

IN THE SUPREME COURT OF FLORIDA

SIDNEY OLLIE GIBSON,

Petitioner,

v.

CASE NO. 72,082

STATE OF FLORIDA,

Respondent.

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RESPONDENT'S BRIEF ON THE MERITS

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RESPONDENT'S BRIEF ON THE MERITS

PRELIMINARY STATEMENT

Respondent accepts the preliminary statement set forth in the Petitioner's brief on the merits.

STATEMENT OF THE CASE AND FACTS

Gibson was charged by information filed in the Circuit Court of Columbia County, Florida, in case number **86-177** with burglary of a dwelling and grand theft. An additional information filed in case number **86-178** charged Gibson with burglary of a dwelling and two counts of grand theft. (R. **215-218**). The cases were consolidated for trial and Gibson was convicted on all counts. (R. **225-227, 229**).

The recommended guidelines sentence was nine to twelve years incarceration (R. **249**), but the trial court departed from the guidelines and sentenced Gibson to a total of forty years incarceration. Gibson was sentenced as follows:

Case No. 86-177: Thirty years incarceration for the burglary of a dwelling charge and ten years incarceration for the grand theft charge to run concurrently with the sentence for burglary.

Case No. 86-178: Ten years incarceration for burglary of a dwelling, and five years incarceration on each of the two grand thefts. These sentences to run concurrently with each other but consecutive through the sentences in case number **86-177**.

(S. **26-27**).

Gibson appealed the departure from the sentencing guidelines range and the First District affirmed in Gibson v. State, 13 F.L.W. **428** (Fla. 1st DCA Feb. 10, 1988).

## SUMMARY OF ARGUMENT

The legislature has determined that the commission of a felony within five years of a previous felony may be sufficient proximity to justify enhancement of the criminal penalty. The sentencing guidelines statute and rules do not provide a similar time period but appellate courts have approved the timing of the subsequent offense as a valid reason for departure.

The only apparent legislative check on the exercise of judicial discretion at sentencing would therefore appear to be the five year time period set forth in the habitual offender statute. Offenses committed within less than five years of the prior release from incarceration are subject to an abuse of discretion standard of review. An appellate court reviewing a departure based on timing of the offenses should **look** to the nature of the prior offense and the nature of the subsequent offense in reviewing the guidelines departure sentence imposed. For instance, a convicted rapist who commits a second rape three years after release from incarceration for the prior rape should be treated more harshly than a rapist who commits a grand theft three years after the initial rape.

ARGUMENT

ISSUE PRESENTED

WHETHER THE COMMISSION OF NEW CRIMES  
WITHIN FOURTEEN MONTHS OF RELEASE FROM  
INCARCERATION FOR PRIOR OFFENSES IS A  
VALID GROUND FOR DEPARTURE FROM THE  
GUIDELINES.

Gibson argues that the instant factual basis is sufficiently different from that in Williams v. State, 504 So.2d 392 (Fla. 1987) to render reliance on Williams impermissible. Gibson describes Williams as a decision approving an established pattern of committing new offenses within a short period of time as a valid reason for departure and not the more general reason, the mere timing of offenses. The various district courts of appeal have not limited Williams to that situation and have approved departure sentences similar to the instant case. Hogan v. State, 12 F.L.W. 2375 (Fla. 1st DCA Oct. 7, 1987); Ree v. State, 512 So.2d 1085 (Fla. 4th DCA 1987). However, the district courts have disapproved the use of this reason where the subsequent offense occurred twenty-two months or more after the original offense. Bruton v. State, 510 So.2d 1243 (Fla. 1st DCA 1987); McClure v. State, 513 So.2d 1119 (Fla. 2d DCA 1987); Simmons v. State, 496 So.2d 911 (Fla. 2d DCA 1986). The question here is whether the commission of five felonies fourteen months after release from incarceration will justify the instant departure.

Section 775.084, Fla.Stat. (1987) allows the trial court to find a defendant an habitual offender when he commits an offense within five years of his previous conviction. This Court recognizes the continued viability of **§775.084**, Fla.Stat. Winters v. State, Case No. **70,164** (Fla. Feb, **25, 1988**) Likewise, a three-year exposure exists for habitual misdemeanants. There has always been a legislative intent to treat recidivist offenders different than first-time offenders. Sidney Ollie Gibson is exactly that kind of recidivist offender as evidenced by the trial court finding of habitual offender status in Gibson v. State, **510 So.2d 1191** (Fla. 1st DCA **1987**). In Gibson, the same defendant was sentenced by another trial court judge who made the following findings in support of habitual offender status:

The trial court's September 3, 1986, five-paragraph order contains both its reasons for departure and its finding of habitual offender status. Paragraphs 1-3 track the language of Section **775,084**, Florida Statutes, and constitute the court's finding that Appellant is a habitual offender. Paragraph 4 states the court's four reasons for departure:

- a) In a relatively short period of time, from **1977** through **1982**, the defendant amassed a total of eleven (11) felony convictions.
- b) The prior eleven (**11**) felony convictions involve different victims, different locations and most were committed on different dates.



c) The defendant has shown a pattern of complete disregard for the property rights of others.

d) The defendant has failed to be rehabilitated by prior terms of probation and short periods of imprisonment.

Id at 1191. The First District Court in that case found the departure sentence invalid under Whitehead v. State, 498 So.2d 863 (Fla. 1986).

Mr. Gibson is obviously not an offender who committed one offense, served his sentence and committed a second offense fourteen months later. The facts set forth in the opinions below demonstrate Mr. Gibson to be a multiple offender who inflicts harm upon multiple victims. These facts set Mr. Gibson apart from a defendant who just happens to commit another crime within fourteen months of his first crime. Mr. Gibson clearly qualifies for the sentence imposed under this Court's rationale set forth in Williams, supra, and the departure sentence should be affirmed. Gibson is an offender who will burglarize homes to steal property and deal in stolen property as long as he is not incarcerated.

There is a distinctive difference between a defendant who has established a criminal lifestyle which he refuses to give up even after periods of incarceration and a defendant who commits an occasional crime bearing no relationship to his criminal history. For example, a criminal defendant who commits an armed


robbery or a sexual battery serves his period of incarceration and then fourteen months later is arrested for possession of a felony amount of marijuana cannot be said to fall in the same category as the career burglar or repeat rapist about whom it can safely be said he will return to his life of crime within any reasonable period following his release from incarceration. The legislature has cited the reasonable period of time is five years. The court below has approved fourteen months and this cannot be said to be unreasonable.

CONCLUSION

The District Court below did not err in approving a sentencing departure based on a repeat offense within fourteen months of a prior period of incarceration where the record clearly demonstrated an offender who is a career criminal. This Court should approve the District Court opinion below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by U.S. Mail to Pamela D. Presnell, Assistant Public Defender, Post Office **Box** 671, Tallahassee, Florida 32302, this 29th day of April, 1988.

  
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Gary L. Printy  
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