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IN THE SUPREME COURT OF FLORIDA

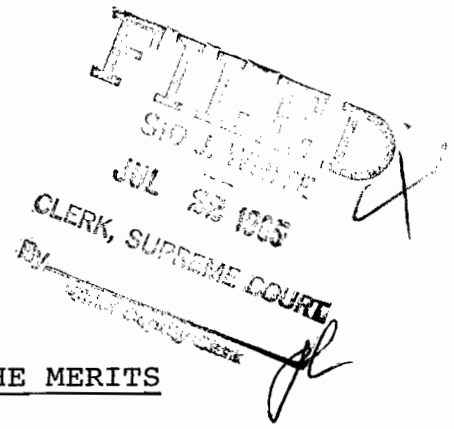
STATE OF FLORIDA,

Petitioner, Cross-Respondent,

v. CASE NO. 66,552

HERMAN JOHNSON, JR.,

Respondent, Cross-Petitioner.



ANSWER BRIEF OF RESPONDENT ON THE MERITS

INITIAL BRIEF OF CROSS PETITIONER ON THE MERITS

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I PRELIMINARY STATEMENT

HERMAN JOHNSON, JR., was the defendant in the trial court, appellant before the District Court of Appeal, First District, and will be referred to in this brief as "respondent," or "cross petitioner." Filed simultaneously with this brief is an appendix containing a copy of the opinion issued by the district court as well as other matters pertinent to this Court's jurisdiction. Reference to the appendix will be by use of the symbol "A" followed by the appropriate page number in parentheses. Reference to petitioner's brief on the merits will be by use of the symbol "PB" followed by the appropriate page number in parentheses.

II STATEMENT OF THE CASE AND FACTS

Respondent accepts the statement of the case and facts as recited in petitioner's brief (PB-2-5). In addition, respondent notes that prior to the time this Court accepted jurisdiction the trial court, on May 24, 1985, entered a written statement of reasons justifying its imposition of a sentence exceeding that recommended by the guidelines (A-4-5).

III SUMMARY OF ARGUMENT

The single issue presented by the state, treated here as Issue I, infra, concerns whether oral reasons for imposing a sentence exceeding that recommended by the sentencing guidelines, later transcribed, satisfies the "writing" requirement of Florida Rule of Criminal Procedure 3.701(d)(11). Since the trial court has now entered a written order, respondent contends the issue is moot. If the merits are reached, respondent requests this Court to approve the decision of the district court.

Since the prohibition against ex post facto laws is a constitutional right, traditional constitutional principles require that any waiver be both knowing and intelligent. Because the record does not reveal that cross-petitioner was ever informed that his act in electing a guidelines sentence rendered him ineligible for parole, cross-petitioner argues in Issue II, infra, that his mere affirmative election is not a valid waiver of his right to be free from ex post facto laws.

In Issue III, infra, cross-petitioner argues that the reasons given for the departure sentence sub judice are not valid, because those reasons largely include factors for which convictions were not obtained, and factors already accounted for in the guidelines scoresheet.

IV ARGUMENT

ISSUE I

THE ISSUE PRESENTED BY PETITIONER IS MOOT AND, IN ANY EVENT, THE DISTRICT COURT CORRECTLY HELD THAT THE TRIAL COURT ERRED IN FAILING TO REDUCE ITS REASONS FOR DEPARTURE FROM THE SENTENCING GUIDELINES TO WRITING.

As noted in the statement of the case and facts, supra, the trial court in this case has now entered a written order purportedly justifying its decision to impose a sentence in excess of that recommended by the guidelines (A-4-5). This action, respondent contends, renders this issue moot. Appellate courts determine only matters actually before them, and will not give opinions on controversies which cannot have any practical effect in settling the rights of the litigants. Pace v. King, 38 So.2d 823 (1949). It is obvious that the issue presented by petitioner will be determined in a case other than this one, and that no matter how this Court should decide the issue in the instant case it will have no practical impact upon either respondent or petitioner. This Court should therefore decline to reach the issue presented.

On the merits, respondent incorporates by reference as if fully set out herein the arguments made in the following briefs of respondent on the issue involved here currently pending in this Court: State v. Oden, No. 66,650; State v. Jackson, No. 65,857; State v. Hernandez, No. 66,875;

State v. Boynton, No. 66,976; and, State v. Schmidt, No. 67,122.

ISSUE II

CROSS-PETITIONER MUST BE GIVEN AN OPPORTUNITY TO WITHDRAW HIS ELECTION TO BE SENTENCED UNDER THE SENTENCING GUIDELINES IN ORDER TO PRECLUDE A VIOLATION OF THE PROHIBITION AGAINST EX POST FACTO LAWS SECURED BY ARTICLE I, SECTIONS 9 AND 14, UNITED STATES CONSTITUTION, AND ARTICLE I, SECTION 10, FLORIDA CONSTITUTION.

According to the record, at no time during the proceedings in the trial court was cross-petitioner ever informed that his affirmative selection of the guidelines amounted to a waiver of the parole eligibility he would be entitled to if he did not elect guidelines sentencing. Thus, cross-petitioner argued to the district court that he should be given an opportunity to withdraw his decision to elect a guidelines sentence pursuant to ex post facto principles. The district court rejected this argument on authority of several of its previous decisions (A-2).

The very same issue is currently pending in this Court in several cases, including Cochran v. State, No. 66,388, and Brown v. State, No. 66,921. As argument, cross-petitioner incorporates by reference as if fully set out herein the arguments made in the initial and reply briefs of petitioner on the merits filed in Cochran v. State, No. 66,388, and the initial brief of petitioner on the merits filed in Brown v. State, No. 66,921.

ISSUE III

THE DISTRICT COURT ERRED IN APPROVING THE REASONS ASSIGNED BY THE TRIAL COURT FOR IMPOSING A SENTENCE IN EXCESS OF THAT RECOMMENDED BY THE SENTENCING GUIDELINES, SINCE THOSE REASONS ARE NOT CLEAR AND CONVINCING OR WERE IMPROPERLY CONSIDERED.

Cross-petitioner was charged with robbing money belonging to Winn Dixie, Inc., from the custody of H. L. Woodham. He elected to be sentenced pursuant to Florida Rule of Criminal Procedure 3.701, the "sentencing guidelines." The guidelines, as calculated, called for a sentence of seven to nine years. The trial court deviated and imposed a life sentence.

[As a preliminary note, cross-petitioner points out that, since he was being sentenced at the same time for two first degree felonies punishable by life, robbery with a firearm, he should have been given 82 points for "primary offense at conviction," and have been given 14 points for the remaining first degree felony under "additional offenses at conviction," which, when added to the 35 points for "prior conviction," amounts to a grand total of 131 points. Instead, the prepare of the scoresheet treated the robberies as life felonies, both were factored in under "primary offense at conviction," which, when added to the uncontested 35 points for "prior convictions," amounts to a grand total of 157 points. The correct total of 131 points calls for a recommended sentence of 5 1/2 to 7 years.]

Florida Rule of Criminal Procedure 3.701(d)(11) permits

departure from the guidelines for "clear and convincing" reasons. Cross-petitioner argues the trial court erred in deviating from the presumptive sentence set forth in the guidelines, since the reasons assigned by the trial court were not clear and convincing or were improperly considered. It follows that the district court erred in approving the reasons given by the trial court.

Perhaps the major or most substantial factor recited by the trial court for deviating from the guidelines was that two other persons, in addition to the victims, were placed in fear as a result of cross-petitioner's conduct. The record suggests that cross-petitioner and two others approached Trevor Edwards, a store employee, after the business was closed. He was forced to open the door. One of the three robbers held Edwards and another employee, Cameron Leuck, at bay. The two others went into the store office, and robbed money from the person of the manager, Woodham.

At the time cross-petitioner was sentenced, Florida Rule of Criminal Procedure 3.701(d)1(11), provided:

> Reasons for deviating from the guidelines shall not include factors relating to either instant offense or prior arrests for which convictions have not been obtained.

This rule has been amended to replace what was characterized as "cumbersome language" and to clarify its intent. See Amendments to Rules of Criminal Procedure, No. 65,216 (Fla. S.Ct. May 8, 1984) (9 FLW 169). The rule now provides:

> Reasons for deviating from the guidelines shall not include factors relating to prior arrests without conviction. Reasons for deviating from the guidelines shall not include factors relating to the instant offenses for which conviction have not been obtained.

Quite plainly, cross-petitioner and his co-defendant's conduct in pointing a firearm at Edwards and Leuck amounted to aggravated assault contrary to Section 784.021, Florida Statutes (1983). Equally plain is the fact that this conduct was a factor relating to the instant offense, since it all occurred during the same sequence of events. But cross-petitioner was not convicted of these assaults. That being the case, the trial court was in error in relying upon the assaults committed against Leuck and Edwards as a reason for deviating from the guidelines.

Another factor recited by the trial court for deviating from the guidelines involved the large amount of money taken, approximately $13,000.00. Cross-petitioner would initially note that most, if not all, of this money was recovered. Moreover, the taking of something of value was already an element of robbery. Section 812.13, Florida Statutes (1983).

The seriousness of the crime of robbery is already accounted for in calculating the suggested guidelines sentence. Florida law generally prohibits "doubling" of sentencing factors which is, in effect, what the trial court did here. See Mattingly v. Florida Parole and Probation Commission, 417 So.2d 1162 (Fla. 1st DCA 1982)

(impermissible to aggregate sentence for factors already included in the definition of other convictions which were used as aggravating elements) and Provence v. State, 337 So.2d 783 (Fla. 1976) (same aspect of offense cannot be used to establish two separate aggravating circumstances in death penalty statute).

The remaining reasons assigned for departure by the trial court, that petitioner disregarded the property rights of others, is insufficient for two reasons. First, since every robbery includes the taking of property owned by others, every robbery can be viewed as an act contrary to the property rights of others. Use of this factor again amounts to improper doubling; the seriousness of robbery is already accounted for. Second, this factor is so vague and overbroad that it amounts to no reason at all, let alone the required "clear and convincing" reason. See Abbott v. State, 421 So.2d 24 (Fla. 1st DCA 1982) (statute authorizing retention of jurisdiction for reasons stated with individual particularity not satisfied where the trial court retained jurisdiction because of circumstances surrounding the offense and the seriousness of the offense).

Assuming arguendo that this Court is of the view that the reasons recited below are sufficient to support some amount of departure, cross-petitioner requests this Court to review the inordinate length of the departure sub judice.

Cross-petitioner, age 30, received a life sentence.

Assuming a life expectancy of 70 years, the average of the seven to nine guidelines range of eight years, the trial court here imposed a sentence over four times in length over the recommended sentence.

In Minnesota, a sentencing court may depart upward to double the sentence set by the guidelines utilized in the statutory standard of "substantial and compelling" reasons which, of course, is similar if not the same as the Florida standard of "clear and convincing" reasons. A series of cases have established that upward departures greater than double the presumptive sentence require facts "so unusually compelling" that such a departure is justified. State v. Evans, 311 N.W. 2d 481 (Minn. 1981) and State v. Givens, 332 N.W. 2d 187 (Minn. 1983).

Cross-petitioner has previously discussed the facts of the instant robbery and contends that, since it was no more aggravated than any other grocery store robbery, those facts are not "so unusually compelling" to justify more than a double departure, let alone the quadruple departure that occurred sub judice.

By way of an example, cross-petitioner notes the following Minnesota cases which upheld double but not triple departures from the guidelines: State v. Givens, supra (defendant's act of participation in robbery and sexual assault that led to death of the victim at the hands of defendant's accomplice justified double, but not triple, departure from the guidelines); State v. Patch,

329 N.W.2d 833 (Minn. 1983) (double but not more than double departure allowed where defendant kidnapped woman from lot and sexually assaulted her in his car); State v. Proffitt, 323 N.W.2d 34 (Minn. 1982) (double departures allowed in two cases wherein the defendant, in the first case, lured a 15 year old girl to his apartment, placed a butcher knife at her throat, forced her to undress and blindfolded her, than forced her to commit oral and anal sodomy; and, in the second case, defendant entered a day care center, placed a knife at the throat of the operator of the center, robbed her of her rings, got on top of her and kissed her, and then tried to tie her up); and, State v. Schmit, 329 N.W.2d 56 (Minn. 1983) (defendant, who had contemplated killing his wife for a period of time, shot and killed her while she was sleep, disposed of her body where it remained undiscovered for two weeks, deserved double, but not more than double, departure from the guidelines).

The following Minnesota cases illustrate those "so unusually compelling" instances justifying a more than double departure from the guidelines: State v. Van Gorden, 326 N.W.2d 633 (Minn. 1982) (defendant broke into home of 66 year old widow, drug her outside while hitting her, which caused permanent injury, tore off her clothing, forced her to commit fallacio, then penetrated her both anally and vaginally with his penis); State v. Ming Sen Shiue, 326 N.W.2d 648 (Minn. 1982) (defendant kidnapped a six year old boy, beat him to death and hid the body in a concealed area, and

refused to reveal where the body was located for five months, during which time the boy's parents did not know whether he was dead or alive).

The facts of the instant case are not comparable at all to the double departure cases and certainly are not comparable to those few cases allowing for more than double departure. For this reason and the others set out herein, cross-petitioner requests this Court to vacate his present sentence and remand the cause for resentencing within the guidelines or, alternatively, for resentencing to an amount not more than double the guidelines sentence.

V CONCLUSION

Based upon the foregoing analysis and authorities, respondent requests this Court to decline to reach the merits of Issue I, supra, on the ground of mootness or, alternatively, to approve the ruling of the district court. For the reasons advanced in Issue II, supra, cross-petitioner requests this Court to allow him the opportunity to withdraw his election to be sentenced pursuant to the guidelines. For the reasons advanced in Issue III, supra, cross-respondent requests this Court to rule that he is entitled to a sentence of 5 1/2 to 7 years, the sentencing range recommended by the guidelines or, at most, that the trial court cannot impose more than 14 years, a double departure.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand to Ms. Patricia Connors, Assistant Attorney General, The Capitol, Tallahassee, Florida, and a copy has been mailed to Mr. Herman Johnson, Jr., #847194, Post Office Box 221, Raiford, Florida, 32083, this 22nd day of July, 1985.

Carl S. McGinnes

CARL S. McGINNES