IN THE SUPREME COURT OF FLORIDA

GEORGE W. BURCH,

Petitioner,

v. CASE NO. 66,493

STATE OF FLORIDA,

Respondent.

PETITIONER'S BRIEF ON THE MERITS

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

GLENNA JOYCE REEVES
ASSISTANT PUBLIC DEFENDER
POST OFFICE BOX 671
TALLAHASSEE, FLORIDA 32302
(904) 488-2458

ATTORNEY FOR PETITIONER

TABLE OF CONTENTS

TABLE OF CITATIONS

IN THE SUPREME COURT OF FLORIDA

GEORGE W. BURCH,	:	
Petitioner,	:	
v.	:	CASE NO. 66,493
STATE OF FLORIDA,	:	
Respondent.	:	
	:	

PETITIONER'S BRIEF ON THE MERITS

I PRELIMINARY STATEMENT

Petitioner, **GEORGE W. BURCH**, referred to herein as petitioner or by name, was the defendant in the trial court and the appellant in his appeal to the First District Court of Appeal. Respondent, the State of Florida, was the prosecuting authority at trial and appellee before the appellate court.

The record on appeal consists of one volume, which will be referred to as "R".

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

II STATEMENT OF THE CASE AND FACTS

An information charged petitioner with two counts of burglary of a structure and one count of grand theft (R 1). He pleaded nolo contendere to Count I, burglary of a structure and Count III, grand theft (R 50, 108). Petitioner elected sentencing under the sentencing guidelines (R 88-101).

On the guidelines scoresheet, petitioner scored a total of 47 points [petitioner scored 20 points for primary offense at conviction plus four points for his grand theft conviction, an additional offense at conviction (R 88-89). Thirteen points were added for two prior convictions (R 90). Also added was 10 points for legal constraint (R 90)], which resulted in a recommended sentence of "community control or 12-30 months incarceration." In deviating from the recommended guideline sentence and imposing a sentence of five years imprisonment on each count (R 98-99, 55-60), the trial judge did not enter a written statement delineating the reasons therefor, but did orally indicate:

> The basis for departure from the guidelines will be the following factors. First, no pretense of moral or legal justification to justify the commission of this offense. Secondly, in need of correctional rehabilitative treatment that can best be provided by commitment to a penal facility. It appears to me by reviewing this Defendant's record, almost every option that is available under our penal system has been explored and sought to be used. And it's been unsuccessful. His probation history, he's had it revoked once. He has been given probation a number of times and it hasn't worked. And also, his parole circumstance -- which may be a scoring

> factor and there is some doubts as to the validity of that exception for departure -- but I'm going to go ahead and use it anyway.

(R 99). Petitioner's counsel objected to any deviation from the guidelines and specifically argued that the reasons recited by the probation oficer and the judge were improper reasons for deviation (R 91, 92, 93-94, 95, 96, 97, 99-101).

On appeal, the First District held that only one reason for departure was proper - petitioner's prior history of unsuccessful alternatives to commitment in a penal facility, i.e., previous revocation of probation. Burch v. State, 462 So.2d 548 (Fla. 1st DCA 1985). Petitioner's objections to this "reason" had been based upon Rule 3.701(d)(5)(c), Florida Rules of Criminal Procedure (1984). The record reveals that petitioner was placed on juvenile probation for shoplifting on January 2, 1978 (R 78). His probation was violated and he was adjudicated delinquent April 24, 1978 (R 78, see also R 92, 95, 96, 100). This juvenile probation revocation, which occurred more than three years prior to the present offense, is the only probation revocation in petitioner's "criminal" history.

III SUMMARY OF ARGUMENT

The trial court deviated from the presumptive guideline sentence based upon a probation revocation, whose scoring was barred by Rule 3.701(d)(5)(c), Florida Rules of Criminal Procedure. Since petitioner's recommended sentence was not probation, but rather was 12-30 months incarceration, the fact that he had previously been unsuccessful on probation bears no logical relationship to support the departure to five years imprisonment. Moreover, since the prohibition against scoring this remote conviction is based upon a lack of relevancy, petitioner contends it is totally illogical, and incongruous, to allow this irrelevant factor to be the sole justification for a departure.

IV ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN IMPOSING A SENTENCE IN EXCESS OF THE SENTENCING GUIDELINES SINCE THE ARTICULATED REASONS FOR DEPARTURE WERE NOT CLEAR AND CONVINCING.

In the present case, the only reason for departure found proper by the District Court was:

> Prior history of unsuccessful alternatives to commitment in a penal facility; i.e. previous revocation of probation.

Petitioner contends this conclusion is erroneous, and accordingly, his sentence should be reversed and the cause remanded for imposition of a guideline sentence. Thomas v. State, 461 So.2d 234 (Fla. 1st DCA 1984); Callaghan v. State, 462 So.2d 832 (Fla. 4th DCA 1985); Knowlton v. State, 466 So.2d 278 (Fla. 4th DCA 1985); Hearn v. State, 10 F.L.W. 1469 (Fla. 2d DCA 1985).

The record reveals that petitioner was placed on juvenile probation January 2, 1978 (R 78). His probation was violated and he was adjudicated delinquent April 24, 1978 (R 78, see also R 91-92, 95, 96, 100). Since this offense occurred more than three years prior to his present conviction, petitioner contends his past juvenile history cannot be used as an aggravating circumstance. Under Rule 3.701(d)(5)(c), prior juvenile dispositions are treated as prior convictions for the purpose of scoring the offender's prior record. [This appears to be a significant change because traditionally juvenile adjudications have been held not to constitute

a conviction of a crime. See, Jackson v. State, 336 So.2d 633 (Fla. 4th DCA 1976).] However, this rule expressly precludes consideration of juvenile dispositions occurring more than three years prior to the current conviction. See also, Committee Note (d)(5):

> Juvenile dispositions, with the exclusion of status offenses, are included and considered along with adult convictions by operation of this provision. However, each separate adjudication is discharged from consideration if three (3) years have passed between the date of disposition and the conviction of the instant offense.

[Emphasis supplied.] It is petitioner's contention that since ancient juvenile adjudications are "discharged from consideration," these discharged events may not then be utilized as a basis for aggravating a guideline sentence.[1] See, Flavey, Defense Perspectives on the Minnesota Sentencing Guidelines, 5 Hamline L. Rev. 257, 263 (1982) ("Prior to the adoption of the Sentencing Guidelines, judges had a great deal of discretion as to whether an offender's juvenile record would become a factor in the sentencing determination. This discretion has been eliminated by the Guidelines....").

---

[1] To allow deviation on this basis would permit the trial judge "to do through the back door that which he could not do through the front." Even had this ancient offense been scored, it would have added only 1 point, which would not have increased the presumptive sentence. See, State v. Barnes, 313 N.W.2d 1 (Minn. 1981) at 2. "Even if the evidence could be deemed strong, that alone would not justify the tacking on of an additional 24 months because it is clear that even if defendant had an actual prior felony conviction for a prostitution-related offense, that would only add one point to his criminal history score and 3 months to his presumptive sentence."

As in Minnesota, Rule 3.701(d)(5)(c) severely limits consideration of ancient juvenile offenses. Since these offenses cannot be scored, they should not be a basis for aggravation.[2] Since petitioner's probation revocation occurred when he was a juvenile and occurred more than five years ago, this factor is not a proper basis for aggravation.

In Weems v. State, 10 F.L.W. 268 (Fla. May 9, 1985), this Court held that the trial court's consideration of a multitude of juvenile dispositions for previous burglaries in departing from the recommended guideline range did not, under the circumstances, constitute an abuse of discretion even though these past offenses could not be scored under Rule 3.701(d)(5)(c). Petitioner urges the Court to reconsider its decision therein. Alternatively, petitioner contends that in the present case, consideration of his remote probation revocation as a juvenile as the sole basis for the guidelines departure did constitute an abuse of discretion.

As previously noted, the recommended guideline sentence for petitioner's offenses was "community control or 12-30 months incarceration." In departing from the guidelines and

[2] The absence of any affirmative indication that these "discharged" offenses may be considered in aggravation also indicates that the contrary was intended. For example, in establishing a PPRD, specific rules preclude juvenile status offenses or ancient criminal offenses from being counted on the salient factor scoring. Rule 23-21.07(1)(c) and (h), Florida Administrative Code. Those rules specifically provide, however, that "this shall not prevent consideration of such behavior as a negative indicant of parole prognosis." Since the guideline rule contains no such proviso, it is logical to presume that the "discharge" intended is absolute.

imposing five years incarceration, the trial court relied upon the fact that, as a juvenile, petitioner had once been unsuccessful on probation. Even assuming arguendo that Rule 3.701(d)(5)(c) does not per se prohibit consideration of this fact, in the present case, petitioner's "prior history of unsuccessful alternatives to commitment in a penal facility" cannot be a basis for a guideline departure. There appears to be no logical correlation between petitioner's past failure on probation and an extended term of imprisonment in the state correctional system. Petitioner's recommended sentence was not probation, nor is he seeking probation. Thus, this reason merely suggests disagreement with the guidelines themselves and is not "clear and convincing." See, Young v. State, 455 So.2d 551 (Fla. 1st DCA 1984) (fact that defendant "needs mental health treatment" improper basis for departure; "There is no logical correlation between the appellant's need for mental treatment and an extended term of imprisonment in the state correctional system. This reason is neither clear nor convincing." Id. at 552); Brooks v. State, 456 So.2d 1305 (Fla. 1st DCA 1984) (reason that "defendant is in need of correctional rehabilitative treatment that can be best provided by commitment to a penal facility" inappropriate for departure in that it "is so vague and general as to be both unclear and unconvincing since it appears to be expressing a choice between incarceration in prison and a non-prison sanction, which is not involved

in the deviation decision at issue here." Id. at 1307); Alford v. State, 460 So.2d 1000 (Fla. 1st DCA 1984) (reasons - no pretense of moral or legal justification, in need of correctional or rehabilitative treatment that can best be provided by commitment to a penal facility, drug or alcohol use and sentence necessary to deter others - not clear and convincing since they "wholly fail to relate to anything within the context of the case." Id. at 1001); Sarvis v. State, 465 So.2d 573 (Fla. 1st DCA 1985) (conclusory statement that "chances of being rehabilitated in thirty months are 'nonexistent' not clear and convincing; this reason for departure "merely suggests the court's disagreement with the guideline sentence." Id. at 576). Minnesota caselaw recognizes that nonamenability to probation does not justify a departure. E.g., State v. Gross, 332 N.W.2d 167 (Minn. 1983) ("Defendant's prior failures on probation and treatment do not provide a basis for the durational departure (but would support a dispositional departure in the form of execution of a presumptively stayed sentence)." Id. at 170.) In essence, the trial judge's departure is based upon his conclusion that 12-30 months incarceration is not enough. That justification is totally inimical to the entire guideline system and could, if sufficient, be used to justify departure in almost every case. State v. Bellanger, 304 N.W.2d 282 (Minn. 1981) (General disagreement with guidelines or the legislative policy on which guidelines based does not justify

departure). Since petitioner's past unsuccessful stint on probation does not relate to anything within the context of the present case, petitioner contends the departure was wholly unjustified.

Moreover, petitioner submits the Court should reevaluate its decision in Weems. Therein, the Court recognized that Rule 3.701(d)(5)(c) excludes juvenile dispositions over three years old from scoring. However, the Court opined that "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. In so concluding, petitioner contends the Court has overlooked the purpose behind the Rule 3.701(d)(5)(c) bar. It is readily apparent that the prohibition against the use of ancient juvenile adjudications in scoring was based upon a policy decision that such ancient adjudications were simply not relevant to the sentencing decision.[3,4] The notion that remote convictions lack relevancy is not one foreign to

---

[3] The Florida Sentencing Guidelines manual reflects that the prohibition was so based: "The provision allowing a prior record to decay with the passage of time is similar to rule 609(b), Federal Rules of Evidence." Of course, rule 609(b), disallows impeachment by means of remote convictions.

[4] In contrast, many other factors, such as lack of remorse, victim's sex, offender's psychological health, offender's drug or alcohol use, or crime committed in a particularly heinous manner, were eliminated as scoring variables not because they were deemed irrelevant, but because they were too subjective to be objectively quantified. See, Sundberg, Plante and Braziel, Florida's Initial Experience with Sentencing Guidelines, 11 Fla.St.U.L.Rev. 125 (1983).

Florida courts. E.g., Braswell v. State, 306 So.2d 609 (Fla. 1st DCA 1975), cert. denied, 328 So.2d 845 (Fla. 1976); Kelly v. State, 311 So.2d 124 (Fla. 3d DCA 1975). In Braswell, the court recognized that a remote conviction cannot be utilized to impeach a criminal defendant testifying in his own behalf. The court's rationale was based upon Winn v. State, 54 Tex.Cr. 538, 113 S.W. 918 (1908), where the court noted:

> Testimony of this character [prior convictions] after a long lapse of years should not have been introduced ... In other words, the law will not permit the early indiscretions of a witness to be brought into requisition to besmirch his subsequent life. To do so, as expressed by Judge Greenlief, ... would be to preclude any possible chance of a reform, and would enable state's counsel to parade the early misdeeds of a subsequently useful life, to be introduced to becloud and discredit the subsequently honorable and useful life.

Id. at 613. It would indeed be an anomaly to allow a remote conviction - deemed too irrelevant to be scored - to then serve as the sole basis for a sentencing guidelines departure. This irony is particularily acute here because even if petitioner's remote juvenile conviction for which probation was revoked were scored [contrary to Rule 3.701(d)(5)(c)] his presumptive guideline sentence would not have been increased.[5]

---

[5] Petitioner's shoplifting conviction would have added only 1 point to his score. Yet, the Weems ruling would appear to allow this conviction to be used to deviate up to the statutory maximum. In the present case, the trial judge used this fact to leap three cells.

Based on the foregoing, petitioner contends that his departure sentence was not based upon a clear and convincing reason. Therefore, petitioner's sentence must be reversed and the cause remanded for entry of a sentence within the guidelines.

V CONCLUSION

For the reasons stated, petitioner seeks reversal of his sentence.

Respectfully submitted,

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

Glenna Joyce Reeves
GLENNA JOYCE REEVES
Assistant Public Defender
Post Office Box 671
Tallahassee, Florida 32302
(904) 488-2458

Attorney for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand to Assistant Attorney General Gary L. Printy, The Capitol, Tallahassee, Florida, 32302, this 16th day of July, 1985.

Glenna Joyce Reeves
GLENNA JOYCE REEVES
Assistant Public Defender