IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Appellant,

vs. CASE NO. 71,765

WILLIE POTTS, JR.,

Appellee.

/

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Appellant, the State of Florida, the prosecuting authority and appellee below and the appellant here under Fla.R.App.P. 9.030(a)(1)(A)(ii), will again be referred to as "appellant" or "the State." Appellee, Willie Potts, the criminal defendant and appellant below, will again be referred to as "appellee."

References to the two-volume record on appeal will again be designated "(R:)."

All emphasis will be supplied by the State.

STATEMENT OF THE CASE AND FACTS

The State stands upon the "statement of the case" and "statement of the facts" provided in its initial brief of March 10.

SUMMARY OF ARGUMENTS

The Fourth District reversibly erred in declaring that § 790.07(2), Fla. Stat. violated appellee's constitutional rights to substantive due process of law, because armed individuals under indictment are more apt to threaten the public safety than are other people.

The trial judge did not reversibly err in departing from the sentencing guidelines, because such was properly predicated primarily on appellee's juvenile record.

ISSUE I

§ 790.07(2), FLA. STAT., DOES NOT VIOLATE SUBSTANTIVE DUE PROCESS

ARGUMENT

In Potts v. State, 13 F.L.W. 78 (Fla. 4th DCA Dec. 30, 1987) (appended), the Fourth District concluded that § 790.07(2), Fla.Stat.,[1] by providing for enhanced penalties for indictees as opopsed to others who carry concealed firearms, violated appellee's constitutional rights to substantive due process of law.[2] Appellee defends this conclusion here by positing that there is no rational relationship between one's status as a covertly armed indictee and a threat to the public safety ("Answer Brief of Appellee," p. 4-9).

For reasons largely expressed in its initial brief, see also State v. Raffield, 515 So.2d 283 (Fla. 1st DCA 1987), review granted, Case No. 71,677 (Fla. 1988), the State continues to maintain that there is a strong rational relationship between one's status as a covertly armed indictee and his threat to the public safety. The State would add here only that its

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[1] **790.07 Persons engaged in criminal offense, having weapons...**
(2) Whoever, while committing or attempting to commit any felony or while under indictment, displays, uses, threatens, or attempts to use any firearm or carries a concealed firearm is guilty of a felony of the second degree, punishable as provided in s. 775.082, s. 775.082, and s. 775.084.

[2] Amendments V and XIV, Constitution of the United States; Article I, § 9, Constitution of the State of Florida.

prosecutors cannot ethically seek indictments unless there exists probable cause to believe that the suspects are guilty of particular offenses. Rule 4-3.8(a), Rules Regulating The Florida Bar. Moreover, experience, and our laws, see e.g. §§ 775.084, § 921.141(4)(a-b), 90.404 and 90.610, Fla. Stat., suggest that people who have acted criminally upon one occasion are far more apt to do so in the future than are other people. Therefore, to assert that covertly armed civilians against whom indictments have been lodged are no more threatening to the public safety than are covertly armed civilians with otherwise spotless backgrounds is logically unsound unless the prosecutors of this State are behaving unethically en masse. The State asserts that there is no evidence to suggest such a pattern of misbehavior, and that one should not be presumed. Compare McCleskey v. Kemp, __ U.S. ___, 95 L.Ed.2d 262 (1987).

ISSUE II

THE TRIAL JUDGE DID NOT REVERSIBLY ERR IN DEPARTING FROM THE SENTENCING GUIDELINES

ARGUMENT

Appellee bootstraps that the trial judge reversibly erred by departing from the Fla.R.Crim.P. 3.988(h) guideline-recommended incarcerative ceiling of 3 1/2 years to impose a 15 year sentence because the reasons advanced therefore (R 261; 265; 273-274) were inadequate. He claims that this Court, if it reinstates his adjudication as the State has heretofore urged, should direct that he be resentenced within the guidelines. For several reasons, the State disagrees.

The State would first contend that this Court should refuse to entertain this issue insofar as it is totally unrelated to the issue which vested the Court with jurisdiction over this cause. Compare Berezovsky v. State, 350 So.2d 80, 81 (Fla. 1977) with Tillman v. State, 471 So.2d 33, 34 (Fla. 1985). The Fourth District can resolve this claim upon remand, and the losing party there may then seek to return here if a legitimate jurisdictional basis for doing so exists.

Turning alternatively to the merits, the State would first note that an objective reading of the trial judge's written order of departure will reveal he did not advance appellee's status as an habitual offender as a reason therefore (R 273), cf. Jordan v. State, 478 So.2d 512 (Fla. 1st DCA 1985), notwith-

standing appellee's claim to the contrary ("Answer Brief of Appellee," p. 10). The four reasons actually advanced were:

(1) Appellee's juvenile record;

(2) Appellee's status as "an immoral person who should be segregated from society;"

(3) Appellee's status as a parolee; and

(4) Appellee's unamenability to rehabilitation or deterence within the confines of the recommended sentence.

(R 273).

The State realizes that the third reason, appellee's status as a parolee at the time of the instant offense, was already scored in computing the guideline-recommended sentencing range (R 261) and hence may not also form a legally viable basis for a departure therefrom under Williams v. State, 492 So.2d 1308 (Fla. 1986). However, the first reason advanced, appellee's unscored juvenile record, is a legally viable basis for departure, Weems v. State, 469 So.2d 128 (Fla. 1985).[3] And the second and fourth reasons advanced, the purported inadequacy of

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[3] The mere fact that appellee had "several disputes" at sentencing with the record found in his pre-sentence investigation (R 201), which P.S.I. he failed to provide to the Fourth District, does not mean that he even disputed the particular fact that he did have numerous juvenile adjudictions. The State submits that appellee's claim here that the first reason for departure factually "cannot be supported by the record" ("Answer Brief of Appellee," p. 11) has not been properly preserved because the objection below was not sufficiently specific to apprise the trial judge or the prosecutor of the putative error. See Dailey v. State, 488 So.2d 532 (Fla. 1986).

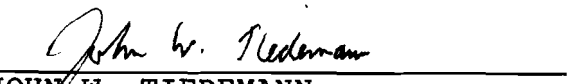
the guideline-recommended sentencing range to effect certain traditional sentencing goals, while not constituting legally viable bases for departure in and of themselves, "should be considered the trial court's written conclusion that departure is necessary based on the valid reason" provided independently. Scott v. State, 508 So.2d 335, 337 (Fla. 1987). The State therefore submits that this Court should affirm the sentencing guideline departure entered below under Albritton v. State, 476 So.2d 158 (Fla. 1985), should it elect to reach this issue.

CONCLUSION

Based on the foregoing argument and authority cited, the decision of the Fourth District Court of Appeal should be REVERSED and the trial court's judgment and sentence REINSTATED.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General



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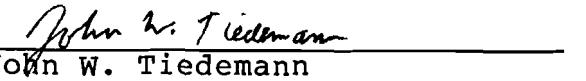
CERTIFICATE OF SERVICE

I CERTIFY that a true copy of the "Reply Brief of Appellant" has been forwarded to Ms. Ellen Morris, Assistant Public Defender, 15th Judicial Circuit of Florida, 301 N. Olive Avenue, 9th Floor, West Palm Beach, FL 33401 by courier mail this 13 day of April, 1988.



John W. Tiedemann
Assistant Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Appendix has been furnished, by courier delivery, to ELLEN MORRIS, ESQUIRE, attorney for Appellee, The Governmental Center, 301 North Olive Avenue, West Palm Beach, Florida 33401, on this 10th day of March, 1988.

Of Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of APPENDIX has been furnished to LEE ROSENTHAL, Assistant Attorney General, Elisha Newton Dimick Building, Suite 204, 111 Georgia Avenue, West Palm Beach, Florida, 33401 by courier this 21ST day of March, 1988.

Ellen Morris

Of Counsel