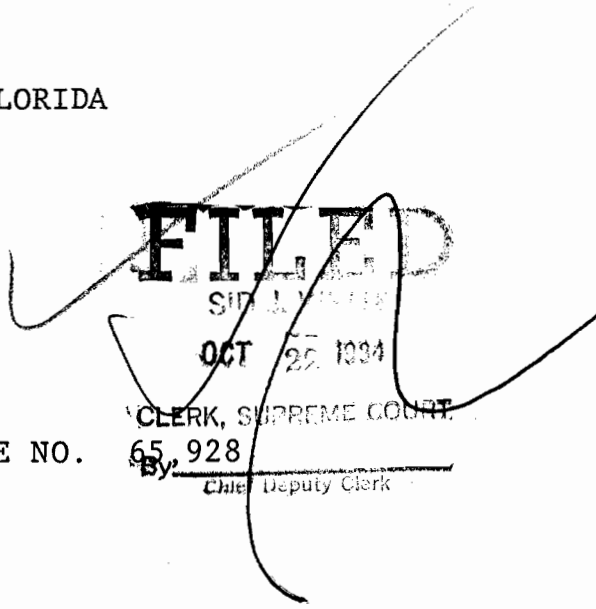
IN THE SUPREME COURT OF FLORIDA



TERRY B. HENDRIX,

Petitioner,

v

CASE NO. 65,928

STATE OF FLORIDA,

Respondent /

RESPONDENT'S BRIEF ON JURISDICTION

JIM SMITH
ATTORNEY GENERAL

MARGENE A. ROPER
ASSISTANT ATTORNEY GENERAL
125 N. Ridgewood Ave.
Fourth Floor
Daytona Beach, Fl. 32014
(904) 252-1067

COUNSEL FOR RESPONDENT

TABLE OF CONTENTS

PAGE:

CITATION OF AUTHORITIES

ARGUMENT

THE PRESENT DECISION IS NOT IN EXPRESS AND DIRECT CONFLICT WITH THE DECISIONS OF YOUNG V STATE, So. 2d__, 9 FLW 1847 (Fla. 1st DCA Case No. AX-1, 8/24/84); SWAIN V STATE, So.2d__, 9 FLW 1820 (Fla. 1st DCA Case No. AV-290, 8/22/84); IN RE RULES OF CRIMINAL PROCEDURE (SENTENCING GUIDELINES), 439 So.2d 848 (Fla. 1983); PROVENCE V STATE, 337 So.2d 783 (Fla. 1976); and BAKER V FLORIDA PAROLE AND PROBATION COMMISSION, 384 So.2d 746 (Fla. 1st DCA 1980).

The decision of the District Court of Appeal, Fifth District is not in express and direct conflict with the decision of this Court in the case of In re Rules of Criminal Procedure (Sentencing Guidelines), 439 So.2d 848 (Fla. 1983). Florida Rule of Criminal Procedure 3.701(d)(11), states:

> Departures from the Guidelines Sentence:
>
> Departures from the presumptive sentence should be avoided unless there are clear and convincing reasons to warrant aggravating or mitigating the sentence. Any sentence outside of the guidelines must be accompanied by a written statement delineating the reasons for the departure. 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.

Under Florida Rule of Criminal Procedure 3.701(d)(5), and the Committee Note thereto, each separate prior felony and misdemeanor conviction in an offender's prior record shall be scored. This rule, when read in conjunction with (d)(11), provides that an offender cannot be punished due to offenses which do not result in a conviction. The language of (d)(11),

states that the court is prohibited from considering offenses for which the offender has not been convicted, but it does not expressly state that the court cannot consider offenses for which the offender has been convicted. If the intent of the legislature was that a trial judge should not depart from the guidelines based on a defendant's prior criminal record of convictions, then that prohibition would have been expressly defined and delineated by the Florida Legislature. The Guidelines, therefore, and this Court's adoption of the same, simply recognize well-known sentencing principles. A universal and persistent foundation stone in our system of law, and particularly in our approach to punishment, sentencing, and incarceration, is the belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. Morisette v United States, 342 U.S. 246,250 82 S.Ct. 240,243 96 L.Ed. 288 (1952). To an unspecified degree, the sentencing judge is obligated to make his decision on the basis of predicitions regarding the convicted defendant's potential, or lack of potential for rehabilitation. United States v Grayson, 438 U.S. 41 98 S.Ct. 2610,2614, 57 L.Ed. 2d 582 (1978)(citing Shimm, foreword 23 Law and Contemp. and Prob. 399 (1958). In the case sub judice the sentencing judge properly determined that a sentence to county jail would simply not be a sufficient deterrent or punishment for the Petitioner. The instant decision is in accord, not only with this Court's adoption of the Rules of Criminal Procedure but with universal and well-known sentencing principles, in which discretion is afforded to the trial judge.

The determination of a defendant's sentence has always been within the discretion of the trial court, and the promulgation of the guidelines was not intended to supercede this principle. Fla. R. Crim. P. 3.701(b)(6); Weems v State, No. 84-219 (Fla. 2d DCA June 22, 1984)[9 FLW 1385]. Rather, the guidelines are intended to assist the sentencing judge in the decision-making process (Rule 3.701(b)), and to insure that the "use of incarcerative sanctions . . . be limited to those persons convicted of more serious offenses or those who have longer criminal histories." Fla. R. Crim. P. 3.701(b)(7). (Emphasis added).

The decision of the District Court of Appeal, Fifth District, that the Petitioner seeks to have reviewed is not in direct and express conflict with the decision of the District Court of Appeal, First District in the case of Young v State, __So.2d__ 9 FLW 1847 (Fla. 1st DCA, Case no. AX-1, 8/24/84). The First District Court of Appeal did find that "the opinion of the trial court that the guidelines form does not account for additional felonies beyond four is both inaccurate and an impermissible and unconvincing reason for departure." 9 FLW 1848. However, the First District Court also found that "the remaining reason given by the trial judge, that the appellant-defendant is an amoral or immoral person and a career criminal who should be segregated from society, finds support in the record; however, when this reason is mired in the confusion revealed by this record, it is impossible to determine whether the trial judge would have come to the same conclusion on this reason alone." (9 FLW 1848). (Emphasis added). To discern some minis-

cule distinction between the reason for departure that the defendant is a "career criminal", and the reason in this case that "he has demonstrated complete disregard for the laws of society, and a sentence to the county jail would simply not be sufficient deterrent or punishment for this individual," is simply to engage in nitpicking over semantics, considering the prior record in both cases. Similarly, the instant case does not directly or expressly conflict with the decision in Swain v State, __So. 2d__, 9 FLW 1820 (Fla. 1st DCA Case no. AV-290 8/22/84). In Swain, the First District Court of Appeal simply approved a guidelines departure based on the timing of the defendant's prior offenses.

Any limitations on the part of the First District Court of Appeal that it was on a different course than the Fifth District Court of Appeal in the instant decision, in past cases, has been totally dispelled in the more recent case Kiser v State, __So.2d__, 9 FLW 857 (Fla. 1st DCA Case no. AW-104, 8/29/84). In Kiser, the appellant argued that the trial court's reasons for departure were premised primarily upon the appellant's prior record, which was already taken into account in computing the recommended sentence of three years, and was therefore improper. The First District Court of Appeal disagreed. The First District Court of Appeal stated as follows:

> Rule 3.701(d)(11), authorizes departure from the presumptive sentence where there are 'clear and convincing reasons to warrant aggravating or mitigating the sentence." The only condition imposed by this rule as it existed at the time of appellant's sentencing was:

> 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.
>
> Certainly here, the trial court considered neither factors relating to the instant offense for which convictions had not been obtained, nor factors relating to prior arrests without convictions; instead, the court reviewed the circumstances of the present offense. We cannot say that in doing so, the trial court abused its discretion. Garcia v State, __So.2d__ (Fla. 1st DCA 1984), Case Nos. AW-135 and AW-313, opinion filed August 14, 1984 [9 FLW 1777]; Weems v State, __So.2d__(Fla. 2d DCA 1984)[9 FLW 1385].
>
> The court also considered appellant's "pockmarked" record concluding that appellant was totally unamenable to rehabilitation. This consideration is not too unlike that given by the trial court in Swain v State, __So.2d__ (Fla. 1st DCA 1984), Case no. AV-290, opinion filed August 22, 1984, [9 FLW 1820], in which we held that consideration given to the "timing" of the various offenses, i.e., the defendant's establishing a pattern of committing new crimes within a short time after his release from any incarceration, was not precluded by the rule as a reason for departure from the recommended guideline sentence. See also Hendrix v State, __So.2d__ (Fla. 5th DCA 1984)[9 FLW 1697]; and Manning v State, __So.2d__, (Fla. 1st DCA 1984)[9 FLW 1362].

9 FLW 1858. In so concluding, the First District Court of Appeal even cited Hendrix v State, __So.2d__ (Fla. 5th DCA 1984)[9 FLW 1697], the instant case as supporting in some degree its decision. The above opinion reflects that only factors relating to the instant offense or prior arrests for which convictions have not been obtained will not be considered as clear and convincing reasons to warrant aggravating or mitigating the sentence. In essence, prior convictions can be considered as circumstances of the present offense. In this respect, the First District Court

of Appeal has clarified its prior holdings in Young and Swain, and such clarification does not conflict with the instant decision of the Fifth District Court of Appeal. Therefore, Young and Swain, as interpreted by the very court which rendered said decisions is not adverse, contrary or in conflict with the instant decision.

The two other cases cited by the Petitioner as conflicting, Provence v State, 337 So.2d 783 (Fla. 1976), and Baker v Florida Parole and Probation Commission, 384 So.2d 746 (Fla. 1st DCA 1980), are inapplicable to the topic of the instant decision and are not conflicting, in that those cases treat different subject matters than the instant one. Unlike the capital sentencing scheme, the Sentencing Guidelines set forth in Rule 3.701, do not specifically delineate aggravating circumstances. Therefore, the reasoning of the Court in Provence is inapplicable. The instant case deals with sentencing discretion, while in Baker, such discretion had already been exercised and what was in question was simply a presumptive parole release date, not an aggravating factor. These holdings, therefore, are inapposite to the instant decision.

CONCLUSION

The decision of the District Court of Appeal, Fifth District that the Petitioner seeks to have reviewed is not in direct and express conflict with the decisions of the District Court of Appeal, First District, in the cases cited by the Petitioner. Because of the reasons and authorities set forth in this brief, it is submitted that the decision in the present case is correct and in perfect accordance with the decisions of the District Court of Appeal for the First District, and the Respondent, therefore, requests that this Court decline to extend its discretionary jurisdiction to this cause.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

MARGENE A. ROPER
ASSISTANT ATTORNEY GENERAL
125 N. Ridgewood Ave.
Fourth Floor
Daytona Beach, Fl. 32014
(904) 252-1067

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Respondent's Brief On Jurisdiction has been furnished by delivery to James R. Wulchak, Assistant Public Defender, this 19th day of October, 1984.

MARGENE A. ROPER
COUNSEL FOR RESPONDENT