IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

PETITIONER,

-VS-

EDWARD LEON ROUSSEAU,

RESPONDENT.

CASE NO. 68,973

PETITIONER'S REPLY BRIEF ON THE MERITS

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SUMMARY OF ARGUMENT

As to the certified question, Petitioner advances no further arguments.

Although it is the Petitioner's position that a determination of whether the District Court was correct in finding that two of the reasons given to justify the sentence departure is not dispositive of the certified question herein, the Petitioner nonetheless submits that under the circumstances of this case, both reasons are not only valid but that there are sufficient credible facts to prove beyond a reasonable doubt that these reasons are clear and convincing.

ISSUE I

WHEN AN APPELLATE COURT FINDS THAT A SENTENCING COURT, IN DEPARTING FROM THE PRESUMPTIVE GUIDELINE SENTENCE, RELIED UPON A REASON WITHIN THE THREE CATEGORIES CONDEMNED IN **STATE V. MISCHLER**, 11 F.L.W. 139 (Fla.April 3, 1986), MAY THE APPELLATE COURT APPLY THE HARMLESS ERROR RULE ARTICULATED IN **ALBRITTON V. STATE**, 476 So.2d 158 (FLA.1985) OR IS REVERSAL MANDATED WITHOUT REGARD FOR THE HARMLESS ERROR RULE?

No further arguments will be advanced in support of Petitioner's position on this issue.

ISSUE II

THE DISTRICT COURT CORRECTLY DETERMINED THAT TWO OF THE REASONS GIVEN TO SUPPORT THE SENTENCE DEPARTURE WERE CLEAR AND CONVINCING.

Initially, the Petitioner once again reiterates its position as advanced in its Motion to Strike and contends this issue is beyond the jurisdictional basis upon which this Court's review of the decision below (May 30, 1986) was predicated. In the event this Court determines, however, that the consideration of this issue is necessary to the disposition of the certified question thereby denying the Motion to Strike, the Petitioner herein addresses the issue and submits the District Court was correct in its determination that two of the reasons given to justify Respondent's sentence departure were clear and convincing.

The two reasons upheld were:

1. Rousseau committed three burglaries in a three-week span.

2. His victims suffered psychological trauma.

(Order, April 22, 1986, p. 2).

Respondent in its Brief on the Merits, challenges the validity of the first reason alleging such a ground is manifest error under **Hendrix v. State,** 475 So.2d 1218 (Fla.1985) in that Respondent's scoresheet reflects points were scored for each of the burglaries and thus, to use the manner in which these same offenses were committed, i.e., in a three-week span, to sustain a departure amounts to impermissible doubling. Petitioner argues **Hendrix** is not applicable.

In **Hendrix, supra,** the defendant pled guilty to grand theft. Under the guidelines, he had a total of twenty-five points, the maximum sentence term being "any nonstate prison sanctions." Of the twenty-five points, twelve resulted from Hendrix' prior convictions. Citing this prior record as justification, the trial court departed from the recommended sentence under the guidelines, imposing a sentence of four years imprisonment. On review the Supreme Court held the departure justification invalid, stating:

> [4] In the instant case the trial judge departed from the guidelines based on the defendant's prior criminal convictions. This was not a proper reason for departing. The guidelines have factored in prior criminal records in order to arrive at a presumptive sentence. Fla.R. Crim.Pro. 3.701(b)(4), (d)2-5. Hendrix received 12 points for his prior convictions, out of a total of 25 for the offense for which he was convicted. 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. Thus, pursuant to **Hendrix,** a defendant's prior criminal record cannot be a reason for departing when the score-sheet has already taken into account this factor (the prior record) to arrive at a presumptive sentence.

Sub judice, under the guidelines, Respondent had a total of 50 points, the recommended sentence thus being community

control or 12-30 months incarceration (R 61,68,75). Of the 50 points, 11 resulted from Respondent's prior record. The trial court departed from the above recommended sentence imposing upon Respondent a concurrent 5 year term per count followed by a 10 year probationary period during which time he was ordered to make restitution. The justification given for such a departure was not Respondent's prior record; rather, the justification was Respondent having engaged on a crime spree while committing the primary offenses, i.e., the burglaries were committed on a three-week span. Thus, on its face this case is clearly different from **Hendrix,** and as such, it provides little support for Respondent's contentions.

Respondent, however, argues that it should make no difference when and presumably how the crimes were committed because the fact that additional offenses were committed along with the primary offense is only a reason to increase the score under the guidelines, but is not a reason to aggravate his sentence. The fallacy of Respondent's argument is quite obvious.

First, this is not a case where Respondent's primary offense at conviction was one burglary with the other two burglaries being only additional offenses so that the principles enunciated by the Third District in **Baker v. State,** 466 So.2d 1144 (Fla.3rd DCA 1985), for example, could be said to apply. Rather, Respondent's three burglaries were the "primary offenses" for which he stands convicted. Even Respondent agrees to this much. Secondly, but most importantly, there is nothing in Fla.R.Crim.P. 3.701, prohibiting a trial court from considering aggravating circumstances

and the actions of an accused in the commission of an offense or offenses as a basis for departure. And specifically, there is nothing in Rule 3.701 prohibiting a sentencing court from considering, finding and determining that a defendant's behavior, i.e., engaging on a crime spree, warrants a departure from guidelines' recommended sentences. Moreover, a defendant's engaging on a "crime spree" or committing the offenses within a "time span" is not a factor which is weighed in arriving at a presumptive sentence under the guidelines, simply because under the guidelines there is no way of predicting when and how a particular defendant would commit a crime. Rather, those circumstances can only come into play when considering either aggravating or mitigating the presumptive sentence. Therefore, it is the Petitioner's position that the District Court correctly found that the trial court's first justification for departing is a valid reason. See also, **Manning v. State,** 452 So.2d 136 (Fla.1st DCA 1984); **Swain v. State,** 455 So.2d 533,535 (Fla.1st DCA 1984); **Mincey v. State,** 460 So.2d 396 (Fla.1st DCA 1984); **Thrasher v. State,** 477 So.2d 1083,1084 (Fla.1st DCA 1985); **Saab v. State,** 479 So.2d 845 (Fla.1st DCA 1985); **Decker v. State,** 482 So.2d 511 (Fla.1st DCA 1986); **Palmer v. State,** 11 F.L.W. 1290,1291 (Fla.5th DCA 1986). But see, **Dawkins v. State,** 479 So.2d 818 (Fla.2d DCA 1985).

Concerning the second justification, Respondent concedes emotional hardship or psychological trauma on the victim may be a valid reason to depart from a guidelines' recommended sentence, acknowledging this Court's holding in **Hankey v. State,**

11 F.L.W. 137 (Fla. April 3, 1986). It contends, however, such a reason herein is neither clear nor convincing because there are no credible facts sub judice to prove that reason beyond a reasonable doubt as required by **State v. Mischler,** 11 F.L.W. 139 (Fla.1986). Instead, it claims, all that is present to support the reason in this case is the blanket assertion by the trial court that a victim suffered extensive psychological trauma presumably based upon a letter from one of the homeowners who outlined the effects the burglary had on the family, which effects, if nothing more, only evidences the trauma usually associated with similar crimes.

Implicit in Respondent's allegations is the argument that since the State at the sentencing hearing[1] did not produce the in-court testimony of the victims to prove beyond a reasonable doubt that emotional hardship was present, then the letter and any information therein, can simply never be considered to be "credible" to prove beyond a reasonable doubt that the departure based on this second reason was warranted. But, no court, of which Petitioner is aware of, has ever held that

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1 Although the record undisputedly shows that no in-court testimony by the victims was adduced at Respondent's sentencing, it is quite apparent that the State at a prior sentencing hearing had introduced some testimony by the victims; however, the transcript of such proceeding was not incorporated in the record herein. (R 87, 90-94).

sentencing hearings other than death penalty proceedings have to be full-blown evidentiary hearings or mini-trials for that matter. Quite to the contrary. Florida courts, including this Court, have continuously recognized the validity of using PSI reports to justify an enhanced sentence, particularly when the information contained therein is never objected to or contested as being untrue. See, e.g., **Eutsey v. State,** 383 So.2d 219 (Fla.1980).

Consistent with the above recognition of PSI reports, sub judice, Respondent's investigative report contained a statement (the letter Respondent makes reference to) which in pertinent part, states as follows:

> We have lost many irreplaceable, priceless, family heirlooms and memorabilia.
>
> My military service requires me to be gone for periods of six months at the time. For my peace of mind and my family's safety, I have been forced to install an expensive, reliable, home alarm system, additionally straining my budget.
>
> Traumatized by the break-in, my daughter is unable to stay in the house by herself.
>
> As a direct result of my daughter's fears, my wife has had to reduce her daily working hours to permit her presence at home in time for my daughter's return from school. Although saving for future costs for my children, her reduced hours have caused her to reevaluate her ability to effectively and efficiently contribute to her staff and has led to a decision to terminate working altogether. The present monetary loss and resultant effect that this will create in future years is substantial and incalculable.
>
> We truly feel violated, akin to a rape victim. Our privacy has been invaded, our personal effects stolen, and our psyche devastated. It has been an experience we shall never forget. Had we come home while the individuals were in our house, would we now be seriously injured or even dead?

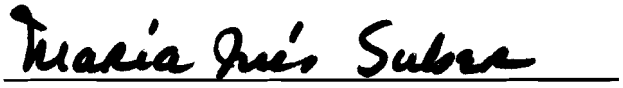
(R 54). However, notwithstanding the fact that Respondent was provided with a copy of the report and its attachments--the record does not reflect otherwise--and thus had a full opportunity to contest the accuracy of the emotional hardship information (he contested the PSI information on other grounds [R 90-94]), he failed to do and as such, Respondent should be estopped from complaining now that there are no "credible" facts to prove beyond a reasonable doubt that the second justification is clear and convincing. Nor can it be said that the trauma suffered by these victims, particularly the daughter, amounts to nothing more than that generally associated with similar victims and crimes. Under the above circumstances, the Petitioner submits the trial court's second justification was likewise clear and convincing and therefore, the District Court was correct in so holding.

CONCLUSION

Petitioner herein reiterates its conclusion as to the correct resolution of the certified question as submitted in its Initial Brief on the Merits. Moreover, if this Court finds it necessary to consider Respondent's Issue II in order to properly resolve the certified question, the District Court's finding that two of the reasons given to justify the sentence departure are clear and convincing should be affirmed.

Respectfully submitted,

JIM SMITH
Attorney General



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief on the Merits has been forwarded to Ms. Ann Cocheu, Assistant Public Defender, Post Office Box 671, Tallahassee, FL 32302, via U. S. Mail, this 27th day of August 1986.

Maria Ines Suber
Assistant Attorney General