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IN THE DISTRICT COURT OF APPEAL, SECOND DISTRICT
LAKELAND, FLORIDA

ISAAC WEEMS, :

Petitioner, :

vs. : Case No. 65,593

STATE OF FLORIDA, :

Respondent. :

_____ :

PETITIONER'S BRIEF ON MERITS

JERRY HILL
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TENTH JUDICIAL CIRCUIT

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CITATION OF AUTHORITIES

IN THE SUPREME COURT OF FLORIDA

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PRELIMINARY STATEMENT

Petitioner, Isaac Weems, was the Appellant in the Second District Court of Appeal and the defendant in the trial court. Respondent, the State of Florida, was the Appellee in the Second District Court of Appeal. The record on appeal, which was utilized on the District Court level and is contained in one volume, will be referred to by the symbol "R" followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

On September 31, 1983, the State Attorney for the Sixth Judicial Circuit in and for Pinellas County, Florida, filed an information charging the Appellant, Isaac Weems, with the following: burglary to a structure contrary to Florida Statute 810.02(3), battery on a law enforcement officer contrary to Florida Statute 784.07/784.03, and resisting arrest without violence contrary to Florida Statute 843.02. All of said charges occurred on September 3, 1983 (R3,4). Mr. Weems changed his plea to guilty on all counts and elected to be sentenced under the guidelines (R5,7,30-34,42). After seeing Mr. Weems' juvenile record, however, the trial court departed from the recommended guideline sentence of non-state prison and imposed two years of imprisonment on each of the charges of burglary and battery on a law enforcement officer and six months of imprisonment on the resisting arrest without violence. Said sentences were to run concurrent with each other, and Mr. Weems was given credit for thirty-five days served (R8-17,36-43).

On appeal Mr. Weems argued that the trial court should not have considered his juvenile offenses, almost all of which were older than three years, in departing from the recommended guideline sentence. Mr. Weems based his argument on F.R.Cr.P. 3.701(d)5.c). The Second District Court of Appeals, however, held that even though these old juvenile offenses could not be

used as prior record points in calculating the applicable sentencing range, they could be used as a reason for departing from the guidelines.

ISSUE

DID THE TRIAL COURT ERR IN EXCEEDING FROM THE RECOMMENDED GUIDELINE RANGE BY USING PAST CRIMINAL CONDUCT WHICH COULD NOT BE CONSIDERED IN THE COMPUTATION OF THE SCORESHEET AS GROUNDS FOR THE DEPARTURE?

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 (R8,38-41). Although the juvenile record is extensive, it is also very old with offenses going back to 1966 (R10,11). Even though the court acknowledged that almost all of the juvenile charges were older than three years and could not be marked as prior record [see F.R.Cr.P. 3.701(d)5.c)], the trial court used this record to justify an increase in sentence to two years of imprisonment (R39,40).

On appeal the Second District Court of Appeal upheld the trial court. Although the Second District Court of Appeal noted that the purpose of the sentencing guidelines was to promote more uniformity in sentencing, it stated that up to twenty percent of the sentencing decisions would routinely fall outside the recommended guideline range. The court then stated:

> 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.

Weems v. State, 451 So.2d 1027 at 1029 (Fla. 2d DCA 1984). In other words, if the trial court wants to depart from the recommended guideline range, it can consider matters that were specifically excluded from the guideline scoresheet.

Harvey v. State, 450 So.2d 926 (Fla. 4th DCA 1984), specifically rejected this type of reasoning. In a situation almost identical to Mr. Weems' where a trial court used old juvenile charges to justify a departure from the recommended guideline range, the court in Harvey reversed, stating:

> We hold that past criminal conduct which cannot be considered in computing the scoresheet cannot be relied upon as justification for departure from the guidelines. Indeed, reliance on the first four items cited by the trial court as a basis for departure is clearly proscribed by Rule 3.701(11), which provides in pertinent part that "Reasons for departing from the guidelines shall not include factors relating to either instant offense or prior arrests for which convictions have not been obtained." (emphasis added).

Harvey, id. at 928. The Court in Harvey had already noted that old juvenile adjudications of delinquency could not be scored as a prior record under F.R.Cr.P. 3.701(d)5.c) and went on to note that F.R.Cr.P. 3.701(d)11. additionally forbids considering prior arrests for which convictions have not been obtained as reasons for departing from the guidelines - the apparent connection being that juvenile adjudications of delinquency are not convictions. 1.

Although the First and Fifth District Courts of Appeal have followed the Second District Court of Appeals in Weems, it is interesting to note strong dissents in these two other districts. Although Chief Judge Ervin concurred with the ultimate sentence in Manning v. State, 452 So.2d 136 (Fla. 1st DCA 1984), he did so on unrelated grounds. In a specifically concurring opinion Chief Judge Ervin stated:

> I strongly disagree with the majority's apparent conclusion that Florida Rule of Criminal Procedure 3.701 b.6. provides a general escape-hatch for trial judges to ignore or depart from sentencing guidelines. The supreme court's adoption of the guidelines in 1983, see In Re Rules of Criminal Procedure (Sentencing Guidelines), 439 So.2d 848 (Fla. 1983), represented the culmination of a six-year study of a sentencing process which was thoroughly lacking in uniformity and fraught with subjectivity. A long-existing concern over the disparity in sentences imposed for virtually the same conduct led to the establishment in January, 1978, of the Sentencing Study Committee by the Florida Supreme Court. See Chapter 79-362, Laws of Florida. The Study Committee, among other things, conducted a detailed survey of the sentencing practices of the circuit courts

1. See Jackson v. State, 336 So.2d 633 (Fla. 4th DCA 1976); and 39.10(4), Florida Statute (1983).

of the state to evaluate the feasibility of developing various sentence reform options on a statewide basis. Id. The Committee's report in turn engendered a pilot project "to develop and implement structured sentencing guidelines...." Id. The study finally led to the creation of a Sentencing Commission whose purpose was to develop a system of sentencing guidelines on a statewide basis. s. 921.001(1), Fla.Stat. (Supp.1982). The preamble to the act creating the Commission states in part the legislative purpose:

> WHEREAS, disparity in sentencing practices exists in Florida because of the sentencing discretion our current system gives to our trial judges, leading some judges to give longer or shorter sentences than others for the same crime committed in different localities, and
>
> . . . .
>
> WHEREAS, the Legislature has previously acknowledged its concern over the disparity in sentencing practices between the various judicial circuits in Florida by enacting chapter 79-362, Laws of Florida, and
>
> . . . .
>
> WHEREAS, the Legislature believes that it is in the public interest for a system of sentencing guidelines to be developed and implemented on a statewide basis within the sentencing parameters established by the Florida Statutes and in furtherance of this goal it is necessary for the Legislature and the courts to join together in a cooperative sentencing reform effort aimed at assuring certainty of punishment for the guilty and equality of justice for all, ...

Ch. 82-145, Laws of Fla.

In 1983, the legislature authorized the Florida Supreme Court, upon receipt of the Commission's recommendations, to develop by September 1, 1983, statewide sentencing guidelines. s. 921.001(4)(a), Fla.Stat.

(1983). In its adoption of the guidelines set forth in Florida Rule of Criminal Procedure 3.701, the court reiterated the same general concerns expressed by the legislature when it formed legislation establishing the Sentencing Commission: "Sentencing guidelines are intended to eliminate unwarranted variation in the sentencing process by reducing the subjectivity in interpreting specific offense--and offender--related criteria and in defining their relative importance in the sentencing decision." Rule 3.701 b. Thus, we find an identical legislative and judicial purpose behind the establishment of the sentencing guidelines: The elimination of subjective variations in the sentencing process which had heretofore existed geographically-and indeed from judge-to-judge-throughout the state.

The history of the guidelines clearly reflects the remedial intent; as such they should be accorded a liberal construction so as to advance the remedy provided. Cf. Gaskins v. Mack, 91 Fla. 284, 107 So. 918 (1926); Amos v. Conkling, 99 Fla. 206, 126 So. 283 (1930). Conversely, exceptions to the guidelines should be narrowly construed. Cf. Farrey v. Bettendorf, 96 So. 2d 889 (Fla. 1957).

. . . .

As previously observed, the statement of purpose, set out at 3.701 b., for creating the guidelines, was to establish a uniform set of standards to assist a trial judge in the sentence-making process and to reduce subjectivity in such process, as well as to assure that incarceration "sanctions used in sentencing convicted felons ... be the least restrictive necessary to achieve the purposes of the sentence." I therefore maintain that subsection d.11., when considered in pari materia with the statement of purpose, precludes a trial judge from considering prior arrests for which convictions were not obtained.

Manning, supra at 138-140 (emphasis added). Similarly, in Burke v. State, No. 84-7 (Fla. 5th DCA September 20, 1984) [9 F.L.W. 1983], the majority of the court agreed with the Weems' decision and held that a trial court may base a departure from the guidelines on factors which it could not contemplate in calculating the guideline sentence--i.e., old juvenile offenses. The majority then certified a conflict with Harvey. Judge Sharp in his dissent stated:

> In addition, reliance on the balance of Burke's juvenile record, if in fact the trial judge did so, appears to me to be barred by other guideline provisions. Rule 3.701(d)(5)(c) bars scoring for offenses committed more than three years previously. Rule 3.701(d)(5)(c) prevents scoring for non-criminal acts and rule 3.701(d)(5)(a)(1) prevents scoring for anything less than conviction: i.e., dismissals or arrests. Because the guidelines detail how a past record should be treated, it follows that matters in the history which the guidelines mention as not permissible to be used in scoring should not be used as the basis for departure. Harvey v. State, 450 So.2d 926 (Fla. 1984). This does indeed limit the exercise of the trial judge's discretion, but without some limitation the guidelines' goals of uniformity and elimination of unwarranted variation in the sentencing process will not be achieved.

Burke, supra 9 F.L.W. at 1984 (emphasis added).

As pointed out above in Harvey, supra, and by Judges Ervin and Sharp, the whole purpose behind using guideline sentences is

to have uniformity in sentencing. If trial courts are allowed to deviate from the guidelines at will by using factors which were specifically kept from the scoresheet, then the guidelines are useless and F.R.Cr.P. 3.701 is meaningless. The guidelines are designed to account for a defendant's prior record and the seriousness of his present charge. The guidelines specifically reject old felony convictions and juvenile dispositions for consideration as "prior record" and do not allow the trial courts to tally these convictions as points on the scoresheets. See F.R.Cr.P. 3.701(d)5.b&c). If the trial courts are not allowed to count these as prior record points but are allowed to use the convictions and dispositions to justify departing from the guidelines, the whole purpose behind the guidelines is being thwarted. If the old convictions and juvenile dispositions cannot be used to increase points on the scoresheet, they should not be used to justify a departure from the guidelines.

In Minnesota, where guideline sentences were instituted a few years prior to Florida's decision to utilize guideline sentences, the courts have had to strictly enforce the guidelines in order to make the concept work. Reasons for departure must be "substantial and compelling" in order to justify a departure; and reasons such as nonamenability to probation, offenses for which a defendant was not charged and convicted, criminal history, a defendant is dangerous, and factors which determine the severity

of a particular offense generally do not justify a departure. See State v. Higginbotham, 348 N.W.2d 327 (Minn. 1984); State v. Peterson, 329 N.W.2d 58 (Minn. 1983); State v. Barnes, 313 N.W.2d 1 (Minn. 1981); State v. Magnan, 328 N.W.2d 147 (Minn. 1983); and State v. Brusven, 327 N.W.2d 591 (Minn. 1982). Florida cases, on the other hand, are being very liberal in determining what kinds of 'clear and convincing reasons' justify a departure: violation of probation, repeated criminal convictions, crime "sprees" or "binges," "careers" of crime and criminal conduct not resulting in a conviction. See Mischler v. State, No. 84-151 (Fla. 4th DCA October 17, 1984)[9 F.L.W. 2205].

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. Attitudes like the Second District Court of Appeal's which allow a trial court to depart from the guidelines on the basis of factors that cannot be used for scoring purposes 'because there is nothing in the rules that say such factors cannot be considered' [2] will have to be altered. Departure from the guidelines should be likened to jury overrides in death cases. Under Tedder v. State, 322 So.2d 908 at 910 (Fla. 1975), a jury recommendation of life is not to be rejected unless "the facts suggesting a sentence of death should be so clear and convincing

2. See Fleming v. State, No. 84-459 (Fla. 2d DCA October 5, 1984) [9 F.L.W. 2118]; and Weems, supra.

that virtually no reasonable person could differ." Such situations should be rare, with the benefit of any doubt going for the application of the guideline sentence.

For such items such as old juvenile offenses which are not convictions and are too old to be considered for scoring under the rules, a departure should never be allowed. Because F.R.Cr.P. 3.701 states a particular factor cannot be scored, the implication is that the particular factor cannot be used to increase the sentence. Thus, such a factor cannot be used to justify a departure. Inasmuch as Mr. Weems' sentence was increased due to the trial court's departure from the guideline sentence based on unscoreable juvenile offenses, Mr. Weems' sentence should be vacated and the original guideline sentence imposed.

CONCLUSION

In light of the foregoing reasons, arguments and authorities, the Second District Court of Appeal's decision in Mr. Weems' case should be reversed; and a sentence that is in line with the guideline recommended range should be imposed. Due to the fact that Mr. Weems has almost completed the maximum sentence recommended by the guidelines, Mr. Weems respectfully requests that his case be expedited. [3.]

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to James H. Dysart, Assistant Attorney General, Park Trammell Bldg., 8th Floor, 1313 Tampa Street, Tampa, FL 33602, November 13th, 1984.

Respectfully submitted,

Deborah K. Brueckheimer

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Assistant Public Defender

3. Motion to Expedite was filed with the Court and granted on November 2, 1984.