

IN THE SUPREME COURT OF FLORIDA

FREDERICK RUSSELL, :
Petitioner, :
vs. :
STATE OF FLORIDA, :
Respondent., :
_____ :

Case No. _____
Appeal No. 84-556

FILED

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PETITIONER'S BRIEF ON JURISDICTION

JERRY HILL
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

By: Deborah K. Brueckheimer
Assistant Public Defender
Criminal Courts Complex
5100 - 144th Avenue North
Clearwater, Florida 33520

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PRELIMINARY STATEMENT

Petitioner, Frederick Russell, was the Appellant in the Second District Court of Appeals and the defendant in the trial court. Respondent, the State of Florida, was the Appellee in the Second District Court of Appeals. The appendix to this brief contains a copy of the decision rendered November 9, 1984.

STATEMENT OF THE CASE AND FACTS

On November 5 and 7, 1979; February 1 and 13, 1980; April 15, 1980; and November 23, 1983, the State Attorney for the Sixth Judicial Circuit in and for Pinellas County, Florida, filed eleven informations against the Appellant, Frederick Russell, charging Mr. Russell with the following: eleven counts of uttering a forged check contrary to Florida Statute 831.02, occurring on August 3, 6, 11, 13, and 21, 1979; October 19 and 20, 1979; and November 16, 17, and 19, 1979; four counts of grand theft contrary to Florida Statute 812.014, occurring on January 25, 1980, and November 6 and 7, 1983; and three counts of burglary contrary to Florida Statute 810.02(3), occurring on November 6 and 7, 1983. On February 17, 1984, the Honorable Crockett Farnell, Circuit Judge, sentenced Mr. Russell on all counts to five years of imprisonment, each sentence to run concurrent with the sentence imposed in the first information. The recommended guideline sentence was in the twelve to thirty month range, and the trial court exceeded the recommended sentence due to the number and variety of Mr. Russell's convictions. On February 17, 1984, Mr. Russell changed his plea to nolo contendere, specifically reserving his right to appeal the trial court's departure from the sentencing guideline recommendation.

On appeal Mr. Russell noted that the trial court's main reason for departure was that the guidelines stopped giving points at the "4+" number for prior convictions and additional offenses. Although Mr. Russell was being sentenced for several charges and had several prior convictions, the guideline points were low because the scoresheet stopped at "4+"; and the trial court was disturbed with this result. The Second District Court of Appeals upheld the trial court's decision stating that even though additional offenses and prior record could not be considered as factors in calculating the applicable sentencing range, such factors could constitute a reason for departure.

ARGUMENT

WHETHER THE DECISION IN RUSSELL
v. STATE, Case No. 84-556 (Fla.
2d DCA November 9, 1984), IS IN
CONFLICT WITH THE FIRST AND FOURTH
DISTRICT COURTS OF APPEALS?

In Young v. State, 455 So.2d 551 at 552 (Fla. 1st DCA 1984), the Court stated that a trial court could not use the fact that a defendant had more additional felonies beyond four as grounds for departure because it is an "inaccurate and an impermissible and unconvincing reason for departure" inasmuch as the "form contemplates more than four felonies and clearly states '4+.'" In Harvey v. State, 450 So.2d 926 at 928 (Fla. 4th DCA 1984), the Court stated "that past criminal conduct which cannot be considered in computing the scoresheet cannot be relied upon as justification for departure from the guidelines."

In Mr. Russell's case the situation addressed in Young, supra, is identical. Young noted that the great number of prior convictions had already been taken into consideration by the "4+" - emphasis on the "+". The Court's holding that numerous prior convictions that do not count for more points after "4" cannot be used as a reason for departure is in direct conflict with the Second District Court of Appeal's decision in Mr. Russell's case holding that additional offenses and prior convictions that go beyond four can be used as a reason for departure.

The situation in Harvey, supra, is almost on point. Although Harvey only dealt with past criminal conduct that could not be considered in computing the scoresheet, the reasoning in Harvey applies to Mr. Russell's case. The reasoning in Harvey is that items that are specifically rejected from giving more points to a scoresheet cannot be used to justify a departure. Although the fact that Mr. Russell had several prior convictions and additional offenses was already taken into account by the "+" in the "4+" category, he could not be given more points for each additional offense and/or prior convictions over four. When the Second District Court of Appeals allowed such excessive additional offenses and prior convictions to justify a departure, it conflicted with the holding in Harvey.

As a result of the Second District Court of Appeal's ruling, Mr. Russell received five years of state prison instead of the recommended twenty to thirty months of state prison. Mr. Russell is entitled to have his sentence vacated and the recommended guideline sentence instituted.

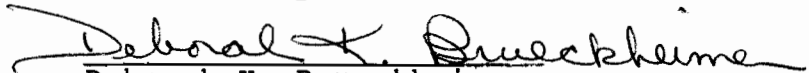
CONCLUSION

In light of the foregoing reasons, arguments and authorities, Petitioner has demonstrated that conflict does exist with the instant decision and the First and Fourth District Court of Appeals so as to invoke the discretionary review of this Court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to William Taylor, Assistant Attorney General, Park Trammell Bldg., 8th Floor, 1313 Tampa Street, Tampa, FL 33602, and to Frederick Russell, 060868, Lawtey Correctional, PO Box 229, Lawtey, FL 32059, November 26th, 1984.

Respectfully submitted,



Deborah K. Brueckheimer
Assistant Public Defender