

IN THE SUPREME COURT OF FLORIDA

GEORGE W. BURCH,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

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CASE NO.: 66,493

**FILED**  
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RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

George W. Burch, the criminal defendant and appellant below, will be referred to herein as Petitioner. The State of Florida, the prosecution and appellee below, will be referred to herein as Respondent or the State.

The Record on Appeal consists of one volume, and will be referred to herein as "R" followed by the appropriate page number(s).

The decision of the First District Court of Appeal is also currently before this Court in State v. Burch, Case No. 66,471.

STATEMENT OF THE CASE AND FACTS

Respondent accepts as accurate, Petitioner's Statement of the Case and Facts with the following exception.

The trial court provided Petitioner with a written statement of the four reasons for departing from the Sentencing Guidelines recommended range. (R 84).

SUMMARY OF ARGUMENT

This Court has rejected Petitioner's argument that juvenile adjudications more than three years old may not be used as a reason for departing from the guidelines. Factors relating to a defendant's prior history of juvenile adjudications are expressly prohibited from calculating a guidelines scoresheet and therefore must be available as reasons for departure absent a direct limitation on the sentencing discretion of the trial court.

ARGUMENT

ISSUE

THE TRIAL JUDGE DID NOT ERR IN  
CONSIDERING PETITIONER'S JUVENILE  
RECORD AS A REASON FOR DEPARTING  
FROM THE GUIDELINES RANGE.

In Weems v. State, 10 F.L.W. 268 (May 9, 1985) this Court faced the question whether an "extensive juvenile record, which could not be considered in calculating the applicable sentencing range because the juvenile dispositions were over three years old, could be considered by the trial court as a reason for departing from the sentencing guidelines." *Id.* at 268. This Court held that:

It is true that Florida Rules of Criminal Procedure 3.701(d)(5)(c) does exclude juvenile dispositions over three years old from the initial computation, but no part of the rule or the guidelines statute exclude such matters from being considered by the trial court as reasons for departing from the guidelines.

*Id.*

Here the trial court considered a juvenile history which included 7 adjudications, one revocation of probation and 4 commitments to HRS. (R 78). Apparently, 5 of the offenses involved grand theft, shoplifting or burglary. Unsurprisingly, Petitioner below pled nolo contendere to one count of burglary

of a structure and another count of grand theft. (R 50,108).

Petitioner argues that to allow deviation for this reason permits the trial judge "to do through the back door that which he could not do through the front." This argument misses the point. If only non-remote juvenile adjudications could be used as a basis for departure, then the guidelines would imply that factors considered in computing the scoresheet are the only factors which may be considered as reasons for departure. The presence of factors which cannot be scored but are otherwise material to appraising the character of the defendant for sentencing purposes, i.e., mitigating or aggravating considerations, must be considered in exercising the broad discretion afforded a trial judge in sentencing a criminal defendant. See Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). Otherwise, the lack of a remote juvenile history could never be considered in mitigation when determining the appropriate sentence.

Respondent argues that the lengthy juvenile record, which included a revocation of probation, clearly justified the departure below.

Justice Alderman correctly observed in Weems that:

The fact that Weems had a multitude of juvenile dispositions for previous burglaries was certainly material to the sentencing process and may be considered by the trial court in deciding on an appropriate sentence under the circumstances.

Id. at 268.



CONCLUSION

The trial judge correctly considered the lengthy juvenile history and revocation of probation as a clear and convincing reason for departing from the recommended guidelines range.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing Respondent's Brief on the Merits was forwarded to Glenna Joyce Reeves, Assistant Public Defender, Post Office Box 671, Tallahassee, Florida, 32302 on this 2nd day of August, 1985.



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