

IN THE FLORIDA SUPREME COURT

DILAR S. BOOKER,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

Case No. 68,400

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

BRIEF OF PETITIONER ON THE MERITS

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PRELIMINARY STATEMENT

Citations to the record on appeal in Booker v. State, Case Nos. 85-508, 85-409 and 85-410 (2d DCA) are designated "R" followed by the appropriate page number. Citations to the prior record on appeal, sub nom Doby v. State, Case Nos. 84-498, 84-499, and 84-500 (2d DCA) are designated "PR" followed by the appropriate page number. An order of the Second District Court of Appeal rendered June 13, 1985 allowed use of the prior record in Booker's appeal to the Second District.

STATEMENT OF THE CASE AND FACTS

Dilar S. Booker, Petitioner, was sentenced to five consecutive terms of five years imprisonment following the revocation of his probation. He appealed to the Second District Court of Appeal which, sub nom Doby v. State, 461 So.2d 1360 (Fla.2d DCA 1984), vacated his guidelines departure sentences because the trial court failed to consider a guidelines score-sheet prior to imposing sentence. Upon remand for resentencing, identical sentences were imposed. In an opinion filed December 13, 1985, the Second District Court of Appeal affirmed these guidelines departure sentences. Booker's motion for rehearing was denied January 28, 1986.

In Hillsborough Circuit Court Case No. 80-4542, Petitioner was charged June 20, 1980 with burglary of a structure (R13). On May 1, 1981, Petitioner pled guilty to this offense (R16). The court withheld adjudication of guilt and placed Petitioner on probation for five years with condition of one year's residence in the county jail (R16-17).

In Circuit Court Case No. 81-4022, Petitioner was charged by a two-count information filed May 8, 1981 with burglary of a structure and second-degree grand theft (R63). These offenses were committed April 27, 1981 (R63). Upon entry of a plea of guilty July 23, 1981, adjudication of guilt was withheld and Petitioner was placed on five year periods of probation for each count (R66). The clerk specifically noted in the "Case Summary" that no warrant was issued to charge violation of the prior probation because the offenses were committed prior to

the date Petitioner's probation commenced (R4). The new periods of probation were made concurrent to each other and to the probation ordered in Circuit Court Case No. 80-4542 (R66).

In Circuit Court Case No. 83-56, a two-count information filed January 17, 1983 charged Petitioner with burglary of a structure and second-degree grand theft (R112). Petitioner pled guilty to these charges May 19, 1983 (R115). The court withheld adjudication of guilt and ordered concurrent probationary terms of five years each to be served concurrently with the previous periods of probation (R115).

Sworn affidavits filed January 23, 1984, charged Booker with violating his several terms of probation by committing strong-arm robbery (R21,71,117). At probation revocation hearings held February 24, 1984 and March 2, 1984 before Circuit Judge Harry Lee Coe III, Michael Singlefield accused Petitioner of demanding repayment of a debt from him on December 11, 1983 (PR108). When Singlefield denied owing Petitioner any money, Petitioner allegedly punched Singlefield and took \$32.50 of the \$36 Singlefield was carrying in his pocket (PR109-110).

Tampa Police Officer David Bryant investigated Singlefield's complaint (PR92). The officer testified that he interviewed Petitioner who denied hitting Singlefield, but admitted demanding payment in return for record albums he had left in Singlefield's custody when he reported to county jail to serve one year as a condition of probation (PR94). While admitting Singlefield was probably afraid of him, Petitioner said Singlefield voluntarily gave him \$18 to \$20 and was given \$5

back when Singlefield said he had no money left (PR94-95). Officer Bryant testified that although Singlefield claimed to have been punched, no evidence at all of any injury was visible (PR95).

Petitioner also testified and confirmed the account of the incident presented by Officer Bryant (PR96-98). The court found Petitioner guilty of violating probation (PR98).

Defense counsel elected guidelines sentencing and requested an opportunity to review the guidelines scoresheet (PR98-99). Commenting "[i]t doesn't matter. I'm giving him the maximum", the trial judge imposed five consecutive prison sentences of five years each without consideration of the guidelines scoresheet (PR99-100). This was held error on appeal to the Second District Court of Appeal which affirmed the revocation of probation, but remanded for resentencing. Doby v. State, 461 So.2d 1360 (Fla.2d DCA 1984). The Doby panel also observed that:

If a trial court...contributes to disparities in sentences...among similarly situated defendants, the purpose of the guidelines would be defeated and there would be a failure to uphold the law.

461 So.2d at 1361.

At resentencing, held January 25, 1985, a guidelines scoresheet was submitted which recommended a non-state prison sanction increased to 12-30 months incarceration because of the violation of probation (R35-36,85-86,131-132,154). The sentencing court deviated from the guidelines and again imposed five consecutive sentences of five years each--a total of

twenty-five years incarceration (R161). As grounds for departure, the sentencing judge cited prior violations of probation where Booker was continued on probation and the strong arm robbery which led to revocation of his probation (R161-162). The prosecutor was directed to prepare a written order specifying the reasons for departure (R162). This "Order of Aggravating Circumstances" was entered and included in the record on appeal (R47-51,98-102,146-150).

On appeal to the Second District Court of Appeal, Booker's sentences were affirmed in a written opinion. See Appendix. The Second District found that the trial court's first reason for departure was proper because of prior "violations occurring in July 1981 and May 1983". Slip opinion p.5 and 6. The second reason for departure was also held appropriate where "the defendant has failed to respond to past rehabilitative efforts, has continued to violate his probation, and has demonstrated an 'evidently escalating criminal involvement'". Slip opinion p.6 and 7.

The Second District also found that the extent of the departure (non-state prison sanction to twenty-five years incarceration) was "somewhat harsh" but not "unreasonable". Slip opinion p.7 and 8. The court certified as a question of great public importance:

WHEN AN APPELLATE COURT FINDS THAT A SENTENCING COURT RELIED UPON A REASON OR REASONS THAT ARE PERMISSIBLE UNDER FLORIDA RULE OF CRIMINAL PROCEDURE 3.701 IN MAKING ITS DECISION TO DEPART FROM THE SENTENCING GUIDELINES, WHAT CRITERIA SHOULD AN APPELLATE COURT ADOPT IN DETERMINING IF THE SENTENCING COURT ABUSED ITS DISCRETION IN ITS EXTENT OF DEVIATION?

Booker's Motion for Rehearing was denied January 28, 1986. A timely Notice to Invoke Discretionary Jurisdiction was filed February 27, 1986 invoking this Court's jurisdiction under the Florida Constitution, Article V, Sections 3(b)(3) and (4).

SUMMARY OF ARGUMENT

The decision of the Second District erroneously approved two grounds for departure from the guidelines recommended sentence found by the sentencing court. The first of these grounds was prior violations of probation not resulting in revocation which allegedly occurred in July 1981 and May 1983. A careful reading of the record shows that Petitioner was not charged with violation of probation for the offenses he pled guilty to in July 1981 because he had committed the offenses prior to the commencement of his probation. The violation of probation occurring in May 1983 resulted in convictions which were scored on the guidelines scoresheet. Therefore, prior violation of probation was not a legitimate reason for departure in the case at bar and considerations of policy suggest that it should not be a clear and convincing reason for departure in any case.

The second ground for departure approved by the Second District was "past criminal history." Although the Second District attempted to distinguish the use of Petitioner's criminal history from the use of prior record disapproved in Hendrix v. State, 475 So.2d 1218 (Fla.1985), the distinction is not persuasive.

On the certified question of great public importance which asks what criteria an appellate court should adopt to determine whether the sentencing court abused its discretion in the extent of deviation from the sentencing guidelines recommended sentence, Petitioner contends the appropriate rule is

that the extent of the departure must be limited to that justified by the reason for departure. An objective, not subjective, analysis of whether sentencing discretion is abused must be adopted.

By analogy to treatment within the sentencing guidelines for a violation of probation resulting in revocation, an idea of the proper weight to be given a violation of probation which does not result in revocation can be determined. While an additional one cell bump on a guidelines departure sentence for a prior unscored violation of probation might be considered reasonable, the nine cell increase actually imposed at bar is excessive and requires reversal.

ARGUMENT

ISSUE I.

THE REASONS FOR GUIDELINES SENTENCING DEPARTURE APPROVED BY THE SECOND DISTRICT'S OPINION ARE NOT VALID REASONS FOR DEPARTURE.

In Hendrix v. State, 475 So.2d 1218 (Fla.1985), this Court held that:

To allow the trial judge to depart from the guidelines based upon a factor which has already been weighed in arriving at a presumptive sentence would in effect be counting the convictions twice which is contrary to the spirit and intent of the guidelines.

Although the opinion of the Second District purported to take Hendrix into account, in fact the decisions are conflicting.

The trial court's written "Order of Aggravating Circumstances" was boiled down by the Second District into two grounds for departure: 1) violation of probation on previous occasions and 2) past criminal history. Slip opinion, p.5. The first reason for guidelines departure was approved noting prior violations of Petitioner's probation occurring in July 1981 and May 1983. The Second District reasoned that this conduct was not factored into the scoresheet.

The so-called July 1981 violation of probation was not in fact a violation of probation as a careful reading of the record would show. Booker pled guilty on July 23, 1981 to two third-degree felonies committed April 27, 1981 (R63,66). While he was on probation in July 1981, that probation had not commenced until he pled guilty to a prior third-degree felony on May 1, 1981 (R16). Therefore, the offenses committed April 27

were not violations of probation because they occurred prior to the commencement of Petitioner's probation. A note by the clerk of the trial court in the "Case Summary" documents this explanation for the absence of a violation of probation (R4).

While the May 1983 violation was in fact a prior violation of probation, it is also evident that it was scored on the guidelines scoresheet in the sentencing court. Petitioner's violation of probation was predicated upon commission of the two third-degree felonies charged in Circuit Court Case No. 83-56. Guilty pleas to these offenses left Petitioner still on probation for the previous offenses, but he also picked up two additional concurrent terms of probation (R115). Upon revocation, these offenses were scored on the guidelines scoresheet as additional offenses at conviction (R35,85,131). Therefore, the May 1983 violation of probation has been already factored into the guidelines recommended sentence and cannot support a departure under the rationale of Hendrix.

Even should this Court agree with the Second District that absence of "a provision factoring in probation violations which occurred between the substantive offense and the current revocation" (Slip opinion, p.6) evades the "double dipping" taboo, the question remains whether prior violations of probation may support a guidelines sentence deviation greater than the one cell departure allowed by Fla.R.Crim.P. 3.701(d)(14). Where a violation of probation is the sole reason for departure from the presumptive sentence, the increase is limited to the next highest cell. Boldes v. State, 475 So.2d 1356 (Fla.5th

DCA 1985). The First District has agreed with this holding, commenting that a violation of probation has now been factored into the guidelines process. Ehrenshaft v. State, 478 So.2d 842 (Fla.1st DCA 1985).

In Riggins v. State, 477 So.2d 663 (Fla.5th DCA 1985), the Fifth District distinguished the situation where a probationer had previously violated his probation, but had been continued on probation until revocation on a later violation. The Riggins court found the prior violation of probation to be grounds for additional departure from the guidelines recommendation. At bar, the Second District cited Riggins as authority for its approval of the trial court's departure sentence. Slip opinion, p.6. See also, Gordon v. State, 10 FLW 2748 (Fla.2d DCA, Dec. 11, 1985); Roberge v. State, 11 FLW 571 (Fla.2d DCA, March 5, 1986).

The problem with utilizing a prior violation of probation as a basis for guidelines departure is that when the court decided to continue the defendant on probation, it necessarily found that the rehabilitative efforts of probation would probably succeed. Revocation of probation conversely presupposes a judgment by the court that the rehabilitative efforts of probation have failed. It is this failure of rehabilitation which supports the increase of one cell from the guidelines presumptive sentence allowed by Fla.R.Crim.P. 3.701(d)(14) without written reasons for departure.

Allowing further sentence departure on a prior violation of probation would be utilizing the prior finding by the

court that the probationer was still a suitable candidate for probation (a positive finding) to support a greater increase in sentence. While we might in hindsight agree that the judge was proved incorrect when the probationer again violated probation, nevertheless it is not logical to aggravate a sentence based upon an earlier finding in mitigation.

As a matter of policy, the trial court should consider only the seriousness of the violation of probation and the probationer's potential for rehabilitation when deciding whether to continue or revoke on a violation of probation. Certainly the process should not degenerate into a gamble where the probationer has the opportunity to risk "double or nothing" on his prison sentence. Consistent with this policy, only probation revocation is a clear and convincing reason for guidelines departure. The first reason approved by the Second District as a ground for departure from the guidelines in Petitioner's sentence should be disapproved by this Court.

Turning to the second ground for departure in Petitioner's sentence, "past criminal history," the Second District approved this reason where:

the defendant has failed to respond to past rehabilitative efforts, has continued to violate his probation, and has demonstrated an "evidently escalating criminal involvement."

(Slip opinion p.6 and 7) Analysis of the factors considered to validate this reason for departure shows that the first two ("failed to respond to past rehabilitative efforts" and "continued to violate his probation") are merely repetitive of the violations of probation cited as the first ground for departure.

At bar, there were no past rehabilitative efforts other than placing Petitioner on probation.

The third of the factors considered ("demonstrated an 'evidently escalating criminal involvement'") is simply not supported by the record. All of Petitioner's convictions were for third degree felonies. Three were for burglary of a structure and the other two were grand thefts which occurred contemporaneously with the burglaries. Moreover, "escalating criminal involvement" itself is suspect as a ground for guidelines departure. See Keen v. State, 11 FLW 221 (Fla.5th DCA, Jan. 16, 1986), dissenting opinion.

To summarize, the Second District has failed to distinguish the trial court's use of Petitioner's "past criminal history" as a ground for departure from the use of prior record disapproved by this Court in Hendrix, supra. Any use of "failure of past rehabilitative efforts" as a reason for departure overlaps the "previous violation of probation" reason for departure. As Petitioner previously demonstrated, "previous violations of probation" was not a sufficient ground to impose a guidelines departure sentence because 1) all previous violations of probation had resulted in convictions which were scored on the guidelines scoresheet, and 2) use of a prior violation of probation which did not result in revocation as a ground for departure beyond the one cell permitted by Fla.R.Crim.P. 3.701(d) (14) is philosophically inconsistent with the rehabilitative purposes of probation and the proper factors to be considered by the court in whether to continue or revoke probation upon its violation.

ISSUE II.

WHEN A GUIDELINES SENTENCING
DEPARTURE IS VALID, THE EXTENT
OF THE DEPARTURE SHOULD BE
LIMITED TO THAT JUSTIFIED BY
THE REASON FOR DEPARTURE.

Without retreating from his contention that there was no valid reason for guidelines departure beyond the one cell bump allowed upon revocation of probation, Petitioner now argues that even if additional sentencing departure was permissible, the sentence imposed at bar was grossly excessive. The Second District characterized the factor of ten departure from 2 1/2 years to 25 years^{1/} as "somewhat harsh" but not unreasonable. While affirming Petitioner's sentence, the court certified the following question as one of great public importance.^{2/}

WHEN AN APPELLATE COURT FINDS THAT A SEN-
TENCING COURT RELIED UPON A REASON OR
REASONS THAT ARE PERMISSIBLE UNDER FLORIDA
RULE OF CRIMINAL PROCEDURE 3.701 IN MAKING
ITS DECISION TO DEPART FROM THE SENTENCING
GUIDELINES, WHAT CRITERIA SHOULD AN APPEL-
LATE COURT ADOPT IN DETERMINING IF THE
SENTENCING COURT ABUSED ITS DISCRETION IN
ITS EXTENT OF DEVIATION?

Petitioner would answer this question by asserting that a sentencing court abuses its discretion when the extent of the departure is not limited to that justified by the reason for departure.

^{1/} Actually the departure from the sentencing guidelines recommendation was even greater. Two and a half years in itself was a departure sentence, although permissible under Fla.R.Crim.P. 3.701(d)(14).

^{2/} This same question was certified by the Second District in Ochoa v. State, 476 So.2d 1348 (Fla.2d DCA 1985), currently pending before this Court, Case No. 67,870.

In Albritton v. State, 476 So.2d 158 (Fla.1985), this Court held that the extent of sentencing departure is subject to appellate review with the proper standard of review being whether the judge abused his judicial discretion. The Albritton court indicated that a reviewing court "should look to the guidelines sentence, the extent of the departure, the reasons given for departure, and the record to determine if the departure is reasonable." 476 So.2d at 160.

Plainly, the Second District did not closely examine the factors cited by the Albritton court in an effort to determine what sentencing departure was appropriate. Instead, the court appears to have taken the view that "discretion is abused only where no reasonable man would take the view adopted by the trial court." Slip opinion p.8, quoting from Canakaris v. Canakaris, 382 So.2d 1197 at 1203 (Fla.1980). From this vantage point, only an irrational decision could be termed an abuse of discretion.

Such a subjective standard does not agree with the intentions of the sentencing guidelines as expressed by this Court. Indeed this Court has declared on several occasions:

One of the purposes of the guidelines is "to establish a uniform set of standards to guide the sentencing judge" and "to eliminate unwarranted variation in the sentencing process by reducing the subjectivity in interpreting specific offense and offender-related criteria and in defining their relative importance in the sentencing decision." [Citations omitted.]

Santiago v. State, 478 So.2d 47 at 48 (Fla.1985). Petitioner suggests that the appropriate interpretation of the "abuse of

discretion" standard is whether a reasonable sentencing judge, desiring to promote the guidelines goal of eliminating "unwarranted variation" in sentencing, could conclude that the extent of the departure from the recommended sentence was justified by the reason for departure.

Applying this standard to the facts at bar, the first step is to identify the reason for departure. At bar, the possible permissible reason for departure approved by the Second District is prior violation of probation which did not result in revocation.

The second step in the process is to compare, when possible, the reason for departure with factors already scored within the guidelines framework. A prior violation of probation not resulting in revocation may be compared to a violation of probation which results in revocation.

The third step is to assess the weight which reasonable judges might give to the reason for departure by comparison with the factor already scored. Reasonable judges might likely disagree as to whether a prior violation of probation not resulting in revocation is entitled to less weight than a violation resulting in revocation; however, reasonable judges would likely agree that more weight should not be given to an infraction which the judge had previously decided did not warrant revocation.

By this analysis, it could be concluded that any departure from the sentencing guidelines recommended sentence which was equal to the increase in sentence provided upon revocation of probation would be a reasonable departure. Since

Fla.R.Crim.P. 3.701(d)(14) allows an increase to the next higher cell of the guidelines range, similar increase of another cell for a violation of probation not resulting in revocation appears to be within the range of judicial discretion.

The Guidelines Scoresheets contained in the record on appeal show that Petitioner scored within the nonstate prison sanction cell of the guidelines range (R35-36,85-86,131-132). A permissible bump of one cell upon revocation of probation yielded a presumptive sentence of 12-30 months incarceration. As explained above, another one cell bump for the written reason of prior violation of probation not resulting in revocation would yield a reasonable guidelines departure sentence of three years.

In fact, the sentencing judge chose to increase Petitioner's sentence by nine cells from the presumptive sentence instead of the one cell called for by the objective analysis of what departure was justified by the reason for departure. Within an objective guidelines framework emphasizing uniformity in sentencing, such disparity must be termed an abuse of discretion.^{3/}

If this Court's mandate in Albritton, supra, that the extent of sentencing departure be reviewed by appellate courts, it is imperative that an objective approach to what constitutes

^{3/} In Thrasher v. State, 477 So.2d 1083 (Fla.1st DCA 1985), the court observed that a prior violation of probation not scored might justify some sentence increase but not the extensive departure from a three year recommendation to twenty years. The case, however, was actually reversed on other grounds.

an abuse of sentencing discretion be adopted. When the Second District first heard Petitioner's appeal, sub nom Doby v. State, 461 So.2d 1360 (Fla.2d DCA 1984), the panel commented:

If a trial court...contributes to disparities in sentences...among similarly situated defendants, the purpose of the guidelines would be defeated and there would be a failure to uphold the law.

461 So.2d at 1361. Although the Doby panel did not direct the trial court to impose a particular sentence, Petitioner interprets the language of the opinion as a strong indication that this panel of appellate judges had deep reservations as to whether any departure sentence was warranted even though the court had "announced what purported to be reasons for departing from the guidelines." 461 So.2d at 136.

From a subjective viewpoint, a determination that a prior violation of probation not resulting in revocation is the type of minimal distinction which does not support any increase in sentence length cannot be termed an unreasonable judicial opinion. At the other end of the spectrum, the Booker panel, examining the same set of facts, termed the sentence which equalled the maximum authorized by the legislature for these offenses to be "somewhat harsh," but not an unreasonable abuse of judicial discretion.

Clearly, if length of departure sentencing is to be contained within the parameters of the guidelines objectives, workable objective criteria for evaluating the extent of a guidelines sentencing departure must be recognized. Petitioner suggests that the cardinal rule should be that the extent of the

sentencing departure should not exceed that justified by the reason for departure. As this Court acknowledged in Canakaris v. Canakaris, supra:

Judges dealing with cases essentially alike should reach the same result. Different results reached from substantially the same facts comport with neither logic nor reasonableness.


382 So.2d at 1203.

CONCLUSION

Based upon the foregoing argument, reasoning and authorities, Dilar S. Booker, Petitioner, respectfully requests this Court to reverse the decision of the Second District Court of Appeal and to order his guidelines departure sentence vacated.

Respectfully submitted,

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