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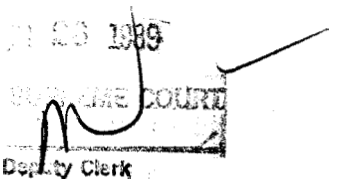
SUPREME COURT OF FLORIDA



RICHARD DIAL THORP, Petitioner,	)	
vs.	)	CASE NO. 73,767
STATE OF FLORIDA, Respondent.	)	

ANSWER BRIEF OF RESPONDENT

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PRELIMINARY STATEMENT

Petitioner was the Defendant in the Criminal Court of the Seventeenth Judicial Circuit in and for Broward County, Florida and the Appellant in the Fourth District Court of Appeal of the State of Florida. Respondent was the Prosecution and the Appellee, respectively, in those lower courts. In this brief the parties will be referred to as they appear before this Honorable Court. The following symbols will be used.

"R" Record on Appeal

"SR" Supplemental Record On Appeal Consisting of Documents Pertinent To Petitioner's Federal Offenses.

STATEMENT OF THE CASE AND FACTS

Respondent, the State of Florida, will accept the Statement of the Case and Facts as set forth in the initial brief of Petitioner.

SUMMARY OF THE ARGUMENT

The proper rule to adopt is that a conviction occurring between the subject offense and sentencing for that offense, for a crime committed prior to the subject offense must be scored as a "prior record" and calculated in arriving at the guideline score. This ruling honors the intent of the guidelines in that it promotes sentencing uniformity, furthermore, the intent of the rule is to have such offenses scored this way.

ARGUMENT

THE TRIAL COURT ACTED PROPERLY WHEN IT USED, IN THE CALCULATION OF APPELLANT'S GUIDELINE SCORE, OFFENSES WHICH OCCURRED BEFORE THE PRESENT OFFENSE AND FOR WHICH CONVICTIONS WERE OBTAINED BEFORE THE SENTENCING OF THE PRESENT OFFENSE (Restated).

At bar, a federal indictment was returned against Petitioner on Nov 13, 1980 (S.R. A2). Petitioner was then charged by information with the present offenses on Nov. 22, 1983 (R. 40-42). Petitioner pled guilty to the federal offenses on Feb 3, 1986 (S.R. A3) and was sentenced on March 14, 1986 (S.R. A4). As to the state offenses at issue, Petitioner pled guilty to the first two counts on Jan 9, 1987 (R. 48). The issue before us is whether the trial court properly concluded that the federal offenses could be used in the computation of the guideline score because they fell under the "prior record" definition of Fla.R.Crim.P. 3.701(d)(5)(a). Respondent submits that this was properly done.

At the time, before some minor amendments to it, 3.701(d)(5)(a) read as follows:

> "Prior Record" refers to any past criminal conduct on the part of the offender, resulting in conviction, prior to the commission of the primary offense. Prior record includes all prior Florida, federal, out-of state, military, and foreign convictions.

In Frank v. State, 490 So.2d 190 (Fla. 2d DCA 1986), then Judge Grimes stated in footnote 1 that because of the commas

setting off the words "resulting in conviction" the rule should be read as meaning that only the past criminal conduct must occur prior to the commission of the primary offense and that the crime should be scored even though the conviction does not occur until after the commission of the primary offense. Judge Grimes went on to state that if the rule were read to require a conviction for the prior crime before the commission of the primary offense, then the very fact of conviction of the prior offense could constitute an independent basis for departure because it could not be used in the guidelines calculation.

The analysis of the placement of the commas is supported by the statutory rule of construction known as the doctrine of the last antecedent, under which relative and qualifying words, phrases, and clauses are to be applied to the words or phrase immediately preceding, and are not to be construed as extending to or including others more remote. Kirksey v. State, 433 So.2d 1236, 1241 (Fla. 1st DCA 1983). Using this analysis, Respondent submits that the "resulting in conviction" section of the rule is a qualifying phrase and is to be applied to the words immediately preceding it. This would be the part dealing with past criminal conduct on the part of the offender. This was the gist of Respondent's argument at the DCA, that we should focus on the word "conduct" and not on the word "conviction." The correct interpretation is that "prior record" refers to any conduct that resulted in conviction which conduct itself occurred prior to the commission of the primary offense.

The grammatical and logical reasoning of Frank has been followed in subsequent opinions in this state.

In Falzone v. State, 496 So.2d 894 (Fla. 2d DCA 1986), Judge Grimes further elaborated on Frank and discussed the 1985 amendment to the rule which removed the "disposed of" language found in the prior rule. The court stated that these words made little sense and that since the amendment did not change the intent of the rule, the interpretation made in Frank is equally applicable to the amended rule. Id. at 895-896. It was further stated that aside from the placement of the commas, the court saw no reason why the rule would seek to exclude from guidelines computation those convictions which occur between the commission of the subject offense and the sentencing for that offense. Id. at 896.

The next court to deal with this issue was the Fifth District in Smith v. State, 518 So.2d 1336 (Fla. 5th DCA 1987). Judge Upchurch, writing for a unanimous panel, went through a review of the caselaw from the 2d DCA in Frank and Falzone and agreed that there was no logical reason why convictions obtained between commission of the primary offense and sentencing cannot be considered as prior record. Such a holding promotes the uniformity in sentencing sought by the guidelines. Id. at 1339.

The Fourth DCA was the last DCA to face this issue in the case of Brown v. State, 529 So.2d 1247 (Fla. 4th DCA 1988). In Brown, the Fourth District adopted the view of the Second District in Falzone, and scored the conviction for a prior

robbery which conviction occurred after the commission of the instant offense as a prior offense. The Third District Court of Appeal apparently has not dealt with this issue. We thus have a total of three DCA's which have adopted the view that Respondent is advocating.

Petitioner meanwhile asks this Court to adopt the holding of a case which has been rejected by every DCA to have faced this issue. This case is Hunt v. State, 468 So.2d 1100 (Fla. 1st DCA 1985). Hunt was the forefather of all the cases in this area and since its decision four years ago, no other appellate court has opted to follow it, and with good reason.

Hunt held that Fla.R.Crim.P. 3.701(d)(5)(a) prohibited consideration of past criminal conduct for which convictions were not obtained prior to the commission of the primary offense for purposes of scoring under the prior record category. This opinion violates the intent of the sentencing guidelines which is to promote sentencing uniformity. Boylan v. State, 489 So.2d 110, 111 (Fla. 4th DCA 1986)(at n. 2). Under the Hunt rationale and the approach proposed by Petitioner, such offenses could be used for purposes of departure from the guideline range. Therefore, a judge in the Panhandle could decide to depart in a given case while a judge in South Florida could decide not to depart in a given case with similar facts. The potential for another body of confusing caselaw dealing with guideline departure would thus be spawned. Furthermore, as then Judge Grimes stated in Frank, if the conviction was needed prior to the

commission of the primary offense then the very fact of conviction could constitute a basis for departure. Id, at 192. This rule would thus have never been necessary in the first place if this had been its intent. To honor the intent of the guidelines the position advocated by Respondent must be adopted.

The primary cases cited by Petitioner in support of his position are not on point. Prince v. State, 461 So.2d 1015 (Fla. 4th DCA 1984) and Davis v. State, 455 So.2d 602 (Fla. 5th DCA 1984) (cited on pg. 22 of Petitioner's brief) dealt with crimes actually committed after the primary offense and are therefore distinguishable from the instant case. See Smith v. State, supra, at 1339 (distinction made there). As for the confusing language in State v. Rodgers, 13 FLW 2703 (Fla. 4th DCA Dec. 14, 1988), (cited in pgs. 23 and 24 of Petitioner's brief), that language was removed from the subsequent opinion when the state's motion for rehearing was granted. State v. Rodgers, 540 So.2d 872 (Fla. 4th DCA 1989). As for Pugh v. State, 499 So.2d 54 (Fla. 1st DCA 1986), this case does nothing but follow its predecessor, Hunt v. State, and also cites to Prince and to Davis which as has already been seen above, are cases which are not on point.

The proper rule to adopt is that a conviction occurring between the subject offense and sentencing for that offense, for a crime committed prior to the subject offense must be scored as a "prior record" and calculated on the scoresheet. Respondent respectfully requests that this be done.

CONCLUSION

WHEREFORE, based on the foregoing arguments and citations of authority, it is respectfully requested that this Honorable Court adopt the law of the Second, Fourth, and Fifth DCA's and hold that the federal offenses were properly scored as prior offenses and make this ruling the law of our state.

Respectfully Submitted

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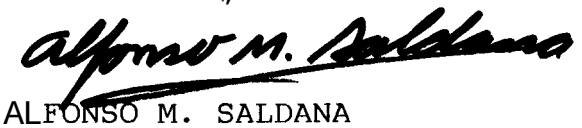

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing brief has been sent by overnight mail to Ms. Catherine Bonner, *Counsel* for Petitioner, 207 S.W. 12th Court, Ft. Lauderdale, Fla **33315** on this 23rd day of June 1989.

Of Counsel