IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,
Petitioner,

vs.

ROBERT GENE DAVIS,
Respondent.

CASE NO. 66,081

PETITIONER'S BRIEF ON THE MERITS

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OTHER AUTHORITY

PRELIMIANRY STATEMENT

Petitioner was the prosecution and Respondent the defendant in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida.

In the brief, the parties will be referred to as they appear before this Honorable Court of Appeal except that Petitioner may also be referred to as the State

The following symbols will be used:

"R" Record on Appeal

"PA" Petitioner's Appendix

All emphasis has been added by Petitioner unless otherwise indicated.

STATEMENT OF THE CASE

Respondent was charged by information with one count of uttering a forged instrument, and one count of resisting arrest without violence (R 401-402). In another case, he was charged with one count of kidnapping with intent to commit robbery, and one count of robbery with a firearm (R 417). The four charges were consolidated for trial (R 406, 431). The jury returned verdicts of guilty as to each count (R 403, 404, 429, 430). Respondent was adjudged guilty of each charge (R 407-408, 432-433).

A sentencing guideline scoresheet was prepared, which had a point score of 125 which would have resulted in a sentence of no greater than seven years incarceration (R 437). The trial court departed from the guidelines sentence, and sentenced Respondent to concurrent thirty-year sentences for the kidnapping and robbery charges, and retained jurisdiction for one-third of those two sentences. The trial court also applied the three year minimum mandatory sentence on each count for the use of a firearm, and gave credit for time served (R 434-436). Respondent also received concurrent sentences of one year for the uttering a forged instrument charge, and three hundred, sixty-four days for the charge of resisting arrest without violence, with credit for time served (R 409-411).

Respondent's motion for new trial (R 440) was denied on January 9, 1984 (R 412, 441). Notice of appeal from the kidnapping and robbery convictions and sentences was filed on

January 10, 1984 (R 442). On January 18, 1984, Respondent filed his pro se notice of appeal from the convictions and sentences for uttering a forged instrument and resisting arrest (R 413). Defense counsel's notice of appeal from the same judgment was filed the next day (R 414). The appeals were ordered consolidated by the Fourth District Court of Appeal. After briefing, and an oral argument, the Fourth District Court of Appeal rendered an opinion on October 17, 1984 (PA [9 F.L.W. 2221]. In part the Court stated:

> Appeals from Guideline departure, despite assurances to the contrary by those who advocated their adoption, are now in full spate. As we see it, the flood cannot subside until the supreme court gives guidelines for the Guidelines. Accordingly, deeming the matter to be of great importance, we also certify this entire case to the supreme court. Specifically, we ask the following question:
>
> > IF THE SCORE SHEETS MADE PROVISION FOR PRIOR CONVICTIONS, CAN THOSE CONVICTIONS ALSO CONSTITUTE CLEAR AND CONVINCING REASONS FOR AGGRAVATED PUNISHMENT OUTSIDE THE GUIDELINES?
>
> (PA at p. 3, footnote omitted)

Petitioner filed its notice to invoke discretionary review on October 22, 1983, and on October 29, 1984, this Honorable Court issued its briefing schedule.

STATEMENT OF THE FACTS

On April 16, 1983, Elizabeth Rafford left work at the Jordan Marsh shore in the Hollywood Fashion Center at about 9:40 P.M. (R 32-33, 36). As she was walking to her car, she heard a noise and noticed a black man walking toward her (R 39). When she got in her car, the black man ran up and forced open the door. Mrs. Rafford testified that she looked at the black man for a few seconds while he was pulling open the door handle of her car (R 40-41). The man put a gun to Mrs. Rafford's head (R 41). Mrs. Rafford tried to get the gun away but was unsuccessful (R 42). When he got the gun back, the man threatened to kill her (R 43). Mrs. Rafford was able to positively identify Respondent as the man who forced himself into her car during the trial (R 45). Mrs. Rafford had at least four opportunities to view Appellant. She had no doubt that Respondent was the perpetrator of the crimes against her (R 50, 67-68). Respondent drove the car for a distance, during which Mrs. Rafford continued to attempt to escape (R 46-48). Finally, Mrs. Rafford told Respondent that he could take her purse and her car, if he would let her go (R 48). Respondent agreed to this, and Mrs. Rafford got away after allowing Respondent to have her purse (R 49). Respondent then drove away (R 50).

Detective Richardson showed Mrs. Rafford a photo lineup of six photographs (R 64). After careful examination of the pictures, Mrs. Rafford identified the photograph of Respondent (R 66).

At the scene of Mrs. Rafford's abduction, Mrs. Rafford spoke with Officer Kevin Doyle regarding the crimes. After she had calmed down a little, she was able to give Officer Doyle a specific description of her assailant. She stated he was a black male, with bushy hair, a mustache and a beard. He was five feet, ten inches tall and weighed about 160 to 170 pounds (R 234). Mrs. Rafford also gave a detailed description over the telephone to Officer Trevor when he was at the bank (R 150).

On April 18, 1983, Margo McCall, a bank teller at the American Bank of Hollywood, was given one of Mrs. Rafford's checks to cash by Respondent (R 125-127), who presented a picture identification card in the name of Carl Adams (R 138). Since the teller knew that Mrs. Rafford had reported her checks stolen (R 125), she and her supervisor tried to keep Respondent at the bank until the police arrived (R 130, 177-178). After a while, however, Respondent told McCall that he had left a child in his car and should check to make sure he was all right (R 131). Respondent left the bank, but did not go toward the parking lot. Instead, he began walking down the street past the bank (R 133). The police arrived very shortly thereafter. When Officer Cox saw Respondent, she told him to stop since he matched the radioed description of the suspect she was looking for (R 216). Respondent tried to run away (R 217) but was apprehended and arrested (R 144).

POINTS INVOLVED ON APPEAL

POINT I

WHETHER PRIOR CONVICTIONS ARE A PROPER BASIS FOR DEPARTING FROM THE SENTENCING GUIDELINES WHEN IT APPEARS THAT A DEFENDANT IS NOT CAPABLE OF BEING REHABILITATED, EVEN THOUGH PRIOR CONVICTIONS ARE FACTORED INTO A SENTENCING GUIDELINE SCORESHEET?

POINT II

WHETHER IF THERE IS ONE CLEAR AND CONVINCING REASON FOR AGGRAVATING A GUIDELINES SENTENCE, THEN ANY OTHER STATED REASON IS MERELY SURPLUSAGE?

ARGUMENT

POINT I

PRIOR CONVICTIONS ARE A PROPER BASIS FOR DEPARTING FROM THE SENTENCING GUIDELINES WHEN IT APPEARS THAT A DEFENDANT IS NOT CAPABLE OF BEING REHABILITATED, EVEN THOUGH PRIOR CONVICTIONS ARE FACTORED INTO A SENTENCING GUIDELINE SCORESHEET.

Petitioner asserts that there is no legal reason why prior convictions cannot be part of "clear and convincing reasons" for departure from a guidelines sentence.

Fla.R.Crim.P. 3.701(d)(11) provides:

> 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.

It should be noted that this rule does not prohibit the court from considering prior offenses for which convictions have been obtained. If the Legislature had intended that post-convictions were not a proper basis for departing from the guidelines, then such a prohibition should have been "expressly defined and delineated by the Florida Legislature." Hendrix v. State, 9 F.L.W. 1697 (Fla. 5th DCA August 2, 1984). See also Fleming v. State, 9 F.L.W. 2118 (Fla. 2d DCA October 5, 1984). The

mention of one thing in a statute implies the exclusion of all others; expressio unius est exclusio alterius. Thayer v. State, 335 So.2d 815 (Fla. 1976). Accordingly, the rule does not prohibit considering prior convictions as a clear and convincing reason for departure from a sentencing guidelines sentence.

The Fifth and First District Courts of Appeal have also held, as the Fourth District Court of Appeal did in the instant case, that a defendant's failure to become rehabilitated from prior convictions is a proper basis for departure. Higgs v. State, 9 F.L.W. 1895 (Fla. 5th DCA September 6, 1984); Kiser v. State, 9 F.L.W. 1857 (Fla. 1st DCA August 29, 1984).

Therefore, the question certified by the Fourth District Court of Appeal must be answered as it has been by the Fourth District Court of Appeal. When prior convictions affect the circumstances of the scored offense[1], the prior convictions are part of a clear and convincing reason for departing from the guidelines.

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[1] Fla.R.Crim.P. 3.701(b)(3)

POINT II

IF THERE IS ONE CLEAR AND CONVINCING REASON FOR AGGRAVATING A GUIDELINES SENTENCE, THEN ANY OTHER STATED REASON IS MERELY SURPLUSAGE.

In the case at bar, the Fourth District Court of Appeal noted that "if there are some acceptable clear and convincing reasons for aggravation, unacceptable ones are surplusage," but went on to state: "We must speculate that the profusion of unacceptable reasons in this case may have affected the extent of the departure." (P.A. at p. 3; emphasis by the court). This speculation by the court led the court to find that "it appears more equitable to reverse and remand for resentencing" (P.A. at p. 3), but the court further noted that the trial judge might give the same enhanced sentence based upon the "acceptable" reasons (P.A. at p. 4). The State asserts that the Fourth District Court erred in remanding the case for resentencing when the court found that two of the four reasons given by the trial court were a proper basis for departing from the guidelines sentence. There was a proper basis for departure.

Departure from the sentencing guidelines is an exercise of judicial discretion. Fla.R.Crim.P. 3.701(b)(6). Thus, the proper test on appellate review of a departure from a guidelines sentence is whether the trial court abused its discretion by departing from the guidelines. Higgs v. State, supra. As a general rule, there is an abuse of judicial

discretion only when no reasonable person would take the view of the trial judge. Matire v. State, 232 So.2d 209 (Fla. 4th DCA 1970). Where an enhanced sentence is supported by at least one clear and convincing reason, then it is the proper role of a district court to uphold the sentence. It is not for a district court to consider the extent of the departure.

The First District Court of Appeal has presented a correct analysis of this issue:

> Appellant argues alternatively that, if departure from the guidelines is justified, the departure in the instant case is excessive. The sentencing guidelines do not explicitly provide any guidance for trial courts in determining a sentence once the trial court has validly departed from the guidelines. The sentences sub judice are within the parameters established by the Legislature. On the facts of the instant case, we decline to hold that the sentences are excessive.
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> Swain v. State, 9 F.L.W. 1820 (Fla. 1st DCA August 22, 1984), footnote omitted.

When a departure sentence is within statutory limits, then the departure should be upheld.

The Fifth District Court of Appeal has also made an analysis of this issue, with the same result:

> The defendant also argues that where some of the reasons given by the trial judge for departure are inadequate or impermissible and other reasons given are authorized and valid reasons this court should mot merely affirm but must remand for the trial court to reconsider the matter and determine if it would depart solely on the basis of the good reasons given. We do not

> agree. We assume the trial judge understood his sentencing discretion and understood that the mere existence of 'clear and convincing reasons' for departing from the sentencing guidelines never requires the imposition of a departure sentence and that the trial judge believed that a sentence departing from the guidelines should be imposed in this case if legally possible. Accordingly, a departure sentence can be upheld on appeal if it is supported by any valid ('clear and convincing') reason without the necessity of a remand in every case. This assumption in the trial judge's continuing belief in the propriety of a departure sentence is especially safe in view of the trial court's great discretion under Florida Rule of Criminal Procedure 3.800(b) to reduce or modify even a legal sentence imposed by it within sixty days after receipt of an appellate mandate affirming the sentence on appeal.
>
> Albritton v. State, 9 F.L.W. 2088-2089 (Fla. 5th DCA September 27, 1984)

The Fifth District Court of Appeal astutely realized that the extent of departure should only be reversed on appeal if the sentence is beyond statutory limits, since the trial court has jurisdiction to reduce a sentence within sixty (60) days of receipt of an appellate mandate pursuant to Fla.R.Crim.P. 3.800(b). Id.

The First District Court of Appeal has certified a question regarding this identical issue in Young v. State, 9 F.L.W. 1847 (Fla. 1st DCA August 24, 1984) and its progeny. In Young, the court remanded for resentencing, but has failed to do so in subsequent cases: Swain, supra; Brooks v. State,

9 F.L.W. 2135 (Fla. 1st DCA October 9, 1984); Carney v. State, 9 F.L.W. 2143 (Fla. 1st DCA October 9, 1984).

Petitioner asserts that where there is at least one clear and convincing reason for departing from a guidelines sentence and the sentence is within statutory limits, there has been no abuse of discretion by the trial court, and the reviewing district court of appeal must affirm the sentence.

CONCLUSION

THEREFORE, based upon the foregoing reasons and authorities cited herein, Petitioner respectfully requests that the Judgment and Sentence of the trial court be AFFIRMED, and the decision of the Fourth District Court of Appeal to remand the case for resentencing be QUASHED.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petitioner's Brief on the Merits has been furnished, by courier/mail, to TATJANA OSTAPOFF, ESQUIRE, Assistant Public Defender, 224 Datura Street - 13th Floor, West Palm Beach, Florida 33401, this 16th day of November, 1984.

Joan Fowler Rossin
Of Counsel