0/A 5-6-85

IN THE SUPREME COURT OF FLORIDA

TERRY B. HENDRIX,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 65,928

PETITIONER'S INITIAL BRIEF ON THE MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

JAMES R. WULCHAK
CHIEF, APPELLATE DIVISION
ASSISTANT PUBLIC DEFENDER
1012 South Ridgewood Avenue
Daytona Beach, Florida 32014
(904) 252-3367

ATTORNEY FOR APPELLANT

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STATEMENT OF THE CASE AND FACTS

As stated by the district court's opinion, the defendant, on appeal, was challenging his four-year prison sentence imposed by the trial court outside the sentencing guidelines. Hendrix v. State, 455 So.2d 449 (Fla. 5th DCA 1984). (Appendix 1) Hendrix, who had pleaded guilty to grand theft, had a total of twenty-five points under the guidelines; the maximum sentence under the matrix for category six crimes thus being "any nonstate prison sanctions." Of these twenty-five points, twelve resulted from the defendant's prior convictions for one third-degree felony and two misdemeanors. Hendrix, supra. Citing this prior record as justification, the trial court departed from the presumptive guidelines sentence, and imposed a sentence of four years imprisonment, a three-cell departure. Id.

On appeal, Hendrix contended that since his prior record was taken into account in calculating his guidelines score, it was error to reconsider this same factor to justify

departure from the guidelines. Id. The District Court of Appeal, Fifth District, affirmed by a two-to-one vote the trial court's departure, ruling that since the doubling was not specifically precluded by the sentencing guidelines rule, it was acceptable:

> 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. . . . 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. The appellant, on the other hand cites to cases from Minnesota, in which it has been held that the use of the same conviction as grounds for departure is, in effect, counting the conviction twice, which is contrary to the spirit and intent of the guidelines. See State v. Brusven, 327 N.W.2d 591 (Minn. 1982); State v. Erickson, 313 N.W.2d 16 (Minn. 1981); State v. Barnes, 313 N.W.2d 1 (Minn. 1981).
>
> There is merit in each argument. But we are more persuaded by that of the state. 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. If a trial judge cannot depart from the guidelines based on a defendant's prior criminal record of convictions, then that prohibition should be expressly defined and delineated by the Florida Legislature.

Id. Judge Sharp, dissenting, felt that the design of the guidelines implicitly prohibits the second use of a defendant's

record to further enhance his punishment where the prior record was already used in determining the presumptive sentence. The dissent noted that if uniformity in sentencing is to be achieved through use of the guidelines, Fla.R.Crim.P. 3.701(b), its mandates and exclusions should control the whole sentencing process. She finally noted that the majority opinion will render the guidelines meaningless by allowing departures in violation of the guidelines rules and mandates. Id.

The defendant filed a timely motion for rehearing and a request for certification of the question to this Court as a matter of great public importance. The district court denied the motion on August 22, 1984. Notice to Invoke Discretionary Jurisdiction was filed on September 21, 1984. This Court accepted jurisdiction on February 5, 1985. This brief follows.

SUMMARY OF ARGUMENT

Allowing the trial court to base a departure from the guidelines on matters already scored, weighted, and considered in arriving at the presumptive sentence constitutes an improper doubling of the factor and is contrary to the intent and purpose of the sentencing guidelines.

ARGUMENT

WHERE A FACTOR SUCH AS PRIOR CONVICTIONS IS ALREADY SCORED IN DETERMINING THE PRESUMPTIVE GUIDELINES SENTENCE, THAT FACTOR IS NOT A PROPER REASON FOR DEPARTING FROM THE GUIDELINES.

The decision of the District Court of Appeals, Fifth District, as stated in the dissenting opinion of Judge Sharp, has effectively eliminated the guidelines and has rendered them meaningless by allowing departures in violation of the guidelines rules and mandates. Hendrix v. State, 455 So.2d 449 (Fla. 5th DCA 1984) (Sharp, J., dissenting). This Court can remedy this problem and restore the original purpose of the guidelines by ruling that factors already scored and thus weighted in determining the presumptive sentence cannot be used to justify a departure from the guidelines.

In In re Rules of Criminal Procedure (Sentencing Guidelines), 439 So.2d 848 (Fla. 1983), this Court adopted the Sentencing Guidelines, Rule 3.701, Florida Rules of Criminal Procedure. The sentencing guidelines were a response to the widespread problem of disparity in sentencing practices around the state. As outlined in this Court's opinion, with the attached rule and committee notes, the guidelines were adopted to establish a "uniform set of standards to guide the sentencing judge" and 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." Id. at 849;

Fla. R. Crim. P. 3.701(b). The import of the guidelines was to assure that similarly situated offenders convicted of similar crimes receive similar treatment. See Sundberg, Plante, & Braziel, Florida's Initial Experience with Sentencing Guidelines, 11 Fla.St.U.L.Rev. 125 (1983). As Judge Ervin of the First District Court of Appeal has observed:

> The supreme court's adoption of the guidelines in 1983 [citation omitted], 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 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. §921.001 (1), Fla. Stat. (Supp. 1982).
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> * * * *
>
> 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).

Manning v. State, 452 So.2d 136 (Fla. 1st DCA 1984) (Ervin, C.J., specially concurring).

Among the offender-related criteria which the guidelines interpreted and assigned specific objective weight was the prior criminal record of the defendant. Fla. R. Crim. P. 3.701(b)4, (d)2-5. Departures from these objectively weighted presumptive sentences are to be avoided and can only be for clear and convincing reasons. In re Rules, supra at 851; Fla. R. Crim. P. 3.701(d)11.

The instant case conflicts with this Court's adoption of the rule and with the whole purpose of the guidelines, by allowing the trial judge to reinsert his subjectivity into an area which the guidelines already have weighed objectively (the

defendant's prior record) in arriving at the appropriate score and presumptive sentence. The rule and this Court's adoption of it forbid this subjectivity into areas already computed into the guidelines scoresheet. The district court's holding to the contrary is thus in error.

The first district court of appeal has correctly followed this Court's adoption of the rule in three cases which directly conflict with the decision of the fifth district. In Young v. State, 455 So.2d 551 (Fla 1st DCA 1984), the trial judge had listed the defendant's prior record of eleven convictions as the basis for his departure from the guidelines, complaining that the guidelines scoresheet did not allow him to take any more than four prior convictions for one category into account. The appellate court vacated the sentence, holding that the prior convictions, since scored in determining the presumptive sentence, could not be used as a basis for departure:

> 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 an unconvincing reason for departure.** The form contemplates more than four felonies and clearly states "4+". (emphasis added)

Young v. State, supra. The first district, in so deciding, recognized the purpose of the guidelines to eliminate unwarranted variances in sentencing and to reduce such subjectivity from the sentencing process. Contrarily, the fifth district has failed to recognize that its decision allows that unwarranted variation and subjectivity back into the sentencing determination.

In Swain v. State, 455 So.2d 533 (Fla. 1st DCA 1984), the first district approved a guidelines departure based on the defendant's prior record only because the trial judge relied on the timing of the prior offenses, not just their occurrence. The court held that the timing of the offenses provided justification for departure because that factor, unlike the mere presence of prior convictions, was not already included in the criteria for determining the scoresheet:

> . . . [O]ne of the primary considerations for departure from the guidelines was the **timing** of the commission of the various offenses by the appellant. It was not merely that appellant had previously committed murder and petit theft, but that appellant had established a pattern of committing new crimes within a very short period of time after his release from any incarceration. The timing of the commission of offenses is not included in the criteria for determining a guidelines score.

Swain, supra. In so ruling, the appellate court has therefore held it proper to aggravate only for factors which are not included in calculating the guidelines score and presumptive sentence. Hence, under the holding of Swain, any factor such as prior record which is already considered in arriving at the presumptive sentence may not be used as a basis for aggravation, contrary to the holding of the fifth district.

In a recent decision, the first district has specifically noted its disagreement with the instant case. In Burch v. State, 10 FLW 167 (Fla. 1st DCA January 11, 1985), the trial court listed as one of the reasons for departure that the

defendant was on parole at the time of the offense for which he was being sentenced. The district court disapproved of this reason since it was already factored into the presumptive sentence:

> The fact that appellant was on parole at the time of his offense was not a proper reason for departing from the guidelines since appellant received ten points on his guidelines scoresheet for this same factor. The stated purpose of the sentencing guidelines is to establish a uniform set of standards to guide the judge in the sentencing process. Fla. R. Crim. P. 3.701 (b). Built into the guidelines is a provision for increasing a defendant's score if he is under legal constraints at the time of the offense. Thus, the guidelines contemplate that those who are convicted of similar crimes and who were under legal constraint at the time of their offense will be treated uniformly in the absence of other factors justifying different treatment. We find a lack of logic in considering a factor to be an aggravation allowing departure from the guidelines when the same factor is included in the guidelines for purposes of furthering the goal of uniformity.

Burch v. State, 10 FLW at 167-168. The court noted in a footnote that its conclusion would appear to conflict philosophically with the fifth district's holding in Hendrix. See also Davis v. State, 458 So.2d 42 (Fla. 4th DCA 1984), wherein the court certified the precise question presented here to this Court.

As noted by these cases, allowing departures based on the identical factor used in calculating the recommended score would mean that the trial court is free to reject this Court's assessment of the relative importance that the five specified

variables should have in the sentencing decision; and the subjectivity in defining the relative importance of these specified variables would in no way be reduced. Fla.R.Crim.P. 3.701, 3.988. This Court in its report to the Legislature on the proposed sentencing guidelines stated:

> It stands to reason that the use of a uniform set of sentencing guidelines will eliminate a considerable amount of unwarranted variation simply because only certain objectively quantifiable variables can be considered without the trial judge specifically enumerating **other factors** he deems worthy of consideration.

A Report to the Legislature, Statewide Sentencing Guidelines Implementation and Review, p. 37 (1982). (Emphasis added.) The petitioner submits that this makes it clear that this Court contemplated that only relevant factors other than those used in computing the recommended sentence would warrant a departure. Otherwise, the guidelines are rendered meaningless. Minnesota has consistently held that the same factor which goes into determining the recommended sentence cannot serve as a basis for departure. State v. Magnam, 328 N.W.2d 147 (Minn. 1983); State v. Brusven, 327 N.W.2d 591 (Minn. 1982); State v. Barnes, 313 N.W.2d 1 (Minn. 1981). In Brusven, supra at 593, the Minnesota court explained:

> [B]ecause the defendant's criminal history is considered in determining the presumptive sentence, it generally would be unfair to consider that criminal history again in determining whether or not to depart, especially durationally. State v. Erickson, 313 N.W.2d 16 (Minn. 1981);

State v. Barnes, 313 N.W.2d 1 (Minn. 1981).

The petitioner submits that three persuasive analogies can be drawn from other areas of criminal law. First, under Section 775.087, Florida Statutes (1983), the degree of a felony and thus the sentence imposed for its commission, may be enhanced if during the commission of the felony, a weapon is used. However, this statute may not be used to enhance a felony in which the use of a weapon is already an essential element. § 775.087(1), Fla. Stat. (1983); Hill v. State, 438 So.2d 513 (Fla. 5th DCA 1983).

Second, in Provence v. State, 337 So.2d 783, 786 (Fla. 1976), this Court held that in a death penalty case it is improper to consider the same factual circumstance as the basis for more than one aggravating circumstance.

Third, under Florida's parole system an inmate receives a Presumptive Parole Release Date (P.P.R.D.) through a process of objective scoring that is strikingly similar to the objective scoring used in the sentencing guidelines. No factor used in arriving at the objective score may be used as an aggravating circumstance to extend an inmate's P.P.R.D. § 947.165, Fla. Stat. (1983); Baker v. Florida Parole and Probation Commission, 384 So.2d 746 (Fla. 1st DCA 1980).

In each of the three areas of law cited above the unfairness of using the same factors to aggravate a sentence twice has been recognized. The petitioner would urge this Court to continue to follow this principle by ruling that factors used

to arrive at a score under the sentencing guidelines may not be used as aggravating circumstances to further increase a sentence.

In conclusion, the decision of the district court of appeal in the instant case must be reversed. The majority opinion allows departure for any reason whatsoever, whether or not already included in the computation of the presumptive sentence, as long as it is not explicitly prohibited from consideration by Rule 3.701, and thus effectively nullifies the guidelines. This Court should vacate the decision of the fifth district court of appeal, and, in so doing, restore the guidelines and their purpose which the fifth district has rendered meaningless. Otherwise, as noted by the dissenting opinion, the "sentencing guidelines in Florida will [have] become an interesting but failed social experiment." Hendrix, supra (Sharp, J., dissenting).

CONCLUSION

BASED UPON the cases, authorities, and policies cited herein, the petitioner requests that this Honorable Court vacate the decision of the District Court of Appeal, Fifth District, vacate the petitioner's sentence, and remand the case to the trial court for resentencing to the presumptive guidelines sentence.

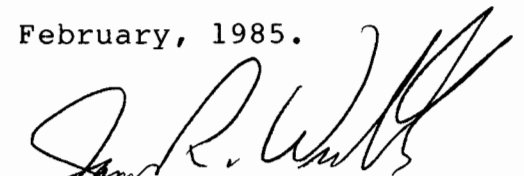
Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

JAMES R. WULCHAK
CHIEF, APPELLATE DIVISION
ASSISTANT PUBLIC DEFENDER
1012 South Ridgewood Avenue
Daytona Beach, FL 32014-6183
(904) 252-3367

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been delivered by mail to: The Honorable Jim Smith, Attorney General, 125 N. Ridgewood Avenue, Daytona Beach, Florida 32014, on this 21st day of February, 1985.



JAMES R. WULCHAK
CHIEF, APPELLATE DIVISION
ASSISTANT PUBLIC DEFENDER