

IN THE SUPREME COURT OF FLORIDA

65593

ISAAC WEEMS,

Petitioner,

v.

APPEAL NO.: 84-219

STATE OF FLORIDA,

Respondent.

**FILED**

SID J. WHITE

AUG 1 1984

CLERK, SUPREME COURT

By *M*  
Chief Deputy Clerk

RESPONDENT'S BRIEF ON JURISDICTION

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ARGUMENT

ISSUE

WHETHER THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL IN WEEMS V. STATE, So.2d (FLA. 2d DCA 1984) (CASE NO. 84-219, OPINION FILED JUNE 22, 1984), IS IN CONFLICT WITH THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL IN HARVEY V. STATE, So.2d (FLA. 2d DCA 1984) (CASE NO. 83-2344, OPINION FILED JUNE 13, 1984) [9 FLW 1332]

Fla. R. Crim. P. 3.701(d)(11) provides in pertinent part:

Reasons for deviating from the guidelines shall not include factors relating to either instant offense or prior arrests for which convictions have not been obtained. (Emphasis supplied)

In Harvey v. State, supra, the trial judge cited the following grounds as reasons for his departure from the guidelines:

- (1) a 1972 juvenile arrest for breaking and entering;
- (2) a 1972 juvenile arrest for petit larceny;
- (3) a 1975 juvenile arrest for buying and concealing stolen property;
- (4) a 1975 juvenile arrest for possession of stolen property and breaking and entering with intent to commit grand larceny;
- (5) a 1980 conviction for having an unsecured tag and vehicle inspection;
- (6) a 1981 fine for disobeying a stop sign;
- (7) a 1982 fine for racing on the highway.

The Fourth District Court of Appeal noted that "reliance on the first four items cited by the trial court as a basis for departure is clearly proscribed by Rule 3.701(11)...." The court held that the trial court erred by departing from the

guidelines because the proffered justification does not amount to a "clear and convincing reason" which warrants aggravating the sentence for purposes of Rule 3.701(d)(11). The Fourth District Court of Appeal was correct in reaching the conclusion that grounds (5), (6), and (7) did not amount to a "clear and convincing reason" for aggravating the sentence in Harvey.

In Weems v. State, supra, on the other hand, the trial court gave a "clear and convincing reason" for departure from the guidelines:

Had this man been scored under burglary, he would come under 12-30 months because of the previous burglaries which can be counted. This man has been to State Prison twice before for burglaries — it apparently taught him nothing. This is his 11th burglary, although we can only "count" two. It is apparent he cannot make it on probation since he violated his last probation and his last parole.

The court attached a record of Weems' prior offenses which included thirteen juvenile dispositions that were the equivalent of convictions had they been committed by an adult.

The difference between Harvey and Weems, supra, is that in Harvey the trial court improperly relied on four prior juvenile arrests in enhancing the sentence while the remaining three factors involved only minor traffic infractions and did not constitute a "clear and convincing reason" for departure, whereas in Weems, supra, the trial court enhanced the sentence on the basis of thirteen prior juvenile convictions, including

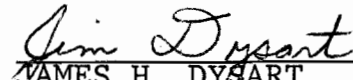
numerous convictions for the offense of burglary, and other  
"clear and convincing reasons".

CONCLUSION

Based on the foregoing facts, arguments, and authorities, petitioner has failed to demonstrate that conflict exists between the decisions in Weems and Harvey, supra, so as to invoke the discretionary review of this Court.

Respectfully submitted,

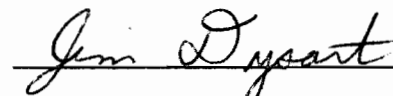
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Deborah K. Brueckheimer, Assistant Public Defender, Criminal Courts Complex, 5100-144th Avenue North, Clearwater, Florida 33520 on this 30th day of July, 1984.

  
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OF COUNSEL FOR RESPONDENT