

IN THE SUPREME COURT OF FLORIDA

66,091
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JAN 14 1985

CLERK, SUPREME COURT

CHARLES BURKE,)
)
 Petitioner,)
)
 vs.)
)
 STATE OF FLORIDA,)
)
 Respondent.)
 _____)

CASE NO. ~~66,091~~ By _____
Chief Deputy Clerk *[Signature]*

REPLY BRIEF OF PETITIONER

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

LUCINDA H. YOUNG
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ATTORNEY FOR PETITIONER

TABLE OF CONTENTS

	<u>PAGE NO.</u>
TABLE OF CONTENTS	i
TABLE OF CITATIONS	ii
ARGUMENT	
THE TRIAL COURT'S DEPARTURE FROM THE RECOMMENDED GUIDELINE SENTENCE FAILS TO COMPLY WITH THE DICTATES AND EXCLUSIONS OF FLORIDA RULE OF CRIMINAL PROCEDURE 3.701.	1
CONCLUSION	4
CERTIFICATE OF SERVICE	4

TABLE OF CITATIONS

OTHER AUTHORITIES CITED:

PAGE NO.

Rule 3.701, Florida Rule of Criminal Procedure

1,3

ARGUMENT

THE TRIAL COURT'S DEPARTURE FROM
THE RECOMMENDED GUIDELINE SENTENCE
FAILS TO COMPLY WITH THE DICTATES
AND EXCLUSIONS OF FLORIDA RULE OF
CRIMINAL PROCEDURE 3.701.

The State contends that the offenses in the Predispositional Report which did not result in convictions were not considered by the trial court. In support of its position, the State relies on the following comment made by the trial judge in response to defense counsel's protest that the guidelines prohibit consideration of offenses for which convictions are not obtained:

THE COURT: They weren't -- I merely aggregated the number of encounters. I didn't deal with them as convictions. He's only been sent away to four different institutions, I think.

(R61)

The judge's remark that he did not "deal with them as convictions" does not mean that he did not consider them in finding an "escalating pattern of violent crimes" which justified the departure. Contrary to the State's argument, Judge Perry's earlier comments clearly indicate he did consider them. In addition to his reference to Burke's twenty-two "encounters" with the law, which the State characterizes as mere "lip service", the trial judge in explaining his reasons for departure stated:

But the record should show that in Mr. Burke's case, he is presently eighteen years old, turned eighteen

in September of this year. His encounters with the law go back to the time when he was eight years old.

(R57) (Emphasis supplied).

As the P.D.R. indicates, the "encounters" which occurred when Burke was eight years old were a shoplifting charge and a beyond control charge (P.D.R. Referral Nos. 1 and 2)^{1/}, both of which were dismissed after initial counseling. The first juvenile disposition which culminated in the equivalent of a conviction occurred in 1978, when Burke was twelve years old. The trial judge also stated that Burke had a "consistent history of theft, escalating to burglary, escalating to car theft, escalating to violence: aggravated assault, aggravated assault a second time, numerous burglaries" (R58). Although there are three entries in the P.D.R. for thefts (P.D.R. Referral Nos. 1, 6, and 13), only one resulted in conviction (No. 13). One theft hardly amounts to a "consistent history of theft". Additionally, although the P.D.R. contained four entries for burglaries, only two resulted in conviction. Judge Perry's statement that Burke had "numerous burglaries" indicates that he was considering the burglary charges for which convictions were not obtained, as well as the two burglary convictions.

^{1/} See Petitioner's Initial Brief on the Merits at 5-6.

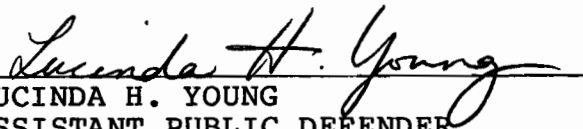
With respect to Petitioner's argument that juvenile adjudications older than three years should not constitute a clear and convincing reason for departure, the State, quoting from the Fifth District's opinion, urges that "a trial court could never deviate from a guideline sentence if in deciding to deviate it could not consider factors other than those he considers in arriving at that guideline sentence". This ignores the distinction between factors which Florida Rule of Criminal Procedure 3.701 expressly excludes from scoring as prior record and factors which are not addressed by Rule 3.701, either by way of inclusion or exclusion. Petitioner's contention is that the former should not constitute a proper basis for departure. Factors not expressly excluded from prior record and not already taken into consideration in calculating the presumptive guideline sentence could serve as a basis for departure, if they rise to the level of a clear and convincing reason.

CONCLUSION

BASED UPON the foregoing arguments and authorities cited herein, and in the initial brief, Petitioner respectfully requests this Honorable Court reverse the decision of the Fifth District Court of Appeal.

Respectfully submitted,

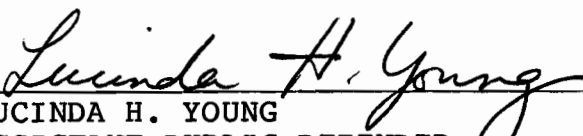
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CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon the Honorable Jim Smith, Attorney General, 125 N. Ridgewood Avenue, Fourth Floor, Daytona Beach, Florida 32014; and mailed to Charles Burke, Inmate No. 092218, Sumter Correctional Institute, P.O. Box 667, Bushnell, Florida 33513, on this 11th day of January, 1985.


LUCINDA H. YOUNG
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