IN THE SUPREME COURT OF FLORIDA

FILED
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SEP 14 1987
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AVERY HIGHSMITH,

Petitioner,

vs. CASE NO. 70,913

STATE OF FLORIDA,

Respondent.

______________________________/

RESPONDENT'S BRIEF ON THE MERITS

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RESPONDENT'S BRIEF ON THE MERITS

PRELIMINARY STATEMENT

Avery Highsmith, was the defendant in the circuit court of Duval County, Florida and the appellant in the First District Court of Appeal and will be referred to hereas "Highsmith". The State of Florida, was the prosecuting authority below and the appellee before the district court and will be referred to herein as "respondent or the state".

The record on appeal consists of three volumes and the presentence investigation report not contained in the bound volume. References to the record on appeal will be made by the

symbol "R" followed by the appropriate page number in parenthesis. The transcript of Highsmith's May 21, 1986 pretrial, pretrial hearings and June 1986 trial and sentencing hearing will be referred to by the "T" followed by the appropriate page number in parenthesis. References to the presentence investigation report will be made by the symbol "PSI" followed by the appropriate page number.

STATEMENT OF THE CASE

Respondent accepts the statement of the case set forth in petitioner's brief on the merits.

STATEMENT OF THE FACTS

Respondent accepts the statement of the facts set forth in the petitioner's brief on the merits with the following additions. The presentence investigation report prepared in this case indicated that Highsmith had a juvenile record comprised of the following criminal activities:

> 10-2-69 breaking and entering, ajudicated delinquent released to parents.
>
> 1-12-70 breaking and entering, 6-5-70: placed on probation, released to custody of mother.
>
> 8-23-70 loitering/resisting arrest, probation continued.
>
> 9-27-70 purse snatching/disorderly conduct, placed in youth detention center.
>
> 11-10-70 assault with a deadly weapon, 1-14-71: placed in intensive probation project.
>
> 6-22-71 vagrancy/habitual loffer, 11-22-71: committed to youth services div. (PSI-3).

None of the above criminal conduct was scored as on the sentencing score sheet.

SUMMARY OF ARGUMENT

Respondent agrees that the certified question herein was disposed of favorably to Highsmith by this court and therefore this cause should be remanded for resentencing to determine if the trial judge would still depart for the valid clear and convincing reason which exist in this record.

The jury was not confused by the instruction given on the defense of voluntary intoxication. Any possible confusion would be attributable to argument of defense counsel and as such invited error is not a basis for reversal.

ARGUMENT

ISSUE I

THE FIRST DISTRICT DID NOT ERR IN AFFIRMING THE EXISTENCE OF VALID REASONS FOR DEPARTURE FROM THE SENTENCE AND GUIDELINES RANGE.

Respondent agrees that this court has already determined in Griffis v. State, 12 F.L.W. 424 (Fla. July 16, 1987) that it will not honor a trial court's finding that it would depart for any one of the reasons given. This case therefore, will be remanded for resentencing.

The question here is whether Circuit Court Judge John Southwood's reliance on Weems v. State, 469 So.2d 128 (Fla. 1985) will be honored by this court. In Hester v. State, 503 So.2d 1342 (Fla. 1st DCA 1987) the First District Court of Appeal below held it was unable to affirm a departure reason based on a criminal defendant's juvenile record where it did not have the benefit of the PSI report. In Hester the trial court had considered the fact that the defendant was currently 24 years old and had a criminal record which began at age 12. Here, the defendant's criminal activity for which he was ajudicated delinquent begins at age 14 and includes six separate instances of criminal conduct between the ages of 14 and 15. (PSI-3). Interestingly enough, three of the juvenile offenses involved either breaking and entering or purse snatching so it would appear obvious that Highsmith's juvenile experience did not

temper or alter his criminal mind set. This court stated in Weems that:

> "The fact that Weems had a multitude of juvenile dispositions for previous burglaries was certainly material to the sentencing process and may be considered by the trial court in deciding on an appropriate sentence under the circumstances. The district court correctly concluded the trial court did not abuse its discretion in departing from the guidelines in this case." Id. at 130.

Respondent would note that four of the Justices comprising the majority opinion in Weems are still on the court and will stand by their earlier decision. In fact, the lone dissenter in Weems has retired from court. Therefore, respondent has demonstrated the existence of a valid reason for departure and the sole act remaining to close this case is a remand to the trial court to determine if he would impose the same ten year sentence based on this reason.

Moreover, respondent has not abandoned the validity of escalating pattern of criminality as a basis for departure. Keys v. State, 500 So.2d 134 (Fla. 1986). There is no apparent necessity to argue this point given the clear validity of the unscored juvenile record.

ISSUE II

THE TRIAL COURT DID NOT ERR IN INSTRUCTING THE JURY ON THE DEFENSE OF VOLUNTARY INTOXICATION.

Highsmith also argues that the trial judge's ommission of the explanation that voluntary drunkenness, intoxication and partial intoxication mean "impairment of the mental faculties by the use of narcotics or other drugs" from his purposed jury instruction was reversible error (R 44; T 311-312; T 343-344). The state disagrees.

Defense counsel requested an instruction on the implausible affirmative defense of voluntary intoxication and the jury was so instructed. Defense counsel disingenuously argued that the defendant was impaired by alcohol but not intoxicated. In other words, defense counsel sought to void the nasty connotation of voluntary drunkenness in favor of the euphemistic term "impairment".

Jurors are presumed to behave rationally and will not be led astray to wrongful verdicts by the illogical and inconsistent arguments of counsel. Blair v. State, 406 So.2d 1103, 1107 (Fla. 1981). Highsmith's argument improperly presumes that his jurors were so obtuse that they could not have divined that a condition of "voluntary drunkenness or intoxication" could also render him "incapable of forming an intent to commit a crime" without further judicial guidance. This jury was not confused nor

mislead by the trial judge's clear and substantially complete instructions as was in the case in Clark v. State, 461 So.2d 131 (Fla. 1st DCA 1984) and Blitch v. State, 427 So.2d 785 (Fla. 2d DCA 1983). The only possible confusion of the jury would have resulted from defense counsel's inconsistent and meaningless attempt to distinguish drunkenness from impairment. If any distinction exist is purely one of semantics. This point is without merit.

CONCLUSION

Respondent agrees this case should be remanded to the trial court for resentencing. This court should affirm the judgment entered by the trial court.

Respectfully submitted,

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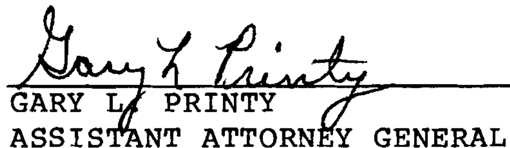
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by hand delivery to Pamela D. Presnell, Assistant Public Defender, Post Office Box 671, Tallahassee, Florida 32302 on this 14th day of September, 1987.



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