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IN THE SUPREME COURT OF FLORIDA

FREDERICK RUSSELL,

Petitioner,

v. CASE NO. 66,209

STATE OF FLORIDA,

Respondent.

BRIEF OF RESPONDENT

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PRELIMINARY STATEMENT

FREDERICK RUSSELL will be referred to as the "petitioner" in this brief. The STATE OF FLORIDA will be referred to as the "respondent." The record on appeal will be referred to by the symbol "R" followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

Respondent accepts the statement of the case and facts as presented by petitioner.

SUMMARY OF THE ARGUMENT

The respondent agrees with the petitioner that the guidelines prior to amendment control sub judice. The respondent, however, will argue that the trial courts both before and after the amendment were allowed to consider an extensive prior criminal history in going outside of the guidelines. If the petitioner's argument, which stresses form over essence, were correct, then prior to the guideline amendment, the court was blind to the defendant's previous criminal history that went over four felony convictions. This is ludicrous. The trial courts before the amendment were free to use discretion in extraordinary cases and that discretion was not restricted or amplified by the amendment.

ISSUE I

DID THE TRIAL COURT ERR IN DEPARTING FROM THE RECOMMENDED GUIDELINE RANGE BY USING APPELLANT'S PRIOR RECORD AND ADDITIONAL OFFENSES TO JUSTIFY A DEPARTURE?

While the petitioner states the issue as shown above, the true issue is more clearly framed by the petitioner at page six of his brief where he states:

> "Using the guidelines as they were written when Mr. Russell was sentenced, the question becomes whether or not a bad prior record and many additional offenses can be used to justify a departure from the recommended guidelines sentence."

The petitioner in his brief refers to "several" offenses and "several" prior offenses. While the use of this word is technically correct, the opinion of the Second District Court of Appeal more clearly puts this in perspective when it refers to eighteen felonies charged by information and the scoresheet, located at R 160, shows as reasons for departure, with specificity.

The petitioner's argument would be valid if certain sweeping premises made by the petitioner in his brief were correct. They are not however. He states at page seven of his brief:

> "The whole purpose behind using guidelines sentencing is to have uniformity in sentencing."

This is a false premise since the statement of purpose concerning the guidelines (one must suppose before and after the amendment) was to punish the offender. Florida Bar Amendment to Rules, 451 So.2d 824 (Fla. 1984). This statement of purpose is located at 451 So.2d 824, 825 goes on to state

> "The severity of the sanction should increase with the length and nature of the offender's criminal history."

If the petitioner's argument were valid it would mean that the purposes of the guidelines were different prior to the amendment and that this statement of purpose is not a clarification, but a major re-evaluation. Such a conclusion is unsupportable.

Further, in his brief at page nine, the petitioner states:

> "That is the very nature of the guidelines - to take away judicial discretion for the sake of uniformity."

This is absurd, and any argument based on this premise must crumble. Again, it places form over substance. The respondent will refer again to the amendment, arguing that it did not change the intent, but clarified the purposes. It could not be more definite from the wording that the guidelines are not, and have never been, an attempt to prohibit the court's discretion, but to require the court have a good reason for going outside of the guidelines and to explain the reasons for doing so. Sub judice, at R 160, good reason is shown and stated with specificity.

The respondent will agree with the petitioner's premise at page seven of his brief that the trial court should not be allowed to deviate from the guidelines at "whim". Reviewing the record in the matter sub judice, can one in good faith argue that the trial court acted at "whim"?

It is important to note that the trial court considered not only the number of offenses "past and present," but the variety as well. Regarding instances where departure from the guidelines will not be reversed because one of the reasons is invalid. See Williard v. State, 10 F.L.W. 213 (Fla. 2 DCA January 16, 1985)

The respondent does not disagree with the petitioner's contention, and the cases he cites in support thereof, that the amended rule does not apply to Mr. Russell's case. There is no need to examine the cases relied on by the petitioner in this regard since the opinion of the Second District Court of Appeal in the matter sub judice has a footnote that recognizes that concept.

But if one begins by stating the valid premises here (that the guidelines were never intended to usurp the discretion of the court, but only to cause the court to use its discretion when good cause is shown) then it is clear that the petitioner's argument has no foundation.

The petitioner at page eight of his brief states:

> "If the old convictions and many additional offenses cannot be used to increase points on the scoresheet, they should not be used to justify departure from the guidelines."

One must ask, as the Second District Court of Appeal did, - Why not? The trial court did no more than consider the extensiveness and the variety of the criminal history of the petitioner, which was outside of the perview of the scoresheet. See Hendrix v. State, 455 So.2d 449 (Fla. 5 DCA 1984) (concerning permissibility of criminal history as a factor). If the petitioner's argument herein were valid, and form was considered over substance, then there would be no need for a judge to use discretion, nor need sentencing hearings, nor need for a presentence investigation, since a computer could tabulate the points and arrive at a sentence that was mathematically unimpeachable. While the scoresheet may give a basis to begin sentencing consideration, and admittedly in most cases is adequate, it could not have contemplated a situation such as that sub judice when

the facts demand the human factor in judicial intervention.

The petitioner at page eight of his brief cites various Minnesota cases to support his arguments. However, those cases do not even represent persuasive authority since first, the wording of the Wisconsin Rule is different and second, as the petitioner candidly admits at page eight of his brief, factors which are not basis for going outside of the guidelines in Wisconsin have been held to be just such a basis by the district courts in this state. For a collection of the various cases see Mischler v. State, 458 So.2d 37 (Fla. 4 DCA 1984) (with particular emphasis at page 40). Minnesota requires "substantial and compelling reasons" whereas the State of Florida relies on "clear and convincing reasons".

This means, of course, that this Honorable Court must look to the wording of the rule prior to the amendment to determine if the guidelines were meant to limit the discretion of the trial judge so that the judge was unable to consider the impact when there existed far more than four prior felony convictions as the petitioner now contends. The respondent can only conclude that the amendment to the guidelines when it refers to statement of purpose was meant to clarify, but was not meant to be a radical departure from the original intent of the guidelines. That is to say, prior to the amendment, the trial court had the discretion to consider an extraordinary criminal history by going outside of the guidelines, and after the amendment, the trial court was still able to consider a prior criminal history because of the change in the scoresheet.

The Second District Court of Appeal, by a unanimous ruling in the case of sub judice, and the First District Court of Appeal in

its dissent in Young v. State, 455 So.2d 551 (Fla. 2 DCA 1984) seems to be the most logical in fair treatment of previous convictions when one considers that justice is due to the state as well as the defendant and the announced purpose of the guidelines is to render punishment commensurate with the crime and the criminal history of the defendant.

At page seven of his brief the petitioner relies on Harvey v. State, 457 So.2d 926 (Fla. 4 DCA 1984). The respondent will note that for this case to serve as precedent, it must be factually and legally on point. An examination of Harvey shows that the criminal record of the defendant in that case pales by comparison to that of Mr. Russell. In Harvey, the offenses were either stale, or if current, were motor vehicle violations. The petitioner, after citing Harvey, goes on to state that the Fourth District Court of Appeal has "waivered" from its original position in Harvey. The respondent will argue that the court has not waivered, but has clearly shown that the doctrine in Harvey was not to be applied when an extraordinary criminal history existed. It would seem in fact that the Davis case supports the holding of the Second District Court of Appeal in Russell. The petitioner also cites Callahan v. State, 462 So.2d 832 (Fla. 4 DCA 1984), however, that case is neither factually, or legally on point and has no bearing on the matter sub judice.

In summary, the Second District Court of Appeal, in its well reasoned opinion in the matter sub judice, relying in part on the case of Townsend v. State, 458 So.2d 856 (2 DCA 1984) and the case cited therein takes the only reasonable approach to this matter. By the same token, the Fourth District Court of Appeal in teh case of

Davis, supra (relying on Hendrix, supra as did the Second District Court of Appeal in Russell) also seems to take a reasonable position. To hold otherwise would be to find that the Florida court's, prior ot the amendment, were blind to one's criminal history when it exceeded four felony convictions.

CONCLUSION

Based on the above-stated facts, arguments and authorities, Appellee would pray that this Honorable Court affirm the decision of the lower court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Deborah K. Brueckheimer, Assistant Public Defender, Crimnal Courts Complex, 5100 - 144th Avenue North, Clearwater, Florida 33520, this 14 day of May, 1985.

OF COUNSEL FOR RESPONDENT.