IN THE SUPREME COURT OF FLORIDA

DOYAL POWELL ROBERTS,

Petitioner,

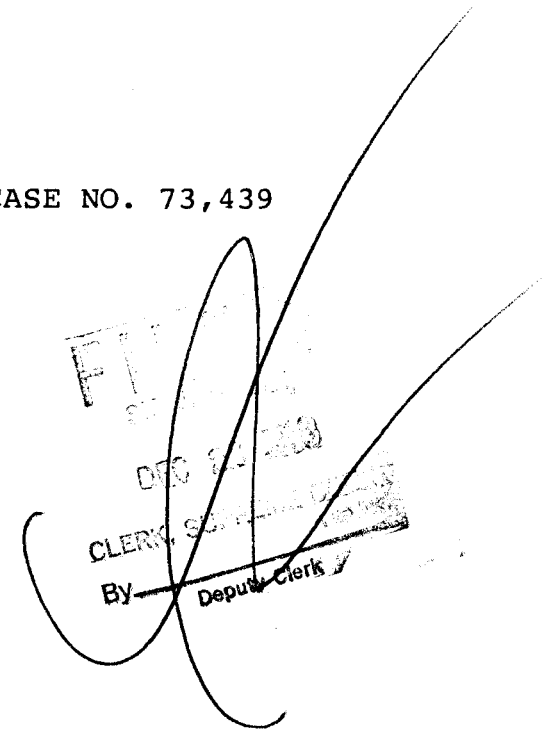
v.

CASE NO. 73,439

STATE OF FLORIDA,

Respondent.

_____/



BRIEF OF PETITIONER ON THE MERITS

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BRIEF OF PETITIONER ON THE MERITS

PRELIMINARY STATEMENT

Petitioner was the defendant in the trial court and the appellant in the lower tribunal. The parties will be referred to as they appear before this Court. A six volume record on appeal, including transcripts from petitioner's direct appeal, will be referred to as "R" followed by the appropriate page number in parentheses. A two volume supplemental transcript, containing the resentencing hearing of December 14, 1987, and the original sentencing hearing of May 6, 1985, will be referred to as "T". Attached hereto as an appendix is the opinion of the lower tribunal. Emphasis is added unless otherwise noted.

STATEMENT OF THE CASE AND FACTS

By information filed November 2, 1984, petitioner was charged with sexual battery and burglary (R 15-16). After jury trial, petitioner was convicted of sexual battery with the threat of great force and burglary of a dwelling with assault (R 77-78). On May 6, 1985, petitioner was adjudicated guilty by Circuit Judge Elzie S. Sanders and sentenced to concurrent terms of 27 years in prison, which were the most available under the guidelines range of 22-27 years (R 83-90; T 46).

On direct appeal, petitioner did not challenge his sentence and his argument concerning a trial error was rejected (R 772-73); Roberts v. State, 491 So.2d 1147 (Fla. 1st DCA 1986). Petitioner then filed a motion to correct his sentences, alleging that his scoresheet was incorrect (R 789-91). Petitioner, pro se, prevailed on appeal, and the lower tribunal ordered that the scoresheet be corrected and petitioner resentenced (R 857-62); Roberts v. State, 507 So.2d 761 (Fla. 1st DCA 1987). Judge Sanders subsequently disqualified himself (R 871).

A new guidelines scoresheet was prepared, which called for 17-22 years (R 888). The state requested that the court depart from the new guidelines range (R 873-83). Petitioner appeared for resentencing on December 14, 1987, before Circuit Judge Nath Doughtie. The victim, [redacted] had no particular recommendation regarding sentencing (T 12-15). Judge Daughtie announced his decision to impose the same 27 year sentences, which would now be a departure sentence (R

23-24). Petitioner was resentenced to the same 27 years, with credit for all time served (R 885-86; T 24-25). The court entered a written order, imposing the same sentences as Judge Sanders (R 890-94).

On a subsequent appeal to the First District, petitioner argued that he could not receive the same sentences, 27 years, now as departures from 17-22 years, because the original sentencing judge saw no reason to depart. The lower tribunal disagreed, but certified conflict with Harrison v. State, 523 So.2d 726 (Fla. 3rd DCA 1988).

On December 15, 1988, a timely notice of discretionary review was filed.

SUMMARY OF THE ARGUMENT

Petitioner will argue in this brief that the successor sentencing judge should not have entered departure sentences when the original prosecutor and sentencing judge saw no reason to depart from the recommended guidelines range, even though that range was reduced as a result of petitioner's successful pro se attack on his scoresheet. The situation is no different from that which occurs when a defendant successfully attacks all of the reasons for departure. Petitioner is being unfairly penalized for winning his pro se attack on his scoresheet.

ARGUMENT

THE LOWER TRIBUNAL INCORRECTLY HELD THAT PETITIONER COULD RECEIVE THE SAME 27 YEAR SENTENCES AS GUIDELINES DEPARTURE SENTENCES AFTER HIS SCORESHEET WAS CORRECTED AND THE RECOMMENDED RANGE LOWERED.

At his original sentencing hearing, petitioner received guidelines sentences, rather than departure sentences, for these two crimes. The original prosecutor repeatedly stated that he saw no reason to depart from the guidelines:

> We're not going to ask the Court to sentence Doyle Roberts to a period of incarceration as a habitual felony offender. But the fact remains that the PSI officer who has done the investigation in this case has reviewed this defendant's background, spoken to law enforcement officers, spoken to family and friends, and other people, and she concludes that the defendant in this case should be sentenced to the maximum period of time recommended by the sentencing guidelines which in this case is 27 years. (T 37).
>
> * * *
>
> So, I would urge the court not to deviate from the guideline recommended sentence of 22-27 years, but instead to sentence him to a period of time that's consistent with the guideline recommendation taking into consideration the seriousness of the crimes as well as his criminal history. (T 40-41).
>
> * * *
>
> I would ask the court to follow the guidelines recommended sentencing to the period of time in the Department of Corrections for a period of 22 to 27 years followed by a period of probation consecutive to that for the rest of his natural life, so this court would have some control over this man. (T 43).

The trial judge also saw no reason to depart from the guidelines range (T 46). The next judge, apparently believing

that 27 years was the perfect sentence for these two crimes, reimposed them as a departure. This was error.

Although research has not disclosed any case directly on point, the recent opinion in Shull v. Dugger, 515 So.2d 748 (Fla. 1987) is instructive.

In Shull, the defendant was sentenced as a habitual offender to a departure sentence when some courts believed such was proper. His sentence was affirmed on direct appeal. Shull v. State, 481 So.2d 1294 (Fla. 1st DCA 1986). When the Supreme Court finally had the opportunity in Whitehead v. State, 498 So.2d 863 (Fla. 1987) to hold that habitual offender was not a valid reason to depart, Shull filed a motion for post-conviction relief, arguing that he should get the benefit of Whitehead. The lower tribunal agreed, but certified the question. Shull v. State, 512 So.2d 1021 (Fla. 1st DCA 1987).

Since the state did not pursue the certified question, and because the mandate had been stayed, Shull filed a habeas corpus petition in the Supreme Court. The state agreed that the habitual offender reason for departure was invalid, but suggested the the sentencing judge should be allowed to formulate new reasons to justify the departure sentence. This Court disagreed:

> We see no reason for making an exception to the general rule requiring resentencing within the guidelines merely because the illegal departure was based upon only one valid reason rather than several. We believe the better policy requires the trial court to articulate all of the reasons for departure in the original order. To hold otherwise may needlessly

> subject the defendant to unwarranted efforts to justify the original sentence and also might lead to absurd results. One can envision numerous resentencings as, one by one, reasons are rejected in multiple appeals. Thus, we hold that a trial court may not enunciate new reasons for a departure sentence after the reasons given for the original departure sentence have been reversed by an appellate court.

Shull v. Dugger, supra, 515 So.2d at 750.

Much of what the court said in Shull is applicable to appellant. Because his scoresheet was inflated one cell, petitioner received a de facto departure sentence in his first sentencing hearing. The only difference between Mr. Shull and petitioner is that petitioner received a departure sentence that no one knew was a departure, whereas Mr. Shull received a departure that everyone knew was a departure, although it turned out to be an illegal one. Petitioner is being subjected to the same "unwarranted efforts" to justify his sentences.

If an incorrect scoresheet can be equated with an illegal departure reason, the result must be the same, i.e., the court upon discovering the error is bound by what occurred at the original sentencing hearing. Since the original prosecutor and judge saw no reason to depart, the second judge should not have been allowed to make up new reasons for departure, even though no one thought any reasons were necessary to justify the 27 year sentences when they were imposed.

The recent case of Harrison v. State, 523 So.2d 726 (Fla. 3rd DCA 1988) interprets Shull in a manner consistent with petitioner's position. There the defendant was sentenced to 22

years in state prison in accord with an elevated violation of probation scoresheet. The scoresheet was incorrect because points were assessed in the primary offense and victim injury sections for an offense for which the defendant was not on probation. The corrected scoresheet resulted in a lower recommended range, and so the state argued that the judge should be able to impose the same sentence as a departure. The court disagreed:

> The thrust, if not the precise holding of Shull [supra] precludes what would be an initial attempt to enter a departure sentence after a prior sentence has, as we do here, been deemed inappropriate on appeal.

Id. at 727. The same is true in the instant case.

The cases relied upon by the lower tribunal are not persuasive. In Waldron v. State, 529 So.2d 772 (Fla. 2nd DCA 1988), the Second District granted rehearing en banc and receded from its prior decision in Teaford v. State, 524 So.2d 1162 (Fla. 2nd DCA 1988). In Teaford, the defendant was sentenced on a violation of probation to three years in prison, followed by 18 months community control, on a scoresheet which called for 2 1/2 to 3 1/2 years. Because this combination constituted a departure, the court reversed and directed the imposition of a guidelines sentence.

Two months later, the court sat en banc in Waldron, which also involved a violation of probation with a similar illegal combination of prison and community control, and held that the judge should be able to depart once that combination is deemed

to be illegal. Waldron is distinguishable from the instant case, because petitioner was not being sentenced on a violation of probation and his sentence was not an illegal combination of prison and community control.

In addition, the Third District's view in Harrison makes far more sense, especially in light of this Court's recent decision in Smith v. State, 13 FLW 703 (Fla. December 8, 1988). There the defendant had been sentenced to six years as a departure from the scoresheet's range of 3 1/2 to 4 1/2 years. While he successfully attacked all of the reasons for departure on appeal, he was convicted of five more robberies. When he appeared for resentencing on the original charge, his scoresheet factored in the five additional robberies and called for life in prison, which the judge imposed. This Court held:

> Equity compels us to vacate Smith's life sentence and remand the case for sentencing within the original range of three and one-half to four and one-half years. If Smith had been properly sentenced in the initial proceeding, he would not be facing life imprisonment. To sustain the life sentence would be to punish Smith for the trial court's mistakes. The more equitable result is to place him in the position he would have been in absent the court's error. This is consistent with the rule espoused in Shull [supra].

Id. The same is true in the instant case. If petitioner's scoresheet had been prepared correctly, he would never have received 27 year sentences.

The lower tribunal also erroneously relied upon Chaplin v. State, 473 So.2d 842 (Fla. 1st DCA 1985), approved, State v.

Chaplin, 490 So.2d 52 (Fla. 1986). In that case, the defendant successfully attacked his scoresheet in the District Court, and his recommended sentence range was reduced from 9-12 years to 7-9 years. The District Court advised the trial court it could depart from the new range if it so chose, because:

> there remains the possibility that had the trial judge been confronted with the correct guidelines range, he would have imposed a sentence outside the guidelines. We note at sentencing, the trial judge expressed the view that the guidelines range of 9-12 years was "substantially low," given appellant's crimes. Obviously then, when faced with an even lower range, the trial judge might wish to consider whether a departure should be ordered.

Id., 473 So.2d at 844. Here, there is no such possibility. As shown by the comments of the prosecutor at the original sentencing hearing, quoted at page 5 of this brief, neither he nor the original sentencing judge saw any reason to depart from the guidelines. The judge, unlike the judge in Chaplin, made no comments to question the inadequacy of the recommended guidelines range.[1] The victim had no particular sentencing recommendation. The distinction between petitioner and Mr. Chaplin is obvious.

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[1]Back in 1984, the salad days of the guidelines, many judges thought it was proper to depart because the recommended guidelines range was: "manifestly not sufficient to provide the appropriate retribution, deterrence, or time for rehabilitation", Mincey v. State, 460 So.2d 396, 398 (Fla. 1st DCA 1984); or because the range was: "insufficient for retribution, deterrence, rehabilitation and for the safety of the public", Scott v. State, 492 So.2d 448, 449 (Fla. 1st DCA 1986), reversed in part, 508 So.2d 335 (Fla. 1987).

The resentencing judge should not be permitted to make up new reasons for departure since none was stated at the initial sentencing hearing. This Court must reverse.

CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, petitioner requests that this Court vacate the 27 year sentences and direct the imposition of no more than 22 years, with credit for all time served.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by delivery to Edward C. Hill, Jr., Assistant Attorney General, The Capitol, Tallahassee, Florida, and a copy has been mailed to petitioner, # 051659, 3876 Evans Road, Box 50, Polk City, Florida, 33868, this 22 day of December, 1988.

P. Douglas Brinkmeyer

P. DOUGLAS BRINKMEYER