IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,
Petitioner,
vs.
EDWARD LEE WILLIAMS,
Respondent.

CASE NO. 66,288

PETITIONER'S BRIEF ON THE MERITS

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TABLE OF CONTENTS

	PAGE
TABLE OF CITATIONS	ii-iii
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE	2 - 3
STATEMENT OF THE FACTS	4 - 5
POINTS INVOLVED ON APPEAL	6
ARGUMENT	
POINT I	7 - 8
PRIOR CONVICTIONS ARE A PROPER BASIS FOR DEPARTING FROM THE SENTENCING GUIDELINES WHEN IT APPEARS THAT A DEFENDANT IS NOT CAPABLE OF BEING REHABILITATED, EVEN THOUGH PRIOR CONVICTIONS ARE FACTORED INTO A SENTENCING GUIDELINE SCORESHEET.	
POINT II	9 - 12
IF THERE IS ONE CLEAR AND CONVINCING REASON FOR AGGRAVATING A GUIDELINES SENTENCE, THEN ANY OTHER STATED REASON IS MERELY SURPLUSAGE.	
CONCLUSION	13
CERTIFICATE OF SERVICE	13
APPENDIX attached with Certificate of Service	

TABLE OF CITATIONS

CASE	PAGE
Albritton v. State, 9 F.L.W. 2088-2089 (Fla. 5th DCA September 27, 1984)	11
Brooks v. State, 456 So.2d 1305 (Fla. 1st DCA 1984)	12
Carney v. State, 9 F.L.W. 2143 (Fla. 1st DCA October 9, 1984)	12
Carter v. State, 452 So.2d 953 (Fla. 5th DCA 1984)	9
Davis v. State, 9 F.L.W. 2221 (Fla. 4th DCA October 17, 1984)	8
Fleming v. State, 456 So.2d 1300 (Fla. 2d DCA 1984)	7
Green v. State, 9 F.L.W. 1909 (Fla. 2d DCA September 5, 1984)	9
Hendrix v. State, 9 F.L.W. 1697 (Fla. 5th DCA August 2, 1984)	7
Higgs v. State, 455 So.2d 451 (Fla. 5th DCA 1984)	8,9,10
Jackson v. State, 454 So.2d 691 (Fla. 1st DCA 1984)	9
Jean v. State, 455 So.2d 1083 (Fla. 2d DCA 1984)	9
Kiser v. State, 455 So.2d 1071 (Fla. 1st DCA 1984)	8
Manning v. State, 452 So.2d 136 (Fla. 1st DCA 1984)	9
Matire v. State, 232 So.2d 209 (Fla. 4th DCA 1970)	10
Smith v. State, 454 So.2d 663 (Fla. 2d DCA 1984)	9
Swain v. State, 455 So.2d 533, 535 (Fla. 1st DCA 1984)	10,12

TABLE OF CITATIONS

(Continued)

CASE	PAGE
Thayer v. State, 335 So.2d 815 (Fla. 1976)	8
Williams v. State, 454 So.2d 756 (Fla. 5th DCA 1984)	9
Williams v. State, 454 So.2d 790 (Fla. 5th DCA 1984)	9
Young v. State, 455 So.2d 551 (Fla. 1st DCA 1984)	12

OTHER AUTHORITY

Florida Rules of Criminal Procedure 3.701	7,8,10
Florida Rules of Criminal Procedure 3.800	12

PRELIMINARY STATEMENT

Petitioner was the prosecution and Respondent the defendant in the Criminal Division of the Circuit Court of the Nineteenth Judicial Circuit, in and for St. Lucie County, Florida.

In the brief, the parties will be referred to as they appear before this Honorable Court except that Petitioner may also be referred to as the State.

The following symbols will be used:

"R'	Record on Appeal
"PA"	Petitioner's Appendix

All emphasis has been added by Petitioner unless otherwise indicated.

STATEMENT OF THE CASE

Respondent was charged by information with robbery with a deadly weapon (R 2). After trial, the jury returned a verdict against Respondent of guilty as charged (R 17). Respondent was adjudged guilty of robbery with a deadly weapon on January 6, 1984 (R 19-20). Although the sentencing guidelines provided for a presumptive sentence of five and one-half (5½) years (R 239), the trial court departed from the guidelines and imposed a ten (10) year sentence, with credit for time served (R 21-22). The trial court gave the following reasons for his departure sentence:

> The reason I'm doing this is that at the time the defendant committed this offense he was on a probationary period of community control. In fact, he'd only been out of prison 12 days at the time he committed this robbery.
>
> This defendant has a lengthy history of criminal activity. The victim in this case was particularly vulnerable as she was a woman slight in build. The record reflects that the defendant has engaged in a pattern of violent conduct which indicates a serious danger to society. I feel that an enhanced sentence outside the guidelines is necessary as a deterrent to others. I feel that imposition of a lesser sentence under the Uniform Sentencing Guidelines would depreciate the seriousness of this particular crime and for those reasons jointly and severally the court is going to sentence this defendant outside the Uniform Sentencing Guidelines.
>
> (R 239)

Respondent timely filed his notice of appeal to the Fourth District Court of Appeal (R 23). After briefing and an oral argument, the district court rendered an opinion on December 5, 1984 (PA; 9 F.L.W. 2533). In part, that court stated:

> There is no scoresheet included in this record so that we have no way of knowing if a 'double dipping' sentence was imposed. See Davis v. State, supra. However, the problem of departing the guidelines for prior convictions which have already been factored in on the scoresheets is of great concern to us. We have certified this question to the Supreme Court in Davis v. State, supra, and it would be less than fair if we failed to do the same here. Accordingly, believing the matter to be of great public importance we ask our mentors in Tallahassee the following question:
>
> IF THE SCORESHEETS MAKE PROVISION FOR PRIOR CONVICTIONS, CAN THOSE CONVICTIONS ALSO CONSTITUTE CLEAR AND CONVINCING REASONS FOR AGGRAVATED PUNISHMENT OUTSIDE THE GUIDELINES?
>
> (PA at p. 2)

Petitioner filed its notice to invoke discretionary review on December 11, 1984, and on December 21, 1984, this Honorable Court issued its briefing schedule.

STATEMENT OF THE FACTS

Sharon Letts testified at Respondent's trial that she was working alone at Mr. Discount, a store in Fort Pierce, on July 13, 1983, at about 2:30 P.M. when two (2) black males entered (R 110-111). One of the men walked behind the counter, came over to her, pushed her against the wall, grabbed her, and said "I want it all." At that time he tore the five or six chains which Ms. Letts had around her neck from her neck (R 112-113). He shoved her with force and violence. When he tore off the chains, he had grabbed Ms. Letts' hair, and he had a ratchet wrench in his hand (R 112). He hit her in the back with the wrench as she was opening the jewelry counters (R 113). The man grabbed some jewelry, as well as money from the cash register. He told her he would hurt her if she screamed. Ms. Letts was in great fear (R 114). She identified Respondent as her assailant (R 115).

Robert Ritter was just going into the store as Respondent was leaving (R 156). He heard Ms. Letts scream "stop him, he's robbed me" from inside the store. Ms. Letts was in hysterics, screaming and crying. Mr. Ritter chased Appellant down the street (R 158). Respondent dropped a white cloth or socks near a tree as he ran. Respondent ran towards the park straight to the bridge (R 159). There were two or three ladies on the bridge, and Respondent ran into them. He hit one with the wrench (R 159-150). He threw the ratchet wrench and

money into the water (R 159). The wrench and money were later recovered (R 150). Mr. Ritter identified Respondent as the man he chased (R 156). Respondent was arrested by the police at the bridge (R 168).

Walter (Willie) Curry was with Mr. Ritter when he went to the "Mr. Discount" store (R 145). He identified Respondent as being the person he observed leaving the store as he arrived. Respondent was carrying a ratchet wrench (R 146). He heard Ms. Letts "holler" (R 147) "stop him, he just robbed me." She was hysterical (R 147). They chased Respondent (R 147-148). Respondent threw the money and wrench off the bridge into the water (R 149-150). Mr. Curry recovered the money from the water (R 152).

POINTS INVOLVED ON APPEAL

POINT I

WHETHER PRIOR CONVICTIONS ARE A PROPER BASIS FOR DEPARTING FROM THE SENTENCING GUIDELINES WHEN IT APPEARS THAT A DEFENDANT IS NOT CAPABLE OF BEING REHABILITATED, EVEN THOUGH PRIOR CONVICTIONS ARE FACTORED INTO A SENTENCING GUIDELINE SCORESHEET?

POINT II

WHETHER IF THERE IS ONE CLEAR AND CONVINCING REASON FOR AGGRAVATING A GUIDELINES SENTENCE, THEN ANY OTHER STATED REASON IS MERELY SURPLUSAGE?

ARGUMENT

POINT I

PRIOR CONVICTIONS ARE A PROPER BASIS FOR DEPARTING FROM THE SENTENCING GUIDELINES WHEN IT APPEARS THAT A DEFENDANT IS NOT CAPABLE OF BEING REHABILITATED, EVEN THOUGH PRIOR CONVICTIONS ARE FACTORED INTO A SENTENCING GUIDELINE SCORESHEET.

Petitioner asserts that there is no legal reason why prior convictions cannot be part of "clear and convincing reasons" for departure from a guidelines sentence.

Fla.R.Crim.P. 3.701(d)(11) provides:

> Departures from the Guideline Sentence:
>
> Departures from the presumptive sentence should be avoided unless there are clear and convincing reasons to warrant aggravating or mitigating the sentence. Any sentence outside of the guidelines must be accompanied by a written statement delineating the reasons for the departure. Reasons for deviating from the guidelines shall not include factors relating to either instant offense or prior arrests for which convictions have not been obtained.

It should be noted that this rule does not prohibit the court from considering prior offenses for which convictions have been obtained. If the Legislature had intended that post-convictions were not a proper basis for departing from the guidelines, then such a prohibition should have been "expressly defined and delineated by the Florida Legislature." Hendrix v. State, 9 F.L.W. 1697 (Fla. 5th DCA August 2, 1984). See also Fleming v. State, 456 So.2d 1300 (Fla. 2d DCA 1984). The mention of one thing in a statute implies the exclusion of all others;

expressio unius est exclusio alterius. Thayer v. State, 335 So.2d 815 (Fla. 1976). Accordingly, the rule does not prohibit considering prior convictions as a clear and convincing reason for departure from a sentencing guidelines sentence.

Moreover, prior convictions can be properly considered with the "circumstances surrounding the offense," and are a proper consideration in departing from a guidelines sentence. Fla.R.Crim.P. 3.701(b)(3).

The Fifth and First District Courts of Appeal have also held, as the Fourth District Court of Appeal did in Davis v. State, 9 F.L.W. 2221 (Fla. 4th DCA October 17, 1984), that a defendant's failure to become rehabilitated from prior convictions is a proper basis for departure. Higgs v. State, 455 So.2d 451 (Fla. 5th DCA 1984); Kiser v. State, 455 So.2d 1071 (Fla. 1st DCA 1984).

Therefore, the question certified by the Fourth District Court of Appeal must be answered as it has been by the Fourth District Court of Appeal. When prior convictions affect the circumstances of the scored offense[1], the prior convictions are part of a clear and convincing reason for departing from the guidelines.

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[1] Fla.R.Crim.P. 3.701(b)(3)

POINT II

IF THERE IS ONE CLEAR AND CONVINCING REASON FOR AGGRAVATING A GUIDELINES SENTENCE, THEN ANY OTHER STATED REASON IS MERELY SURPLUSAGE.

In the case at bar, the Fourth District Court of Appeal held that deterrence was not a proper basis for departing from the guidelines (PA at p. 1). The court also noted that a trial court could not take into account prior "criminal activity", but could take into account prior convictions (PA at p. 2).

This guidance by the district court of appeal left intact at least three reasons for departing from a guidelines sentence: 1) Respondent was on probation at the time he committed the crime, and had only been out of prison twelve (12) days when the crime was committed; 2) the victim was particularly vulnerable as she was a woman slight in build; 3) Respondent has engaged in a pattern of violent conduct which indicates a serious danger to society (R 239). These are all proper reasons for departing from a guidelines sentence. 1) See e.g., Carter v. State, 452 So.2d 953 (Fla. 5th DCA 1984); Jackson v. State, 454 So.2d 691 (Fla. 1st DCA 1984); Jean v. State, 455 So.2d 1083 (Fla. 2d DCA 1984). 2) Williams v. State, 454 So.2d 756 (Fla. 5th DCA 1984); Williams v. State, 454 So.2d 790 (Fla. 5th DCA 1984); Green v. State, 9 F.L.W. 1909 (Fla. 2d DCA September 5, 1984). 3) Manning v. State, 452 So.2d 136 (Fla. 1st DCA 1984); Higgs v. State, supra; Smith v. State, 454 So.2d 663 (Fla. 2d DCA 1984).

Accordingly, the district court should have upheld Respondent's sentence on the basis of the remaining valid reasons rather than remanding for resentencing.

Departure from the sentencing guidelines is an exercise of judicial discretion. Fla.R.Crim.P. 3.701(b)(6). Thus, the proper test on appellate review of a departure from a guidelines sentence is whether the trial court abused its discretion by departing from the guidelines. Higgs v. State, supra. As a general rule, there is an abuse of judicial discretion only when no reasonable person would take the view of the trial judge. Matire v. State, 232 So.2d 209 (Fla. 4th DCA 1970). Where an enhanced sentence is supported by at least one clear and convincing reason, then it is the proper role of a district court to uphold the sentence. It is not for a district court to consider the extent of the departure.

The First District Court of Appeal has presented a correct analysis of this issue:

> Appellant argues alternatively that, if departure from the guidelines is justified, the departure in the instant case is excessive. The sentencing guidelines do not explicitly provide any guidance for trial courts in determining a sentence once the trial court has validly departed from the guidelines. The sentences sub judice are within the parameters established by the Legislature. On the facts of the instant case, we decline to hold that the sentences are excessive.
>
> Swain v. State, 455 So.2d 533, 535 (Fla. 1st DCA 1984), footnote omitted.

When a departure sentence is within statutory limits, then the

departure should be upheld.

The Fifth District Court of Appeal has also made an analysis of this issue, with the same result:

> The defendant also argues that where some of the reasons given by the trial judge for departure are inadequate or impermissible and other reasons given are authorized and valid reasons this court should not merely affirm but must remand for the trial court to reconsider the matter and determine if it would depart solely on the basis of the good reasons given. We do not agree. We assume the trial judge understood his sentencing discretion and understood that the mere existence of 'clear and convincing reasons' for departing from the sentencing guidelines never requires the imposition of a departure sentence and that the trial judge believed that a sentence departing from the guidelines should be imposed in this case if legally possible. Accordingly, a departure sentence can be upheld on appeal if it is supported by any valid ('clear and convincing') reason without the necessity of a remand in every case. This assumption in the trial judge's continuing belief in the propriety of a departure sentence is especially safe in view of the trial court's great discretion under Florida Rule of Criminal Procedure 3.800(b) to reduce or modify even a legal sentence imposed by it within sixty days after receipt of an appellate mandate affirming the sentence on appeal.
>
> Albritton v. State, 9 F.L.W. 2088-2089 (Fla. 5th DCA September 27, 1984)

The Fifth District Court of Appeal astutely realized that the extent of departure should only be reversed on appeal if the sentence is beyond statutory limits, since the trial court has jurisdiction to reduce a sentence within sixty (60) days of

receipt of an appellate mandate pursuant to Fla.R.Crim.P. 3.800(b). Id.

The First District Court of Appeal has certified a question regarding this identical issue in Young v. State, 455 So.2d 551 (Fla. 1st DCA 1984) and its progeny. In Young, the court remanded for resentencing, but has failed to do so in subsequent cases: Swain, supra; Brooks v. State, 456 So.2d 1305(Fla. 1st DCA 1984); Carney v. State, 9 F.L.W. 2143 (Fla. 1st DCA October 9, 1984).

Petitioner asserts that where there is at least one clear and convincing reason for departing from a guidelines sentence and the sentence is within statutory limits, there has been no abuse of discretion by the trial court, and the reviewing district court of appeal must affirm the sentence.

CONCLUSION

WHEREFORE, based upon the foregoing reasons and authorities cited therein, Petitioner respectfully requests that the judgment and sentence of the trial court be AFFIRMED, and the decision of the Fourth District Court of Appeal to remand the case for resentencing be QUASHED.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petitioner's Brief on the Merits has been furnished, by courier/mail, to TATJANA OSTAPOFF, ESQUIRE, Assistant Public Defender, 224 Datura Street - 13th Floor, West Palm Beach, Florida 33401, this 8th day of January, 1985.

Joan Fowler Rossin
Of Counsel