

IN THE SUPREME COURT OF FLORIDA

FILED
J. WHITE

MAR 24 1988

CLERK SUPREME COURT

By _____
Deputy Clerk

STINGRAY JONES,)
)
 Petitioner,)
)
 v.)
)
 STATE OF FLORIDA,)
)
 Respondent .)
 _____)

CASE NO. 71,874

PETITIONER'S REPLY BRIEF ON THE MERITS

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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 symbol will be used in this brief:

"R" Record on Appeal

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.

Respondent claims that Petitioner posits that the habitual offender statute has been repealed. To set the record straight, Petitioner recognizes that it is logical and warranted to utilize the habitual offender statute where the recommended guideline range exceeds the statutory maximum. Under such circumstances the habitual offender statute is being used to implement the intent of the guidelines in sentencing. However, where recommended guidelines sentence is below the statutory maximum, the use of the habitual offender statute thwarts, rather than implements, the intent of the guidelines.

In Whitehead v. State, 498 So.2d 863 (Fla. 1987), this Court stated that the habitual offender statute could not be considered as providing an exemption for guideline sentencing. Here, where the guideline recommendation fell below the statutory maximum, the habitual offender statute is being used merely to impose a sentence above the maximum. Normally, where there are valid reasons for departure, the maximum sentence that can be imposed is the statutory maximum. The only reason for departing from the statutory maximum is the habitual offender finding. In other-words, the finding is in essence being used as an exemption.

The danger in permitting the habitual offender statute to be utilized to thwart the guidelines is that the statute will be used without carefully considering reasons for departure which are really distinct from prior record. Even the Respondent argues that the reasons for departure are surplusage:

Respondent further posits that where sentencing falls outside of Rule 3.701, Fla.R.Crim.P., supra, at page 15, that the recitation of reasons for departure becomes an unwarranted exercise. The legislature has not repealed §§ 775.082 nor 775.084, Fla. Stat. Where the application of valid statutory sentencing precludes the guidelines, seeking reasons for departure becomes extraneous.

Respondent's brief at 19.

Finally, the recommended guideline range represents the dangerousness of a defendant. The habitual offender statute should not be used to depart from either the recommended guideline range or from the statutory maximum lying above the recommended range. The use of the statute under either circumstances has the same effect -- to thwart the intent of the guidelines. Petitioner relies on his brief on the merits for further argument on this point.

POINT II

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

In its brief Respondent claims that this Court's decision in Williams v. State, 504 So.2d 392 (Fla. 1987) upholds the trial court's decision that a continuing pattern of criminal activity was a clear and convincing reason for departure. However, this Court's decision in Williams is inapposite to the present case because in Williams the trial court gave a detailed and specific analysis of the defendant's background to conclude there was a continuing pattern of criminal activity. Here the reasons for departure were merely based on Petitioner's prior record. This is demonstrated by the portion of Respondent's brief where Respondent states that:

The reasons stated by the trial court are supported by the record sub judice. (R.7,19, Exhibit 1). The Petitioner's continuing and persistent pattern of criminal activity is indicated by his prior convictions.

(Respondent's brief at 18-19) (emphasis added).

The record referred to by Respondent has already been scored and thus does not constitute a clear and convincing reason for departure. The mere characterization of prior record as either an "escalating" or "continuing" pattern does not transform the record into clear and convincing reasons for departure. Again, Petitioner's prior record was already used to determine the guideline score.

Respondent also cites to the portion of Williams, supra, which indicates that the timing of the offense may be a valid reason for departure. However, Petitioner would point out that unless there is some explanation as to why timing is relevant the specific timing required for departure becomes arbitrary. Respondent relies on Gibson v. State, 13 F.L.W. 428 (Fla. 1st DCA, February 10, 1988) to support its position that the timing of the offense without further explanation is a clear and convincing reason for departure. However, Gibson merely reflects the arbitrariness of using timing of the offense to justify a departure without any explanation as to why the timing is relevant. 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 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 explanation as to the relevancy of the timing, logic would dictate that an 18 month 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 other words, it is not logical to base departure merely on timing.

Also, timing may be a mitigating circumstance, where close temporal circumstances are involved.¹ There must be some explanation of its significance, for timing to be a clear and convincing reason for either upward or downward departure.

Finally, Respondent argues that the reasons for departure do not have to be scrutinized when the habitual offender statute is utilized:

Respondent further posits that where sentencing falls outside of Rule 3.701, Fla.R.Crim.P., supra, at page 15, that the recitation of reasons for departure becomes an unwarranted exercise. The legislature has not repealed §§ 775.082 and 774.084, Fla. Stat. Where the application of valid statutory sentencing precludes the guidelines, seeking reasons for departure becomes extraneous.

(Respondent's brief at 19).

However, the habitual offender statute is not a valid reason for departure and there must be other valid reasons for departure. Respondent's argument demonstrates the belief that the reasons for departure are invalid. Petitioner relies on his brief on the merits for further argument on this point.

¹ A trial judge could legitimately mitigate a sentence where the close timing of the offenses was the result of a temporary personal or drug problem. See Ross v. State, 474 So.2d 1170, 1174 (Fla. 1985); State v. Twelves, 463 So.2d 493 (Fla. 2d DCA 1985).

POINT III

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

Petitioner relies on his initial brief on the merits **for**
argument on this point.

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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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 22 day of March, 1988.

Jeffrey J. Andersen

Of Counsel