IN THE SUPREME COURT OF FLORIDA

MARVIN RAYMOND BALLARD,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. 68,967
	)	
STATE OF FLORIDA,	)	
	)	
Respondent.	)	
	)	

PETITIONER'S BRIEF ON THE MERITS

RICHARD L. JORANDBY
Public Defender

MARGARET GOOD
Assistant Public Defender
15th Judicial Circuit
9th Floor Governmental Center
301 North Olive Avenue
West Palm Beach, Florida 33401
(305) 820-2150

Counsel for Petitioner.

TABLE OF CONTENTS

AUTHORITIES CITED

OTHER AUTHORITIES

Florida Rules of Criminal Procedure

STATEMENT OF THE CASE AND FACTS

On June 6, 1984, petitioner was charged with burglary of a structure while armed with a knife, a first degree felony (R-163). Petitioner entered a guilty plea on June 27, 1984, and was sentenced to four years probation (R-164). A guidelines scoresheet was (incorrectly) prepared at that time and the recommended range called for probation (R-165).

On November 2, 1984, an affidavit of violation of probation was filed charging that petitioner had violated the law by trafficking in stolen property on October 29 and 30, 1984 (R-166). After a final violation of probation hearing, the trial court found petitioner in violation and revoked his probation (R-143,168).

A new sentencing guidelines scoresheet was prepared (R-170). Petitioner scored 113 points under Category 5; 60 points for a first degree felony as the primary offense at conviction, 48 points under prior record for one second degree felony and four third degree felonies and five points for the number of prior convictions for Category 5 offenses (R-170). This score placed petitioner in the fifth grid, for a recommended sentence of five years, which was elevated to the next grid by reason of the violation of probation; that grid recommended six years imprisonment, with a five-and-a-half to seven year range of discretion.

On January 28, 1985, the court sentenced petitioner to 15 years incarceration and dictated into the record the court's many

reasons for aggravating outside the guidelines (R-156-160, Appendix - 11-16). Petitioner timely appealed. On November 6, 1985, the district court entered a written decision relinquishing jurisdiction for 30 days "with directions to put the grounds in writing or follow the other dictates of Boynton v. State, 473 So.2d 703 (Fla. 4th DCA 1985)," or attach a signed transcript to the scoresheet. Ballard v. State, 477 So.2d 671 (Fla. 1985) (Appendix - 1). The district court further said:

> In complying with the foregoing, we respectfully request the trial judge to reconsider the grounds relied upon in the light of any new case law that has been announced since the date of sentencing, some 15 months ago.

Ballard v. State, supra, (Appendix - 1).

Petitioner moved for rehearing on November 8, 1985, objecting to the decision and maintaining he was entitled to a resentencing with a concomitant right to be present with counsel. Petitioner also complained that giving the trial court an opportunity to delete and change reasons for departure ran counter to Albritton v. State, 476 So.2d 158 (Fla. 1985). (Appendix - 2-4). On December 4, 1985, petitioner's rehearing motion was denied "without prejudice to present these arguments to the trial court." (A-5).[1]

On December 3, 1985, the trial court entered a written order departing from the sentencing guidelines for these two reasons:

---

[1] Thereafter, petitioner attempted to invoke the court's discretionary review jurisdiction to this decision of November 6, 1985, but his request was denied. Ballard v. State, Supreme Court Case No. 68, 122.

> (1.) Continuing pattern of increasing serious offenses. The Court herein incorporates the attached copy of pages 2 and 3 of the January 28, 1985 sentencing hearing.
>
> (2.) The defendant's poor performance on probation and his inability to rehabilitation. The Court herein incorporates pages 4, 5 and 6 of the January 28, 1985 sentencing hearing.

(Appendix - 6).

On January 31, 1986, the district court requested supplemental briefs on the written reasons for departure (A-7), which the parties prepared and filed.

On May 21, 1986, the district court entered its decision that the written reasons made upon relinquishment of jurisdiction complied with the dictates of Boynton v. State, supra, and that the reasons were not invalid under Hendrix:

> In addition, the reasons set forth as grounds for departure from the sentencing guidelines, Ballard's escalating pattern of more serious offenses and his unamenability to rehabilitation, are clear and convincing reasons for departure. We find that the above reasons do not represent the type of "double" consideration of prior offenses prohibited by Hendrix v. State, 475 So.2d 1218 (Fla. 1985), since it is not the prior offenses themselves that are considered but rather the pattern of escalating criminality discernable from them and the evidence that appellant is unamenable to rehabilitation through the probation process.

Ballard v. State, 11 F.L.W. 1179 (Fla. 4th DCA May 21, 1986) (Appendix - 8-9).

Judge Hurley dissented:

> In my view, neither of the reasons stated by the trial court constitutes a clear and convincing reason to depart from the sentencing guidelines. On the contrary, I submit that both reasons violate the general rule which holds that a trial court may not depart from

> the guidelines based upon a factor which has already been weighed in arriving at a presumptive sentence. See Hendrix v. State, 475 So.2d 1218 (Fla. 1985).
>
> The trial court's first reason was the "continuing pattern of increasing serious offenses." The scoresheet, however, reveals that the trial court factored in both the number and the seriousness of prior convictions when it computed the presumptive sentence. Thus, under the Hendrix rule, the trial court should be precluded from placing a new tag on an old factor and counting it a second time.
>
> The same holds true for the trial court's second reason: "The defendant's poor performance on probation and his inability to [achieve] rehabilitation." If, by "poor performance," the trial court is referring to the fact that the defendant violated his probation, the trial court factored that in when it increased the presumptive sentence by one cell pursuant to Rule 3.701(d)(15), Fla.R.Crim.P. On the other hand, if "poor performance" is a veiled reference to the criminal act which triggered the probation violation, that act cannot be factored in because the defendant has not been tried and convicted. Accordingly, I respectfully dissent.

(Appendix - 10).

Mr. Ballard timely petitioned this Court to invoke its discretionary review jurisdiction and this Court accepted jurisdiction and dispensed with oral argument. This brief follows.

SUMMARY OF ARGUMENT

Point I: A departure reason of "continuing pattern of increasing serious offenses" is an invalid departure reason under this Court's decision in Hendrix v. State when that reason is based solely on the record of the defendant's prior convictions. Restating criminal "history" to be a "pattern" does not avoid the Hendrix rule. The number and seriousness of the defendant's prior convictions are already factored into the guidelines score, therefore when a defendant to be sentenced for a felony of the first degree has prior convictions for lesser degrees of felony, the "increase" in degree is already counted and factored against him. The reasoning of this Court in its recent decision of Whitehead v. State, 11 F.L.W. 553 (Fla. October 30, 1986), further prohibits allowing this departure reason as an exception to Hendrix.

Point II: When a defendant is sentenced upon a violation of probation, a departure reason that the defendant is "unamenable to rehabilitation through the probation process," when probation is not an option under the recommended guidelines, is an invalid reason to depart. The defendant's performance on probation has already been factored into the guidelines score due to the automatic elevation of one grid for sentence upon violation of probation. The underlying criminal offense which was the basis for the violation of probation cannot be utilized for a reason for departure because the defendant has not been convicted of

that criminal offense. Furthermore, considering that the defendant is not amenable to probation is an invalid departure reason when based on the defendant's prior record.

Point III: This Court requires that the reasons for departing from the sentencing guidelines be set forth in a contemporaneous writing. Relinquishing jurisdiction for written reasons for departure some 11 months after the sentencing hearing, violates the Court's requirement that the reasons for departure must be reduced to writing contemporaneously. Failure to reduce reasons for departure to writing entitles the defendant to a new sentencing hearing.

ARGUMENT

POINT I

THE DEPARTURE REASON "CONTINUING PATTERN OF INCREASING SERIOUS OFFENSES" IS INVALID AND IMPROPER.

The district court erred in upholding the trial court's first written reason for departure, continuing pattern of increasing serious offenses, as invalid under Hendrix v. State, 475 So.2d 1218 (Fla. 1985); Hendrix holds that reasons already factored into the defendant's scoresheet can not be used as a basis for aggravating the recommended sentence. The number and seriousness of the petitioner's prior convictions have already been counted on the scoresheet. The trial court's written statement of a "continuing pattern of increasing serious offenses" is based on the defendant's prior convictions and is just another way of saying that petitioner had five prior convictions for felonies of a lesser degree when he was convicted for this offense of armed burglary. A trial judge should not be permitted to restate the defendant's prior felony convictions already scored under the guidelines in order to use them as a reason to depart. See Holt v. State, 477 So.2d 59 (Fla. 5th DCA 1985), the court cannot aggravate defendant on a first felony conviction because of a history of many misdemeanors already factored.

In Smith v. State, 479 So.2d 804 (Fla. 1st DCA 1985), the Court held that a finding of "a violent pattern of conduct" cannot be used as a basis for departure where that finding is "apparently based factually on past convictions alone, without

further explanations." 479 So.2d at 808. The Smith decision is based on this Court's holding in Hendrix v. State, supra. In Battles v. State, 482 So.2d 540 (Fla. 3d DCA 1986), the district court invalidated "increasing severity of crimes" as a departure reason because it was based on the defendant's prior record and thus an insufficient reason for departure under Hendrix v. State, 475 So.2d 1218 (Fla. 1985).

Some district courts seem to take the view that a departure reason of a "history of ongoing violence" is invalid but a finding of an "escalating pattern of criminal conduct" is a sufficient reason for departure. Smith v. State, 487 So.2d 663 (Fla. 5th DCA 1985), escalating pattern of criminal conduct valid, and Lee v. State, 486 So.2d 709 (Fla. 5th DCA 1986), that an ongoing history of violence is invalid. The Fifth District found the reason of an "escalating pattern of criminal behavior" to be a valid reason for departure in Floyd v. State, 11 F.L.W. 2143 (Fla. 5th DCA October 9, 1986), under the reasoning that the defendant's criminal record indicated that his criminal behavior was escalating as to frequency and seriousness. This appears to be a departure reason based on timing considerations which is not a factor here.

Petitioner submits that use of the word "pattern" instead of "history" to describe the defendant's prior record does not avoid the rule of Hendrix. See Simmons v. State, 490 So.2d 1285 (Fla. 1st DCA 1986). Calling the defendant a "chronic offender" because the defendant had 26 criminal convictions was found not

to be a valid reason for departure in McCray v. State, 488 So.2d 912 (Fla. 2d DCA 1986). Likewise a "prior criminal record of assaultive behavior" is invalid. Brunson v. State, 11 F.L.W. 1763 (Fla. 3d DCA August 12, 1986). A "pattern" of criminal conduct as evidenced by prior convictions is invalid. Parsons v. State, 11 F.L.W. 1633 (Fla. 2d DCA July 25, 1986). Inadequacy of a recommended sentence indicated by criminal history is an invalid departure reason. Scott v. State, 11 F.L.W. 1684 (Fla. 1st DCA August 5, 1986).

Restating or re-characterizing a defendant's prior criminal record as a "pattern" does not provide a clear and convincing reason for departure that passes muster under the rule of Hendrix v. State. Recently, this Court held that the habitual offender statute cannot be used as a basis for departure from the guidelines, Whitehead v. State, 11 F.L.W. 553 (Fla. October 30, 1986). In determining that the habitual offender stature is an inadequate reason to depart from the recommended guideline sentence, this Court utilized the precise reasoning which should be applied to prohibit the practice of aggravating a defendant based on his "pattern" or "increasing history" of prior criminal conduct, as was done in this case. Since a defendant's prior criminal record is carefully and specifically considered and scored within the guidelines, a defendant's prior record is automatically weighed and results in an enhanced sentence under the guidelines. Sentences under the guidelines automatically escalate in accordance with the number and seriousness of prior convictions. The guidelines take into effect scoring for factors relating to

future danger to society. Whitehead, supra at 553-554. Also, the Court held that the objectives and considerations of the habitual offender statute are fully accommodated by the sentencing guidelines. Just as Whitehead forbids departure based on criteria of the habitual offender statute because such would conflict with the holding in Hendrix v. State, supra, so too the departure reason approved by the district court in this case, would conflict with Hendrix.

Reference to the trial court's finding of an "escalating pattern of more serious offenses" in petitioner's case demonstrates how easily this finding can be substituted for the prohibited departure reason under Hendrix of the defendant's prior convictions. Unlike the circumstances of Floyd v. State, where the defendant's offenses progressed from misdemeanors and petty theft to more serious burglaries and aggravated assaults, here petitioner's record shows no such uniform progression. The trial court incorporated its oral statement at page 2 and 3 (R-155-157) of the January 28, 1985, sentencing hearing in support of this reason for departure. These pages of the sentencing hearing contain a recitation of petitioner's prior record of criminal convictions. The trial court recites petitioner's convictions as progressing from less serious to more serious crime but chronologically, that progression is not reflected by the dates of conviction. Petitioner's first conviction in 1969 was for burglary, in 1973 he was convicted under the Dyer Act for interstate transportation of a stolen vehicle and in 1978 he was convicted of a less serious offense, forgery. In

1981 petitioner was convicted of a presumably minor theft in El Paso for he only received one year imprisonment. Aside from the fact that a trial court may attempt to use this "escalating pattern" reason for departure when it is not factually supported by the record, see Echevarria v. State, 11 F.L.W. 1767 (Fla. 3d DCA August 12, 1986), Fabelo v. State, 488 So.2d 915 (Fla. 2d DCA 1986), under the facts of this case it appears that the district court approved the reason based only on a showing that the defendant had never before been convicted of a first degree felony. Therefore, this conviction is an "escalation" in degree of seriousness from the prior convictions. This Court's reasoning in Whitehead v. State, supra, would prohibit a trial court from concluding that a departure reason of "increasing pattern of serious criminal offenses" based solely on the record of the defendant's prior convictions supports aggravation where the recommended range calls for a lesser sentence after scoring those prior convictions and their seriousness into account. Accordingly, the first written reason given by the trial judge is invalid under Hendrix and Whitehead.

POINT II

THE DEPARTURE REASON "DEFENDANT'S POOR PERFORMANCE ON PROBATION AND HIS INABILITY TO REHABILITATION" IS INVALID AND HAS NO LOGICAL CORRELATION TO THE SENTENCE RECOMMENDED.

The trial court's second written reason for departure is, "The defendant's poor performance on probation and his inability to rehabilitation." (A-6). The district court upheld this reason for departure upon "the evidence that appellant is unamenable to rehabilitation through the probation process." (A-8-9). Although another meaning to this second reason for departure is possible, petitioner will first address the basis on which the district court found this reason to be valid. A trial court should not utilize as a reason for departure a finding that the defendant is not a good candidate for probation when probation is not an option under the recommended guideline range. See Williams v. State, 390 So.2d 1026 (Fla. 1st DCA 1986), Atwaters v. State, 11 F.L.W. 2187 (Fla. 1st DCA October 15, 1986), Stooksbury v. State, 11 F.L.W. 2127 (Fla. 3d DCA October 7, 1986). Obviously, where the guidelines recommended range calls for a jail or prison sentence, a determination that the defendant is not capable of being rehabilitated by probation has no logical correlation to the sentencing decision. In Burch v. State, 462 So.2d 548 (Fla. 1st DCA 1985), the First District observed that reference to the inadequacy of probation to rehabilitate a defendant is invalid as unrelated to a sentencing

decision where a deviation decision does not involve a non-state prison sanction. See also Young v. State, 455 So.2d 551 (Fla. 1st DCA 1984).

This second written reason of the trial court cannot be a "clear and convincing reason" for departure because the confusion it causes as to its meaning demonstrates that it lacks the clarity needed to satisfy the standard which must be employed. State v. Mischler, 488 So.2d 528 (Fla. 1986). This reason might also mean that the defendant is being aggravated because the sentence is imposed upon a violation of probation. A violation of probation is a sufficient basis for an upward departure only to the next higher cell. Florida Rule of Criminal Procedure 3.701(d)(14). For a departure of more than one cell to be permissible, it must be supported by other reasons than the fact that the sentence is imposed upon a violation of probation itself. Boldes v. State, 475 So.2d 1356 (Fla. 5th DCA 1985), Adams v. State, 490 So.2d 53 (Fla. 1986). Since the sentencing guidelines scoresheet used by the trial judge already factored the one cell elevation into petitioner's recommended sentence, violating probation cannot also support further departure to the 15 years metered out by the trial court. Boldes v. State, supra.

A sentencing court's conclusion that the defendant shows poor prospects for rehabilitation is likewise invalid when that conclusion is based on the defendant's prior record. Frank v. State, 490 So.2d 190 (Fla. 2d DCA 1986).

This second written reason for departure concerning the defendant's "poor performance" on probation could also refer to

the criminal act of trafficking in stolen property, evidence of which the trial court had just heard and found to be sufficient to satisfy the conscience of the court that petitioner had violated his probation in a material respect. Since petitioner had not been tried and convicted of trafficking in stolen property, then his "poor performance" on probation as evidenced by his commission of a subsequent criminal offense, could not be considered a reason for departure under the plain wording of the rule. Florida Rule of Criminal Procedure 3.701(d)(11). Because petitioner performed poorly on probation is not a valid reason to impose a sentence of 15 years instead of the six years as recommended by the sentencing guidelines.

POINT III

THE DISTRICT COURT EMPLOYED AN IMPROPER PROCEDURE AND DENIED PETITIONER HIS RIGHT TO BE PRESENT WITH COUNSEL AT RESENTENCING WHEN IT ALLOWED THE TRIAL COURT TO ENTER WRITTEN REASONS FOR DEPARTURE FROM THE SENTENCING GUIDELINES UPON THE DISTRICT COURT TEMPORARILY RELINQUISHING JURISDICTION FOR THIRTY DAYS.

In State v. Oden, 478 So.2d 51 (Fla. 1985), this Court specifically held that the entry of a written order delineating reasons for departure must be contemporaneous with the sentencing of the defendant. Here petitioner was sentenced in January of 1985 and the written reasons were not entered until December of 1985. Neither petitioner nor his counsel were present nor was any resentencing hearing held at the time the trial court complied with the district court's order to enter written findings supporting deviation from the guidelines. Failure to reduce the reasons for departure to writing requires reversal for a new sentencing hearing. State v. Jackson, 478 So.2d 1054 (Fla. 1985), State v. Boynton, 478 So.2d 351 (Fla. 1985), approving Boynton v. State, 473 So.2d 703 (Fla. 4th DCA 1985), State v. Rhoden, 448 So.2d 1013 (Fla. 1984).

In Elkins v. State, 11 F.L.W. 1338 (Fla. 5th DCA June 12, 1986), the district court held that the trial judge's providing its "contemporaneous written statement of reasons" for departure five weeks after the sentencing hearing did not comply with the Oden requirement. The First District Court said in Jones v. State, 11 F.L.W. 1545 (Fla. 1st DCA July 15, 1986), that granting the state's motion to relinquish jurisdiction does not serve

judicial economy, that the better course is to allow the appeal to proceed and to review the orally stated reasons for departure before remanding to the trial court upon a reversal for resentencing.

Perhaps relinquishing jurisdiction is a procedure that might be employed to expeditiously deal with a trial court's failure to provide written reasons for departure as long as the district court's order makes it clear that the trial court can still impose a sentence within the guidelines or, if it intends to depart that the defendant and his counsel should be present when the court pronounces sentence. See Lewis v. State, 11 F.L.W. 2242 (Fla. 4th DCA October 22, 1986).

Further, in petitioner's case, the district court allowed the trial court to reconsider the grounds relied upon to justify the sentencing departure in light of subsequent case law without allowing the trial court to reconsider the sentence imposed on petitioner in the first place. (A-1). The district court had a duty to review the sentence imposed and the reasons given to determine whether impermissible reasons affected the departure sentence imposed. Albritton v. State, supra. This may well be an arduous task for the appellate court, Booker v. State, 482 So.2d 414 (Fla. 2d DCA 1985), but the district court should not simply remand to the trial court to provide a written order and delete impermissible reasons when there is no indication that the state has met the burden of Albritton on appeal. The sentence should be reversed unless the state shows beyond a reasonable

doubt that the absence of the impermissible reasons would not have affected the departure sentence. Griffin v. State, 479 So.2d 739 (Fla. 1985).

Relinquishing jurisdiction for the written reasons to be deleted, revised and changed is not an expeditious procedure when, as in the present case, it requires that the district court call for additional supplemental briefs. Providing a written order and changing the reasons relied on for aggravation may well moot out the initial and answer briefs filed by the parties in the district court. A simple reversal for resentencing where the parties may be present and represented by counsel, have input into the trial court's consideration of reasons for departure and whether they are valid or invalid under current case law, would expedite not only the defendant's receipt of a proper sentence in accordance with the guidelines, but the proper course to be followed on appeal.

This Court should disapprove of the procedure utilized by the district court in this case, to remand for a belated entry of written reasons to support departure as violative of the requirements of a contemporaneous writing under State v. Oden, supra.

CONCLUSION

Based on the foregoing, petitioner respectfully requests this Court to vacate the decision of the district court and to remand for resentencing within the guidelines.

Respectfully submitted,

RICHARD L. JORANDBY
Public Defender

MARGARET GOOD
Assistant Public Defender
15th Judicial Circuit
9th Floor Governmental Center
301 North Olive Avenue
West Palm Beach, Florida 33401
(305) 820-2150

Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by courier, to NOEL PELELLA, Assistant Attorney General, Counsel for Respondent, Elisha Newton Dimick Building, Room 204, 111 Georgia Avenue, West Palm Beach, FL 33401, this 10th day of November, 1986.

MARGARET GOOD
Assistant Public Defender