O/A 5-6-85

IN THE SUPREME COURT OF FLORIDA

TERRY B. HENDRIX,

Petitioner,

v. CASE NO. 65,928

STATE OF FLORIDA,

Respondent.

_____/

RESPONDENT'S ANSWER BRIEF ON MERITS

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SUMMARY OF ARGUMENT

Offenders must be treated as individuals and trial judges must continue to have the same broad sentencing discretion conferred upon them under the general law. The guidelines purpose is not to totally eliminate variation in sentencing, but to eliminate unjustified disparities while retaining justified disparities. District court decisions do allow departure on the basis of prior convictions and "magic words" of departure should not be required. In departure sentences, the scoresheet is a tool for the sentencing judge to gauge the extent of his departure and calculation of the scoresheet does not constitute the double consideration of an aggravating factor.

ARGUMENT

IT IS ENTIRELY PROPER TO CONSIDER AN OFFENDER'S PRIOR CRIMINAL RECORD OF CONVICTIONS TO JUSTIFY DEPARTURE FROM THE SENTENCING GUIDELINES EVEN THOUGH THAT PRIOR RECORD IS ALSO TAKEN INTO ACCOUNT IN ARRIVING AT A POINT TOTAL FOR THE PRESUMPTIVE SENTENCE RANGE.

The sentencing guidelines in Florida will become an "interesting but failed social experiment," contrary to the petitioner's assertions, if and when an offender is treated not as an individual, but as a cell in a matrix and his sentencer rendered an automaton who must put aside all that he knows of the offender and blindly determine his future on the basis of categorization alone. Quashal of the decision of the Fifth District Court of Appeal in this case would have just that effect. Despite this fact, the petitioner urges this court to do just that, for reasons the state would submit, that are less than clear and convincing.

Trial judges should continue to have the same broad sentencing discretion conferred upon them under the general law, subject only to certain limitations or conditions imposed by the guidelines, which are to be narrowly construed so as to encroach as little as possible on the sentencing judge's discretion, but whose specific directives are required to be recognized in a manner consistent with the guidelines' stated goals and purposes. Garcia v. State, 454 So.2d 714,717 (Fla. 1st DCA 1984).

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 supersede this principle. Fla. R. Crim. P. 3.701(b)(6). Rather, the guidelines are intended to assist the sentencing judge in the decision making process and to ensure 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).

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 guidelines 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. Sundberg, Plante and Braziel. Florida's Initial Experience With Sentencing Guidelines, 11 Fla. St. U.L. Rev. 125,142 (1983). "If Florida Rule of Criminal Procedure 3.701(d)(11) precludes consideration by the trial judge of past convictions, then it becomes only a political placebo to placate the trial courts and divert public attention from the legislature's ultimate responsibility for abbreviated sentences." Hendrix v. State,

455 So.2d 449,450 (Fla. 5th DCA 1984). In such event, trial judges should more appropriately be cautioned that at all times the guidelines should be viewed as the final word in the sentencing process. It is clear that we must recognize a judge's discretion to sentence outside the recommended guideline sentence, provided clear and convincing reasons are given in writing. Moreover, these reasons should be reviewed broadly so as not to "usurp judicial discretion." Fla. R. Crim. P. 3.701 (b)(6). The reviewing court should not reevaluate the trial court's exercise of discretion, rather it should assure that there is no abuse of that discretion. Addison v. State, 452 So.2d 955 (Fla. 2d DCA 1984). Such assurance should not be difficult in this case.

It is clear that the guidelines were adopted to eliminate unwarranted variation in the sentencing process, as the petitioner states. However, sentencing cannot be dehumanized, and the guidelines purpose is to eliminate unjustified disparities while retaining justified disparities. If this were not so, judicial discretion could not only be usurped but obliterated, something clearly not contemplated in the guidelines. It was never imagined that at sentencing a trial judge must put away logic and reason and blindly follow every guidelines proviso, save for the one according him his due discretion.

The petitioner cites numerous cases in support of his position that prior convictions, already included in the criteria for calculating the scoresheet, cannot be relied upon as

justification for departing from the guidelines recommended sentencing range. All of these cases involved aggravated sentences. It should not be overlooked, however, that sentencing discretion is a double-edged sword and departure can be upward or downward. If Hendrix had the benefit of a lesser or mitigated departure sentence based on "lack of prior convictions" or "no significant prior convictions," which lack thereof is calculated in the scoresheet by a reduced numerical point assessment, he would not be here complaining of his lesser sentence based on his prior convictions or of a "double-dipping" sentence. Hendrix complains not of discretion, or an abuse thereof, but that it was not exercised in his favor. Discretion cannot be a one-sided proposition. It then becomes a directive to mitigate sentences only. Prison over-crowding simply does not justify the hamstringing of an experienced trial judge, who stands at sentencing as a protector of society from those who pose a threat to it.

The petitioner relies on decisions of the First District Court of Appeal in support of his position that prior convictions do not justify a departure sentence. The state would submit that the decisions of that court do allow departure based upon prior convictions if "magic words" are mouthed by the trial judge, such as "timing of the offense" or "pattern of criminality." See Swain v. State, 455 So.2d 533 (Fla. 1st DCA 1984); Kiser v. State, 455 So.2d 1071 (Fla. 1st DCA 1984). But the timing of offenses, or a pattern of criminality, or an escalation of criminal activity is the very sub-

stance of a trial judge's abhorrence of a defendant's criminal record in the first instance, and such considerations are obvious and inhere in the judge's recital of prior convictions. It is certainly not the purpose of the guidelines to instruct judges as to vocalization of rationales--such an expenditure of time and labor is fruitless and that is the essence of a "failed social experiment." Moreover, it is seldom that a trial judge's recital of prior convictions is not followed by a conclusion, such as in the instant case, where the judge was lead to believe, based on prior convictions, that the defendant has "demonstrated a complete disregard for the laws of society" and a "sentence to county jail would not be a sufficient deterrent or punishment." In such cases, the "totality" of the reasons for departure must be examined, not simply the fact of prior convictions. Such an examination in this case reveals more than adequate clear and convincing reasons for departure.

Moreover, such considerations as "timing of offenses" or "patterns of criminality" do not exist in a vacuum and are only supported by prior consideration of prior convictions. The decisions of the First District Court of Appeal are not really concerned then with double-dipping sentences, but rather with the mouthing of "magic words"--a requirement we do not impose on defendants to preserve error for appellate review, and should not impose on trial judges when we know very well what they mean. Such a semantic debacle must not be perpetuated.

The First District, in fact, tacitly authorizes so called "double-dipping" sentences by its willingness to construe scoresheet calculations as surplusage in the face of a valid departure sentence. In Bogan v. State, 454 So.2d 686 (Fla. 1st DCA 1984), the scoresheet was improperly prepared resulting in an incorrect point total and a recommended sentence range of "community control or 12-30 months incarceration" rather than the proper recommended range of "any nonstate prison sanction." But, in view of a proper departure sentence, based on clear and convincing reasons, the First District refused to vacate the sentence, despite these errors. It is clear that in non-departure sentences, the guidelines scoresheet is the sentencing instrument of choice, however, when a trial judge exercises his discretion to depart from the recommended sentencing range, the scoresheet is not the sentencing instrument, but becomes merely a tool by which the trial judge can measure the extent of his departure. In such cases, there is no double imposition of a penalty or aggravation of a sentence. Provence v. State, 337 So.2d 783,786 (Fla. 1976), cited by the petitioner is completely inapposite, as mere consideration of a scoresheet in departing does not constitute the finding of an aggravating circumstance in the first instance, and the sentence imposed is not based on the scoresheet total and is limited only by statute. Petitioner's other analogies must likewise fall for the same reason. Minnesota has simply curtailed judicial discretion in its decisions and such an approach to sentencing

in Florida is not contemplated, even in the guidelines, by its proviso that judicial discretion should not be usurped. The guidelines cannot be given "teeth" by rendering the sentencing judge "meaningless." The guidelines cannot foresee and contemplate every sentencing situation. Can we render a sentencing judge meaningless in some situations, then call upon him to exercise the same discretion that has been taken away to fill in guidelines gaps? The state thinks not.

There is nothing in Florida Rule of Criminal Procedure 3.701, in effect at sentencing, which says that factors used in scoring, cannot also be considered to justify departure from the guidelines. Florida Rule of Criminal Procedure 3.701(d)(11) states:

> Departures from the Guideline 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 the state notes that it does not expressly state that the court cannot consider offenses for which the offender has been convicted. Moreover, those who have longer criminal histories are to be accorded incarcerative sanctions. Fla. R. Crim. P. 3.701(b)(7). There is no limitation in the guidelines as to how those incarcerative sanctions are to be imposed.

To accept the argument that the guidelines already take prior convictions into account on the scoresheet, and the consequences of such departure would be a double-dipping sentence "would be to remove the trial judge's right to exercise his discretion for clear and convincing reasons.... 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." Davis v. State, 458 So.2d 42,44 (Fla. 4th DCA 1984).

CONCLUSION

Unless the appellate courts of this state are prepared to take over the sentencing function, they need to be vigilant in resisting various inroads now being urged in the present glut of cases wending their way through our system, which inroads would inexorably lead towards the development of the district courts of appeal as, for all practical purposes, the sentencing courts of this state. Young v. State, 455 So.2d 55 (Fla. 1st DCA 1984) (Nimmons J. dissenting). The guidelines cannot foresee and contemplate every sentencing situation. Judicial discretion is the last bastion between the appellate courts as reviewing courts, and the appellate courts as sentencing courts. This is only the first of many attacks on that discretion. Approval of the decision of the Fifth District Court of Appeal is mandated.

Respectfully submitted

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Respondent's Answer Brief on Merits has been furnished by mail to James R. Wulchak, 1012 S. Ridgewood Avenue, Daytona Beach, Florida 32014-6183, this 13th day of March, 1985.

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