IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs. CASE NO. 70,138

CLEDIUS ORLANDO JONES,

Respondent.

_____/

RESPONDENT'S BRIEF ON THE MERITS

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RESPONDENT'S BRIEF ON THE MERITS

I PRELIMINARY STATEMENT

Respondent, CLEDIUS ORLANDO JONES, was the defendant in the Circuit Court of Escambia County, Florida, and the appellant in the First District Court of Appeal. Petitioner, the State of Florida, was the prosecuting authority in the trial court and the appellee in the First District Court of Appeal. Respondent will be referred to herein as "Jones" or "respondent." Petitioner will be referred to herein as "the state."

References to the record on appeal and the supplemental record on appeal will be made by the symbols "R" and "SR", respectively, followed by the appropriate page number in parentheses.

II STATEMENT OF THE CASE AND FACTS

Respondent accepts petitioner's statement of the case and facts with the following additions:

The state moved for rehearing and rehearing en banc to the First District Court of Appeal, arguing that the court's disapproval of the second ground for departure conflicted with prior decisions of the court in Swain v. State, 455 So.2d 533 (Fla. 1st DCA 1984), and Williams v. State, 484 So.2d 71 (Fla. 1st DCA 1986), in which the court approved timing or temporal proximity of the commission of the crimes as a reason for departure. The First District noted that the order in Jones' case made no reference to any particular offenses or the time sequence of their commission, and denied the motion for rehearing (see Exhibit B). The First District then certified the question at issue.

III SUMMARY OF ARGUMENT

The First District correctly held that the trial court's second reason for departure, the certified question, is invalid. The reason is not clear and convincing because it is subject to many differing interpretations. Moreover, these interpretations are invalid as improper in themselves or as not supported by clear and convincing evidence.

IV ARGUMENT

ISSUE

(RESTATED) THE FIRST DISTRICT WAS CORRECT IN HOLDING THAT THE TRIAL COURT'S SECOND REASON FOR DEPARTURE WAS INVALID.

On Motion for Rehearing, the First District certified to this Court the following question as being one of great public importance:

> Is the trial court's conclusion that defendant is a continuing threat to the community due to the fact that the temporal proximity of commission of the crime evinces a total disregard of the property rights of others a valid and sufficient ground for departing from the sentencing guidelines?

Jones v. State, 12 FLW 440 (Fla. 1st DCA Feb. 4, 1987) (see Exhibit B). This certified question is the same as the trial court's second reason for departure in respondent's case.

The state argues that it is "unquestionably clear" that the trial court departed due to the temporal proximity of the commission of the crimes, a reason recently approved by this Court in Williams v. State, 12 FLW 132 (Fla. March 19, 1987). Respondent disagrees. The fatal flaw with the trial court's reason is that it is not clear just what the trial court's reason is for departure.

The First District suggested that this reason might mean that the trial court felt respondent was on a "crime spree." Jones v. State, 12 FLW 247 (Fla. 1st DCA January 13, 1987) (see Exhibit A). The court then correctly held this reason invalid because the record did not clearly and convincingly support

such a contention. The record indicates that Jones was convicted of burglary, grand theft, and dealing in stolen property for crimes occurring in February, 1983, and convicted of dealing in stolen property for conduct occurring in July, 1983 (SR-33-34). These four acts, committed over a period of six months, can hardly be said to constitute a "crime-wave" or "crime-spree." Compare Manning v. State, 452 So.2d 136 (Fla. 1st DCA 1984).

Another interpretation of this reason is that the trial judge felt departure necessary because respondent was a threat to the community. This, however, is not a valid reason for departure. Keys v. State, 12 FLW 56 (Fla. December 24, 1986). As this Court noted in Keys, "We can only observe that proscribed conduct which subjects the actor to criminal sanctions is presumed to be dangerous to the community." 12 FLW at 57. Likewise, as in Keys, in the instant case there is no record showing that this reason is based upon facts other than respondent's prior record which has already been factored into the guidelines.

Yet another interpretation of this reason is that the trial court felt departure was warranted because respondent's crimes evinced a disregard of the property rights of others. This factor, however, is inherent in the crimes for which respondent was convicted (grand theft, burglary, and dealing in stolen property), and thus cannot be used as a reason to depart. Lerma v. State, 497 So.2d 736 (Fla. 1986), State v. Mischler, 488 So.2d 523 (Fla. 1986).

With regard to the state's argument that the reason for departure was the timing of the offenses, on Motion for Rehearing the First District correctly noted that "the order made no reference to any particular offenses or the timing of their commission." 12 FLW at 440. This fact alone makes this case readily distinguishable from the case of Williams v. State, 12 FLW 132 (Fla. March 19, 1987), which forms the crux of the state's argument. To avoid this crucial distinction, the state now argues that it is "entirely appropriate" to refer to the record to determine the sufficiency of the reasons for departure. The state then lists respondent's prior record as stated in the pre-sentence investigation report (PSI) as support for its interpretation of the reason. The problem with the state's argument is two-fold.

Initially respondent contends that the reason for departure itself must be clear and convincing. The state cannot rewrite the trial court's order to convert it into an acceptable reason for departure to fit the state's argument on appeal. Likewise, "[i]t is not the function of an appellate court to cull the underlying record in an effort to locate findings and underlying reasons which would support the order." State v. Jackson, 478 So.2d 1054, 1056 (Fla. 1985). The reason at issue in the instant case which is subject to many differing interpretations and which leaves one to speculate as to its true meaning is not clear and convincing. See Decker v. State, 482 So.2d 511 (Fla. 1st DCA 1986).

Secondly, clear and convincing reasons "require that the

facts supporting the reasons be credible and proven beyond a reasonable doubt." Mischler, supra, at 525. In support of its argument, the state relies upon entries in respondent's juvenile record which, as will be shown, are not clear and convincing.

On appeal to the First District the trial court's first reason for departure, the defendant's extensive juvenile record, was challenged. In holding this reason invalid, the court stated:

> In this case, the judge apparently relied on the presentence investigation for the record of appellant's juvenile offenses. But the PSI does not show any adjudications of guilt, and the record is unclear as to the disposition of many of the juvenile offenses cited by the judge. Of twelve offenses cited, only five show dispositions which suggest convictions. Appellant was undoubtedly adjudicated guilty of some of those offenses, but the record does not show which ones or how many., "Entries in criminal histories which show no disposition, disposition unknown, arrest only, or other non-conviction disposition shall not be scored." Fla.R.Crim.P. 3.701(d)0(5)(a)(1). Nor can such entries be considered clear and convincing evidence for departure. See, Weems v. State, 469 So.2d at 130. On remand, the disposition of any juvenile offenses must be determined in order for them to be used as a reason for departure from the guidelines.

12 FLW at 247.

As this Court granted the state's motion to stay proceedings in this cause, respondent has not been resentenced and, more importantly, no determination has been made as to the disposition of respondent's juvenile offenses. These entries, which have already been determined to be not clear and

convincing, cannot now be relied upon and argued by the state as support for its position.

Because one is left to merely speculate as to the trial court's reason for departure, this reason must fail as not being clear and convincing. Even if the possible interpretations are considered, they are either improper or not supported by the record, and thus are invalid. The First District Court of Appeal was correct in holding this reason invalid. The Petition for Review should be denied.

V CONCLUSION

Based on the argument presented herein, respondent asks this Honorable Court to answer the certified question in the negative and affirm the decision of the First District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand-delivery to John Koenig, Assistant Attorney General, The Capitol, Tallahassee, Florida; and by U.S. mail to Cledius Jones, #884783, Post Office Box 158, Lowell, Florida 32663, on this 27th day of April, 1987.

PAMELA D. PRESNELL