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IN THE SUPREME COURT OF FLORIDA

JAMES CLARIN GREGORY, )  
 )  
 Petitioner, )  
 )  
 vs. )  
 )  
 STATE OF FLORIDA, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

CASE NO. 66,317

PRELIMINARY STATEMENT

James Clarin Gregory, the defendant and appellant in Gregory v. State, 458 So.2d 792 (Fla. 5th DCA 1984), will be referred to herein as Petitioner.

Citations to the Record on Appeal will be indicated parenthetically as "R", with the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

On June 29, 1983 Petitioner pled guilty to four counts of knowingly uttering or issuing a worthless check (R128-129). The State agreed to nolle prosequi nine other worthless check charges in exchange for the plea (R124). Sentencing was delayed several times, and finally held on January 17, 1984, before the Honorable Robert R. Perry, Circuit Judge (R85-112). Petitioner elected to be sentenced under the sentencing guidelines rule (R45). A guidelines Scoresheet was prepared for the court (R46). The recommended sentence under the guidelines was 3 1/2 to 4 1/2 years (R96). The State submitted a written motion asking the court to depart from the guidelines and impose a longer sentence (R43-44). Petitioner argued that there was no clear and convincing reason to depart from the guidelines, therefore, they should be followed (R98-103). The court stated its position as follows:

THE COURT: Mr. Zolezzi, I'm mindful of your argument. One word stands out; the word is "mockery". The sentencing guidelines, as I am able to figure them out, Mr. Zolezzi, seem to me to be a collusion between the three branches of government to escape the responsibility which is and should be the State's.

They have for all practical purposes made it impossible for crimes against property to be punishable by incarceration in the penitentiaries of the state. They have in a very real sense passed the buck from where it should be under the laws of this state, with the state, back to the local communities. And, they've

made us all responsible for property crimes simply because of prison overcrowding and federal lawsuits, realizing full well at the time they abrogated their responsibility in the matter, that we were facing overcrowded jails, federal lawsuits, and a declining tax base.

It is to be sincerely hoped, by this Judge and this citizen, that the people will make their wishes known in the matter. If the sentencing guidelines were a law, I would, upon the slightest motion, hold it unconstitutional as being an illegal imposition on the constitutional powers of this Court.

Since they come to us in the guise of rules of court, one cannot say that, as Shakespeare did, the law is an ass or an idiot, but it is sure and certain, Mr. Zolezzi, that these guidelines make a mockery, in this Judge's view, of the law. And in my view, it would also be a mockery of everything that I believe that this country is, stands for, has been, and could be again to not consider the prior criminal involvement of Defendants just like these.

Therefore, I propose to depart from the guidelines in the imposition of sentence. We will let the appropriate authorities--you've preserved your points beautifully, we will let the appropriate authorities pass on it.

But I hope that the people of this state will let the executives who have jurisdiction over the Department of Corrections, the Legislature which passed the Corrections Reform Act of 1983 of which the guidelines seem to be a big part, and the Supreme Court, whom I hold in the highest regard, know their feelings with regard to these guidelines.

Once again, I cannot improve on Shakespear's language. Anything else?

(R103-105).

No other reasons for departing from the guidelines were given by the court. Petitioner was sentenced to serve two and one half (2 1/2) years in prison on each of the four counts, said sentences to be served consecutively (R110-112).

In the District Court of Appeal, Appellant argued that the trial court's reasons for departure were not "clear and convincing" for two reasons. First, most of Judge Perry's sentencing statement was an attack on the guideline system itself, having nothing to do with Petitioner or his offense. And second the brief reference to "the prior criminal involvement of Defendants just like these" could not support departure because Petitioner's prior record had already been accorded significant weight in arriving at the 3 1/2 to 4 1/2 recommended sentence. [Without prior convictions Petitioner's recommended sentence would have been "any non-state prison sanction" (R46)].

On October 11, 1984, the District Court of Appeal, Fifth District held as follows:

PER CURIAM

AFFIRMED on the authority of Hendrix v. State, No. 83-1702 (Fla. 5th DCA August 2, 1984) [9 F.L.W. 1697] (See Appendix "A" attached hereto).

Rehearing was denied on November 19, 1984. A Notice to Invoke Discretionary Jurisdiction, based on express and direct conflict was filed December 19, 1984. On April 12, 1985 this Court accepted jurisdiction and dispensed with oral argument. This brief follows.

## SUMMARY OF ARGUMENT

Petitioner argues herein that his sentence should be reversed because the trial judge departed from the sentencing guidelines recommended sentence without clear and convincing reasons. The trial judge's decision to depart was mainly based on his personal disagreement with the sentencing guideline system. The judge's philosophical disagreement with the law has nothing to do with Petitioner's case and should not be allowed to effect his sentence.

To the extent that the decision to depart from the guidelines was based on Petitioner's prior criminal record, Petitioner argues this reason is also erroneous. Petitioner disagrees with the decision allowing use of prior record to depart. Hendrix v. State, 455 So.2d 449 (Fla. 5th DCA 1984). This Court has agreed to review the Hendrix case. If the Hendrix decision is reversed, Petitioner's sentence should likewise be reversed.



ARGUMENT

THE DISTRICT COURT ERRED IN  
AFFIRMING THE TRIAL COURT'S  
DECISION TO DEPART FROM THE  
RECOMMENDED GUIDELINE SEN-  
TENCE WHERE THE REASONS FOR  
THE DEPARTURE WERE NOT CLEAR  
AND CONVINCING.

The major impetus for developing the sentencing guidelines system in Florida was the desire to eliminate or at least minimize unwarranted variations in sentencing<sup>1/</sup>. To that end the guidelines set a presumptive sentence which should be imposed in each criminal case, absent "clear and convincing reasons" for departure. Fla.R.Crim.P. 3.701(d) (11). While the rule does not eliminate judicial discretion in sentencing, it does seek to discourage departures from the guidelines. Judges must explain departures in writing and may depart only for reasons that are "clear and convincing." Fla.R.Crim.P. 3.701(b) (6) (d) (11). Moreover, the guidelines direct that departures "should be avoided unless there are clear and convincing reasons to warrant aggravating or mitigating the sentence." Fla.R.Crim.P. 3.701(d) (11). And the legislature has authorized appellate review whenever a trial judge departs from a recommended sentence. Section 921.001(5), Florida Statutes (1983).

In the instant case the trial court departed from

<sup>1/</sup> Sundberg, Plante and Braziel, Florida's Initial Experience with Sentencing Guidelines, 11 Fla.St. U.L. Rev. 125,128 (1983).

from the guidelines and imposed a ten (10) year sentence where the guidelines called for three and one-half to four and one-half (3 1/2 to 4 1/2) years. The judge stated his reasons for departure on the record at the time of sentencing. The statement of reasons given by Judge Perry is set out in full herein in the Statement of the Case and Facts.

On appeal, the Fifth District Court affirmed Petitioner's sentence without opinion, citing Hendrix v. State, 455 So.2d 449 (Fla. 5th DCA 1984). Petitioner asserts that the decision to affirm his sentence is incorrect for two reasons.

First, the District Court's citation to Hendrix, supra leaves the impression that Judge Perry's decision to depart from the guidelines was based on Petitioner's prior criminal record. However Judge Perry's sentencing statement shows that his main reason for departure was his personal disagreement with the sentencing guidelines system.

It is abundantly clear that the trial judge in this cause believed the sentencing guidelines "made a mockery of the law" and were unconstitutional. The judge seemed especially concerned with the possibility that more inmates would serve sentences in county jails at county expense, rather than in state prisons at state expense. He saw the guidelines as a means to "pass the buck" back to the counties (R103-105).

The trial court's opinion of the sentencing guide-

lines has absolutely nothing to do with Petitioner or his case. Yet the court's only statement of it's reasons for departing from the guidelines in this case, is an attack on the system itself. Petitioner would assert that no part of the trial court's statement that does not directly address the facts and circumstances of Petitioner's case should be considered as justifying a departure from the guidelines. To allow even the appearance that a criminal defendant would suffer harsher penalties before a judge because that judge does not believe in the law, would truly make a mockery of the system. Even if this Court decides to affirm the Hendrix decision, Petitioner's sentence should still be reversed.

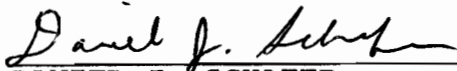
Petitioner also believes his sentence should be reversed because the Hendrix case was wrongly decided. Hendrix held that a trial court may base a decision to depart from the guidelines on a defendant's prior criminal record, even where that same factor has been taken into account in determining the presumptive guidelines sentence. This Court accepted jurisdiction to review the Hendrix decision on February 5, 1985. Hendrix v. State (Fla. Supreme Court Case No. 65,928). The Fifth District Court of Appeal took the position in the instant case that Petitioner's sentence should be affirmed based on Hendrix. Therefore, if this Court reverses the District Court's decision in Hendrix, Petitioner's sentence should likewise be reversed.

CONCLUSION

Based on the foregoing arguments and authorities, Petitioner respectfully requests that this Honorable Court reverse the decision of the Fifth District Court of Appeal in this cause and remand the case for resentencing with appropriate instructions.

Respectfully submitted,


JAMES B. GIBSON  
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SEVENTH JUDICIAL CIRCUIT

  
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed to the Honorable Jim Smith Attorney General at 125 N. Ridgewood Avenue, Daytona Beach, Florida 32014 and to Mr. James Clarin Gregory Inmate No. A030480, 3876 Evans Rd. Box 50, Polk City, Florida 33868 on thsi 2nd day of May 1985.

  
\_\_\_\_\_  
DANIEL J. SCHAFER  
ASSISTANT PUBLIC DEFENDER