

IN THE SUPREME COURT OF FLORIDA

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CLERK, SUPREME COURT

By _____
Chief Deputy Clerk



JOSEPH WILLIAM COLBERT, :
 :
 Petitioner, :
 :
 vs. :
 :
 STATE OF FLORIDA, :
 :
 Respondent. :
 :
 _____ :

Case No. 67,607

DISCRETIONARY REVIEW OF DECISION OF
THE DISTRICT COURT OF APPEAL
SECOND DISTRICT OF FLORIDA

BRIEF OF PETITIONER ON MERITS

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE AND FACTS

The State filed eight separate informations in the Circuit Court for Polk County charging Petitioner, JOSEPH WILLIAM COLBERT, with two armed robberies and six robberies which occurred between November 17, 1983, and January 4, 1984. (R17 - 24, 30 - 37)

On June 19, 1984, Petitioner appeared with counsel before the Honorable Edward F. Threadgill, Jr., Circuit Judge, and entered unnegotiated pleas of nolo contendere to the two armed robbery charges and guilty to the six robbery charges. (R41 - 61) The State's factual basis for the pleas established that Petitioner personally possessed a firearm during one of the armed robberies (R49, 60), but a co-defendant possessed the firearm during the other armed robbery. (R44 - 49, 58)

On July 11, 1984, the court adjudicated Petitioner guilty of all eight offenses and sentenced him to concurrent terms of ten years imprisonment with credit for time served. (R64, 75 - 77, 80 - 112) The court imposed a three year mandatory minimum term for the armed robbery in which Petitioner possessed the firearm. (R75, 82) The guidelines recommended a sentence of six years, with a sentencing range of five and a half to seven years. The court's reason for departure was "Multiple Robberies not scored because Guideline Sheet scores none after 4." (R84)

On appeal, the District Court of Appeal, Second District affirmed the sentences. Colbert v. State, 474 So.2d 218 (Fla. 2d DCA 1985)(Appendix 1). Petitioner filed a timely notice invoking

this Court's discretionary jurisdiction. This Court accepted jurisdiction on January 29, 1986.

SUMMARY OF ARGUMENT

I. Petitioner's offenses were committed between November 17, 1983, and January 4, 1984. He was sentenced on July 11, 1984. The trial court erred by applying the sentencing guidelines rule in effect on the dates of the offenses rather than the rule in effect on the date of sentencing. This error was prejudicial because the amended rule would have eliminated the court's sole reason for departure from the sentence recommended by the guidelines.

II. The trial court's sole reason for departure from the guidelines was that two of Petitioner's additional offenses at conviction were not scored. This was incorrect, because the guidelines used by the trial court considered and scored points for "4⁺" additional offenses at conviction. Furthermore, the adding of extra points for the additional offenses in excess of four under the amended guidelines rule in effect on the date of sentencing would not have changed the recommended sentence. Therefore, the court's reason for departure was not clear and convincing and did not justify the departure.

ARGUMENT

ISSUE I.

THE TRIAL COURT ERRED BY APPLYING
THE SENTENCING GUIDELINES RULE IN
EFFECT ON THE DATES OF THE OFFENSES
RATHER THAN THE RULE IN EFFECT ON
THE DATE OF SENTENCING.

Petitioner was charged with two armed robberies and six robberies which occurred between November 17, 1983, and January 4, 1984. (R17 - 24, 30 - 37) He pleaded nolo contendere to the armed robbery charges and guilty to the robbery charges on June 19, 1984. (R41 - 61) Petitioner was sentenced on July 11, 1984. (R64, 75 - 77, 80 - 112)

In determining the sentencing guidelines recommendation, the trial court used the scoresheet provided by Florida Rule of Criminal Procedure 3.988(c) prior to the 1984 amendments to the rule. (R84) As approved by the court, this scoresheet provided 98 points for the two armed robberies as the primary offense at conviction, 14 points for the six robberies scored as "4⁺" additional offenses at conviction, 5 points for two prior misdemeanors, and 21 points for severe victim injury. The total score was 138 points. The recommended sentence was six years, with a sentencing range of five and a half to seven years. (R84) The court sentenced Petitioner to eight concurrent terms of ten years imprisonment. (R75 - 77, 80 - 112) The court's written reason for departure was "Multiple Robberies not scored because Guidelines Sheet scores none after 4." (R84)

This Court has ruled that the sentencing court must apply the sentencing guidelines rule in effect on the date of sentencing. State v. Jackson, 478 So.2d 1054, 1056 - 1057 (Fla. 1985). Florida Rule of Criminal Procedure 3.988(c) was amended effective July 1, 1984, ten days prior to Petitioner's sentencing. See The Florida Bar: Amendment to Rules of Criminal Procedure (3.70, 3.988 - Sentencing Guidelines), 451 So.2d 824, 832 - 833 (Fla. 1984); Ch. 84-328, §§1 and 3, Laws of Fla. Under the amended version of Rule 3.988(c), Petitioner should have received 16 points for the six robberies scored as additional offenses at conviction rather than the 14 points scored by the trial court. This would have raised Appellant's score to 140 points but would not have changed the recommended sentence of six years. See Fla.R.Crim.P. 3.988(c), as amended eff. July 1, 1984.

The trial court's error in applying the pre-amendment version of Rule 3.988(c), rather than the amended version in effect on the date of sentencing, was prejudicial to Petitioner because it gave rise to the court's sole reason for departure, i.e., the failure to score points for the additional offenses at conviction in excess of four. Had the court applied the amended version of Rule 3.988(c), as required by State v. Jackson, the court would have had no reason to depart from the guidelines recommendation of six years. The court could not have departed on the basis of additional offenses at conviction which were considered and scored in determining the recommended sentence. See Hendrix v. State, 475 So.2d 1218 (Fla. 1985)(reversing departure based upon prior record offenses which were considered and scored

in determining recommended sentence). The decision of the District Court of Appeal, Second District affirming Petitioner's sentences, Colbert v. State, 474 So.2d 218 (Fla. 2d DCA 1985)(Appendix 1), must be reversed and the cause remanded to the trial court for resentencing under the guidelines in effect on the date of sentencing.

ISSUE II.

THE TRIAL COURT'S REASON FOR DEPARTURE FROM THE SENTENCING GUIDELINES WAS NOT CLEAR AND CONVINCING BECAUSE THE ADDITIONAL OFFENSES AT CONVICTION WERE SCORED AND ADDING EXTRA POINTS FOR ADDITIONAL OFFENSES ABOVE FOUR WOULD NOT HAVE CHANGED THE RECOMMENDED SENTENCE.

The trial court's sole reason for departure from the sentence recommended by the guidelines was "Multiple Robberies not scored because Guidelines Sheet scores none after 4." (R84) As argued under Issue I, this reason for departure was invalid because the trial court should have applied the amended version of Florida Rule of Criminal Procedure 3.988(c) which was in effect on the date of sentencing and which would have scored points for all six additional offenses at conviction. Assuming arguendo that the trial court was correct in applying the pre-amendment version of Rule 3.988(c) in effect on the dates of the offenses, the court's reason for departure cannot be found clear and convincing, as required by Florida Rules of Criminal Procedure 3.701(b)(6) and (d)(11), because Petitioner's additional offenses at conviction were considered and scored in determining the recommended sentence, and adding extra points for the offenses in excess of four would not have changed the recommendation.

The guidelines scoresheet, as approved by the trial court, gave Petitioner 14 points for 4⁺ additional offenses at conviction (the six counts of robbery to which Petitioner pleaded guilty), a total of 138 points, and a recommended sentence of six years, with a sentencing range of five and a half to seven years.

(R84) Since 14 points were included for the "4⁺" (actually six) additional offenses at conviction, the trial court was not authorized to depart from the guidelines recommendation on the ground that no points were scored for additional offenses above four. Young v. State, 455 So.2d 551 (Fla. 1st DCA 1984), affirmed, 476 So.2d 161 (Fla. 1985).

In Young the District Court of Appeal, First District ruled,

The opinion of the trial court that the guidelines form does not account for additional felonies beyond four is both inaccurate and an impermissible and unconvincing reason for departure. The form contemplates more than four felonies and clearly states "4⁺".

455 So.2d at 552. The Young decision is supported by this Court's ruling in Hendrix v. State, 475 So.2d 1218 (Fla. 1985), that trial courts are not permitted to depart from the guidelines recommendation on the basis of prior offenses which have been considered and scored in determining the recommendation.

The scoresheet used by the trial court (R84) was prepared in compliance with the original version of Florida Rule of Criminal Procedure 3.988(c) in effect at the time of Petitioner's offenses. Had the scoresheet been prepared under the amended version of Rule 3.988(c) in effect when Petitioner was sentenced on July 11, 1984, (R64, 75 - 77, 80 - 112) two additional points would have been added for the two robberies in excess of four. See The Florida Bar: Amendment to Rules of Criminal Procedure (3.701, 3.988 - Sentencing Guidelines), 451 So.2d 824, 832 - 833 (Fla. 1984); Ch. 84-328, §§1 and 3, Laws of Fla. This would have raised the point total from 138 to 140 (R84) but would not have

changed the recommended sentence of six years. Fla.R.Crim.P. 3.988(c), as amended eff. July 1, 1984.

Since there was no difference in the recommended sentence regardless of whether points were scored for four additional offenses or six additional offenses, no reasonable person could find the court's reason for departure to be clear and convincing under the particular circumstances presented by this case. The guidelines were adopted to establish a uniform set of standards to guide the sentencing judge and to eliminate unwarranted variation in sentencing by reducing the subjectivity in interpreting specific offense and offender-related criteria. Hendrix v. State, 475 So.2d at 1219 - 1220. Since the guidelines took Petitioner's additional offenses at conviction into account in determining the recommended sentence, and since the recommended sentence remained the same whether or not extra points were added for the additional offenses in excess of four, the trial court should not be permitted to depart from the recommendation on the basis of those same additional offenses. The decision of the District Court of Appeal, Second District affirming Petitioner's sentences, Colbert v. State, 474 So.2d 218 (Fla. 2d DCA 1985)(Appendix 1), must be reversed and the cause remanded to the trial court for resentencing in compliance with the guidelines recommendation.

CONCLUSION

Petitioner respectfully requests this Honorable Court to reverse the decision of the District Court of Appeal, Second District, and remand this cause for resentencing in compliance with the recommendation of the sentencing guidelines in effect at the time of sentencing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Office of the Attorney General, Park Trammell Bldg. 8th Floor, 1313 Tampa Street, Tampa, FL 33602, this 18th day of February, 1986.



PAUL C. HELM

PCH:rms