

IN THE SUPREME COURT OF FLORIDA

FILED

S'D J. WHITE

DEC 3 1984

CLERK, SUPREME COURT

By [Signature]
Chief Deputy Clerk

ISAAC WEEMS,)
)
Petitioner,)
)
v.)
)
THE STATE OF FLORIDA,)
)
Respondent.)
_____)

CASE NO. 65,593

RESPONDENT'S BRIEF ON MERITS

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ARGUMENT

ISSUE

WHETHER THE TRIAL COURT ERRED IN
IMPOSING A SENTENCE THAT EXCEEDED
THE RECOMMENDED GUIDELINE RANGE.

Petitioner's recommended sentence under the sentencing guidelines was "any nonstate prison sanction." The trial court imposed a sentence that exceeded the recommended sentence and gave the following reasons therefor:

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. See attached.

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

On appeal, Petitioner argued that the court improperly relied upon his juvenile record to depart from the guidelines since Fla. R. Crim. P. 3.701 d (5)(c) excludes from the guideline computation all prior juvenile dispositions more than

three years old. The Second District Court of Appeal upheld the trial court stating:

. . .[W]e believe that the appellant misconceives the theory of sentencing guidelines.

The purpose of sentencing guidelines is to promote more uniformity in sentencing without usurping judicial discretion. While it was contemplated that most sentences would fall within the guidelines, it was also anticipated that from fifteen to twenty percent of the sentencing decisions routinely would fall outside the recommended range. To prevent an abuse of discretion, provision was made for an appellate review of the reasons given for departing from the guidelines. Fla. R. Crim. P. 3.701(d)(11).

The fact that appellant's juvenile record cannot be considered in calculating the applicable sentencing range does not mean that it cannot be considered by the court as a reason for departing from the guidelines. The only limitation on reasons for deviating from the guidelines is found in subsection (d)(11) which reads:

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.

There is nothing in Rule 3.701 to suggest that matters excluded for purposes of guideline computation cannot be considered as reasons for departure from the guidelines.

The stated reasons provided an adequate basis for sentencing appellant above the recommended range.

Petitioner presently argues in his brief (page 4) that "In departing from the recommended guideline sentence of non-state prison sanctions, the trial court focused only on one main issue: Mr. Weems' juvenile record (R. 8, 38 - 41). This statement is untrue. The record clearly reflects that the trial court considered four issues:

- (1) had petitioner been scored under burglary, he would fall in the 12 - 30 months guidelines range;
- (2) petitioner had been to State Prison twice before and it apparently taught him nothing (since he continued to commit offenses);
- (3) the burglary for which he was sentenced was petitioner's 11th burglary; and
- (4) it was apparent petitioner could not make it on probation since he violated his last probation and his last parole.

Although none of these matters could be assigned points for the purpose of guidelines computation, the Second District Court of Appeal held that they provided an adequate basis for sentencing petitioner above the recommended range.

Thus, even if this Court finds that reason (3) above is inadequate, three other reasons remain which were deemed adequate by the Second District and which were not challenged by petitioner on direct appeal and which are not challenged in his present brief.

Petitioner raises for the first time in his brief the argument that juvenile adjudications of delinquency are not convictions, citing as authority Jackson v. State, 336 So.2d 633 (Fla. 4th DCA 1976). Because petitioner has obtained the jurisdiction of this Court solely on the basis of a conflict between Weems v. State, 451 So.2d 1027 (Fla. 2d DCA 1984) and Harvey v. State, 450 So.2d 926 (Fla. 4th DCA 1984), Respondent questions the propriety of Petitioner now arguing that there is a conflict between Weems, supra and Jackson, supra.

Nevertheless, Respondent submits that juvenile adjudications of delinquency fall within the definition of "conviction" given in Fla. R. Crim. P. 3.701 d(2):

"Conviction" means a determination of guilt resulting from plea or trial, regardless of whether adjudication was withheld or whether imposition of sentence was suspended.

Rule 3.701 d 5(c) states:

Juvenile record: All prior juvenile dispositions which are the equivalent of convictions as defined in section d(2), occurring

within three (3) years of the commission of the instant offense and which would have been criminal if committed by an adult, shall be included in prior record.

Logic and consistency dictate that if juvenile dispositions can be the equivalent of convictions for purposes of guidelines computation they can also be the equivalent of convictions for all sentencing determinations.

The most important issue in this case is whether the Second District Court of Appeal was correct when it said:

The purpose of sentencing guidelines is to promote more uniformity in sentencing without usurping judicial discretion.

and:

There is nothing in Rule 3.701 to suggest that matters excluded for purposes of guideline computation cannot be considered as reasons for departure from the guidelines.

Weems, supra.

Petitioner argues in his brief (page 9) that "the whole purpose behind using guideline sentences is to have uniformity in sentencing." Respondent contends that:

The use of sentencing guidelines within the criminal courts has two primary goals: to reduce unwarranted variation in sentencing

decisions while retaining judicial discretion to individualize sentences; and to articulate an explicit sentencing policy that can be reviewed on a regular basis and, if necessary, modified.

* * *

It must be recognized that statistical models of human behavior are imperfect and must be used in conjunction with experience and good judgment to produce an effective decision-making tool.

* * *

A distinction should be made between the factors that are scored as part of the guidelines and those information items which can be considered in the sentencing process but are not assigned a specific weight. The former establish a baseline from which to operate. The latter represent those factors unique to specific cases which may suggest imposition of a sentence outside the guidelines or at the extremes of the guideline range. Therefore, because a factor is not included within the matrix does not preclude its consideration in the overall sentencing decision.

The sentencing guidelines are designed to aid the trial judge in the sentencing decision and are not intended to usurp judicial discretion. . . . The trial judge may either impose the recommended sentence or, if warranted by the nature of the offense and the offender characteristics, impose a sentence outside the recommended range, provided that the decision is accompanied by a written statement delineating the reasons for

the court's decision. The written explanation will be reviewed by the guidelines advisory board in determining the suitability of the sentence ranges provided by the guidelines, as well as assessing the need to add or delete additional offense or offender variables to the guidelines.

Judicial Sentencing - Help Is On the Way, 55 Fla. B.J. 536 (1981).

As noted by the authors of Florida's Initial Experience With Sentencing Guidelines, 11 Fla. St. L. Rev. 125 (1983):

Sentencing guidelines offer a different approach to sentencing reform. The underlying concept is not altogether different from the basic presumptive sentencing model. Under both sentencing schemes, the trial judge is presented with the limited range of sentences at his disposal and deviation from the prescribed sentence must be based on mitigating or aggravating circumstances present in the case. The difference between the two approaches lies in the flexibility given the trial judge in deviating from the recommended sentence under guidelines and, perhaps more importantly, the fact that guidelines are both offender and offense oriented rather than strictly offense oriented.

* * *

After an extensive review of felony sentencing practices within the state and an examination of the various sentencing proposals currently in vogue throughout the country, the Sentencing Study Committee endorsed,

[I]n principle, the exercise of judicial discretion in the sentencing process. However,

in order to achieve a greater degree of consistency and fairness in the sentencing process throughout the state, the Committee recommend [ed] the development and implementation of structured sentencing guidelines in combination with a sentence review panel that would operate within the parameters prescribed by the Legislature.

* * *

Although the purpose of sentencing guidelines was the reduction of unwarranted sentence variation, the need for some variation was recognized and indeed promoted. It was anticipated that from 15 - 20% of the sentencing decisions routinely would fall outside of the recommended range. The trial judges were cautioned that at no time should sentencing guidelines be viewed as the final word in the sentencing process. The factors delineated were selected to ensure that similarly situated offenders convicted of similar crimes receive similar sentences. Because a factor was not expressly delineated on the score sheet did not mean that it could not be used in the sentence decision-making process. The specific circumstances of the offense could be used to either aggravate or mitigate the sentence within the guideline range or, if the offense and offender characteristics were sufficiently compelling, used as a basis for imposing a sentence outside of the guidelines. The only requirement was that the judge indicate the additional factors considered.

* * *

In promulgating the guidelines, the advisory board elected not to identify a list of aggravating and mitigating circumstances that would support deviating from the guidelines. It was felt that such a "shopping list" would give the impression of structuring the sentence decision-making process to a greater extent than designed. If a judge disagreed with the recommended sentence based upon the ten to fifteen factors listed on the scoresheet, then it was incumbent upon the judge to select the factor or factors distinguishing that case from similar cases. Given the adversary process, it was assumed that the prosecuting attorney and defense counsel would have already identified the relevant circumstances supporting an argument for a sentence greater or less than the guideline sentence and would argue such factors during the sentencing hearing.

To specifically identify certain factors without providing a fairly detailed explanation as to how they should be interpreted would negate much of the purpose of the project - the reduction of unwarranted sentence disparity. Many of the possible factors could be used either in aggravation or mitigation depending upon their context in the overall circumstances of the case. Therefore, it would be inappropriate to restrict them to one category or the other. Furthermore, it would be virtually impossible to assign an appropriate weight for their interpretation. Were this possible, the variable would have been included in the guidelines.

The decision of the court in Weems is consistent with the following principle set forth in Rule 3.701:

While the sentencing guidelines are designed to aid the judge in the sentencing decisions and are not intended to usurp judicial discretion, departures from the presumptive sentences established in the guidelines shall be articulated in writing and made only for clear and convincing reasons.

(Emphasis added).

Petitioner argues (page 11 of his brief) that "If the guidelines are going to work, then judicial discretion will have to suffer. That is the very nature of the guidelines - to take away judicial discretion for the sake of uniformity." This argument is not consistent with the principle set forth above.

As the Second District Court of Appeal stated in Weems:

The only limitation on reasons for deviating from the guidelines is found in subsection(d)(11) which reads:

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. ^{5/}

^{5/}Acknowledging that this wording was being misinterpreted, the Sentencing Guidelines Commission in a memorandum of February 9, 1984, to the bench, bar and others serving in the criminal courts stated:

The Commission has intended that this language be understood to provide that reasons for deviating from the

guidelines shall not include arrests or charges relating to the instant offense for which convictions have not been obtained and shall not include prior arrests for which convictions have not been obtained. Other factors, consistent and not in conflict with the Statement of Purpose may be considered and utilized by the sentencing judge.

(Emphasis added).

R. Wesley, Director, Sentencing Guidelines Commission, Memorandum on Sentencing Guidelines Modification, February 9, 1984 (available from the Office of State Courts Administrator). The May 8, 1984 amendment to the rule changed the wording of subsection (d)(11) to further clarify the Commission's intent.

The First, Second, Fourth, and Fifth District Courts of Appeal have indicated that the standard for appellate review in sentencing guidelines cases is abuse of discretion by the trial court. Manning v. State, 452 So.2d 136 (Fla. 1st DCA 1984); Addison v. State, 452 So.2d 955 (Fla. 2d DCA 1984); Davis v. State, __So.2d__ (Fla. 4th DCA 1984) [9 FLW 2221]; Higgs v. State, __So.2d__ (Fla. 5th DCA 1984) [9 FLW 1895]. Only a handful of sentencing guidelines cases have been decided by the Third District. That court apparently has not yet had occasion to state its view of what the standard for appellate review should be.

All of the District Courts that have taken a position on the subject have indicated that deference must be given to the discretion of trial courts to consider matters excluded for purposes of guideline computation as reasons for departure from the guidelines.

It is interesting to note that in Davis v. State, supra, the Fourth District Court of Appeal apparently rejected the logic it used in deciding Harvey, supra. In Davis, the trial court found Davis' prior convictions to be a clear and convincing reason for imposing a sentence above the recommended guidelines range. The court said, "The defendant had been convicted several times before and was a poor prospect for rehabilitation." In holding this to be an adequate reason for exceeding the recommended guideline range, the Fourth District said:

Finally, it is argued that the Guidelines already take prior convictions into account on the score sheet and the consequence here is tantamount to a double-dipping sentence. This argument also troubles us, but to accept it would remove the trial judge's right to exercise his discretion for clear and convincing reasons. As we see it, though we admit the apparent paradox in the Guidelines, our system of criminal justice is in part predicated on enhanced punishment for incorrigibles. If this be true, it cannot help but be a clear and convincing reason for aggravation, notwithstanding built-in provisions

for prior criminal convictions on the score sheets.

The cases which most closely resemble Weems are Burke v. State, __So.2d__ (Fla. 5th DCA 1984) [9 FLW 1983] and Albritton v. State, __So.2d__ (Fla. 5th DCA 1984) [9 FLW 2088].

In Burke, the court wrote:

The trial court explained that the guideline sentence is inappropriate in this case because appellant's prior record (which includes juvenile dispositions) reflects an escalating pattern of violent criminal activity over a ten-year period and reflects that appellant has failed to respond to the state's repeated efforts to rehabilitate and/or punish him. In reaching these conclusions about appellant, the lower court considered portions of appellant's prior adult criminal and juvenile delinquency record which the guidelines preclude him from considering when tallying up the scoresheet to determine the recommended sentence. This is proper. A trial court could never deviate from a guideline sentence if, in deciding to deviate, it cannot consider factors other than those it considers in arriving at the guideline sentence. We hold that a trial court may base a departure from the guidelines on factors which it could not contemplate in calculating the guideline sentence. Weems v. State, 451 So.2d 1027 (Fla. 2d DCA 1984).

We are aware that the Fourth District Court of Appeal reached a contrary result in Harvey v. State,

We do not follow Harvey because that result unduly limits the court from deviating from the sentencing guidelines. We certify a conflict with Harvey.

In Albritton the court said:

The third reasons given for imposing a sentence departing from the guideline recommendation was that the defendant had been convicted of seven offenses of driving while intoxicated over a fifteen year period. We specifically hold that this was a clear and convincing reason for the trial judge to depart from the guidelines suggested sentence in this case because the defendant's long continued drinking and driving problem and disregard for the safety of others, as evidenced by his multiple DWI convictions, was not a factor considered in the guidelines sentencing calculations and, hence, is an appropriate "clear and convincing" reason for imposing a sentencing that departs from the guidelines recommendation. Cf., Boyett v. State, 452 So.2d 958 (Fla. 2d DCA 1984).

It is apparent that the Second District's decision in Weems is consistent with the letter and the spirit of the sentencing guidelines. Petitioner provides no proof that the purpose of the guidelines is being thwarted by trial courts' consideration of factors other than those it considers in arriving at the guideline sentence. Absent such proof, the conflict between Weems and Harvey should be decided in favor of Weems.

CONCLUSION

Based on the foregoing facts, arguments and authorities, the decision of the Second District Court of Appeal in Weems should be approved, and the decision of the Fourth District Court of Appeal in Harvey should be disapproved.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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



Of Counsel for the Respondent