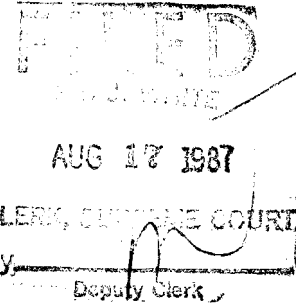


IN THE SUPREME COURT OF FLORIDA



STATE OF FLORIDA,

Petitioner,

vs.

CASE NO. 70,918

DANIEL F. JAGGERS,

Respondent.

PETITIONER'S BRIEF ON THE MERITS

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PETITIONER'S BRIEF ON THE MERITS

PRELIMINARY STATEMENT

Daniel F. Jagers, the criminal defendant and appellant below, will be referred to herein as Respondent. The State of Florida, the prosecution and appellee below, will be referred to herein as Petitioner.

Citations to the sequentially numbered record on appeal, which consists of one record volume, one transcript volume, and one supplemental record volume, will be indicated parenthetically as "R" with the appropriate page number(s).

The decision of the lower court herein, a copy of which has been attached hereto as an appendix, is currently reported as Jagers v. State, 12 F.L.W. 1528 (Fla. 1st DCA June 23, 1987).

STATEMENT OF THE CASE AND FACTS

Respondent was convicted of committing a lewd and lascivious act upon a child under the age of fourteen (a female, six years of age (R 11)), in violation of Florida Statutes §800.04 (R 5) and was sentenced to fifteen years in prison (R 7), a sentence in excess of the guidelines recommended range. In the original appeal of this cause, the lower court affirmed Respondent's judgment, reversed the sentence and remanded the cause for resentencing because "[t]he trial judge apparently did not have a proper guidelines scoresheet before him when he imposed the [Respondent's] sentence." Jaggers v. State, 492 So.2d 418 (Fla. 1st DCA 1986).

Upon remand, a proper scoresheet was prepared indicating a recommended sanction of community control or twelve to thirty months incarceration (R 9). The trial judge imposed a departure sentence of fifteen years based upon the following written reasons:

1. In December, 1976, Mr. Jaggers was charged with Child Molestation by the Grand Jurors of the State of Missouri. On November 10, 1977, the Circuit Court of St. Louis found Mr. Jaggers to be a "criminal sexual psycopath" and committed him to a Mental Health State Hospital for treatment and detention. Less than three years later, Mr. Jaggers was conditionally released from the Mental Hospital and placed on probationary status for three years. Thereafter, he came to Florida and committed the

instant offense on October 31, 1981, while still on probationary status from the State of Missouri. Past attempts to rehabilitate and treat Mr. Jagers in mental hospitals and/or the community for his sexual deviancy have failed. Since this was not scored on the scoresheet, this Court considers this information relevant in determining the appropriate sentence for Mr. Jagers.

2. Mr. Jagers has admitted and his psychologists confirm that he can not control his problem with young girls without some type of external controls. Community based supervision has failed to deter Mr. Jagers from committing illegal sexual acts and his medical records indicate if he is placed in society, he will revert back to criminal behavior. The public, especially young children, has a right to be protected from a criminal who cannot or will not be rehabilitated.

3. While the scoresheet allows for physical injuries, the Court considers the mental trauma done to the six year old victim to be a valid reason for departure. The Court observed the victim's emotional state during her testimony at trial and has heard the testimony of the victim's mother as to how this incident has affected the child's life.

4. A Guideline Sentence of community control or twelve to thirty months incarceration is insufficient to provide the appropriate retribution, deterrance or rehabilitation of Mr. Jagers.

For all the above reasons, this Court hereby declares the Sentencing Guidelines' recommendation of community control or twelve to thirty months incarceration to be inadequate. For the protection of the people of the

State of Florida, and because of the above reasons, this Court hereby exceeds the guidelines and sentences of Mr. Jagers accordingly.

(R 11, 12).

Subsequently, Respondent perfected a second appeal to the lower court claiming that the trial judge erred in imposing a sentence upon him in excess of the guidelines recommended range. The lower court found all of the trial judge's reasons for departure to be invalid, once again reversed the sentence, and certified the following question:

WHETHER, PURSUANT TO ITS RECENT RULING IN WILLIAMS III V. STATE, 504 SO.2d 392 (FLA. 1987), A COMMITMENT TO A MENTAL INSTITUTION FOR OTHER THAN A CRIMINAL CONVICTION AND THE SUBSEQUENT CONDITIONAL RELEASE OR SUPERVISION STATUS THAT EXISTED AT THE TIME OF THE CRIME, ARE VALID REASONS FOR DEPARTURE FROM THE GUIDELINES?

Jagers v. State, 12 F.L.W. 1528 (Fla. 1st DCA June 23, 1987).

Pursuant to this Court's Briefing Schedule issued July 28, 1987, Petitioner's Brief on the Merits follows.

SUMMARY OF ARGUMENT

Petitioner first argues that consideration of Respondent's Missouri commitment as a criminal sexual psychopath and his status subsequent thereto as evidence of his future dangerousness and unaminability to rehabilitation is not proscribed either by Fla.R.Crim.P. 3.701(d)(11) regarding departures based upon prior arrests without convictions or this Court's ruling in Hendrix v. State, infra, which precludes basing departure upon factors used in determining the guidelines recommended range.

Petitioner next argues that only one of the trial judge's reasons for departure, psychological/emotional trauma to the victim, was arguably invalid and that the absence of that reason, beyond a reasonable doubt, would not have affected the departure herein.

Accordingly, Petitioner requests that the decision of the lower court be quashed and Respondent's sentence in excess of the guidelines recommended sanction be affirmed.

ARGUMENT

ISSUE

WHETHER, PURSUANT TO ITS RECENT RULING IN WILLIAMS III V. STATE, 504 SO.2d 392 (FLA. 1987), A COMMITMENT TO A MENTAL INSTITUTION FOR OTHER THAN A CRIMINAL CONVICTION AND THE SUBSEQUENT CONDITIONAL RELEASE OR SUPERVISION STATUS THAT EXISTED AT THE TIME OF THE CRIME, ARE VALID REASONS FOR DEPARTURE FROM THE GUIDELINES? [Certified Question].

The trial judge's first two statements of reasons for departure, which gave rise to the question certified by the lower court, were:

1. In December, 1976, Mr. Jagers was charged with Child Molestation by the Grand Jurors of the State of Missouri. On November 10, 1977, the Circuit Court of St. Louis found Mr. Jagers to be a "criminal sexual psychopath" and committed him to a Mental Health State Hospital for treatment and detention. Less than three years later, Mr. Jagers was conditionally released from the Mental Hospital and placed on probationary status for three years. Thereafter, he came to Florida and committed the instant offense on October 31, 1981, while still on probationary status from the State of Missouri. Past attempts to rehabilitate and treat Mr. Jagers in mental hospitals and/or the community for his sexual deviancy have failed. Since this was not scored on the scoresheet, this Court considers this information relevant in determining the appropriate sentence for Mr. Jagers.

2. Mr. Jagers has admitted and his psychologists confirm that he can

not control his problem with young girls without some type of external controls. Community based supervision has failed to deter Mr. Jagers from committing illegal sexual acts and his medical records indicate if he is placed in society, he will revert back to criminal behavior. The public, especially young children, has a right to be protected from a criminal who cannot or will not be rehabilitated.

(R 11). The lower court found these reasons invalid because the Missouri offense resulting in Respondent's commitment pursuant to Missouri Statutes, Chapter 202.700 et seq (R 77, 78), fell into the "arrest only or other non-conviction disposition" category and generally because:

We believe that an affirmance of the trial court's first and second reasons for departure, which are based upon appellant's history of mental disorder and civil commitment, would set an undesirable precedent with respect to individuals who commit offenses while on conditional release from mental health institutions in Florida. We are unwilling to suggest that these individuals' mental disorders and civil commitment histories should be valid bases for departure in sentencing them to lengthy state prison terms for a subsequent criminal conviction.

Jagers v. State, supra at 12 F.L.W. 1530.

Initially, Petitioner contends that the lower court's construction of the certified question misses the mark on the facts of this case. The trial judge's first two statements

quoted above, do not constitute reliance upon the fact of Respondent's Missouri commitment and status subsequent thereto as a reason for departure in and of itself. Rather, the statements demonstrate that the trial judge looked to this fact along with the proffered testimony of Dr. Zeitouni (R 13, 14) and Respondent's statement at the sentencing proceeding (R 57-60) as evidence of Respondent's lack of positive response to treatment indicating his continued danger to society. In other words, the trial judge set forth an historical perspective of Respondent's nefarious conduct, recognized that Respondent's past hospitalization was fruitless, and reached the conclusion that Respondent's demonstrated inability to control his aberrant sexual conduct poses a real and continued threat to the female children he encounters, necessitating imposition of the maximum term of incarceration provided by law¹ to assure the protection of society. Thus, the question actually before this Court is whether the trial judge properly could have considered Respondent's Missouri commitment as evidence of the failure of hospitalization to correct Respondent's deviant sexual behavior and the ensuing need to protect society in general, and young girls in particular, from his repulsive conduct. Given the posture of this case, Petitioner contends that the trial judge's

¹ Florida Statutes §775.082(3)(c).

evidentiary consideration of Respondent's Missouri commitment and subsequent status would be improper if it could be demonstrated that such consideration ran afoul of the guidelines prohibition of departing upon the basis of prior arrests without convictions, Fla.R.Crim.P. 3.701(d)(11), or if that factor had already been considered in arriving at the guidelines recommended range. See Hendrix v. State, 475 So.2d 1218 (Fla. 1985).

While Fla.R.Crim.P. 3.701(d)(11) and the Committee Notes pertaining thereto operate to prohibit the sentencing judge from considering offenses for which the offender has not been convicted, nothing therein renders improper, in this case, the trial judge's consideration of Respondent's Missouri commitment as a criminal sexual psychopath. Interestingly enough, an argument similar to the position advanced by the lower court was rejected by a Missouri appellate court. In Bynum v. State, 545 S.W.2d 720 (Mo.App. 1977), the defendant appealed the denial of his motion for post-conviction relief wherein he alleged, inter alia, that the sentence imposed upon him was increased because the trial court considered non-existent prior convictions, to-wit: his commitment as a criminal sexual psychopath on an assault charge. The Missouri appellate court affirmed the denial of the motion holding, in part:

The proceeding during which an individual is found to be a criminal sexual psychopath is civil, remedial, and curative rather than criminal and punitive. . . . But the trial court

could properly consider this prior judicial determination in sentencing defendant because the commitment related to the background, character, and propensities of defendant which are proper subjects of inquiry. [Citations omitted.] [Emphasis added.]

Id., at 721. See also Beattie v. State, 603 S.W.2d 42, 45 (Mo.App. 1980). This result is not surprising since, early on, a Missouri appellate court recognized that "the general purpose of the Act [Missouri Statutes, Chapter 202] is to detain, treat and care for a person found to be a criminal psychopath with the hope his condition will improve; and also to protect the public against his depredations." State v. McDaniels, 307 S.W.2d 42, 44 (Mo.App. 1957). [Emphasis added.] Consequently, Petitioner submits that evidentiary consideration of the Missouri commitment does not offend the provisions of Fla.R.Crim.P. 3.701(d)(11) since, unlike an arrest without a conviction, an accused, prior to commitment under the Missouri statutory scheme, is afforded a judicial proceeding attended by the generally recognized due process protections including the right to the determination of the issue of criminal sexual psychopathy by a jury. See Missouri Statutes §202.720 (R 77, 78).

Moreover, reliance upon the commitment and subsequent status as evidence of Respondent's continued danger to society was proper as not being violative of the proscriptions set forth by this Court in Hendrix v. State, supra, since this factor was not

included in the calculus yielding the guidelines recommended range. This conclusion logically and appropriately follows from this Court's decisions in Williams v. State, 504 So.2d 392 (Fla. 1987); Whitehead v. State, 498 So.2d 863 (Fla. 1986). See also Keys v. State, 500 So.2d 134 (Fla. 1986). As the lower court noted, this Court, in Williams v. State, supra, opined:

We also agree with the district court that the trial court's description of Williams' "frequent contacts with the criminal justice system [was] something substantially more than a mere reference to the defendant's prior criminal record." 484 So.2d at 72. In Keys v. State, 500 So.2d 134 (Fla. 1986), we recently rejected the argument that a trial judge's consideration of a defendant's "escalating course of criminal conduct" was nothing more than consideration of a defendant's prior criminal history contrary to Hendrix. Hendrix precludes reliance upon only those aspects of a defendant's prior criminal record which have been factored in for scoring purposes. See Hendrix, 475 So.2d at 1220. Neither the continuing and persistent pattern of criminal activity nor the timing of each offense in relation to prior offenses and release from incarceration or supervision are aspects of a defendant's prior criminal history which are factored in to arrive at a presumptive guidelines sentence. Therefore, there is no prohibition against basing a departure sentence on such factors. [Emphasis added].

Id., at 393. Similarly, in Whitehead v. State, supra, this Court, speaking to the question of future dangerousness, held:

Second, the factual finding that a defendant poses a danger to society is

equally accomodated by the guidelines and is also applied to all defendants. Some indicia of future danger are, of course, weighed and scored within the guidelines. Victim injury, for example, which may under some circumstances indicate dangerousness, is specifically scored and therefore considered in a guidelines sentence. The same is true regarding a defendant's use of a weapon and his legal status when committing a crime. Other evidence, however, 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. [Emphasis added].

Id., at 865.

Inasmuch as evidentiary consideration of Respondent's Missouri commitment and subsequent status does not offend the provisions of Fla.R.Crim.P. 3.701(d)(11), and inasmuch as this factor was not included in the calculations leading to the recommended guidelines range, and inasmuch as it is evidence tending to establish beyond a reasonable doubt that Respondent poses a danger to society, Petitioner submits that consideration of Respondent's commitment and status subsequent thereto as evidence of his continuing threat to society, or for that matter his unamenability to rehabilitation,² was entirely proper.

² See Fuller v. State, 12 F.L.W. 1747 (Fla. 2d DCA July 17, 1987); Ashley v. State, 12 F.L.W. 1615 (Fla. 5th DCA July 2, 1987).

Indeed, the best evidence that the trial judge's first and second statements of reasons formed a proper basis for departure is found in the following conclusions drawn by the lower court from the instant record:

However, it is obvious from the expert psychiatric testimony in the record that appellant needs constant supervision and continual medication so that his propensity to commit lewd and lascivious acts will be prevented. We recognize that appellant is a potential danger to society; however, because appellant has served a prison sentence longer than his guidelines maximum recommendation of 12-30 months incarceration or community control, and all of the trial court's reasons for departure are invalid, we cannot legally justify a sentence longer than the guidelines permit. This does not mean that we are comfortable with appellant being out in public where he will be exposed to female children. [Emphasis original].

Jagers v. State, supra at 12 F.L.W. 1530.

At this point, Petitioner notes that the fact that this Court accepted jurisdiction over this cause on the basis of a certified question, does not preclude this Court's review of the lower court's disposition of this cause regarding the validity of the remaining reasons for departure. See Keys v. State, supra; State v. Rousseau, 12 F.L.W. 291 (Fla. June 11, 1987). Consequently, Petitioner submits that although the lower court was arguably correct in striking down the trial judge's reliance

upon emotional trauma as a reason for departure,³ it was entirely in error in finding the trial judge's fourth reason for departure to be invalid because it amounted to nothing more than dissatisfaction with the guidelines sentence. See Jaggers v. State, supra at 12 F.L.W. 1529. The simple fact of the matter is that the trial judge here, as in Williams v. State, supra, "was not merely substituting his opinion as to the appropriate sentence for that of the Sentencing Guidelines Commission; rather, he was expressing his conclusion that based upon the reasons given in this case departure was justified." [Emphasis original]. Id., at 394. See also Shelton v. State, 12 F.L.W. 1850 (Fla. 2d DCA July 29, 1987). This conclusion was repeated in stronger language in the trial judge's closing paragraph (R 11, 12).

This being the case, only one of the trial judge's reasons for departure, psychological trauma to the victim, could properly have been found invalid. Consequently, Respondent's sentence must be reversed and the cause remanded for resentencing unless Petitioner can show beyond a reasonable doubt that the absence of the invalid reason would not have affected the departure sentence. Keys v. State, supra; Albritton v. State, 476 So.2d 158 (Fla. 1985). Looking to the trial judge's statement of

³ See Keys v. State, supra at 136.

reason for departure (R 11, 12), it is readily apparent that the dominant theme throughout the pleading is the real, present, and continuing danger Respondent poses to society in general and young girls in particular and the trial judge's conclusion that the guidelines recommended sanction, on the facts of this case, was grossly inadequate to afford the citizens of this State the protection to which they are entitled. As a result, Petitioner contends that there can be no doubt that the absence of the third reason for departure would not have affected the departure sentence.

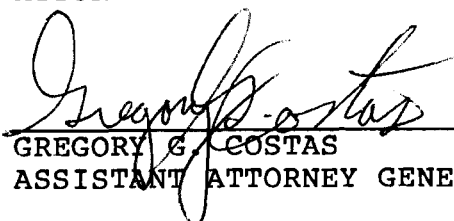
In sum, consideration of Respondent's Missouri commitment as criminal sexual psychopath and his status subsequent thereto as evidence of the danger Respondent poses to society and his unamenability to rehabilitation was not improper since such consideration did not contravene the provisions of Fla.R.Crim.P. 3.701(d)(11) regarding arrests without convictions and since consideration of that factor was not utilized in arriving at the guidelines recommended range. Furthermore, inasmuch as only one of the trial judge's reasons for departure correctly could have been found invalid, and inasmuch as the absence of the invalid reason clearly would not have affected the departure, the decision of the lower court should be quashed and the trial judge's imposition of a sentence in excess of the guidelines recommended range should be affirmed.

CONCLUSION

Based upon the foregoing argument and the authority cited herein, the decision of the lower court should be quashed and Respondent's sentence should be affirmed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

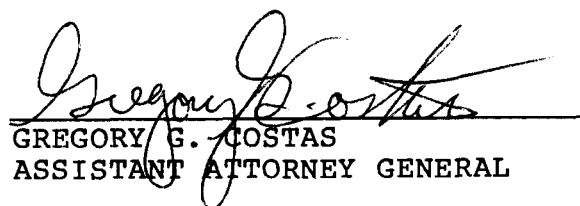

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by hand delivery to P. Douglas Brinkmeyer, Assistant Public Defender, Post Office Box 671, Tallahassee, Florida 32302 on this 17th day of August, 1987.


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