IN THE SUPREME COURT OF FLORIDA

JOHNNY LEE KEYS, JR.,

Petitioner

vs.

STATE OF FLORIDA,

Respondent.

CASE NO 67,504

PETITIONER'S BRIEF ON THE MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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ATTORNEY FOR PETITIONER

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STATEMENT OF THE CASE AND FACTS

Petitioner, JOHNNY LEE KEYS, JR., was charged by information with the crimes of sexual battery, robbery, aggravated battery and two counts of resisting an officer with violence (R7-8). Petitioner entered pleas of guilty to sexual battery, robbery and aggravated battery (R39-56). The resisting an officer charges were dropped by the State (R39).

A sentencing guidelines scoresheet prepared in Petitioner's case shows a total of four hundred twenty-two (422) points in the sexual offenses category (R25). This corresponds to a recommended sentence of twelve to seventeen years incarceration (R26,59-60).

Sentencing was held on December 7, 1984 in the Circuit Court for Putnam County, before the Honorable Robert R. Perry (R59-65). Petitioner was sentenced to one hundred years imprisonment on the sexual battery (R20), one hundred years imprisonment on the robbery (R21), and fifteen years imprisonment on the aggravated battery (R22). All of the sentences were to run consecutive to each other (R62-63). The sentencing judge retained jurisdiction over one-third of the sentence (R69).

The sentencing judge gave the following written reasons for departure:

> 1. In this regard the Court notes the following criminal history of the Defendant as is contained in his Presentence Investigation report:
>
> a. On August 2, 1971, the

Defendant was charged with breaking and entering with intent to commit a felony resulting in his being placed on probation for three (3) years.

b. On November 9, 1973, the Defendant's probation was revoked and he was sentenced to eighteen (18) months in the Department of Corrections.

c. On September 2, 1975, the Defendant was charged with petty larceny for which he was fined and received a suspended jail sentence.

d. On July 6, 1981, the Defendant was charged with sexual battery involving the use of a knife which resulted in the Defendant pleading guilty to aggravated assault for three (3) years in the Department of Corrections from which he was released on July 1, 1983.

e. The instant offenses occurred on September 1, 1984, and have resulted in the Defendant pleading guilty to sexual battery, robbery and aggravated battery.

2. The above criminal history of this Defendant evinces to this Court that his conduct began as non-violent crimes against property and has escalated to very violent crimes involving the theft of property. It is further evident to this Court that the Defendant has been previously afforded probation and has been imprisoned in an effort to curb his criminal activities. Obviously, these punitive measures have been to no avail.

3. The Court further notes the severity of the injuries caused to the victim herein as a direct result of the Defendant's violent anti-social conduct. The victim

> was stabbed in the chest and sexually assaulted requiring both medical and psychiatric attention.
>
> 4. In short, the criminal history of this Defendant, together with the severe victim injury herein, establishes that the Defendant is a continuing and serious threat to the community.
>
> 5. It is patently obvious to this Court that the Defendant is unable to live in a non-structured environment without violating the laws of society and that, therefore, the protection of society requires that he be institutionalized by a term of imprisonment far in excess of that provided under the sentencing guidelines. Accordingly, this Court has imposed sentences totaling 115 years on this Defendant.

(R36-37)

(The sentences actually totaled 215 years).

The lower court also stated some reasons for departure at the sentencing hearing (R64-65). These were: (1) Mr. Keys is a "non-rehabilatable career criminal"; (2) victim injury in excess of physical injury; (3) a favorable plea bargain and ()4) an escalating course of criminal conduct.

On appeal, the Fifth District Court of Appeal struck the retention of jurisdiction. The Court of Appeal also held:

> We find that the reasons set out by the trial judge -- Keys' violation of probation, his escalating course of violent criminal conduct indicating that he is unsuitable for probation or community control and the facts and circumstances relating to the present offenses -- provide clear and convincing reasons supporting departure from

the guidelines. Any reference by the trial judge to impermissible reasons for departure from the guidelines does not vitiate these valid reasons.

This Court accepted jurisdiction over this case on December 12, 1985.

SUMMARY OF THE ARGUMENTS

The reasons for departure from the recommended guideline sentence given by the trial court, and upheld by the Court of Appeal, are improper and not clear and convincing. The trial court abused its discretion by departing from the recommended guideline sentence by two centuries. For these reasons resentencing is called for.

POINT I

WHETHER THE REASONS THE TRIAL COURT GAVE FOR DEPARTURE FROM THE SENTENCING GUIDELINES WERE PROPER.

The first reason given by the trial judge for departing from the guidelines is merely a listing of Appellant's prior criminal record. Since the Court of Appeal's decision in this case, this Court has held that prior record, when used in computing the guidelines sentence, can not be used as a reason for departure, Hendrix v. State, 475 So.2d 1218 (Fla. 1985); Gregory v. State, 475 So.2d 1221 (Fla. 1985).

The lower court's second written reason for departure contains two points. First, the judge states that the Petitioner has shown an escalation of criminal conduct. This is one of the reasons specifically upheld by the Court of Appeal. The reason is, of course, also based on prior record and is improper under Hendrix, supra. At least one Court of Appeal has held that merely elaborating on a defendant's prior record does not create a clear and convincing reason for departure, Smith v. State, 10 FLW 2711 (Fla. 1st DCA December 10, 1985).

The second part of the second reason for departure is that the Petitioner has not responded well to probation and imprisonment in the past. This reason for departure has no logical validity. According to the lower court's listing of the Petitioner's prior record, the longest period of time Petitioner has spent incarcerated is two years between 1981 and 1983. Appellant's recommended sentence in the case at bar is seventeen

to twenty-two years imprisonment (R59-60), a lengthy sentence. It is true that probation and relatively short periods of imprisonment have seemingly not changed Petitioner for the better. Since Petitioner has never been imprisoned for more than two years at a time, it is impossible to say that a twenty-two year sentence will not achieve what a two year sentence failed to do.

The third reason for departure is victim injury. Petitioner did receive forty (40) points on his scoresheet for "penetration or slight injury". The lower court pointed out that the injury involved went beyond the physical. This is the only reason for departure with possible validity, since victim injury has been held to be a clear and convincing reason for departure. Hanover v. State, 10 FLW 2765 (Fla. 2d DCA December 11, 1985); Lerma v. State, 10 FLW 2273 (Fla. 5th DCA October 3, 1985).

It should be noted, however, that victim injury, at least in the physical sense has been used in computing Petitioner's sentence, and thus using it as a reason for departure violates the law of the Hendrix decision.

The fourth written reason for departure is repetitious and merely mentions prior record and victim injury as factors making Petitioner a threat to the community.

The fifth written reason for departure is that Petitioner is "unable to live in a non-structured environment without violating the laws of society". Over a period of thirteen years Petitioner has been convicted of one misdemeanor, a violation of probation and two felonies until the time of the instant offense. Petitioner was on probation from August of 1971 until November of

1973 before violating his probation. Also Petitioner did not commit any crimes for a period of six years from 1975 to 1981. This indicates that Petitioner is capable of staying out of trouble. This aggravating factor is not supported by the record and should be stricken. See Wiggins v. State, 10 FLW 2228 (Fla. 4th DCA September 25, 1985); Wyman v. State, 459 So.2d 1118 (Fla. 1st DCA 1984).

The sentencing judge also gave oral reasons for departure (R64-65). With one exception these reasons are the same as the written reasons. They are not valid in light of State v. Jackson, 10 FLW 564 (Fla. October 17, 1985).

The absence of clear and convincing reasons for departure make it necessary to remand this cause for resentencing.

POINT II

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION BY DEPARTING FROM THE RECOMMENDED GUIDELINE SENTENCE BY TWO HUNDRED YEARS.

Even if this Court decides that one or more of the reasons for departure given in this case are clear and convincing, the trial court erred in departing from the recommended sentence by two hundred years. The Court of Appeal may have been correct in holding that reference by the trial judge to impermissible reasons does not vitiate valid reasons, but the presence of invalid reasons makes resentencing necessary. Albritton v. State, 476 So.2d 158 (Fla. 1985).

The sentence presumed to be correct for a person with Petitioner's prior record, who commits the crimes committed by Petitioner is twelve to seventeen years incarceration (R25-26). In order for Petitioner's recommended sentence to have been life imprisonment he would have to have had four additional third degree felonies on his prior record plus two additional life felonies at conviction.

Petitioner recognizes that the sentencing guidelines are not meant to usurp judicial discretion. But a departure of two centuries, more than eleven times the recommended sentence, based on the reasons given by the trial court, makes a mockery of any idea of relative uniformity in sentencing. The trial judge could hardly have abused his sentencing discretion to a greater extent. Albritton, supra, calls for resentencing, without the

clearly excessive departure imposed by the trial court at the first sentencing.

CONCLUSION

BASED UPON the arguments made and authorities cited herein, Petitioner asks this Honorable Court to reverse the decision of the Fifth District Court of Appeal in this cause.

Respectfully submitted,

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PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon the Honorable Jim Smith, Attorney General, 125 N. Ridgewood Avenue, Fourth Floor, Daytona Beach, Florida 32014; and mailed to Johnny Lee Keys, Jr., Inmate No. 039841, #WU51-1002, Union Correctional Institute, Post Office Box 221, Raiford, Florida 32083, on this 30th day of December, 1985.

Kenneth Witts

KENNETH WITTS
ASSISTANT PUBLIC DEFENDER