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IN THE SUPREME COURT OF FLORIDA

FREDERICK RUSSELL, :

Petitioner, :

vs. : Case No. 66,209

STATE OF FLORIDA, :

Respondent. :

:

PETITIONER'S BRIEF ON MERITS

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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CITATION OF AUTHORITIES

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PRELIMINARY STATEMENT

Petitioner, Frederick Russell, was the Appellant in the Second District Court of Appeal and the defendant in the trial court. Respondent, the State of Florida, was the Appellee in the Second District Court of Appeal. The record on appeal, which was utilized on the District Court level and is contained in one volume, will be referred to be the symbol "R" followed by the appropriate page number.

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 (R4,5,16,17,29,30,41,42,55,56,60-70, 81-85,96-100,111-113,122-127,143-145). 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 (R170,176-187).

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. (R9-12,21-24,34-37, 48-51,62-65,77-80,92-95,107-110,118-121,134-139,151-159, 184-186). 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 (R160,161).

Mr. Russell timely filed his Notice of Appeal on all eleven cases on March 7, 1984 (R171).

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.

SUMMARY OF ARGUMENT

Mr. Russell argues that the trial court erred in departing from the recommended guideline sentence on the basis of Mr. Russell having several prior and additional offenses. The guidelines take into account a prior record and additional offenses; thus, such items cannot also be used to justify a departure. In addition, Mr. Russell is entitled to be scored under the guidelines as they stood when he elected them. To apply the amended guidelines in his case would be an ex post facto application of the law.

ISSUE

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?

The issue in this case is the trial court's departure from the recommended guideline sentence. 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+ for additional offenses and prior record (R160). The trial court was disturbed with this result and exceeded the recommended guideline range by two steps (R160,161).

This particular problem was recently recognized by the Florida Supreme Court and rectified by an amendment. See the Florida Bar Amendment to Rules of Criminal Procedure (3.701, 3.988 - Sentencing Guidelines, 451 So.2d 824 (Fla. 1984). Mr. Russell, however, was sentenced on February 17, 1984, with the original guidelines. Mr. Russell relied on these original guidelines as approved by this Honorable Court, gave up the right to parole on the majority of the charges he pled to, and had a right to have them applied as written. The amended rule cannot now be applied to Mr. Russell's case due to the fact that it would result in an increased sentence. To do so would be an ex post facto application of the rule on Mr. Russell's sentence.

See State v. Williams, 397 So.2d 663 (Fla. 1981); Dorman v. State, 457 So.2d 503 (Fla. 1st DCA 1984); Carter v. State, 452 So.2d 953 (Fla. 5th DCA 1984); Hanabury v. State, 459 So.2d 1113 (Fla. 4th DCA 1984); and Foreman v. State, 458 So.2d 1213 (Fla. 2d DCA 1984).

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 guideline sentence. According to F.R.Cr.P. 3.701(d)11. (1983), departures from the guideline sentence should be avoided "unless there are clear and convincing reasons to warrant aggravating ... the sentence." Because the guideline scoresheet takes into consideration prior and additional offenses, the fact that there is a cap on such offenses does not give a trial court justification for exceeding the recommended range. It was the intent of the guideline rules to limit the score past a certain amount of offenses. If the trial court cannot give points for more than four additional or prior convictions, then the trial court cannot use such a reason as the excessive number of prior and additional convictions to justify a departure from the guideline sentence.

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." Although the Fourth seems to waiver from its decision in Harvey with its case of Davis v. State, 458 So.2d 42 (Fla. 4th DCA 1984), it rejects the concept of "double-dipping" for purpose of aggravation in Callaghan v. State, 462 So.2d 832 (Fla. 4th DCA 1984).

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 "+". To allow the trial courts to use additional offenses and prior convictions that go beyond 4 as a reason for departure would be to allow for "double-dipping" and departure at whim.

The whole purpose behind using guidelines sentences is to have uniformity in sentencing. If trial courts are allowed to deviate from the guidelines at whim, then the guidelines are useless and the Supreme Court's rule is meaningless. The guidelines are designed to account for a defendant's prior record and additional offenses at time of sentencing. The guidelines

Mr. Russell was sentenced under specifically rejected the use of more priors or additional offenses for adding more points to a scoresheet after the number 4. If the trial courts are not allowed to add more points for prior record and additional offenses but are allowed to use these items to justify departing from the guidelines, the whole purpose behind the guidelines is being thwarted. If the old convictions and many additional offenses cannot be used to increase points on the scoresheet, they should not be used to justify a departure from the guidelines.

In Minnesota, where guideline sentences were instituted a few years prior to Florida's decision to utilize guideline sentences, the courts have had to strictly enforce the guidelines in order to make the concept work. Reasons for departure must be "substantial and compelling" in order to justify a departure; and reasons such as nonamenability to probation, offenses for which a defendant was not charged and convicted, criminal history, a defendant is dangerous, and factors which determine the severity of a particular offense generally do not justify a departure. See State v. Higginbotham, 348 N.W.2d 327 (Minn. 1984); State v. Peterson, 329 N.W.2d 58 (Minn. 1983); State v. Barnes, 313 N.W.2d 1 (Minn. 1981); State v. Magnan, 328 N.W.2d 147 (Minn. 1983); and State v. Brusven, 327 N.W.2d 591 (Minn. 1982). Florida cases, on the other hand, are being very liberal in

determining what kinds of 'clear and convincing reasons' justify a departure: violation of probation, repeated criminal convictions, crime "sprees" or "binges," "careers" of crime and criminal conduct not resulting in a conviction. See Mischler v. State, 458 So.2d 37 (Fla. 4th DCA 1984).

If the guidelines are going to work, then judicial discretion will have to suffer. That is the very nature of the guidelines - to take away judicial discretion for the sake of uniformity. Attitudes like the Second District Court of Appeal's which allow a trial court to depart from the guidelines on the basis of factors that cannot be used for scoring purposes 'because there is nothing in the rules that say such factors cannot be considered' [1]. will have to be altered. Departure from the guidelines should be likened to jury overrides in death cases. Under Tedder v. State, 322 So.2d 908 at 910 (Fla. 1975), a jury recommendation of life is not to be rejected unless "the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." Such situations should be rare, with the benefit of any doubt going for the application of the guideline sentence.

Because the guideline scoresheet already took into consideration and gave points for the reasons given by the trial court in justifying a departure from the guideline sentence, the trial court erred in its departure. The fact that the guidelines

1. See Fleming v. State, 456 So.2d 1300 (Fla. 2d DCA 1984); and Weems v. State, 451 So.2d 1027 (Fla. 2d DCA 1984).

have been amended to add points for each additional or prior offense has no affect on Mr. Russell's case. The rules for the guidelines will undergo many changes in the years to come. Mr. Russell is entitled to be scored under the guidelines as they were when he elected them and waived his eligibility for parole. [2.]

2. Although the charges for which Mr. Russell was sentenced ran a time span from November 1979 to November 1983, most of his charges were committed before October 1, 1983.

CONCLUSION

In light of the foregoing reasons, arguments and authorities, Appellant respectfully asks this Honorable Court to reverse the judgment and sentence of the lower court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to William E. Taylor, Assistant Attorney General, Park Trammell Bldg., 8th Floor, 1313 Tampa Street, Tampa, FL 33602, April 25th, 1985.

Respectfully submitted,

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