IN THE SUPREME COURT, STATE OF FLORIDA

BARRY ALLEN WILLIAMS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 67,369

PETITIONER'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND OF THE FACTS

Barry Allen Williams, the Defendant below, shall hereinafter be referred to as "Petitioner". The State of Florida, Plaintiff below, shall be hereinafter referred to as "Respondent". References to the Record on Appeal shall be designated, (R.__).

Petitioner was charged in a three count Information with the crimes of Burglary of a Dwelling, Grand Theft and Grand Theft Auto. (R.3) On April 4, 1984 Petitioner's court appointed counsel entered a written plea of not guilty to the charges. (R.6)

On May 31st Petitioner entered a plea of guilty to the charges after the reduction of the second count to Petit Theft. (R.7) A Bench Warrant was issued for Petitioner on July 24, 1984 and execution of same was returned on October 10, 1984. (R.28) Petitioner was before the court for sentence on November 13, 1984. The court imposed a sentence of fifteen years as to Count One, sixty days concurrent as to Count Two and five years concurent as to Count Three. (R.29-32)

Petitioner's scoresheet was prepared pursuant to Rule 3.701(C) and was a Category Five scoresheet. (R.44) Pursuant to the scoresheet the Petitioner's presumptive sentence should have been "any non-state prison sanction". The reason given by the court for departing from the guideline sentence was,

> "The Defendant was ROR when guilty plea taken and given a sentence date of 20 July 1984 at 2:00 p.m. He did not appear but fled to Texas and was brought back". (R.44)

At the time Petitioner entered his guilty plea it had been with the understanding that he would be sentenced according to the guidelines. (R.10-11) During the course of the plea colloquy the Petitioner was warned by the court that if he failed to appear for sentencing, the court would not be bound by the terms of the plea argument.(R.20-22)

Petitioner failed to appear for the imposition of sentence. After being apprehended in Texas he was returned to Lee County where he was sentenced on November 12, 1984. Before imposing sentence the court gave the Petitioner the opportunity to explain his failure to appear. Petitioner explained that he had been unable to find employment in Lee County and had gone to Texas to seek employment to support his wife and baby. (R38)

SUMMARY OF ARGUMENT

The sentencing court is required to impose a guideline sentence unless permitted to deviate under Rule 3.701. It is not permissable to deviate from the guideline sentence based on factors relating to the instant offense for which convictions have not been obtained.

Therefore, the sentencing court could not condition imposition of a guideline sentence upon Petitioner's complying with any requirements imposed by the court. Similarly, the sentencing court could not deviate therefrom by reason of Petitioner's failure to appear, wilfull or not, since under F.S. 843.15, this was an offense relating to the instant offense for which a conviction had not been obtained.

I.

THE COURT BELOW ERRED IN SENTENCING APPELLANT OUTIDE THE PRESUMPTIVE GUIDELINE SENTENCE WHERE THE ONLY REASON FOR DEPARTING FROM THE GUIDELINE SENTENCE WAS APPELLANT'S FAILURE TO APPEAR FOR A PRIOR SCHEDULED SENTENCING.

The trial court sentenced Petitioner to fifteen years in state prison on Count I, sixty days on Count II and five years in state prison on Count III. The sentence on Counts II and III to run concurrent with the sentence in Count I. (R.29-32) A scoresheet compiled for Petitioner in accordance with Rule 3.701 Fla. R. Crim. P. found a presumptive sentence in Appellant's case to be "any non-state prison sanction". (R.44)

The trial court based the departure from the guideline sentence upon Petitioner's failure to appear at a previously scheduled sentencing date.

> "You did not report back on the 20th of July at 2:00 p.m. for your sentencing. That released me of my promise to sentence you under the guidelines. And it also gives me good cause to sentence you outside of the guidelines because you have demonstrated by your actions that you cannot be a suitable person to be sentenced to probation." (R.39)

The trial court had conditioned application of the Rule 3.701 Sentencing Guidelines upon three things:

1. that Petitioner's criminal record was as represented
2. that Petitioner appear for his sentencing, and
3. that Petitioner engage in no further criminal activity while awaiting sentencing. (R.21)

The Petitioner did not appear at the scheduled sentencing on July 20, 1984. He had to be returned from Texas. (R.44) Petitioner explained his failure to appear on July 20th as follows:

"I realize what I done, that it was wrong and it didn't solve nothing, your Honor. but, I, you know, I had to make some money for my wife and my baby. I - - I ain't even held my son since I've been back or nothing. And that's the main reason why I left your Honor". (R.38)

Fla. R. Crim. P. 3.701(d)(11) states that departure from the sentencing guidelines should be avoided unless there are clear and convincing reasons to warrant aggravating the sentence. The discretion of the sentencing court in this respect is further limited by the rule that reasons for deviating from the guidelines shall not include factors relating to the instant offense for which convictions have not been obtained. The 1983 Committee Note (b) to Rule 3.701 makes it clear that these principles are binding on the sentencing court.

In analyzing the actions of the sentencing court it is obvious that it sought to avoid the mandatory applicaton of the Sentencing Guidelines by making their application conditional upon Petitioner abiding by the three conditions imposed by the ocurt. This the sentencing court is clearly forbidden to do. Additionally, the sentencing court, in imposing a sentence in excess of the guidelines on Petitioner, violated the prohibition against including factors relating to the instant offense for which convictions have not been obtained. Petitioner's failure to appear was, under the circumstances of the case, a violation of 843.15 Florida Statutes. However, Petitioner was not convicted of this offense. Not having been convicted of the offense it could not have been used as a basis to exceed the presumptive sentence under the Sentencing Guidelines. Rule 3.701(d)(11), Monti v. State 11 F.L.W. 61 (Fla. 5th D.C.A. 1985)

Just as the sentencing court had no authority to deviate from the guideline sentence, it had no authority to refuse to apply the guidelines or to condition their application.

921.001(4)(a) Florida Statutes (1983) requires that the Sentencing Guidelines be applied to all felonies, except capital felonies, committed on or after October 1, 1983. Petitioner's crimes were committed January 12, 1984, thereby making application of the Sentencing Guidelines mandatory in his case. There are no applicable exceptions, the Petitioner not being charged with a capital offense.

The application of the Sentencing Guidelines to a non-capital offense is a statutory mandate and not a matter of judicial discretion. The sentencing court cannot formulate conditions to its application of the guidelines, it must apply them,and it cannot do indirectly, by deviation, that which it cannot do directly by refusing to apply the guidelines. Harms v. State 454 So. 2d 689 (Fla. 1st D.C.A. 1984), Parker v. State 465 So. 2d 1361 (Fla. 1st D.C.A. 1985).

A sentencing court cannot deny application of the Sentencing Guidelines based solely on a failure to appear. Harms v. State 454 So. 2d 689 (Fla. 1st D.C.A. 1984) and Parker v. State 465 So. 2d 1361 (Fla. 1st D.C.A. 1985). Any attempt to distinguish Harms on the basis that the failure to appear of the Appellant in Harms was not willful and that Petitioner's failure to appear was, must fail. Footnote four to the court's opinion in Harms makes clear the circumstances,

> " ... that defendant: is back before the Court for sentencing. He did not surrender himself. ...after he failed to appear ... He was arrest further on one, two counts of armed burglary, one count of attempted armed burglary, one count of attempted murder, one count of possession of a firearm by a convicted felon. ... he failed to appear in Court and then while he was out and under a status of a fugitive, he has been arrested again on several very serious charges".

(Emphasis added) Harms, supra at 690. It is hard to imagine any more willful reason for failure to appear than Harms's. Yet, in the First District a dangerous and violent multiple offender goes free while, in the Second District, a non-violent first offender receives the maximum statutory penalty. The whole purpose of Rule 3.701 is to avoid just

such stunning inequities in criminal sentences, just as it is this Court's duty to resolve conflicts in the law between the various District Court of Appeal.

Upon reflection, it is clear, that the opinions of the First and Fifth Districts, in Harms, Parker and Monti, reflect the spirit and intent of the drafters of the Sentencing Guidelines. The opinion of the Second District, under review sub judice, would continue to allow trial courts to deny the application of the guidelines by allowing the sentencing judge to condition the imposition of a sentence under the guidelines upon fulfillment of non-statutory criteria left to the judges unbridled discretion and in direct contravention of the statutory mandate, or to do indirectly, by deviation, that which they cannot do directly, refuse to apply the guidelines.

CONCLUSION

This Court must harmonize the rulings of the District Court of Appeal by reversing the ruling of the Second District Court of Appeal in Petitioner's case and adopting the holdings of the First and Fifth Districts in Harms, Parker and Monti, that failure to appear for a scheduled sentencing is insufficent reason to impose a sentence in excess of the presumptive sentence under the guidelines and that a trial court cannot refuse to apply the sentencing guidelines by conditioning their application upon appearance by a defendant at a scheduled sentencing.

Petitioner's case should then be remanded to the sentencing court with instructions to impose the presumptive guideline sentence, in his case, any non-state prison sanction.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by regular U.S. Mail to the Attorney General's Office, Park Trammel Building, Suite 804, 1313 Tampa Street, Tampa, Florida 33602 this 28th day of January, 1986.

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