O/A 1-8-87

IN THE SUPREME COURT OF FLORIDA

JESSIE WILLIAMS, III,

Petitioner,

v.

CASE NO. 68,505

STATE OF FLORIDA,

Respondent.

PETITIONER'S INITIAL BRIEF ON THE MERITS

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PETITIONER'S INITIAL BRIEF ON THE MERITS

I PRELIMINARY STATEMENT

Petitioner, as referred to in this brief, was the defendant in the trial court and the appellant in the First District Court of Appeal. Respondent, the State of Florida, was the prosecuting authority and appellee.

The record on appeal consists of three volumes, which will be referred to as "R."

II STATEMENT OF THE CASE AND FACTS

An information charged petitioner with burglary of a dwelling with an assault (Count I); aggravated battery (Count II); and robbery (Count III) (R 8). Petitioner pleaded guilty to burglary of a dwelling with intent to commit an assault (Count I) and aggravated battery (Count II) (R 15-20, 40-47). The recommended guideline sentence was $4\frac{1}{2}$ to $5\frac{1}{2}$ years imprisonment (R 29). In imposing a sentence of 10 years (R 24-28), the trial judge gave the following reasons for his departure:

> This Court having considered the background of the Defendant, his past criminal conduct, record and the goals of sentencing finds as follows:
>
> 1. The Defendant as a juvenile was committed to the Department of HRS for the offense of Arson dated January 11, 1977. He was committed also in Case No. 76-466 for Arson and Burglary of an Occupied Dwelling, and again committed for Shoplifting dated August 18, 1978. At age eighteen (18) years, the Defendant was sentenced to Department of Corrections for three (3) years for Burglary of a Structure dated February 19, 1979 and paroled September 16, 1980. He was charged with violation of his parole on March 3, 1981 having only been out of prison for some six months. On July 10, 1981 the Defendant was again sentenced to the Department of Corrections on the offense of Attempted Burglary for five (5) years. On December 10, 1983 he was discharged as to that sentence and after only approximately ten (10) months committed the instant offense on October 6, 1984.
>
> 2. The continuing criminal behavior since the Defendant's age of sixteen years demonstrates his total disregard for the rehabilitative efforts of the past dispositions for his criminal behavior. There is no hope for rehabilitation of this individual.

> 3. The Defendant served approximately fourteen (14) months on his three (3) year Department of Corrections sentence and some twenty-nine (29) months on the five (5) year Department of Corrections sentence. Under sentencing guidelines for standing convicted of Burglary of a Dwelling with Intent to Commit an Assault and Aggravated Battery, this Defendant would receive a recommended sentence of four and one-half ($4\frac{1}{2}$) to five and one-half ($5\frac{1}{2}$) years which with gain time might allow him to serve less time on these serious violations than he served on his last period of incarceration. This should not be the intent of a sentence and the punishment for his criminal conduct in the present cases should be substantially greater to protect society and deter him in future criminal activities.
>
> 4. To impose the suggested sentence under sentencing guidelines would make a mockery of this court's sentencing goal.
>
> 5. The frequency of the Defendant's criminal conduct and especially in view of the short duration from his previous periods of incarceration with the Department of Corrections demonstrates a need for punishment greater than that provided by Rule 3.701, Fla.R.Crim.P.

(R 22-23).

The District Court affirmed the guideline departure stating, in part:

> [We] view the trial judge's narrative of this defendant's frequent contacts with the criminal justice system as something substantially more than a mere reference to the defendant's prior criminal record. Such a view is consistent with several recent post-Hendrix decisions of our sister courts. See Booker v. State, 482 So.2d 414 (Fla. 2nd DCA 1985); Smith v. State, 480 So.2d 663 (Fla. 5th DCA 1985); Johnson v. State, 477 So.2d 56 (Fla. 5th DCA 1985); and May v. State, 475 So.2d 1004 (Fla. 5th DCA 1985).

> The defendant's continuing and persistent pattern of criminal activity since age 16, together with the timing of such offenses relative to prior offenses and releases from incarceration or supervision, clearly demonstrated the inadequacy of sentences for the subject crimes within the guidelines range. Indeed, as the trial judge suggested in paragraph 3 of his order, a sentence of this defendant for these crimes of only $5\frac{1}{2}$ years would be inordinately low, particularly in light of the liberal gain time provisions of Section 944.275, Florida Statutes (1985).

Williams v. State, 484 So.2d 71, 72-73 (Fla. 1st DCA 1986).

By order of September 3, 1986, this Court accepted conflict jurisdiction. This brief on the merits follows.

III SUMMARY OF ARGUMENT

The trial judge's stated reasons for departure were not clear and convincing. The primary basis for departure was petitioner's criminal history. Since that is a prohibited basis for departure, reversal of petitioner's sentence is mandated.

IV ARGUMENT

ISSUE PRESENTED

THE TRIAL COURT ERRED IN DEPARTING FROM THE RECOMMENDED GUIDELINE SENTENCE BECAUSE THE REASONS GIVEN WERE NEITHER CLEAR NOR CONVINCING.

The trial judge's sentencing order is clearly inadequate to support the departure since its overall import is merely a disagreement with the guidelines range.[1] A departure for that primary reason, with others annexed largely as make-weights and rationalizations, contradicts the entire purpose and philosophy of the guidelines.

Mere disagreement with the guidelines is an invalid basis for a guideline departure. State v. Bellanger, 304 N.W.2d 282 (Minn. 1981) clearly repudiates this practice. Reducing an aggravated sentence to a guideline sentence, the Court said:

> Here, the trial court expressed the view that there is a great deal too much made of "regularity and conformity in sentencing" and his belief that the presumptive sentence of 30 months in prison adopted by the Sentencing Guidelines for one who commits a simple robbery and has a criminal history score of 3 is too lenient. For that primary reason, the court departed from the presumptive sentence and imposed a 48-month prison term. General disagreement with the Guidelines or the legislative policy on which the Guidelines are based does not justify departure.

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[1] Paragraph 4 of the sentencing order expresses this sentiment by stating that "to impose the suggested sentence under sentencing guidelines would make a mockery of this court's sentencing goal."

[Emphasis added]. Id. at 283. Similar sentiments were expressed by Judge Sharp in her dissenting opinion in Hendrix v. State, 455 So.2d 449, 451 (Fla. 5th DCA 1984):

> The trial judge in this case thought the presumptive sentence was too light a punishment for this crime and this defendant with his prior record. I agree. However, the degree of punishment afforded by the guidelines, or lack thereof, should not be grounds for enhancement. The basic problem is the generally light punishments programmed as presumptively correct in the guidelines. The legislature can remedy this problem. However, if in the meantime the courts render the guidelines meaningless by allowing departures in violation of the guidelines rules and mandates, there will be nothing left to remedy.[3] Sentencing guidelines in Florida will become an interesting but failed social experiment.
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>
> [3] The paramount goal of the guidelines is to reduce unwarranted disparity in sentencing. Fla.R.Crim.P. 3.701. Thus, the Guidelines are designed to insure that similarly situated offenders convicted of similar sentences. See Sundberg, Plante, Braziel, Florida's Initial Experience with Sentencing Guidelines, 11 Fla. St. U.L. Rev. 125 (1983). Similarly situated offenders would not be assured of equal treatment if each trial judge is allowed to sentence an offender based upon his or her ideas or philosophy regarding punishment.

This Court has held likewise:

> It is also improper to depart based on the trial court's perception that the recommended sentence under the guidelines is not commensurate with the seriousness of the crime. The raison d'etre of the sentencing guidelines is to develop punishment commensurate with the seriousness of the crime. The different categories of crimes, the various scoring opportunities, and the disparate punishment ranges

> are clearly bottomed on this objective. The guidelines were enacted "to establish a uniform set of standards to guide the sentencing judge" and "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." In re Rules of Criminal Procedure (Sentencing Guidelines), 439 So.2d 848, 849 (Fla. 1983). Accord Santiago v. State, 478 So.2d 47, 48 (Fla. 1985); Hendrix, 475 So.2d at 1219-20. A trial judge may not substitute his own opinion for that of the Sentencing Guidelines Commission simply because he does not agree with the presumptive sentence. Cf. Allen v. State, 476 So.2d 309, 310 (Fla. 2d DCA 1985) (trial judge may not depart simply because he thinks a harsher sentence will deter others). To permit every trial judge to determine his or her own sentence would result in the total elimination of the sentencing guidelines.

Williams v. State, 11 F.L.W. 289, 290 (Fla. June 26, 1986). See also, Scurry v. State, 489 So.2d 25 (Fla. 1986) ("Reason ten, that a lesser sentence is not commensurate with the seriousness of the crime, flies in the face of the rationale of the guidelines. In effect this reason reflects a trial judge's disagreement with the Sentencing Guidelines Commission and is not a sufficient reason for departure." Id. at 29).

Petitioner's criminal record is not a valid basis for departure. Petitioner received a total of 23 points based upon his prior record (R 29). As this Court recognized in Hendrix v. State, 475 So.2d 1218 (Fla. 1985), it would be incongruous to allow his past record to be utilized again to support a departure. As the court noted:

> 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. Accord, State v. Brusven, 327 N.W.2d 591 (Minn. 1982); State v. Erickson, 313 N.W.2d 16 (Minn. 1981); State v. Barnes, 313 N.W.2d 1 (Minn. 1981). We agree with the First District Court of Appeal in that "[w]e find a lack of logic in considering a factor to be an aggravation allowing departure from the guidelines when the same factor is included in the guidelines for purposes of furthering the goal of uniformity." Burch v. State, 462 So.2d 548, 549 (Fla. 1st DCA 1985).

Id. at 1220.

The First District's approval of the departure here by describing the judge's "narrative of this defendant's frequent contacts with the criminal justice system as something substantially more than a mere reference to the defendant's prior criminal record" is a blatant attempt to circumvent this Court's rule in Hendrix. Semantics aside, the stated reasons [with the arguable exception of portions of reason

1, see Weems v. State, 469 So.2d 120 (Fla. 1985)],[2] undoubtedly refer to petitioner's prior record, reasons clearly prohibited by Hendrix. The Minnesota court, in interpreting its sentencing guidelines, has clearly thwarted such circumvention. In State v. Magnan, 328 N.W.2d 147 (Minn. 1983), the trial

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[2] Petitioner urges that the Court reconsider its Weems decision. Petitioner maintains that the prohibition against the use of ancient juvenile adjudications in scoring was based upon a policy decision that such ancient adjudications were simply not relevant to the sentencing decision. [The Florida Sentencing Guidelines manual reflects that the prohibition was so based: "The provision allowing a prior record to decay with the passage of time is similar to rule 609(b), Federal Rules of Evidence." Of course, rule 609(b), disallows impeachment by means of remote convictions.] The notion that remote convictions lack relevancy is not one foreign to Florida Courts. E.g., Braswell v. State, 306 So.2d 609 (Fla. 1st DCA 1975), cert. denied, 328 So.2d 845 (Fla. 1976); Kelly v. State, 311 So.2d 124 (Fla. 3d DCA 1975). In Braswell, the court recognized that a remote conviction cannot be utilized to impeach a criminal defendant testifying in his own behalf. The court's rationale was based upon Winn v. State, 54 Tex.Cr. 538, 113 S.W. 918 (1908), where the court noted:

> Testimony of this character [prior convictions] after a long lapse of years should not have been introduced ... In other words, the law will not permit the early indiscretions of a witness to be brought into requisition to besmirch his subsequent life. To do so, as expressed by Judge Greenlief, ... would be to preclude any possible chance of a reform, and would enable state's counsel to parade the early misdeeds of a subsequently useful life, to be introduced to becloud and discredit the subsequently honorable and useful life.

Id. at 613. It would indeed be an anomaly to allow a remote conviction - deemed too irrelevant to be scored - to then serve as the sole basis for a sentencing guidelines departure. See, Weems v. State, 469 So.2d 128, 130-131 (Fla. 1985) (Boyd, J. dissenting) and Johnson v. State, 483 So.2d 855, 857 (Fla. 5th DCA 1986) (Cowart, J. dissenting).

judge had relied upon the facts concerning the defendant's criminal history and his dangerousness to the public in departing from the guidelines. In reversing that departure, the Minnesota Supreme Court noted:

> Generally the sentencing court cannot rely on a defendant's criminal history as a ground for departure. The Sentencing Guidelines take one's history into account in determining whether or not one has a criminal history score and, if so, what the score should be. Here defendant's criminal history was already taken into account in determining his criminal history score and there is no justification for concluding that a qualitative analysis of the history justifies using it as a ground for departure. State v. Erickson, 313 N.W.2d 16 (Minn. 1981); State v. Barnes, 313 N.W.2d 1 (Minn. 1981). Similarly, the court's belief that defendant is so dangerous that an extended period of incarceration is warranted is not ground for the departure. State v. Hagen, 317 N.W.2d 701 (Minn. 1982).

[Emphasis supplied]. Id. at 150. The court thus recognized that just as a quantitative analysis of a criminal record cannot be a basis for departure, use of a qualitative analysis of the same [i.e., its "length," see State v. Gross, 332 N.W.2d 167 (Minn. 1983); its "character," see Williams v. State, supra ("violent" pattern); its "form," see Scurry v. State, supra (twice before on probation) etc.] is equally verboten.[3]

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[3] Every criminal history or record has a qualitative aspect to it. See Hankey v. State, 485 So.2d 827 (Fla. 1986) ("If we were to allow this circumstance to justify departure we would be forced to uphold departure in nearly all theft and burglary result in economic hardship on the victim. Such a result was obviously not intended when the guidelines were conceived."

In short, the examination and description of the extent or form or content or pattern of a criminal record amounts to no more than use of the criminal record, and is therefore forbidden. Hendrix v. State, supra. Since prior record cannot be a proper basis for departure, reversal of petitioner's sentence is mandated, even assuming, arguendo, that petitioner's juvenile record could be a basis for departure. See State v. Mischler, 488 So.2d 523 (Fla. 1986); Albritton v. State, 476 So.2d 158 (Fla. 1985).

V CONCLUSION

For the reasons stated, petitioner's departure sentence must be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand to Assistant Attorney General Henri C. Cawthon, The Capitol, Tallahassee, Florida; and by mail to Mr. Jessie Williams, III, #067572, Avon Park Correctional Institution, Post Office Box 1100, Avon Park, Florida, 33825, this 29th day of September, 1986.

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