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IN THE SUPREME COURT OF FLORIDA

FILED

SID J. WHITE

MAY 23 1985

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

Handwritten initials and signature

JAMES CLARIN GREGORY,

Petitioner,

v.

CASE NO. 66,317

STATE OF FLORIDA,

Respondent.

.....
_____ /

RESPONDENT'S BRIEF ON THE MERITS

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SUMMARY OF ARGUMENT

Respondent contends that the trial court did not depart from the recommended guidelines sentence in the instant cause on the basis of the judge's statement concerning the guidelines. Although the trial judge did express his personal disagreement with the sentencing guidelines system and the guidelines as drafted, such statements should not be considered the basis for departure. The trial court stated that it was departing from the recommended guidelines sentence on the basis of petitioner's extensive prior criminal record, which included several convictions for passing bad checks, the same crime as the instant charge.

Respondent contends that departure based on petitioner's prior record, which was scored on the scoresheet, is proper. Even if this court determines that departure on the basis of the prior record alone is improper, petitioner's extensive history of committing the same crime as the instant charges is a proper basis for departure.

POINT ON APPEAL

THE DISTRICT COURT DID NOT ERR IN AFFIRM-
ING THE TRIAL COURT'S DECISION TO DEPART
FROM THE RECOMMENDED GUIDELINES SENTENCE.

ARGUMENT

Respondent submits that the trial court did not depart from the recommended guidelines sentence in the instant cause due to the judge's personal views concerning the guidelines and their effect and purpose. Rather, the trial court departed on the basis of petitioner's extensive prior criminal record, which included several convictions for passing bad checks (the same crime as the instant charges). Although the trial judge did engage in a lengthy discussion attacking the sentencing guidelines and the correctional system, the record clearly indicates that this is not the reason he sentenced petitioner to four (4) consecutive terms of two-and-one-half (2-1/2) years incarceration. The trial judge cited ample justification for departing from the recommended guidelines. Contrary to petitioner's contention, the trial judge stated; "I do not seize upon him [petitioner] as an example particularly here, it just so happens that he comes across in that fashion because of the prior criminal record." (R. 106). The trial court had previously stated that, "It would be a mockery . . . not to consider the prior criminal involvement of defendants just like this." (R. 104). Throughout the sentencing hearing, the state argued the extensive prior criminal record of petitioner and the extent of similar crimes as a basis for departure.

In the instant case, petitioner wrote fifteen (15) checks for a total of over five thousand dollars (\$5000) over a ten day period on an account he opened with fifty dollars (\$50) under an alias and with a fraudulent driver's license (R. 43,99). Petitioner had a history of passing bad checks intentionally. He was convicted in December of 1962 of three (3) counts of forgery and placed on probation. In October, 1965, petitioner was convicted of two (2) counts of forgery in California and placed in prison. In June, 1970, petitioner was sentenced to the Department of Corrections in Florida for passing a worthless check in Palm Beach County. Petitioner had been released in June of 1973 and was on parole until May of 1976. In the instant case, petitioner pled guilty to four (4) charges of passing worthless checks in exchange for the state dropping the other eleven (11) charges. Judge Perry relied on the foregoing as clear and convincing reasons for departure from the guidelines as contemplated by Florida Rule of Criminal Procedure 3.701(d)(11). Subsection (d)(11) states that reasons for departure shall not include prior arrests for which convictions have not been obtained. This implies that prior convictions can be used as reasons for departure from the guidelines.

Based on these facts, the propriety of the sentence imposed in the instant cause becomes apparent. Petitioner has a long history of fraudulently passing checks, has been convicted and punished for those crimes, and has failed to learn to obey the law. The nature of petitioner's record

was a clear and convincing reason for departure. The Fifth District Court of Appeal properly affirmed based on Hendrix v. State, 455 So.2d 449 (Fla. 5th DCA 1984), which held that prior record can be a basis for departure even though it is scored on the scoresheet. Hendrix is presently before this court on review. Hendrix v. State, (Fla. S.Ct. Case No. 65,928). If Hendrix is affirmed, the instant cause should also be affirmed. But, even if Hendrix is not affirmed, the facts of the instant cause still support departure. The trial court did not depart solely because petitioner had an extensive prior criminal record. The nature of that record was also a factor in departing. The significant history of passing bad checks as opposed to merely having a criminal record is sufficient reason for departure. Also, the circumstances surrounding the instant crime provides additional support for departure. Petitioner's crime spree of passing fifteen (15) worthless checks over a ten (10) day period provides further support for the departure.


In conclusion, respondent contends that the trial judge did not depart on the basis of his statement concerning the guidelines. The trial judge's statement should not be considered a statement of his reasons for departure. The trial judge's stated reasons for departure were the petitioner's extensive criminal history and the nature of that record (convictions for several similar crimes). Therefore, petitioner's sentence should be affirmed.

CONCLUSION

Based on the arguments and authorities presented herein, respondent respectfully requests this honorable court affirm the judgment and sentence of the trial court in all respects.

Respectfully submitted,

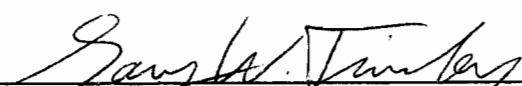
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Respondent's Brief on the Merits has been furnished by mail to Daniel J. Schaefer, Assistant Public Defender, 112 Orange Avenue, Suite A, Daytona Beach, Florida 32014, and counsel for the petitioner, this 22nd day of May, 1985.


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