

IN THE SUPREME COURT OF FLORIDA

STINGRAY JONES,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

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CASE NO. 71,874

PETITIONER'S BRIEF ON THE MERITS

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481 (1986).

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PRELIMINARY STATEMENT

The Petitioner was the Appellant in the court below and the defendant in the trial court. Respondent was the Appellee in the court below and the prosecution in the trial court. A copy of the district court's opinion is attached to this brief as part of the Appendix.

The following symbols will be used in this brief:

"R"	Record on appeal
"A"	Appendix

STATEMENT OF THE CASE AND FACTS

On May 18, 1984, Petitioner, STINGRAY JONES, was charged by information with grand theft (R13). On December 5, 1985, Petitioner was adjudicated guilty of the grand theft (R14). Petitioner was sentenced outside the recommended guideline range (R25-27). On appeal the Fourth District Court of Appeal held that three of the four reasons for departure were invalid and reversed Petitioner's sentence and remanded the case for resentencing (R25-27).

On resentencing on April 6, 1987, the trial court departed from the guidelines and sentenced Petitioner to ten (10) years in prison (R18). Petitioner's recommended guideline sentence was two and one half (2½) to three and one half (3½) years in prison (R19). The trial court's reasons for departure were that: (1) the defendant committed the instant offense only eight days after being released from his third separate prison commitment and (2) the defendant's behavior demonstrated a continuing and escalating pattern of conduct and he has been convicted of three additional grand thefts (R20). The trial court utilized the habitual offender statute to exceed the statutory maximum penalty of five (5) years for grand theft and sentenced Petitioner to ten (10) years in prison (R18,20). Petitioner appealed.

On December 30, 1987, the Fourth District Court of Appeal affirmed Petitioner's sentence (A1-3). The district court held that the trial court's reasons for departure were valid and ruled that the habitual offender statute could be utilized to increase

the sentence beyond the statutory maximum and the recommended guideline range (A2-3). The district court certified the following question:

DOES WHITEHEAD V. STATE, 498 So.2d 863 (Fla. 1986) PREVENT THE USE OF THE HABITUAL OFFENDER STATUTE TO ENHANCE A DEFENDANT'S SENTENCE BEYOND THE RECOMMENDED GUIDELINES SENTENCE AND BEYOND THE MAXIMUM STATUTORY PENALTY WHERE THERE ARE OTHERWISE VALID GROUNDS FOR DEPARTURE?

(A3).

On January 22, 1988, Petitioner timely filed his notice to invoke this Court's discretionary jurisdiction. On February 5, 1988, this Court set forth a briefing schedule for this review.

## SUMMARY OF THE ARGUMENT

1. Petitioner was convicted of a third degree felony. Petitioner's recommended guideline sentence was two and one half (2½) to three and one half (3½) years in prison. Petitioner was sentenced to 10 years in prison by utilization of the habitual offender statute to exceed the statutory maximum 5 year penalty. The trial court erred in utilizing the habitual offender statute to sentence Petitioner beyond the statutory maximum penalty for grand theft where the recommended guideline sentence was below the statutory maximum.

2. The trial court erred in departing from the recommended guideline range, based on the timing of the offense and the escalating pattern of criminal conduct, where the reasons were not either adequately explained or were not sufficiently supported by a factual basis which would permit departure. Petitioner must be resentenced within the guideline range.

3. Where § 27.3455, ~~Fla. Stat.~~ (1985) became effective after the date of Petitioner's offense, it was a violation of the ex post facto clause to impose costs pursuant to that statute.



ARGUMENT

POINT I

THE TRIAL COURT ERRED IN UTILIZING THE HABITUAL OFFENDER STATUTE TO SENTENCE PETITIONER TO TEN (10) YEARS IN PRISON FOR A THIRD DEGREE FELONY WHERE THE RECOMMENDED GUIDELINE SENTENCE WAS BELOW THE FIVE (5) YEAR STATUTORY MAXIMUM.

On April 6, 1987, Petitioner was sentenced to ten (10) years in prison for the offense of grand theft -- a third degree felony (R18). Petitioner's recommended guideline sentence was two and one half (2½) to three and one half (3½) years in prison (R19).

During the sentencing, the trial court did not use the habitual offender statute as a reason to justify departing from the sentencing guidelines, but did use the habitual offender statute to sentence Petitioner beyond the statutory maximum five (5) year penalty for a third degree felony. In Whitehead v. State, 498 So.2d 863, 867 (Fla. 1986), this Court held that "... section 775.084 cannot operate as an alternative to guidelines sentencing ..." which is precisely what was done in the instant situation. In McGriff v. State, 13 F.L.W. 55 (Fla. 3d DCA, December 22, 1987), the Third District Court of Appeal recognized that the habitual offender statute cannot be used in an attempt to circumvent the guidelines in situations like the present case:

In the present case, the trial court imposed the maximum statutory sentence of fifteen years which is greater than the guidelines' recommendation. Neither of the two reasons given for this departure sentence were that the defendant was an habitual offender. In fact, the record reveals that the trial judge was fully aware that a departure from the recommended range could not be based on the habitual offender statute. Having exceeded the guidelines the court then proceeded to find the defendant to be an habitual offender and the sentence was

increased from fifteen to thirty years by applying section 775.084, Florida Statutes (1985). Clearly, such action circumvents the law. See Whitehead. The trial court may not exceed the guidelines using reasons other than a defendant's habitual nature and then apply the habitual offender statute to further enhance the sentence.

13 FL.W. at 55.

The decisions in Whitehead and McGriff are logical and correct.

There is no rationale for using the habitual offender statute to increase the statutory maximum sentence where the guideline recommendation falls below the statutory maximum and the guidelines take into account all the factors used in arriving at a habitual offender finding. As explained in Whitehead, the guidelines fully take into account the factors of the habitual offender statute:

The habitual offender statute provides an enhanced penalty based on consideration of a defendant's prior criminal record and a factual finding that the defendant poses a danger to society. The guidelines take into account both of these considerations.

First, a defendant's prior criminal record is carefully and specifically considered and scored within the guidelines. Sentences automatically escalate in accordance with the number and seriousness of prior convictions. Whereas, under the habitual offender statute the state had to specifically request habitual offender statute in a separate proceeding in order to assure an increased sentence for prior offenses, under the guidelines every defendant's prior record is automatically weighed and results in an enhanced sentence.

Second, the factual finding that a defendant poses a danger to society is equally accommodated by the guidelines and is also applied to all defendants.

498 So.2d at 863.

Thus, it is illogical to utilize the habitual offender statute to increase a sentence, whether it be by departing or exceeding a statutory maximum, where the guidelines objectively consider a defendant's prior record and that he poses a danger to society.

Utilization of the habitual offender statute in cases such as this will destroy the primary goal of the guidelines by permitting unwarranted disparity in sentencing. The number of defendants who qualify for habitual offender treatment is very high. The statistics maintained by the Florida Department of Corrections reveal that there are 32,705 inmates in the Department of Corrections.<sup>1</sup> Of these inmates, 75.89% have been sentenced to prison at least one time previously.<sup>2</sup> Thus, the overwhelming majority will qualify for habitual offender treatment. However, there is a lack of uniformity in deciding which of those who qualify for habitual offender treatment will be subject to such treatment. Some judges may repeatedly use the habitual offender statute, while others may not use it. This results in disparity in sentencing.

The disparity in sentencing caused by use of the habitual offender statute is also a product of the statute's lack of guidance in determining what constitutes a sufficient factual basis to impose an extended term for the "protection of the public."

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<sup>1</sup> Statistics as of November 19, 1987, Florida Department of Corrections, developed by Robert Kreiger, Administrator of Research and Statistics.

<sup>2</sup> Id.

Without such guidance, judges will be left with using their subject belief, or the defendant's record,<sup>3</sup> in making such a determination. A judge will often determine that the public needs protection because of the future danger that a defendant presents. However, it has been proven that it is impossible to accurately predict dangerousness.<sup>4</sup> Differing predictions may result from similar circumstances due to the lack of objective criteria for making the determination. The result again is disparity in sentencing -- the very antithesis of the primary goal of the guidelines,

In addition, a practical consideration which must be noted is that the habitual offender statute is not enforced where the defendant pleads guilty. Only those who exercise their constitutional right to trial will feel the wrath of the statute's punishment. Where the guidelines sentence is less than the statutory maximum, it may be likely that the defendant's sentence is being increased because he exercised his right to a trial.<sup>5</sup> This is not permissible.

Another consideration is that there is no parole from guidelines sentences, yet the habitual offender scheme contemplates the effect of parole practices on the sentences inmates actually

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<sup>3</sup> Again, this is factored into the guidelines.

<sup>4</sup> Zimring & Hawkins, Dangerousness and Criminal Justice, 85 Mich.L.Rev. 481 (1986).

<sup>5</sup> If the recommended guideline sentence exceeded the statutory maximum it is more likely that the habitual offender statute was used to increase the sentence to implement the full recommendation of the guidelines sentence.

served. Petitioner received a sentence extended beyond both the recommended guideline range and the statutory maximum, but without the ameliorating effect of parole contemplated by the statute.

The habitual offender statute should not have been used to circumvent the principles of the guidelines. Petitioner's sentence for grand theft must be reversed with directions that he not be sentenced above the statutory maximum penalty of five years in prison.

POINT II

THE TRIAL COURT ERRED IN DEPARTING FROM THE  
RECOMMENDED GUIDELINE SENTENCE.

Due to the amount of time which has passed, this particular issue may be moot. However, since the district court has ruled upon the guidelines departure, a discussion of the reasons for departure is warranted. Petitioner's recommended guideline sentence was two and one half (2½) to three and one half (3½) years in prison (R19). The trial court departed from the guidelines and sentenced Petitioner to ten (10) years in prison. The district court held that the following written reasons for departure were valid:

1. The Defendant committed the instant offense only eight days after being released from its third separate prison commitment. The Court finds that this reason standing alone would be sufficient to depart to the maximum period allowed by law as extended by the habitual offender statute.
2. The Defendant's behavior demonstrates a continuing and escalating pattern of criminal conduct. Since the Defendant was placed on probation he has been convicted of three additional grand thefts which could not be scored under the guidelines.

The purpose of the guidelines is to ensure uniformity and to eliminate unwarranted variation in the sentencing process, and to prevent overcrowding in our prison system. Fla.R.Crim.P. 3.701; § 921.001, Fla. Stat. (1983). Since the purpose of the guidelines is to remedy subjective variations in the sentencing process, any exceptions to the guidelines should be narrowly construed. Cf., Farrey v. Bettendorf, 96 So.2d 889 (Fla. 1957). Any departure from the guidelines shall be articulated in writing

and made only for clear and convincing reasons. Fla.R.Crim.P. 3.701(b)(6). While the rule does not eliminate judicial discretion, it does seek to discourage departures from the guidelines. Hendrix v. State, 475 So.2d 1218 (Fla. 1985). Clear and convincing reasons require that the facts supporting the reasons be credible and proven beyond a reasonable doubt. State v. Mischler, 488 So.2d 523, 525 (Fla. 1986). The reasons themselves must be of such weight as to produce in the mind of the judge a firm belief or conviction, without hesitancy, that departure is warranted. Id. With these principles in mind, Petitioner will discuss the reasons for departure.

1. **The Defendant committed the instant offense only eight days after being released from his third separate prison commitment.**

Without an explanation as to why the timing of the offense justifies an enhanced penalty, timing is not a clear and convincing reason for departure. The fact that the offense occurred more recently after release from prison could actually be a reason to mitigate a sentence rather than a reason to aggravate a sentence. For example, the close timing of the offenses could result from a temporary drug problem which might be a reason to mitigate the sentence. See, Ross v. State, 474 So.2d 1170 (Fla. 1985); State v. Twelves, 463 So.2d 493 (Fla. 2d DCA 1985). The close temporal circumstances could result from a defendant's temporary personal problems. A trial judge could legitimately depart downward due to the close temporal circumstances in those cases. However, without an explanation as to the significance of

the temporal circumstances, the reason would not be of such weight as to produce in the mind of a judge that the downward departure is warranted. See, Mischler, supra, at 525. The same reasoning applies to upward departures based on temporal circumstances, timing is not clear and convincing without an explanation of its significance.

Without an explanation of why the timing is significant there will be disparity in sentencing if timing is considered a valid reason for departure. Any decision, unless accompanied with an explanation, as to the specific timing required for departure is arbitrary. If no explanation is required, there must be some bright-line test as to the amount of time which will be considered valid for departure. However, it is obvious that any bright-line test in itself would be arbitrary and contribute to disparity in sentencing. For instance, if the test were 6 months, would it be logical to permit unlimited departure<sup>6</sup> because the offense was committed 5½ months after release from prison as opposed to 6½ months. Without an explanation which can be analyzed objectively, timing is not a clear and convincing reason for departure.

Gibson v. State, 13 F.L.W. 428 (Fla. 1st DCA, February 10, 1988) demonstrates the arbitrariness of using timing of the offense without any further explanation. In Gibson the district court held that the timing of the offense 14 months after release from prison was a clear and convincing reason for departure. The

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<sup>6</sup> Appellate review of extent of departure is no longer permitted.



14 month timing was held to be valid not because of any explanation as to why this particular timing was relevant, but because the court had previously held a timing of 10 months to be a valid reason. Without any bright-line test or further explanation, logic would dictate that an 18 months timing would be valid because the 14 month timing was valid. Future cases would then hold that a 22 month timing is valid because the 18 month timing was valid. Using this logic, eventually any timing would become a valid reason to depart. In otherwords, it is not logical to base departure merely on timing. There must also be some explanation of its significance.

The timing of an offense can be an indication of the recidivism of an offender. However, the recidivism of an offender is more precisely defined by prior convictions which are already factored into the guideline recommendation. **As** this Court stated in State v. Rousseau, 509 So.2d 281 (Fla. 1987):

The record indicates no additional facts concerning the timing of these offenses which were not already factored into the guidelines score-sheet. Therefore, this reason cannot justify departure.

509 So.2d at 283.

Without an explanation as to why timing is significant, timing itself can not be of such weight as to produce in the mind of the judge a firm belief or conviction, without hesitancy, that departure is warranted.

- 2, The Defendant's behavior demonstrates a continuing and escalating pattern of criminal conduct, Since the Defendant has been placed on probation he has been convicted of three additional grand thefts which could not be scored under the guidelines,

While escalating pattern of criminal conduct may be a valid ground for departure, such a conclusion must be fully explained and not merely based on prior record. Here, the fact that Petitioner had been convicted of three grand thefts does not show an escalating pattern of more serious offenses. An escalating pattern is intended to be valid where there is a series of increasingly severe crimes which indicates a dangerous propensity not accounted for by the guidelines. See, Keys v. State, 500 So.2d 134 (Fla. 1986) (commission of four crimes escalating from property to persons); Williams v. State, 504 So.2d 392 (Fla. 1987) (nine escalating offenses in ten years); Newland v. State, 508 So.2d 486 (Fla. 3d DCA 1987) (six escalating offense over three years). Here there was only the commission of similar offenses which are not sufficient to depart from the guidelines. See, Aleman v. State, 498 So.2d 967 (Fla. 2d DCA 1986).

In addition, the mere fact that three subsequent grand theft convictions could not be scored, without more, is not a clear and convincing reason for departure. The subsequent convictions will be scored in computation of the guidelines scoresheet for those offenses.<sup>7</sup> This is not a situation where those convictions will never be taken into account. Utilization of those offenses prematurely to depart from the guidelines is illogical. For

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<sup>7</sup> The present offense will be included as prior record in that scoresheet.

example, if Petitioner had been sentenced for the three additional offenses at the same time as he was sentenced for the probation violation,<sup>8</sup> the guideline scoresheet would have increased the guideline score to 64 points and yielded the same 2½ to 3½ year recommendation. It is illogical to increase a sentence by departing for unscored convictions where the unscored convictions would not have changed the recommended sentence if they had been scored.

More importantly, unscored convictions should not be used to justify departure unless they have some other significance not accounted for by the guidelines. If the guidelines rule provides that a conviction should not be scored because the offender has maintained a conviction-free record for a period of time,<sup>9</sup> the stale conviction should not be utilized to permit departure. It makes no sense to allow departure where extent is not reviewable for something that is deemed insufficient to score in the first place. Unfortunately, this Court's decision in Weems v. State, 469 So.2d 128 (Fla. 1985) has been misconstrued so as to permit such a departure. In Weems, supra, this Court merely held that the accumulation of nine prior convictions which could not be scored was a proper consideration for departing from the guidelines because they reflected a part of the character of the offender not taken into account by the guidelines:

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<sup>8</sup> Counsel does not know why the subsequent offenses and the probation violation were not scheduled for sentencing at the same time.

<sup>9</sup> Fla.R.Crim.P. 3.701(d)(5)(b) and (c).

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 that the trial court did not abuse its discretion in departing from the guidelines in this case.

469 So.2d at 130 (emphasis added).

However, Weems does not stand for the proposition that unscorable convictions are a valid reason for departure.

For the reasons stated above, none of the trial court's reasons for departure were valid. Petitioner's sentence must be reversed and he must be resentenced within the recommended guideline range.

POINT III

THE \$200 COSTS IMPOSED PURSUANT TO § 27.3455,  
FLORIDA STATUTES, MUST BE STRICKEN FROM THE  
JUDGMENT FORM.

The judgment form in this case reflects that a \$200 cost was imposed pursuant to § 27.3455, ~~Fla. Stat. (1985)~~.<sup>10</sup> The offense committed by Appellant occurred on May 12, 1984 (R13,19), well before the effective date of § 27.3455, Fla. Stat. (1985) -- July 1, 1985, so that the imposition of costs pursuant to the statute violated the ex post facto clause. State v. Yost, 507 So.2d 1099 (Fla. 1987).<sup>11</sup> The \$200 cost must be stricken from the judgment form.

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<sup>10</sup> The sentencing form after resentencing indicated that "T.F. & community service waived" (R18).

<sup>11</sup> Appellant moved to discharge the costs on this ground (R15), but the trial court denied Appellant's motion (R20).

CONCLUSION


For the reasons stated in Point I, Petitioner would request this Honorable Court to reverse the decision of the district court and direct that Petitioner be sentenced below the statutory maximum penalty of five years for the offense of grand theft.

For the reasons stated in Point 11, Petitioner respectfully requests this Honorable Court to reverse the decision of the district court upholding the guideline departure and to direct that Petitioner be sentenced within the recommended guideline range.

For the reasons stated in Point 111, Petitioner respectfully requests this Honorable Court to remand this cause with directions that the \$200 cost imposed pursuant to § 27.3455, Florida Statutes, be stricken from the judgment form.

Respectfully submitted,

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JEFFREY L. ANDERSON  
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to DEBORAH GULLER, Assistant Attorney General, Elisha Newton Dimick Building, Suite 204, 111 Georgia Avenue, West Palm Beach, Florida, 33401 by courier this 25<sup>th</sup> day of February, 1988.

Jeffrey J. Anderson  
Of Counsel