

IN THE SUPREME COURT OF FLORIDA

FILED

MAR 6 1966

CLERK OF SUPREME COURT

CASE NO. 68,146

By: *[Signature]*
Clerk

CHARLES FERGUSON, :
Petitioner, :
v. :
STATE OF FLORIDA, :
Respondent, :
_____ :

BRIEF OF RESPONDENT ON THE MERITS

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IS THE DETERMINATION OF A DEFENDANT AS A HABITUAL FELONY OFFENDER PUR- SUANT TO SECTION 775.084 A SUFFI- CIENT REASON FOR DEPARTURE FROM THE RECOMMENDED RANGE OF THE SENTENCING GUIDELINES?	
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SUMMARY OF THE ARGUMENT

This court should answer the certified question in the affirmative. Reasons that are good enough to support a finding that the public needs the protection of an extended sentence for a given offender are clear and convincing reasons for departing from the presumptive sentence indicated by the guidelines. Every district court to consider the question has reached this result. It is not inconsistent with Hendrix, infra. As the district court recognized, a habitual offender finding requires more than simply the fact of prior offenses. This approach is in keeping with the currently existing notes to the Sentencing Guidelines scheme.

The defendant's proposal for harmonizing the laws is without merit. It is contrary to the Statement of Purpose of the Guidelines rule. It usurps judicial discretion. And, it puts the Habitual Offender Act into a strait jacket leaving only one circumstance that would justify a finding that the public needs protection from a given offender, the defendant's score. To the extent that it repeals the Habitual Offender Act, the construction urged by the defendant is without merit. There is no basis for it in the legislative history of the Sentencing Guidelines Statutes. And, the law does not favor implied repeals. There is room for both statutes to operate fully under the analysis proposed by the state.

PRELIMINARY STATEMENT

This brief refers to the Petitioner in this court as either the defendant, the role he filled in the trial court, or by his name and it refers to the Respondent in this action as the State.

SUPPLEMENTAL STATEMENT OF THE CASE

Neither the Directions to the Clerk as originally filed, R.145, nor the Supplemental Directions to the Clerk, R. 149, call for the trial court's written findings in support of its determination that the defendant should be sentenced as an habitual offender.

SUPPLEMENTAL STATEMENT OF FACT

In addition to noting the number of the defendant's prior offenses as established by the State's evidence and the Pre-Sentence Investigation, the accuracy of which the defendant did not challenge in this regard, the trial court considered the timing of the defendant's offenses in arriving at its determination that an extended period of incarceration for the defendant was appropriate for the protection of the public. In passing its sentence the trial court said:

Mr. Ferguson, I have reviewed the presentence investigation. And I note in there that since the 3rd of July, 1971, that you have what I would call a very extensive criminal record with few, if any, gaps, yearly gaps, in this.

The record shows that you had thirteen convictions during that time, five of them for felonies. This, in and of itself, shows that the recommended sentencing guidelines in this case are ludicrous and completely out of line.

The State has shown by its evidence that you fall into the habitual offender category. Based upon your extensive criminal record, it is clear to this Court that your presence in this community does constitute a danger to it. R.139, 140

The court went on to find the defendant to be a habitual offender and then imposed a ten years sentence on him. R.140

QUESTION PRESENTED

IS THE DETERMINATION OF A DEFENDANT AS A HABITUAL FELONY OFFENDER PURSUANT TO SECTION 775.084 A SUFFICIENT REASON FOR DEPARTURE FROM THE RECOMMENDED RANGE OF THE SENTENCING GUIDELINES?

The State submits the answer to the certified question is an unqualified yes. A finding that a individual defendant should receive an extended period of incarceration for the protection of the public is always a clear and convincing reason for departing from the presumptive sentence indicated by the guidelines. Defendant's argument is simply without merit. It would, in effect, have this court rule that the Sentencing Guidelines scheme, Fla. Stat. §921.001 et seq. together with its attendant rules and forms, Florida Rules of Criminal Procedure 3.701 and 3.988, repealed the Habitual Offender Act, Fla. Stat. §775.084 (1985).

The question certified by the district court is more apparent than real. For example, under the facts of this case the court's finding that the timing of the defendant's prior offenses demonstrated both that he should receive an extended sentence for the protection of the public and that there is a clear and convincing reason for departing from the presumptive sentence indicated by the guidelines.

As the district court recognized in Fleming v. State, No. 85-1115 (Fla. 2d DCA Jan 3, 1986) [11 F.L.W. 112] citing to this court's decision in Eutsey v. State, 383 So.2d 219, 225 (Fla. 1980), a convicted defendant's general course of behavior can support a finding that an extended period of incarceration is necessary where the threshold requirements of the habitual offender statute have otherwise been met. 11 F.L.W. at 113 Likewise, a convicted defendant's general course of behavior, particularly one like the one present here, should provide the basis for a finding that there is a "clear and convincing reason" for departing from the presumptive sentence indicated by the guidelines.

Unlike the situation presented in Hendrix v. State, 475 So.2d 1218 (Fla. 1985), there is more than simply the fact of the prior convictions. There is the temporal pattern in which those offenses occurred. The guidelines make no attempt to take this type of factor into account. The district court's decision recognized a finding that a given defendant should be sentenced as an habitual offender required consi-

deration of more than simply the factors that go into a guidelines score. 11 F.L.W. at 111 In this case it was the timing of the defendant's prior criminal behavior that resulted in the circuit court's decision to protect the public from him by imposing an extended sentence. The First District's recent decision in Crapps v. State, Nos. BC-151 & BC-334 (Fla. 1st DCA Jan. 3, 1986)[11 F.L.W. 488] illustrates this point in another way. That decision concluded that the defendant's "extraordinary vindictiveness and violent character" was both a good reason for imposing an extended sentence for the protection of the public and that the habitual offender finding for which it was the basis was a clear and convincing reason for disregarding the presumptive sentence indicated by the guidelines. There is, in effect a kind of pass through.

This construction of the law is in keeping with the results of every district court decision to address the situation. The district courts that have addressed the question have uniformly held that a finding that an accused should be treated as a habitual offender for the purposes of Section 775.084, Fla. Stat. 1985 is sufficient reason for departing from the presumptive sentence indicated by the guidelines. In addition to this case and Fleming v. State, No. 85-115 (Fla. 2d DCA Jan. 3, 1986)[11 F.L.W. 112] those cases are Crapps v. State, Nos. BC-151 & BC 334 (Fla. 1st DCA Jan. 3, 1986)[11 F.L.W. 488]; Holt v. State, 472 So.2d 551 (Fla. 1st DCA 1985); Howard v. State, 469

So.2d 216 (Fla. 5th DCA 1985); Whitehead v. State, 467 So.2d 779 (Fla. 1st DCA 1985); McCuiston v. State, 462 So.2d 830 (Fla. 2d DCA 1984); Davis v. State, 461 So.2d 1361 (Fla. 2d DCA 1985); Smith v. State, 461 So.2d 995 (Fla. 5th DCA 1985); Gann v. State, 459 So.2d 1175 (Fla. 5th DCA 1984); Cuthbert v. State, 459 So.2d 1098 (Fla. 1st DCA 1984); Brady v. State, 457 So.2d 544 (Fla. 2d DCA 1984).

It is, likewise, in keeping with this court's reported understanding of how these sentencing laws interrelate. The May 8, 1984 revision of the guidelines, The Florida Bar Amend. To Rules, Etc., 451 So.2d 824, *(Fla. 1984) indicates at 12) that the guidelines were not meant to displace alternative sentencing schemes but only to require that the sentencing court express why the alternative program is used in the sentence is to exceed the presumptive sentence indicated by the guidelines.^{1/} That happened in this case. The temporal sequence of defendant's pattern of criminal conduct over the years is both a clear and convincing reason for departing from the guidelines and a valid supporting reason for the sentencing court's conclusion that an extended sentence for this defendant was necessary for the protection of the public.

^{1/}This appears as a note but those notes have been adopted by the court. Joyce v. State, 466 So.2d 433 (Fla. 5th DCA 1985)

The defendant's argument propounds three ways of looking at The Habitual Offender Act and the Sentencing Guidelines scheme. They are as follows: First, use the approach of the district court in this case and rule that a finding that a given individual is a habitual felon for the purposes of Section 775.084, Fla. Stat. (1985) constitutes a clear and convincing reason for departure from the presumptive sentence indicated by his guidelines score. Second, use the method propounded at length in the defendant's argument to this court, permit the use of The Habitual Offender Act only when the number of points on the offender's scoresheet indicates a sentence in excess of the maximum term for which law provides. Finally, treat the Habitual Offender Act as an exception or alternative to the Sentencing Guidelines scheme.

The defendant argues only in favor of the second scheme, limiting the use of enhanced penalties only when the points on the offender's scoresheet indicate a sentence in excess of that otherwise provided by law. This argument is without merit for two reasons. First, it is inconsistent with the Statement of Purpose in the Sentencing Guidelines Rule, Fla. R. Crim. P. 3.701. It is a construction that usurps judicial discretion in the area of sentencing. And, it has the effect of substantially repealing the Habitual Offender Act.

Florida Rule of Criminal Procedure 3.701(b)(6) plainly states that the guidelines are not to usurp judicial discretion in sentencing. It make room of departures based

on clear and convincing reasons. It wisely leaves definition of this term open to development. The defendant's construction would foreclose development of this term with regard to sentences under the Habitual Offender Act. There would, in effect, be only one clear and convincing reason for the imposition of an extended sentence when it is otherwise appropriate, the scoring situation contemplated in the defendant's argument, enough points to indicate a sentence higher than that otherwise contemplated by law. It would outlaw results like that in Crapps supra.

The defendant's argument leaves no room for the operation of the Habitual Offender Act. It creates an irrebuttable presumption that the public only needs protection from offenders who accumulate enough points on their scoresheets to indicate a sentence in excess of that otherwise provided by law. This construction is in conflict with the plain meaning of the statute. It would have the court substitute a particular result under the guidelines, a score indicated a sentence exceeding that for which the applicable statute provides, for the statute's provision that given the appropriate predicate, the court could impose an extended sentence when necessary for the protection of the public. It would have permit only one set of circumstances, a score indicating a sentence exceeding that for which the applicable statute provides, and rule out consideration of matters not factored into the guidelines computation like the one present here, the temporal pattern in which those offenses occurred.

To the extent it does this, it impliedly repeals the act.^{2/} Repeals by implication are not favored and are only to be found where the statutes are irreconcilable. State v. Dunmann, 427 So.2d 166 (Fla. 1983); Town of Indian Shores v. Richey, 348 So.2d 1 (Fla. 1977); State v. Digman, 294 So.2d 325 (Fla.1974). The general presumption is that the legislature passed the later statute, section 921.001 Florida Statutes (1983) (Sentencing Guidelines Statutes), with knowledge of prior existing laws, section 775.084 Florida Statutes (1983) (The Habitual Offender Act) in this case, and the favored construction is one that gives effect to a field of operation for each. Oldham v. Rooks, 361 So.2d 140 (Fla. 1978). There is room for a field of operation for both the statutes at issue here. They are not irreconcilable. The pass through situation leave room for the full operation of both statutes.

^{2/} There is nothing in the Laws of Florida creating the sentencing guidelines scheme that indicates an intent on the part of the legislature repeal section 775.084 Florida Statutes, the Habitual Offender Act. See Whereas clauses and §§ 1,2 & 3 82-145; §2 83-87; § 83-216 & § 84-328 Laws of Florida.

CONCLUSION

WHEREFORE the State prays that this Honorable Court will answer the question certified by the district court in the affirmative ruling that a proper finding that an individual who has been found to be a habitual offender should be sentenced to an extended period of incarceration because such term is necessary to protect the public is a clear and convincing reason for departing from the presumptive sentence indicated by the guidelines on the basis of the above and foregoing reasons arguments and authorities.

Respectfully submitted,

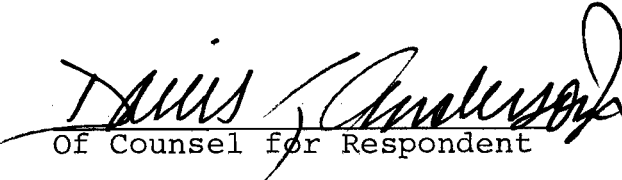
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Ann N. Radabaugh, Assistant Public Defender, Hall of Justice Building, 455 North Broadway, P.O. Box 6140, Bartow, Florida 33830 on this 4th day of March, 1986.


Of Counsel for Respondent