

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,
Petitioner,
v.
LARRY TEAGUE,
Respondent.

CLERK OF THE SUPREME COURT
CASE NO. 69,034
Deputy Clerk

_____ /

PETITIONER'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Larry Teague was charged by information on June 6, 1985, with one count of burglary of a structure and two counts of grand theft. (R 241-242)¹ On August 16, 1985, Teague entered a plea of guilty to one count of grand theft in exchange for the state dismissing the other charges, pursuant to a written plea agreement. (R 96-110, 251-254) The state filed notice of intent to prosecute Teague as a habitual offender on September 3, 1985. (R 261-265) Section 775.084 Fla. Stat.(1983).

The sentencing hearing was conducted before Judge Leffler on November 25, 1985. The defense did not dispute two valid, prior convictions for rape in 1972 and armed robbery in 1978. (R 113-117) The state argued that shortly after Teague's release from prison on parole for each crime, he quickly committed other serious felonies, indicating that increased incarceration was necessary for the protection of the public. (R 119-120) The court adopted the state's argument that the timing of the offenses established that increased incarceration was necessary for the protection of the public. (R 130, 134, 138).

A sentencing guidelines scoresheet was prepared; the undisputed recommended guidelines sentence was three and one half to four and one half years in prison. (R 139, 281) The trial court departed and sentenced Teague to eight years in prison. (R 283). The written

¹(R) refers to the record on appeal. § 810.02(3), Fla. Stat. (1983); § 812.014(2)(b) Fla. Stat. (1983).

reason for departure was stated as follows: "After hearing, pursuant to the requirements of 775.084, F.S. the court found the defendant to be a Habitual Offender with enhanced penalty as provided to be necessary for the protection of the public. (Gann v. State) [459 So.2d 1175 (Fla. 5 DCA 84)]" (R 281).

Notice of appeal was timely filed on December 16, 1985. After briefs were filed, the District Court of Appeal, Fifth District, entered its decision on July 3, 1986, quashing the sentence and remanding on the authority of Vicknair v. State, 483 So. 2d 896 (Fla. 5th DCA 1986), pending case number 68,536.

Notice to invoke this honorable court's discretionary jurisdiction was filed by petitioner on July 9, 1986, accompanied by a motion to withhold mandate pending disposition of State v. Vicknair, 68,536, which was granted on August 5, 1986.

This court accepted jurisdiction in this cause on October 22, 1986.

SUMMARY OF ARGUMENT

The guidelines departure sentence imposed in this case should be affirmed because the state established beyond a reasonable doubt that the defendant posed a future danger to society since he demonstrates a pattern of committing serious felonies shortly upon his release from prison on parole.

ARGUMENT

THE TRIAL COURT DEPARTED FROM THE
RECOMMENDED GUIDELINES SENTENCE
BASED UPON THE CLEAR AND CONVINCING
REASON THAT INCREASED INCARCERATION
WAS NECESSARY FOR THE PROTECTION OF
THE PUBLIC, SO THIS SENTENCE SHOULD
BE AFFIRMED.

The written reason for departure given by the trial court was that Teague was found to be a habitual offender pursuant to section 775.084 Florida Statutes (1983), "...with enhanced penalty as provided to be necessary for the protection of the public." (R 281) The district court reversed on the authority of Vicknair v. State, 483 So.2d 896 (Fla. 5th DCA 1986) pending case number 68,536.²

Although the question of whether habitual offender status is a clear and convincing reason for departure was unanswered when the notice and jurisdictional briefs were filed, two recent cases from this honorable court have apparently resolved this question. Whitehead v. State, 11 F.L.W. 553 (Fla. October 30, 1986); Ferguson v. State, 11 F.L.W. 570 (Fla. October 30, 1986).

However, the Whitehead decision states, "Other evidence which establishes beyond a reasonable doubt that the defendant poses a danger to society in the future can clearly be considered justification for a departure from the recommended sentence." Id. at 554. Petitioner contends that the sentence imposed in this case

²This issue is also pending in Payne v. State, 480 So.2d 202 (Fla. 1st DCA 1985), pending case number 68,180; Moultrie v. State, 488 So.2d 558 (Fla. 5th DCA 1986), pending case number 68,945; Crapps v. State, 483 So.2d 544 (Fla. 1st DCA 1986), pending case number 68,485.

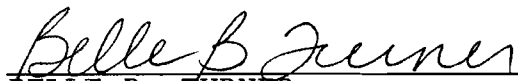
should be affirmed because the trial court specifically determined that Teague posed a future danger to society because he repeatedly committed serious felonies shortly upon his release from prison on parole. This is a valid reason for departure. See also Rodrigue v. State, 481 So.2d 24 (Fla. 5th DCA 1985); Torrey v. State, 482 So.2d 553 (Fla. 2d DCA 1986).

CONCLUSION

Based on the arguments and authorities presented herein, petitioner respectfully prays this honorable court to affirm the judgment and sentence in all respects.

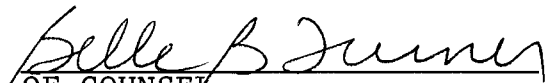
Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Petitioner's Brief on the Merits has been furnished, by deliver, to Michael S. Becker, Assistant Public Defender for Respondent, this 14th day of November, 1986.


OF COUNSEL