w/o.a.a.

IN THE SUPREME COURT OF FLORIDA

CASE NO. 66,428

THE STATE OF FLORIDA,

Petitioner,

vs.

JOSEPH CURTIS SMITH,

Respondent.

****

ON PETITION FOR DISCRETIONARY REVIEW

****

REPLY BRIEF OF PETITIONER ON THE MERITS

JIM SMITH
Attorney General
Tallahassee, FL

GEORGINA JIMENEZ-OROSA
Assistant Attorney General
111 Georgia Ave., Suite 204
W. Palm Beach, FL 33401
305-837-5062

Counsel for Petitioner.

TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER AUTHORITY

PRELIMINARY STATEMENT

Petitioner was the Appellee in the court below and prosecution in the trial court. Respondent was the Appellant in the court below and the defendant in the trial court. In this brief the parties will be referred to as they appear before this Honorable Court. All emphasis in this brief is supplied by Petitioner unless otherwise indicated.

The following symbols will be used:

"R" Record on Appeal

"SR" Supplemental Record on Appeal

STATEMENT OF THE CASE

Petitioner will rely on the Statement of the Case in his Initial Brief herein, but would like to draw the Court's attention to the fact that pursuant to this Court's opinion in L.S. v. State, ___So.2d___, 10 F.L.W. 140 (Fla. Case No. 65,183 filed February 28, 1985) the Fourth District Court of Appeal on May 29, 1985, filed a new Opinion in the instant case by which the opinion filed in Smith v. State, 10 F.L.W. 59 (Fla. 4th DCA, December 28, 1984) was withdrawn and the conviction and sentence of Appellant was affirmed. A copy of the May 29, 1985, Fourth District Court Opinion is attached to this Brief and designated "Appendix I." Petitioner has filed a Motion to Dismiss the Instant Case based on the May 29, 1985, District Court Opinion.

STATEMENT OF THE FACTS

Petitioner will rely on its Statement of the Facts in his Initial Brief herein.

Respondent in his Answer Brief points out that there were four additional issues raised by Respondent in the Fourth District Court of Appeal which were not addressed by the Fourth District Court's Opinion of May 1, 1985. For purposes of argument of those four issues in the instant cause, Petitioner accepts Respondent's Statement of the Facts, as they appear in Respondent's Answer Brief on pages three (3) through five (5), with the following exceptions and/or additions:

On page four (4) of Respondent's Answer Brief it is asserted that the detective told the victim that the tract was found on one of the six men in the photographic lineup prior to her viewing of that lineup. However that assertion does not appear to be borne out by the record. The record at 202-2 shows that Ms. Plyler's testimony was as follows:

> Q. (By Mr. Tylock) Rebecca, I will show you what is now marked State Exhibit Two in Evidence. Will you look at all these photographs?
>
> Were these the same photographs that Detective Parente showed you that day?
>
> * * * *
>
> A. Yes.
>
> Q. How did he show these to you? How did he show them to you, one at a time of give you all six?
>
> A. No. He put them down like this (indicating).
>
> Q. Did he tell you or what did he tell you about these people when he showed them to you?
>
> A. (Shakes head negatively.)

Q. In other words, did he tell you anything about these six people in these pictures?

A. No. I don't know anything about them, no.

Q. Did he tell you anything about them?

A. No.

Q. Did he tell you that the tract you identified had been found on one of these people?

A. Oh, yes, he told me that.

Q. He did tell you that?

A. I don't remember. I'm sorry. I really don't. He could have. I don't know.

Q. What did he tell you about these people to the best of your memory?

A. (Shakes head negatively.) I don't remember talking about these people.

Q. In any form of fashion did he indicate or point to any of these people that you should pick out a certain one?

A. No, no.

Q. What did he tell you when you looked at them?

A. Tell me?

Q. If you can remember, Rebecca?

A. I don't know. I don't remember him telling me anything when I looked at the pictures. I don't know what you are asking.

Q. He gave you the photographs. What did he say to you? Look at these photographs?

A. See if you can identify someone in there, the man that was there that night. I don't remember his words. I don't know what he said.

Q. Any way, did he point to or make any remarks about a specific picture therein?

A. No.

Q. Did you look at the photos?

A. Yes.

Q. What happened?

A. I picked one out.

Q. Which one did you pick out?

A. Number four.

Q. Why did you pick number four?

A. Because that is the man that was in my apartment.

Q. Were you sure that was the man that was in your apartment?

A. I am positive.

POINTS INVOLVED

I. WHETHER THE STATE PROVED BEYOND A REASONABLE DOUBT THAT RESPONDENT COMMITTED THE OFFENSE OF BURGLARY?

II. WHETHER THE TRIAL COURT ERRED IN DENYING RESPONDENT'S MOTION TO SUPPRESS PHYSICAL EVIDENCE AND STATEMENTS BECAUSE OF THE ALLEGED ILLEGALITY OF THE INVESTIGATORY STOP?

III. WHETHER THE TRIAL COURT ERRED IN ADMITTING EVIDENCE REGARDING APPELLANT'S OUT-OF-COURT IDENTIFICATION?

IV. WHETHER RESPONDENT'S SENTENCE IN EXCESS OF THE GUIDELINES WAS PROPER?

V. WHETHER THE TRIAL COURT ERRED IN IMPOSING COSTS WHERE RESPONDENT HAD BEEN ADJUDICATED INSOLVENT?

SUMMARY OF ARGUMENT

POINT I The Fourth District Court in its December 28, 1984, found sufficient evidence to support entry with "intent to assault the victim sexually." This Court has determined that when the state charges the defendant did intend to commit a specific offense after the breaking and entering, it may avail itself of § 810.07, Florida Statutes, to prove the essential element of intent necessary to obtain a defendant's conviction of burglary. The Fourth District subsequently withdrew its December 28, 1984 opinion and affirmed the judgment of the trial. Therefore this issue being dispositive of the appeal, this appeal should be dismissed.

POINT II From the facts as they appear in the record it is clear the police had a "founded suspicion" that Respondent was the person involved in the burglary; thus the stop was proper, and the denial of the motion to suppress must be approved.

POINT III The police did not employ impermissibly suggestive pre-trial identification procedures. Even assuming arguendo that the pre-trial identification procedures were improper, the in-court identification by the victim was not tainted by the pre-trial procedures, and therefore no reversible error appears from the record in the case sub judice.

POINT IV The absence of a score sheet in this case was irrelevant because the defense attorney informed the trial court as to the presumptive sentence under the guidelines.

The reasons for departure, set out by the trial court in its Order, were clear, convincing and proper under the circumstances of Respondent's criminal history. The trial court properly departed from the sentencing guidelines and properly sentenced Respondent within the statutory parameters of the convicted offense. Therefore the sentence of 20 years for the burglary offense was not too severe and must be affirmed.

POINT V Petitioner recognizes the case of Jenkins v. State, 444 So.2d 947 (Fla. 1984), and urges this Court to remand the case to the trial court to hold a hearing to determine the applicability of the assessment of those costs.

Petitioner, in the alternative, points out that should this case be dismissed as moot, the Fourth District in its opinion of May 29, 1985, has complied with the mandate of Jenkins.

POINT I

THE STATE PROVED BEYOND A REASONABLE DOUBT THAT RESPONDENT COMMITTED THE OFFENSE OF BURGLARY.

Petitioner maintains that there was sufficient evidence for the jury to find that in fact, the Respondent committed the offense of theft of a forked trough from the utility room of the residence in controversy. Admittedly, the evidence of this theft is circumstantial, however, the record contains substantial competent evidence to support the jury finding that Respondent was guilty of burglary as charged in the information.

The victim testified that she had been threatened by the Respondent who was holding a garden tool, like a weeder. It looked like a fork with the middle prong missing (R 183, 226). Vickie Brayton, the owner of the residence, testified that the day after the offense she checked out her utility room and discovered that her forked trough was missing as well as her utility gloves, one of which was later discovered out in the hedges (R 240). Under the circumstances, there was a sufficient basis for the jury to connect the trough missing from the utility room to the assault against the victim with what she described as a gardening tool, a weeder, which looked like a fork with the middle prong missing. In the case of circumstantial evidence, the determination as to whether the evidence failed to exclude all reasonable hypotheses of innocence is for the jury to determine, and should not be reversed where there is substantial, competent evidence to support the jury vercict. Rose v. State, 425 So.2d 521, 523 (Fla. 1982).

Additionally, it is clear under the facts of this case that where the Respondent gained stealthy entry to the structure without permission of the occupant of the owner with an apparent intent to commit an offense therein, the State is entitled to rely on the statutory presumption of Section 810.07, Florida Statutes to establish a prima facie case of intent to commit an offense. L.S. v. State, 10 F.L.W. 140 (Fla. February 28, 1985) Even without any other evidence of the Respondent's state of mind at the time of unlawful entry, the unlawful entry itself will be legally sufficient proof of intent to support a verdict. State v. Waters, 436 So.2d 66, 70 (Fla. 1983).

Respondent in his Answer Brief concedes that this Honorable Court in L.S. v. State, supra, held that "when the state charges that the defendant did intend to commit a specific offense after the breaking and entering, it may avail itself of section 810.07." But requests this Court to reconsider its decision in L.S., supra.

This Court's very recent opinion in L.S., supra, is very clear, and it is dispositive of the instant case. Respondent urges this Court to recede from its Opinion in L.S. without setting forth any new argument, or distinguishing the instant case from L.S. Respondent cites State v. Waters, 436 So.2d 66 (Fla. 1983) as support for his position in the instant appeal. Yet it is clear from a reading of this Court's Opinion in L.S., that this Court relied on Waters for its holding in L.S.

Further, the Fourth District Court of Appeal following this Court's mandate in L.S., supra, by its opinion filed

May 29, 1985, has withdrawn its original opinion filed in Smith v. State, 10 F.L.W. 59, (Fla. 4th DCA, December 28, 1984) and affirmed the judgment of the trial court. The Fourth District Court did not mention the other issues on Appeal because it apparently found them to be without merit. Where a case is affirmed by an appellate court, it will be presumed that no reversible error has been found. And if affirmed on a stated point, it will be presumed that all other points raised by briefs have been examined and found to be without merit and may be considered as having been adjudicated. See Shayne v. Saunders, 176 So. 495, 129 Fla. 355 (Fla. 1937); Florida Public Utilities Co. v. Wester, 7 So.2d 788, 150 Fla. 378 (Fla. 1942). Therefore, Respondent's arguments are baseless and without merit. This case should be dismissed as the question to be answered by this Appeal has been Answered in Petitioner's favor by this Court's opinion in L.S. v. State, supra.

POINT II

THE TRIAL COURT DID NOT ERR IN DENYING RESPONDENT'S MOTION TO SUPPRESS PHYSICAL EVIDENCE AND STATEMENTS BECAUSE OF THE ALLEGED ILLEGALITY OF THE INVESTIGATORY STOP.

At the hearing on the motion to suppress, the victim, Rebecca Plyler described the perpetrator as a short black man, about an inch shorter than she, and that she was five feet six inches tall. He was wearing a pair of shorts (R 14, 23). She described them as "short shorts." She denied ever telling the police officer that he was only wearing yellow underwear, and suggested that she possibly said yellow shorts (R 33-34).

The officer who received the information for the original BOLO relayed the information that the burglar was a male, approximately five foot five, slim build, and wearing yellow bikini style underwear. According to the officer who relayed this information, the victim was extremely upset at this point in time (R 72).

Officer Tubman testified that shortly after the initial dispatch as she was driving to the location at 720 N.E. 15th Court she saw on N.E. 7th Avenue and N.E. 14th Court, she observed the defendant on a bicycle peddling southbound at that corner (R 48). The time was approximately 2:49 A.M. which was just a few seconds after she had received the BOLO. The area is not heavily travelled at that time of the morning (R 49),

and since the bicycler fit the general description of the suspect, she communicated sighting the bicycle.

Gary Jones, the officer who actually executed this stop of the defendant heard both descriptions which went out on the radio. He was circulating in the area around where the burglary took place and around the 500 block of West Sunrise Boulevard saw a subject who fit the description that was put on the radio initially and he was also riding a black bicycle as in the relay of Officer Tubman (R 87). The time was approximately 3:39 A.M. and when the defendant saw Officer Jones he seemed to act evasively (R 88-89). After Officer Jones executed the stop he requested Officer Tubman to respond to the scene at which time she informed that she was positive that the subject stopped on the bike was in fact the same subject she had seen earlier on in the area of the burglary. At that point, Officer Alexander filled him in on the details of the offense and that the perpetrator had taken a religious tract from the residence. Officer Jones advised her that the subject stopped, did have what looked to be a religious tract sticking out of his beltline in the front of his pants (R 90-91). Officer Jones also testified that when he observed the subject riding his bike he could see the subject was wearing a pair of shorts and that a pair of binkini underwear was visible sticking out of the back of his shorts as he passed under the streetlight (R 92). As he peddled under the streetlights, the bathingsuit appeared yellow (R 93). Additionally, this subject seemed to match both BOLOS in that the subject was a black male, short, possibly five feet five, and maybe a hundred

and twenty pounds (R 93). The subject was riding a black bike which fit the description put out by Officer Tubman (R 94).

Petitioner maintains that the circumstances as related above were sufficient to justify the stop of Respondent by Officer Jones. Under our "stop and frisk" law a law enforcement officer must have a founded suspicion that a person has committed, is committing, or is about to comit a crime before he may lawfully detain such person. Section 901.151, Florida Statutes (1979). "A founded suspicion is a suspicion which has some factual foundation in the circumstances observed by the officer, when those circumstances are interpreted in the light of the officer's knowledge." State v. Stevens, 354 So.2d 1244, 1245 (Fla. 4th DCA 1978).

In the instant case, a "founded suspicion" can be gleaned from the facts cited above. Respondent fit the general description (albeit he was no longer clad in yellow binkini underwear the police could reasonably think that he may have dressed himself between the initial intrusion and the time he was sighted on the bicycle), was in the area of the offense and attempted to evade the approach of the police officer. Thus the stop was proper. It is a well-settled proposition that a trial court's ruling on a motion to suppress comes to this Court with a presumption of correctness and must be accepted by this Court if the record reveals evidence to support the findings. State v. Spurling, 385 So.2d 672 (Fla. 2d DCA 1980); Smith v. State, 378 So.2d 281 (Fla. 1979).

In spite of the presumption that the lower court was correct in denying the motion to suppress, Respondent asserts that the police did not have a founded suspicion to execute the stop. As support for that assertion, Respondent relies upon the cases of McClain v. State, 408 So.2d 721 (Fla. 1st DCA 1982) (detective stopped defendant and companion only because they seemed to be avoiding him); Kearse v. State, 384 So.2d 272 (Fla. 4th DCA 1980) (deputies observed defendant leaning into the passenger window of a vehicle occupied by several persons and as the deputies approached the defendant "briskly" walked away. Although the deputies were unable to articulate what type of criminal activity they suspected, they became "suspicious" because of defendant's inconsistent behavior on the day in question); Wilson v. State, 433 So.2d 1301 (Fla. 2d DCA 1983) (detective testified he approached the defendant on a "hunch," after his observation that the defendant changed the direction he was walking in and changed the package he was carrying from one arm to another in addition to the officer's personal knowledge that they were in a high crime area); Freeman v. State, 433 So.2d 9 (Fla. 2d DCA 1983) (carrying a lit flashlight in the early morning hours through a parking lot which had suffered a rash of vehicle burglaries may give a rise to a "bare" suspicion of illegal activity, it does not, without more, give rise to a "founded" suspicion of illegal activity.); Ross v. State, 419 So.2d 1170 (Fla. 2d DCA 1982) (police received general BOLO description which could have fit many people in the area and was received at an hour when many people were on the street. In consideration of the fact

that the defendant's hairstyle and the direction in which he was walking when first spotted, were inconsistent with the BOLO information, the police did not have "founded" suspicion for the stop.); Levin v. State, 449 So.2d 288 (Fla. 3d DCA 1983) (sole basis for the stop was that defendant was walking on public street at 3:00 A.M. in "high class" residential area where there had been some prior burglaries carrying a fishing pole.)

Clearly the cases cited by Respondent are distinguishable from the one at bar which presents far more compelling circumstances to support the finding of the trial court that the police did have a "founded suspicion" to justify the stop. Respondent did match the general description of the perpetrator as released in the BOLO and the fact that he was not clothed only in yellow bikini underwear does not denigrate the fact that he fit the general description. Certainly, the police could reasonably surmise that such a perpetrator might dress himself before leaving the scene of the offense. On her way to the victim's residence, one of the police officers espied in the area in which the offense took place, an individual who fit the general characteristics of BOLO and the time was approximately 3:00 A.M. so that there were very few people on the streets at that time. Consequently, the officer's suspicions were aroused and she communicated through standard police procedures that she observed a suspect in the crime who fit the general description riding a black bicycle. Therefore, when Sergent Jones subsequently saw an individual who matched both BOLOS riding a black

bicycle he did have the requisite "founded suspicion" to stop the defendant. Indeed, had he not stopped the defendant under the circumstances in this case he would have been derelict in his duties. Accordingly, Appellee asserts that the temporary stop in this case is much more akin to the cases of Brezial v. State, 416 So.2d 818 (Fla. 4th DCA 1982); State v. Amerson, 392 So.2d 311 (Fla. 4th DCA 1980) and State v. Hundley, 423 So.2d 548 (Fla. 4th DCA 1982), and therefore the denial of the motion to suppress should be approved.

POINT III

THE TRIAL COURT DID NOT ERR IN ADMITTING EVIDENCE REGARDING APPELLANT'S OUT-OF COURT IDENTIFICATION.

Respondent contends that the police employed impermissibly suggestive procedures to obtain the out-of-court identification of Respondent. Consequently, Respondent maintains that through the admission of the "tainted" identification Respondent was denied due process of law. Petitioner contends that the police did not employ impermissibly suggestive procedures in this case.

The victim testified that when she was first shown the photo line-up she was in a hurry and didn't even have time to look at the line-up and therefore could not pick anyone out (R 36-37). The second time the victim was shown the photographic line-up she did make an identification but requested a live line-up so that she could make sure in her own head that the identification was proper (R 41-42). During the live line-up she knew who the perpetrator was instantly but wanted to look at him a minute. (R 44). Even when she identified the perpetrator in the photographic line-up, she was absolutely sure he was the one. (R 25, 28).

The victim testified that she wasn't sure how long the defendant was in the room with her, although it seemed like twenty minutes (R 17). She talked to him, told him he didn't want to do it, that Jesus loved him, and that he can't do this (R 19). She told him that if he just left, everything would

be alright, and gave him a religious tract (R 21-22).

Contrary to Respondent's assertion, the victim's identification of him was never equivocal, in fact, she was always quite certain but because she realized the gravity of the identification, she always wanted to assure herself that she was absolutely correct. Additionally, although Respondent asserts that the photographic line-up was unduly suggestive, the trial judge found that it was not (R 126).

To avoid the hazard of misidentification the courts have fashioned a two-prong test to evaluate allegations of an impermissibly suggestive pre-trial identification procedure. The first step of the inquiry is a factual determination of whether the police employed an unnecessarily suggestive procedure to obtain the out-of-court identification. If the procedure is found to have been too suggestive, the second step is to ask whether, in light of all these circumstances, there was a substantial likelihood of misidentification. In this respect, a number of factors may be considered. Among them are the opportunity of the witness to observe the criminal at the time of the crime; the witness' degree of attention, the accuracy of the witness' prior description of the criminal; his degree of certainty at the confrontation; and the length of time between the crime and the confrontation. Grant v. State, 390 So.2d 341 (Fla. 1980), cert. denied 451 U.S. 913, 101 S.Ct. 1987, 68 L.Ed.2d 303 (1981), Judd v. State, 402 So.2d 1279 (Fla. 4th DCA 1981), review denied 412 So.2d 470 (Fla. 1982).

With these principles in mind, Petitioner maintains in accord with the trial judge that the pre-trial photographic array was not impermissibly suggestive. Further, even if this Court were to find that the pre-trial photographic array or the live lineup were impermissibly suggestive, that fact would be vitiated by the other circumstances which would have reduced the "substantial likelihood of misidentification."

The record reveals that the victim did not initially identify anyone in the photographic line-up because she was in a rush and did not have the time to examine the line-up. However, a few days afterwards when she was shown the line-up again she had no difficulty in making an identification. She testified that she was not in any way influenced by the police officers in making this identification. She then requested a live line-up so she could be absolutely certain of the identification. Finally, her identification at trial was absolute.

The record reveals that despite the fact that the only apparent lighting in the room was from the television set, the defendant was present in the room for an extended period of time, was in very close proximity to the victim (indeed, she reached out an touched him) and engaged in a sort of conversation with her. The victim testified that although she was not positive how long the defendant was in fact in her room, it seemed like at least twenty minutes. In light of the circumstances, it would seem that even if the pre-trial identification procedures were impermissibly suggestive (which Petitioner by no means concedes) that such factor would be vitiated by the circumstances which gave rise to the identification itself.

In conclusion Petitioner contends that the pre-trial identification procedures were not improper and that even if they were, the in-court identification by the victim was not tainted by the pre-trial procedures. Grant v. State, 390 So.2d 341 (Fla. 1980), cert. denied 451 U.S. 13, 101 S.Ct. 1987, 68 L.Ed.2d 303 (1981); Baxter v. State, 355 So.2d 1234, 1238 (Fla. 2d DCA), cert. denied 365 So.2d 709 (Fla. 1978).

POINT IV

RESPONDENT'S SENTENCE IN EXCESS OF THE GUIDELINES WAS PROPERLY IMPOSED.

Respondent challenges the sentence the trial court imposed on him because of the absence of a scoresheet and on the alternative as being too severe to be justifiable. Petitioner will assert that absence of a formal guidelines scoresheet from the record is not reversible error. Further the trial judge's expressed reasons from deviating from the guidelines were proper, and thus properly sentenced Respondent within the statutory parameters of the convicted offense.

Respondent cites Gage v. State, 461 So.2d 202 (Fla. 1st DCA 1984); Myrick v. State, 461 So.2d 1359 (Fla. 2nd DCA 1984); Doby v. State, 461 So.2d 1360 (Fla. 2d DCA 1984); Newsome v. State, 10 F.L.W. 829, (Fla. 2d DCA, opinion filed March 29, 1984); and Ford v. State, 10 F.L.W. 1076 (Fla. 2d DCA, opinion filed May 3, 1985) for the proposition that departure from a guideline sentence is improper when there is no scoresheet, and that lack of a scoresheet requires resentencing. Petitioner now would address this Honorable Court and Respondent to Davis v. State, 461 So.2d 1361 (Fla. 2d DCA 1984) which states that the lack of a scoresheet on the record is not reversible error when the defense attorney has informed the trial court as to the presumptive sentence under the guidelines. See Davis, id. at 1363.

In the instant case, at the sentencing hearing the following colloquy took place:

MR. TYLOCK (The Prosecutor): My one question is, has the Defense chosen finally to choose the guidelines or not under the guidelines for sentencing?

MR. TORNBERG: We have chosen the guidelines.

THE COURT: What does the guidelines come out to?

MR. TORNBERG (Defense Counsel): It comes out to a hundred and five points.

MS. TAYLOR: Well, there is a little bit of discrepancy and that is that I am not sure whether we are talking about a first degree felony or second.

THE COURT: In what case?

MS. TAYLOR: In the case of involuntary sexual battery.

THE COURT: I think we are talking second.

MS. TAYLOR: Okay

MR TORNBERG: He was sentenced to the 15 years.

THE COURT: I believe we are talking second degree because the judgments and sentences that are entered are so close together it doesn't look like there was an appeal.

MR. TYLOCK: Sentenced in '79.

THE COURT: In '79?

MR. TYLOCK: From what I can see in here.

MR. TORNBERG: According to what the Defendant told me, they found the facts could not support the evidence.

THE COURT: It ought to be reported in the Southern Reporter somewhere.

MR. TORNBERG: I stated that wrong. The evidence did not support the charge.

THE COURT: Let's say it is second degree then and give him the benefit of the doubt.

MR. TORNBERG: That appears that the sentence would be the maximum of what that charge would hold. It would be 15 years.

(R 409-410).

From this excerpt it is clear that the absence of the scoresheet in the record is irrelevant because the guidelines were properly considered since the trial court had been advised of the presumptive sentence. See Davis v. State, supra; Newsome v. State, and Ford v. State, supra.

As to Respondent's argument with regard to the reasons for departure from the guidelines a review of the order of the trial judge shows that the sentence was properly entered (R 439-440).

The trial judge enunciated the following reasons for deviating from the guidelines:

(A) Pre-sentence reports indicate that Appellant has been an habitual offender as far back as 1971;

(B) In 1975 he was convicted of sexual battery and sentenced to life incarceration which was later changed to a fifteen year sentence.

It would be travesity for the societal deviant who served nine years on a fifteen year sentence, who upon his release committed a life offense to be sentenced and released with twenty percent of the time that he had just served. Consequently, as stated by the trial judge, "It is illogical and unjust to impose the guidelines sentence for such repeated, similar anti-social conduct." (R 439).

The purpose of sentencing guidelines is to promote more uniformity in sentencing without usurping judicial discretion. While it was contemplated that most sentences would fall within the guidelines, it was also anticipated that from fifteen to twenty percent of the sentencing decisions routinely would fall

outside the recommended range. Weems v. State, 451 So.2d 1027 (Fla. 2d DCA 1984). Further, the determination of a defendant's sentence has always been within the discretion of the trial court, and the promulgation of the guidelines was not intended to supersede this principle. Fla.R.Crim.P. 3.701(b)(6); Jean v. State, 455 So.2d 1083 (Fla. 2d DCA 1984).

When a defendant appeals a sentence outside the guidelines, it is not the function of the appellate court to re-evaluate the exercise of the trial judge's discretion in this area. The role of the appellate court is to assure that there is no abuse of that discretion. Santiago v. State, 459 So.2d 468 (Fla. 1st DCA 1984); Murphy v. State, 459 So.2d 337 (Fla. 5th DCA 1984); Addison v. State, 452 So.2d 955 (Fla. 2d DCA 1984). Petitioner submits that Respondent has failed to demonstrate that the trial court abused its discretion in departing from the guidelines.

The trial court's reason for departing from the guidelines was clearly Respondent's criminal history (R 439-440, 411-14, 417). The Petitioner submits that the trial court's reasons for departure from the guidelines were clear and convincing, and not an abuse of discretion. A review of the trial court's order (R 439-440) and the trial court's oral pronouncements (R 417), taken in context, reveal that the trial court was very concerned with Petitioner's prior 1975 conviction, the facts of which are almost identical to the instant case. The fact that Respondent had been previously convicted for a similar offense which did not deter him from committing the same type of offense again, justifies departure from the guidelines. See, e.g. Albritton

v. State 458 So.2d 320 (Fla. 5th DCA 1984); Jean v. State, 455 So.2d 1083 (Fla. 2d DCA 1984). Furthermore, where the circumstances of the instant offenses and Respondent's prior record shows that Respondent is totally unamendable to rehabilitation, departure from sentencing guidelines is appropriate. See Kiser v. State, 455 So.2d 1071 (Fla. 1st DCA 1984).

In Manning v. State, 452 So.2d 136 (Fla. 1st DCA, 1984), the presumptive sentencing was any non-state prison sanction. At the sentencing hearing however the prosecutor argued that the defendants "constituted a two-man gang war." In imposing sentence, the trial judge departed from the guidelines and imposed consecutive three year terms of imprisonment for each offense, indicating that:

> . . . the sentencing guidelines require a disposition which would be altogether inappropriate in this case. The Court is going to go outside the guidelines for sentencing in this case. My reasons for doing so is each one of you went on a crime binge and created a two-man crime wave in Backer County, which cannot go unnoticed or will not be condoned by the people of this community. I'm not going to avoid my responsibilities as the conscience of this community and put you back on the streets . . .

In affirming the sentence in Manning, the district court found that the trial court's expressed reason for deviating from the guidelines was supported by the temporal geographical circumstances of the offenses for which the defendants were convicted. Similarly, in the instant case, the trial judge's expressed reasons for deviating from the guidelines were proper, and must be affirmed.

Respondent's last argument on this point is without merit. Respondent alleges that the 20 year sentence by him is too severe and cannot be justified. Respondent was charged with and convicted of Burglary, which pursuant to §810.02 Florida Statutes, it is a "felony of the first degree, punishable by imprisonment for a term of years not exceeding life imprisonment . . ." or under §775.082 "by a term of imprisonment not exceeding 30 years . . ." Therefore the 20 year sentence was not too severe and falls within the statutory parameters.

POINT V

THE TRIAL COURT DID NOT ERR IN IMPOSING COSTS WHERE RESPONDENT HAD BEEN ADJUDICATED INSOLVENT.

Petitioner recognizes the case of Jenkins v. State, 444 So.2d 947 (Fla. 1984) which holds that the State must provide adequate notice of the assessment of costs under Sections 960.20 and 943.25 Florida Statutes (1981), with full opportunity to object to the assessment of those costs. Petitioner also agrees that no prior notice or opportunity to object is indicated on the record (in fact, Petitioner would also note that the assessment of the costs is not even indicated on the record). Consequently, Petitioner urges this Honorable Court to consider remanding this case to the trial court to hold a hearing to determine the applicability of the assessment of those costs.

In any event, should this Court dismiss the instant case as urged by Petitioner, the Fourth District Court's Opinion of May 29, 1985, disposes of the issue by complying with the mandate of Jenkins.

CONCLUSION

Based upon the foregoing argument, supported by the circumstances and authorities cited herein, Petitioner would respectfully request this Honorable Court to AFFIRM Respondent's conviction, Dismiss the instant case or, in the alternative, to approve the second opinion of the Fourth District Court of Appeal filed May 29, 1985, which affirms the trial court's judgment.

Respectfully submitted,

JIM SMITH
Attorney General
Tallahassee, FL

Georgina Jimenez-Orosa

GEORGINA JIMENEZ-OROSA
Assistant Attorney General
111 Georgia Ave., Suite 204
W. Palm Beach, FL 33401
305-837-5062

Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief of Petitioner on the Merits has been furnished to: RICHARD B. GREENE, Esquire, Assistant Public Defender, 224 Datura Street, W. Palm Beach, FL 33401, this 28th day of June, 1985.

Georgina Jimenez-Orosa
OF COUNSEL