convicted of an inchoate offense, attempted first degree murder (R. 5-8). His sentence **was** calculated on the sentencing guidelines scoresheet for category 1, murder **and** manslaughter (R. 9). This was the incorrect scoresheet, however, and the court erred in using it. The defense contended that the Category 1 scoresheet should not have been **used**, and that the **Category 9** scoresheet, "all other felony offenses" should have been **used** instead (R. 41). The **defense was** correct because the Category I scoresheet specifically excludes first degree murder, the offense which Appellant was convicted of attempting.

The Fourth District Court of Appeals recently decided this exact issue in favor of the defense. Tarawneh v. State, 16 FLW D2510 (Fla. 4th DCA Oct. 4, 1991). That decision recognizes the exception on the face of the Category 1 scoresheet which excludes first degree **murder**, Florida Statute 782.04(1)(a), and relying on the Committee Notes to Rule 3.701, Florida Rules of Criminal Procedure, concludes that, "its express exclusion of capital murder makes use of the (Category 1) scoresheet error." Tarawneh at 132510. Contra Hayles v. State, 17 FLW D-960 (1st DCA 4/13/92) and Orr v. State, 17 FLW D-866 (5th DCA 4/3/92). These decisions ignore the **rule** of statutory construction which requires that the courts accord a rule its plain meaning **when, as** here, the rule's language is unambiguous.

The Committee Notes to the Sentencing Guidelines have been specifically adopted by the Florida Supreme Court as part of the Florida Rules of Criminal Procedure. These Committee Notes have the same force and effect as the Sentencing Guidelines themselves, Joyce v. State, 466 So.2d 433 (Fla. 5th DCA 1985); Thomason v. State, 480 So.2d 713 (Fla. 2d DCA 1986).

The Committee Notes, Florida Rule of Criminal Procedure 3.701, Committee Note (c) from the 1983 adoption of the Sentencing Guidelines which are also included verbatim in the more recent amendments of the Guidelines, including 1985 and 1988, state in pertinent part as follows:

(c) Only one category is proper in any particular case. Category 9, "All other felony offenses," should be used only when the primary offense at conviction is not included in another more specific category. The guidelines do not apply to capital felonies.

Inchoate offenses are included within the category of the offense, attempted, solicited, or conspired to, as modified by Ch. 777.

Under the Committee Note to Rule 3.701, the Appellant should have been sentenced under Category 9 rather than Category 1.

The Category 1 scoresheet used for Appellant's sentence and established by Rule 3.988(a), Florida Rules of Criminal Procedure, explicitly excludes from its purview Section 782.04(1)(a), Florida Statutes, which defines the crime of first degree murder. The Committee Note (c) brings Appellant's offense of attempted first degree murder within the category of the offense attempted, solicited, or conspired to. Here the inchoate offense is an attempt

to commit first degree murder, which is of course further defined by Section 777.04(1), Florida Statutes. The Committee Note (c) specifically incorporates Chapter 777. **Appellant was** convicted under both Chapter 777 and **Section 782.04(1)(a)**. The only nexus the inchoate offense has to any scoresheet is the particular section of law which describes the offense attempted. **It is thus clear that Appellant's** offenses were incorrectly scored on the Category 1 scoresheet because the scoresheet **rule, 3.988(a)**, excludes the offense attempted, Section 782.04(1)(a). Since Category 1 was not **applicable** and Appellant's offense **does** not fall under any other category, the only remaining category available **was** Category 9, "all other **felony** offenses." Where **the** offense in question is not specifically included in any other scoresheet, the Category 9 scoresheet, "all other felony offenses," must be used. Tarawneh, supra; Robertson v. State, 559 So.2d 352 (Fla. 1st DCA 1990); Vance v. State, 565 So.2d 915 (Fla. 4th DCA 1990); Williams v. State, 501 So.2d 191 (Fla 5th DCA 1987).

It is indisputable that **Appellant** was greatly **prejudiced** by the **use of** the incorrect scoresheet. With 174 points scored on the Category 1 scoresheet, Appellant's **guideline range was** 12 to 17 years in prison, and he was **sentenced to 12 years** (R. 5-9). Had the Category 9 scoresheet been used instead, his score would have been 207 points, which would **yield a** sentencing range of 5 1/2 to 7 years. Rule 3.988 (i), Florida Rules—of Criminal Procedure.

Criminal statutes are to be strictly construed, **and** when **their** Language is susceptible of differing constructions, it must be

construed most favorably to the *accused*. Section 775.021(1), Florida Statutes; State v. Wershow, 343 So.2d 605, 608 (Fla. 1977). Construing the guidelines and the statutes strictly, Appellant's sentence can only be calculated under Category 9.

The Court must reverse and remand with instructions to resentence Appellant utilizing the Category 9 scoresheet.

CONCLUSION

Based on the foregoing arguments and the authorities cited therein, Appellant respectfully requests this Court to reverse the sentence of the trial court and to remand this cause with directions to properly resentence and/or vacate the plea and sentence.


Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to LESLIE SCHRIEBER, Assistant Attorney General, THE ATTORNEY GENERAL'S OFFICE, 401 Northwest 2nd Avenue, Suite 820, Miami, Florida 33128, this 26 day of August, 1992.


HERMAN ROTH