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APR 8 1988

IN THE SUPREME COURT OF FLORIDA

SIDNEY OLLIE GIBSON,
Petitioner,

CLERK, SUPREME COURT

By ~~Deputy Clerk~~ *rl*

v.

CASE NO. 72,082

STATE OF FLORIDA,
Respondent.

BRIEF OF PETITIONER ON THE MERITS

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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IN THE FLORIDA SUPREME COURT

SIDNEY OLLIE GIBSON, :
Petitioner, :
v. : CASE NO. 72,082
STATE OF FLORIDA, :
Respondent. :
_____ :

BRIEF OF PETITIONER ON THE MERITS

PRELIMINARY STATEMENT

Petitioner, Sidney Ollie Gibson, was the defendant in the Circuit Court of Columbia County, Florida, and the appellant in the First District Court of Appeal. Respondent, the State of Florida, was the prosecuting authority and the appellee respectfully. Petitioner will be referred to as "Gibson" or "petitioner". Respondent will be referred to herein as "the state".

The record on appeal consists of four volumes. References to Volumes I, II, and III of the Record on appeal will be designed by the symbol "R" followed by the appropriate page number. References to the transcript of Gibson's August 27, 1986, sentencing hearing, will be made by the symbol "s" followed by the appropriate page number.

STATEMENT OF THE CASE

Petitioner relies upon the facts as set forth in the First District's opinion filed February 10, 1988, a copy of which is attached here to as Exhibit A. The First District affirmed petitioner's sentence with respect to the departure from the guidelines, but certified to this Court the following question of great public importance:

Whether commission of new crimes
within fourteen months of release
from incarceration for prior
offenses is a valid ground for
departure from the guideline.

Notice to invoke discretionary jurisdiction of this Court was timely filed on March 9, 1988. This brief is filed pursuant to the briefing schedule issued on March 14, 1988.

SUMMARY OF ARGUMENT

Under the facts of this case, the certified question should be answered in the negative. The facts of this case are readily distinguishable from the facts of Williams v. State, 484 So.2d 71 (Fla. 1st DCA 1986), affirmed, 504 So.2d 392 (Fla. 1987), wherein this Court held "timing of the offenses" to be a valid reason for departure.

If this Court finds this case to be indistinguishable from Williams, supra, petitioner respectfully requests this Court to recede from its holding in that case. This reason is based primarily upon factors already scored and computed in arriving at the presumptive guidelines sentence. Inasmuch as it is based upon factors not previously scored, approving timing of the offenses as a reason to depart will lead to arbitrariness and unwarranted disparity in sentencing because there are no parameters to guide the trial court.

ARGUMENT

ISSUE: THE TRIAL COURT ERRED IN DEPARTING FROM
THE GUIDELINES IN SENTENCING PETITIONER.

The First District certified to this Court the following question of great public importance:

Whether commission of new crimes within fourteen months of release from incarceration for prior offenses is a valid ground for departure from the guidelines.

Gibson v. State, 13 FLW 428 (1st DLA Feb. 10, 1988). Under the facts of his case, petitioner contends that this question must be answered in the negative.

The first District affirmed petitioner's sentence based upon Williams v. State, 484 So.2d 71 (Fla. 1st DCA 1986), affirmed, 504 So.2d 392 (Fla. 1987). This case, however, is readily distinguishable from Williams, supra. In Williams, the defendant had established a pattern of committing new offenses within a short period of time of release from incarceration. From his initial commitment to H.R.S. as a juvenile in January, 1977, to the offenses at issue on appeal, which were committed in October, 1984, Williams had repeatedly committed new offenses soon (from six months to ten months) after his releases from incarceration. Under those facts, this Court held that timing of the offenses was a valid reason for departure.

In the case at bar, however, petitioner had only been incarcerated in prison once previously (S-17). Moreover, the instant offenses were committed **14** months after his release.¹ Not only is this incident not indicative of a pattern, but the 14 month time lapse distinguishes this case from the six and ten month periods in Williams, supra. This time lapse also distinguishes this case from other cases in which the District Courts of Florida have held the timing of offenses to be a valid reason for departure, such as: Nixon v. State, **494** So.2d 222 (Fla. 1st DCA **1986**) (instant offense committed **3 1/2** months after release from prison); White v. State, **481** So.2d **993** (Fla. 5th DCA **1986**) (instant offense committed two days after release from prison); Swain v. State, 455 So.2d **533** (Fla. 1st DCA **1984**) (offense committed **7** months after release on parole); and Jean v. State, 455 So.2d **1083** (Fla. 2nd DCA **1984**) (Defendant violated probation within one month of release from first conviction).

If this Court determines that petitioner's case falls within the scope of the above cited cases, petitioner respectfully requests this Court to recede from its holding in

¹The First District stated that the instant offenses were committed **14** months after petitioner's release from incarceration, however, at sentencing the trial court was under the impression that there had been a one and one-half years lapse of time.

Williams, supra, and hold timing of the offenses an invalid reason for departure.

This "reason" is based upon factors which are already scored and computed in arriving at the presumptive guidelines sentence, and thus cannot be used again as a reason to depart. Hendrix v. State, 478 So.2d 1218 (Fla. 1985).

The "reason" primarily relies upon a defendant's prior record, which is already scored. Inasmuch as it relies upon the actual timing of the offense in relation to a defendant's release from incarceration, in most instances this will also be scored in computing the recommended guidelines sentence. If a defendant has been recently released from incarceration, he will often be under legal constraint (i.e. probation) and this will be scored under the guidelines and the sentence will be increased accordingly.²

Perhaps the best argument against this "reason" for departure, however, is that it will encourage the exact arbitrariness and disparity in sentencing that the guidelines were designed to prevent. There are no parameters to guide the sentencing authority. Each trial court will have to make its determination in each individual case whether the commission of the new offenses is "close enough" in proximity to the

²Petitioner was scored 129 points for prior record, and an additional 6 points for being under legal constraint at the time the instant offenses were committed.

defendant's release from incarceration on prior offenses. How will it do so? How will the line be drawn? because these questions cannot be answered, "timing of the offenses" must be held an invalid reason for departure.

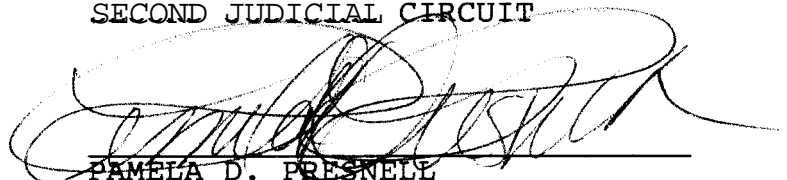
Because the trial court gave no valid reason for departure, this case must be remanded for resentencing within the guidelines. Shull v. Duggar, 515 So.2d 748 (Fla. 1987).

CONCLUSION

Based upon the argument presented here, Sidney Ollie Gibson respectfully requests that this Court answer the certified question in the negative, and remand this case for resentencing within the guidelines.

Respectfully submitted,

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

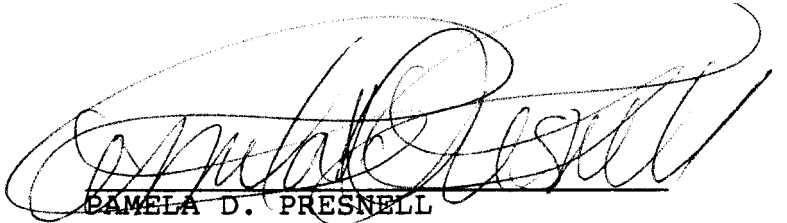


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery to Robert A. Butterworth, Attorney General, The Capitol, Tallahassee, Florida, and a copy has been mailed to petitionr, Sidney Ollie Gibson, Inmate # 851955, Post Office Box 221, Raiford, Florida 32083, this 8th day of April, 1988.



PAMELA D. PRESNELL