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IN THE SUPREME COURT OF FLORIDA

CHARLES BURKE,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 66,091

RESPONDENT'S BRIEF ON THE MERITS

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SUMMARY OF ARGUMENT

The district court did not err in determining that the sentencing judge had not abused his broad discretion in departing from the recommended guideline sentence based upon an obvious pattern of escalating violent criminal behavior on the Petitioner's part. The sentencing judge adequately placed on record at the sentencing proceeding, later transcribed, the reasons for departure and noted that his decision was based not upon consideration of offenses for which juvenile adjudications had not been obtained, but on various juvenile offenses (including grand theft, auto theft, burglary, and aggravated assault) which resulted in suffered juvenile adjudications and commitments. These numerous juvenile offenses had culminated in the armed robbery with a firearm for which the Petitioner was sentenced sub judice and the sentencing judge, taking into account the obvious failure to adequately punish and/or rehabilitate the Petitioner (despite various previous sentencing efforts including probation, nonincarcerative camp-type commitments, and incarceration), properly departed from the recommended guideline sentence, both to protect the public and to finally adequately punish the Petitioner. Although prior juvenile offenses (which are expressly excluded from being considered as "prior record" for purposes of guidelines scoresheet computations) were utilized by the sentencing judge, Fla. R. Crim. P. 3.701 does not, despite the Petitioner's assertion to the contrary, prohibit consideration of those offenses by a sentencing judge in evaluating a defendant's criminal history

and tendencies for purposes of a possible departure from a recommended guidelines sentence.

ARGUMENT

DISTRICT COURT DID NOT ERR IN AFFIRMING THE SENTENCE IMPOSED BY THE TRIAL JUDGE WHERE NO ABUSE OF DISCRETION WAS DEMONSTRATED IN THE SENTENCING JUDGE'S DEPARTURE FROM THE RECOMMENDED GUIDELINES.

Petitioner raises a number of challenges to the sentence imposed upon the armed robbery charge to which he pled guilty. There is no dispute that the fifteen year term of incarceration imposed is within the statutory maximum for that offense; rather, the issue to be determined is whether the district court erred in finding that the sentencing judge had not abused his discretion when he determined that it was necessary to depart from the recommended guideline sentence range of three and one-half to four and one-half years of incarceration. An analysis of the Petitioner's predispositional report and the clear and convincing reasons for departure pronounced at the sentencing hearing by the trial court judge present more than ample evidence of what the lower court termed "an escalating pattern of violent crimes like [the instant offense]" and a complete lack of rehabilitation despite "numerous opportunities to staighten up his life" which clearly supported the need to depart from the recommended guideline sentence and impose a greater period of incarceration sufficient to protect the public and adequate to impress upon the Petitioner the fact "that crime doesn't pay." (R 58,59). No abuse of sentencing discretion has therefore been demonstrated.

Initially, Burke urges that this Court should vacate

his sentence because the trial judge (despite an apparent intent to do so included of record) failed to himself prepare a written statement setting forth his reasons for departing from the recommended guideline sentence. (AB 11-13). Respondent submits that given the circumstances of this case and the fact that the sentencing judge clearly stated his reasons for departure at the sentencing hearing, vacating of the sentence imposed in this case would constitute a meaningless exaltation of form over substance without substantive benefit to either party or the interest of judicial economy. Here, the reasons for departure were well-known to the Petitioner and his counsel who were, of course, present at the sentencing hearing when the judge orally dictated them into the record. (R 57-59). Indeed, Burke's counsel was obviously well aware of the reasons for departure when he raised his objections to them at the sentencing hearing (R 59-63). Furthermore, the reasons for departure were "readily available to the parties", despite Burke's contention to the contrary, through the sentencing transcript which has obviously provided an ample basis for the Petitioner to raise an appellate challenge to those reasons both before the district court and this tribunal. (AB 12).

As correctly determined by the district court below, no reversible error justifying vacation or remand Burke's sentence was demonstrated merely because the trial judge did not preform the simple clerical task of reducing his already recorded reasons for departure to a written order especially where as here, the judge made it apparent that the contents of his written

order would be the same as the oral pronouncement which he wished to "spread...upon the record". (R 57). The decisional weight of the majority of appellate courts in this State, including the district courts' Harvey v. State, 450 So.2d 926 (Fla. 4th DCA 1984) decision-upon which Burke relies for conflict with the instant decision-rests with the decision sub judice that a written statement is not required if the reasons for departure are dictated into the record for transcription. Webster v. State, Case No. 84-388 (Fla. 2d DCA November 14, 1984) [9 FLW 2419]; Fleming v. State, Case No. 84-459 (Fla. 2d DCA October 5, 1984) [9 FLW 2118]; Williams v. State, Case No. 84-1124 (Fla. 4th DCA December 5, 1984) [9 FLW 2533]; Carter v. State, 452 So.2d 953 (Fla. 5th DCA 1984); Contra: Millett v. State, Case No. AX-377 (Fla. 1st DCA December 10, 1984 [9 FLW 2559].

Burke next challenges the sentencing judge's discretionary determination that a departure from a recommended guideline sentence range was necessary. Specifically the Petitioner contends that the reasons announced by the trial judge were not "clear and convincing" bases for departing from the recommended range. From this argument it appears apparent that Burke, despite his contention to the contrary elsewhere in his initial brief, was able to discern from the alleged "rambling discussion" by this sentencing judge those specific reasons which supported departure. (AB 12). Petitioner's assertions to the contrary notwithstanding, the district court committed no error in determining the sentencing judge had not abused his broad discretion in such matters in departing from the recommended guideline sentence.

The sole question to be addressed here is whether the district court erred in determining that no abuse of sentencing discretion had been demonstrated by the Petitioner so as to justify overturning the sentencing judge's determination that departure from the guideline sentence was warranted. Within the statement of purpose and principles contained within the sentencing guidelines is Fla. R. Crim. P. 3.701(b)(6) which makes it clear that the guidelines are not designed to usurp judicial discretion in the sentencing decision-making process. Indeed, the district courts of this state have made it clear that a trial judge sentencing under the new guidelines continues to have the same broad sentencing discretion conferred upon him under general law subject only to the specific limitations of the guidelines which should be narrowly construed so as to encroach as little as possible on the sentencing judge's discretion. Santiago v. State, Case No. AW-418 (Fla. 1st DCA November 28, 1984)[9 FLW 2479]; Garcia v. State, 454 So.2d 714 (Fla. 1st DCA 1984); Murphy v. State, Case No. 83-1660 (Fla. 5th DCA October 18, 1984)[9 FLW 2230]; Higgs v. State,455 So.2d 451 (Fla. 5th DCA 1984); Addison v. State, 452 So.2d 955 (Fla. 2d DCA 1984). Furthermore, no reevaluation of the sentencing courts discretionary action is appropriate, only an assurance that no abuse of that discretion took place. Santiago v. State, supra; Murphy v. State, supra; Addison v. State, supra.

Did the sentencing court in this case abuse its discretion? The State thinks not.

Burke's predisposition report presents a vivid portrayal

of an individual who has made no effort to abide by societal regulations despite frequent warnings, probationary terms, and incarcerative punishments. This disdain for societal rules has escalated from various theft related offenses (e.g., grand theft, burglary, auto theft, retail theft) to crimes of violence (e.g. aggravated assault) and now finally to the offense at issue- armed robbery- wherein he admitted robbing two individuals at gunpoint. (R 34,80-82). For each of the offenses noted Burke, a juvenile, was committed or recommitted until the armed robbery at issue finally resulted in his involuntary transfer to adult court where he pled guilty. (R 34). It was this "escalating pattern" of violent criminal conduct along with the Petitioner's obvious failure to "straighten up his life" despite various rehabilitative efforts including probation, "a non-incarceration camp type environment", and incarceration (juvenile committment) that convinced the sentencing judge that it was necessary to depart from the guidelines recommendation. (R 57-59). Although the sentencing judge paid lip service to the Petitioner's twenty-two "encounters" with the law it is clear from the sentencing transcript that he did not consider those non-conviction encounters the basis for his departure (R 61) and in fact specifically relied only on that criminal conduct which resulted in his various commitment. Indeed, the sentencing judge specifically referred only to those offenses (theft, burglary, auto theft, aggravated assault) which had resulted in Burke's "serv[ing] time in every branch of the juvenile system available" in reaching his determination that the Petitioner's conduct amply demonstrated and

"escalating pattern of violence, violent crime, [that] deserves the sentence outside the guidelines." (R 58-59). This conclusion was additionally based in part upon the sentencing judge's conclusion that despite the numerous efforts to punish and/or rehabilitate the Petitioner through probation and incarceration his anti-social behavior had simply escalated to such a point that it became necessary to demonstrate to Burke "that crime doesn't pay". (R 58). This "pattern of criminal conduct" basis for departure has been approved in comparable situations and clearly affords an ample basis for the trial judge's discretionary determination that the recommended guideline sentence was insufficient to meet the primary sentencing goals of punishment and rehabilitation or to protect the public from an even further escalation of violent criminal conduct in conformance with the pattern already established by the Petitioner. Keeley v. State, Case No. 84-9 (Fla. 5th DCA October 11, 1984)[9 FLW 2190]; Swain v. State,455 So.2d533(Fla. 1st DCA 1984); Weems v. State, 451 So.2d 1027 (Fla. 2d DCA 1984); Fla. R. Crim. P. 3.701(b)(2).

The Petitioner argues that the sentencing judge improperly considered certain portions of his juvenile record including certain arrests which did not result in conviction (but did result in "initial counseling"); certain juvenile conduct which is not equivalent to a crime (i.e., beyond control, runaway, ungovernable); and a number of juvenile dispositions (which were the equivalent of convictions if committed by an adult) which were disposed of more than three years before the instant offense. Burke argues that these factors cannot be considered in preparing a guideline

scoresheet and could likewise not be considered for purposes of departing from the recommended guideline sentence.

Initially, the State reasserts that a review of the sentencing transcript reveals that the sentencing judge did not rely upon those juvenile offenses in the predisposition report which constituted mere arrests or non-criminal behavior but instead clearly concerned himself not with these mere "encounters" but with that criminal conduct-including a number of thefts, burglaries, and aggravated assaults-which resulted in some sort of disposition/commitment or incarceration of the Petitioner. (R 58-59,61). Thus, the proscription of Fla. R. Crim. P. 3.701(b)(11) is of no import here. Alternatively, Burke's numerous juvenile offenses for which a disposition/commitment did result provide a more than adequate basis, notwithstanding the other "encounters" listed on the predisposition report to support the trial judge's determination that an escalating pattern of violent criminal conduct was demonstrated and to thereby support the departure from the recommended guideline sentence. See Webster v. State, Case No. 84-388 (Fla. 2d DCA November 14, 1984) [9 FLW 2419]; Albritton v. State, Case No. 84-204 (Fla. 5th DCA September 27, 1984) [9 FLW 2088]; compare Young v. State, 455 So.2d 551 (Fla. 1st DCA 1984).

Furthermore, the sentencing judge's use of prior juvenile adjudications (convictions), which resulted in the Petitioner's commitment on numerous occasions, to support a determination that Burke's criminal record evinced an escalating pattern of criminal conduct finally culminating in violent crime so as to support a departure from the guideline sentence was not

erroneous. As noted by the district court below and by other appellate tribunals throughout this State, there is no specific sentencing guidelines prohibition which precludes a sentencing judge's consideration, for purposes of departure, of prior criminal conduct (convictions/juvenile adjudications) simply because that conduct could not be considered "prior record" in calculating the defendants guideline scoresheet as contemplated by Fla. R. Crim. P. 3.701(d)(5). Townsend v. State, Case No. 84-1147 (Fla. 2d DCA November 9, 1984)[9 FLW 2357]; Fleming v. State, Case No. 84-459 (Fla. 2d DCA October 5, 1984)[9 FLW 2118]; Addison v. State, 452 So.2d 955 (Fla. 2d DCA 1984); Weems v. State, 451 So.2d 1027 (Fla. 2d DCA 1984); see also Garcia v. State, supra. In Weems, the court rejected the contention that the sentencing judge erred in relying upon the defendant's record of prior juvenile dispositions more than three years old as grounds for a sentence beyond the guidelines and in doing so held that there is nothing in Rule 3.701 to suggest that matters excluded for purposes of guidelines computation cannot be considered as reasons for departure. This interpretation, clearly embraced by the district court sub judice, is a logical one based upon a reading of the rule, the broad discretion still invested in sentencing judges, and the realization that as noted by the district court below, a trial court could never deviate from a guideline sentence if in deciding to deviate it could not consider factors other than those he considers in arriving at that guideline sentence. Burke v. State, supra at 1246.

Furthermore, despite the Petitioner's assertion to the contrary, the State submits that the sentencing judge's reliance upon prior dispositions that were already included in calculating the presumptive guideline sentence was not improper. Williams v. State, Case No. 84-124 (Fla. 4th DCA December 5, 1984) [9 FLW 2533]; McGuiston v. State, Case No. 84-663 (Fla. 2d DCA December 7, 1984) [9 FLW 2561]; Hendrix v. State, 455 So.2d 449, (Fla. 5th DCA 1984); Kiser v. State 455 So.2d 1071 (Fla. 1st DCA 1984).

To summarize, the sentencing judge committed no abuse of his discretion in such sentencing matters in determining that based upon Burke's extensive criminal history (as evinced by numerous juvenile convictions/dispositions) and the obvious failure of repeated rehabilitative and putative efforts by the state (including probation, nonincarcerative camp-type environments, and commitment/incarceration) to stem his increasingly violent criminal activity, departure from the recommended sentence was warranted both to protect the public and to serve as a more forceful lesson to the Petitioner "that crime doesn't pay." (R 58). Indeed, as noted by the Court in Davis v. State, Case No. 84-87, (Fla. 4th DCA October 17, 1984) [9 FLW 2221] our system of criminal justice is in part predicated on enhanced punishment for incorrigibles and the sentencing judge in this case obviously and correctly determined that the Petitioner was a member of that group. Burke's argument that the "immaturity and inexperience of the offender" should require a sentencing judge to blind himself to juvenile adjudications

is clearly both illogical and dangerous especially where, as here, Burke's repeated "juvenile" conduct (including numerous burglaries, auto thefts, and aggravated assaults) provide a clear picture of a career criminal who simply started his still extant pattern of anti-social and violent criminal behavior at an early age. Certainly, Burke's ever-escalating pattern of violent criminal activity is no less indicative of the clear threat he poses to society in the future merely because his criminal tendencies surfaced as a "juvenile".

CONCLUSION

Based on the arguments and authorities presented herein, Appellee respectfully prays this Honorable Court affirm the decision of the district court in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished by delivery to Lucinda H. Young, Assistant Public Defender, at 1012 S. Ridgewood Avenue, Daytona Beach, Florida 32014, this 27th day of December, 1984,

Of Counsel
Sean Daly