

067

IN THE SUPREME COURT OF FLORIDA

CASE NO. 74,457

THE STATE OF FLORIDA,

Petitioner,

vs .

TIMOTHY VAN HORN,

Respondent.

**FILED**  
 GOD & STATE  
 AUG 01 1989  
 CLERK, SUPREME COURT  
 By \_\_\_\_\_  
 Deputy Clerk

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ON PETITION FOR DISCRETIONARY REVIEW

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INITIAL BRIEF OF PETITIONER ON THE MERITS

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*Crossed  
out in  
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## INTRODUCTION

This is a criminal prosecution for burglary, attempted sexual battery, and aggravated battery. The petitioner, THE STATE OF FLORIDA, was the prosecution in the trial court and the appellee in the Third District Court of Appeal. The respondent, TIMOTHY VAN HORN, was the defendant in the trial court and the appellee in the district court. The parties will be referred to herein as State and Defendant.

The symbol "A" will designate the Appendix to this brief. All emphasis has been added unless otherwise indicated.

## STATEMENT OF THE CASE AND FACTS

The Defendant was charged by informations with burglary, use of a weapon during the commission of a burglary, attempted sexual battery, and two counts of aggravated battery. (Exhibit A). He entered guilty pleas to four offenses that were committed on March 11, 1984: burglary, attempted sexual battery, and two counts of aggravated battery. (Exhibit B).

At the time the Defendant committed the offenses, the "primary offense" was defined under Florida Rule of Criminal Procedure 3.701 d.3 as that "offense with the highest statutory degree, in the order of life felony, first degree felony

punishable by life, first degree, second degree, and third degree felonies." Applying the definition in effect at the time the charged offenses were committed, the burglary was the primary offense and, thus, the "Burglary" scoresheet was utilized. Use of this scoresheet resulted in a total score of 134 and a recommended sentencing range of 5 1/2 to 7 years' imprisonment. (Exhibit C).

On June 28, 1984, sentencing of the Defendant was postponed until July 5, 1984. During this one-week interval, on July 1, 1984, an amendment to the guidelines, promulgated by the Florida Legislature and this Court, took effect which pertained to the definition and mode of calculating the "primary offense." This amendment to Rule 3.701 d.3 provided that where a defendant is to be sentenced for multiple offenses, a scoresheet must be prepared scoring each offense at conviction as the "primary offense," with the remaining offenses scored as "additional offenses at conviction;" the scoresheet that produces "the most severe sentence range" is the scoresheet to be used by the sentencing judge.

At the July 5th sentencing hearing, the prosecutor requested the court to utilize this amendment. The trial court acceded to this request, over defense counsel's objection that the amendment, which became effective after the commission of the charged offenses, could not be applied retroactively. (Exhibit

D). The trial court, by applying the amendment, treated the attempted sexual battery conviction as the primary offense and, utilizing the "Sexual Battery" scoresheet, arrived at a total score of 402, which resulted in a recommended sentencing range of 12-17 years' imprisonment. (Exhibit E).

As an alternative to imposition of the amended guidelines sentence, the State filed a notice of intent to seek departure from the guidelines sentence, stating the following as grounds for departure: 1) the age and vulnerability of the victim; 2) the crime involved multiple victims; 3) the crime was particularly heinous, atrocious, and cruel; and 4) a specific deterrent was necessary because the Defendant was a greater risk to the public than normal. (Exhibits D at 28, F). The trial court imposed sentences totalling seventeen years' imprisonment. (Exhibit G).

On direct appeal to the Third District Court of Appeal, the Defendant challenged the trial court's retroactive application of the guidelines amendment as violative of the federal constitutional ex post facto prohibition. While the case was pending on direct appeal, this Court rendered its decision in State v. Jackson, 478 So.2d 1054 (Fla. 1985), holding that retroactive application of amendments to the sentencing guidelines does not violate the federal constitution's ex post facto ban. Relying upon State v. Jackson, the district court rejected the Defendant's ex post facto claim, affirmed the

sentences but certified the issue as a question of great public importance. Van Horn v. State, 485 So.2d 1380, 1381 (Fla. 3d DCA 1986).

This Court exercised its discretionary review jurisdiction and, on the basis of its prior holding in State v. Jackson, approved the district court's decision affirming the Defendant's sentences. Van Horn v. State, 498 So.2d 426 (Fla. 1986).

After this Court's decision, the United States Supreme Court addressed the same issue that the Defendant had raised in the Florida state courts. In Miller v. Florida, 482 U.S. 473, 107 S.Ct. 2446, 96 L.Ed.2d 351 (1987), the Court held that application of Florida's revised guidelines to a criminal defendant whose crimes occurred before the law's effective date, July 1, 1984, violates the ex post facto clause of the United States Constitution.

The Defendant then filed a petition of writ of habeas corpus in federal district court pursuant to 28 U.S.C. § 2254 (1988). In the petition, he raised the following sole ground:

Whether the retroactive use of the revised sentencing guidelines unconstitutionally denied the petitioner the benefit of the trial judge's compliance with the existing presumptive



sentence, in violation of the Ex Post Facto Clause.

(Exhibit H). Respondent, Richard Dugger, conceded that the Miller decision was applicable in this case and that the cause had to be remanded for further proceedings not inconsistent therewith. (Exhibit I). The district court granted the petition and ordered that the trial court resentence the Defendant. (Exhibit J).

At the re-sentencing hearing, the State noted its original intention to seek departure from the guidelines in this case and argued that the court could then legally impose a departure sentence. (Exhibit K at 6-10). The Defendant asked that he be sentenced within the guidelines range, contending that any previously cited reasons for possible departure from the guidelines were not validated by the appellate court at the time of original sentencing, so an upward departure would again be an ex post facto violation. (Exhibit K at 4-6). The court imposed the following sentence: twelve years for burglary of an occupied dwelling and five years for attempted sexual battery and the two counts of aggravated battery to run consecutive with the twelve-year sentence. (Exhibit K at 23). The court recited the following reasons for departure:

I do, however, find that proceeding from disturbing the peace to burglary; to

burglary of dwelling, which it is cited without dispute there was a threat; to burglary of a dwelling with actual assault, constitutes an escalating pattern of violent criminal behavior. That the victims in this case, because of their age, that being 82 and 69, as I recall at the time of the occurrence, and because of their gender were particularly vulnerable, and the Court takes the opinion of Madam Justice Barkett cited by defense counsel in Mathis V. State, 515 So.2d 214 and 216, indicating that gender alone is insufficient. I certainly concur with the learned Justice -- not that she needs my concurrence -- but I think that the other factors make it a valid reason for departure.

\* \* \*

I find additional reasons for departure, in that apparently the weapon used in this assault, being a cranberry juice bottle, was not present in the house, according to the occupants of the house, and must have been brought in by the defendant, thereby adding a heightened degree of premeditation not required within the elements of the crime.

For all and each of the above reasons, the Court cites overwhelming reasons to depart in this case and does so.

(Exhibit K at 23-24).

In its written order, the court provided the following reasons for the deviation:

1. Defendant has exhibited an escalating pattern of criminal behavior which has become violent in nature.

2. The victims in this case were particularly vulnerable, being women of advance years, 82 and 69, and the Court does not depart for this reason based on gender alone.

3. The Court finds that the weapon used in the assault in this case was brought with the Defendant adding a heightened degree of premeditation.

The Court would depart for any of the above reasons independent of the others.

(Exhibit L).

The Defendant sought a second appeal to the third district court, challenging the departure sentence imposed on remand. Under its decision in Harrison v. State, 523 So.2d 726 (Fla. 3d DCA 1988), the district court reversed the departure sentence and remanded the cause to the trial court with directions to resentence the Defendant within the guidelines ranges of 5 1/2 to 7 years' imprisonment. (Exhibit M). However, the district court expressly acknowledged conflict with the decisions of other district courts as follows:

The state, however, disagrees with Harrison and reserves the right to seek further review of the decision we reach herein. We certify that our decision is "in direct conflict with...decisions[s] of [] other district court[s] of appeal" in Brown v. State, 535 So.2d 332 (Fla. 1st DCA 1988); Dyer v. State, 534 So.2d

843 (Fla. 5th DCA 1988); and Waldron v. State, 529 So.2d 772 (Fla. 2d DCA 1988), so as to permit further review by the Florida Supreme Court pursuant to Article V, section 3(b)(4) of the Florida Constitution.

On July 19, 1989, the State timely filed its Notice to Invoke Discretionary Jurisdiction. On August 1, the State moved to stay the issuance of the district court mandate pending review of this cause by this Court. This brief follows.

POINT ON APPEAL

WHETHER A TRIAL COURT WHICH INADVERTENTLY SENTENCES A DEFENDANT IN EXCESS OF THE APPROPRIATE GUIDELINES SENTENCE WITHOUT PROVIDING WRITTEN REASONS THEREFOR UNDER THE BELIEF THAT THE SENTENCE IS WITHIN THE GUIDELINES MAY, ON REMAND FOR RESENTENCING, IMPOSE A DEPARTURE SENTENCE.

SUMMARY OF ARGUMENT

The issue raised here is whether a trial court, mistakenly thinking that it is sentencing within the guidelines, sentences a defendant above the guidelines without entering reasons therefor should be allowed to enter grounds for departure and impose a departure sentence upon remand for resentencing. The State submits that on remand, the sentencing court should be given the opportunity to determine whether departure from the appropriate guidelines sentence is warranted. Such a rule will not lead to an endless cycle of resentencing because if the court departs and the supporting grounds are later found to be invalid, upon resentencing from the departure the court would be limited to imposing sentencing within the guidelines.

## ARGUMENT

WHERE A TRIAL COURT INADVERTENTLY SENTENCES A DEFENDANT IN EXCESS OF THE GUIDELINES WITHOUT PROVIDING REASONS THEREFOR, ON REMAND FOR RESENTENCING, THE COURT MAY IMPOSE A DEPARTURE SENTENCE.

In the instant case, the trial court imposed what it considered to be a guidelines sentence. Thus, the trial court provided no reasons for the sentence originally imposed. The sentence was later invalidated as a violation of the ex post facto clause of the United States Constitution. Upon resentencing, the court departed upwards from the properly calculated guidelines range based upon reasons and evidence presented at the original sentencing hearing. The State submits that the departure sentence was legally entered. This Court should, therefore, quash the district court decision.

In Brown v. State, 535 So.2d 332 (Fla. 1st DCA 1988), the first district court addressed an identical situation. There, the defendant committed armed sexual battery, kidnapping, and burglary in December, 1983. The sentencing guidelines in effect at that time yielded a presumptive sentence of 17 to 22 years' imprisonment. Under the amended guidelines which took effect on July 1, 1984, and therefore in effect at the defendant's December, 1984 sentencing, the recommended sentence was life imprisonment. Over the defendant's objection, the

trial court applied the amended guidelines and imposed a sentence of life imprisonment.

On appeal, the district court rejected the defendant's contention that the sentence violated the ex post facts clause of the United States Constitution. Brown v. State, 487 So.2d 332 (Fla. 1st DCA 1986). However, in Miller v. Florida, 482 U.S. 423, 107 S.Ct. 2446, 96 L.Ed.2d 351 (1987), the United States Supreme Court held that retroactive application of the more severe sentencing guidelines violated the ex post facts clause.

Subsequently, the defendant filed a motion for post-conviction relief, raising again his ex post facto claim. The trial court denied the motion. On appeal, the district court reversed the denial of the motion but held that upon remand, the trial court would not be prohibited from imposing a departure sentence Brown, 535 So.2d at 334-334.

The first district court determined that a Miller violation essentially constitutes an incorrect calculation of the guidelines score. Brown, 535 So.2d at 334 (citing Dupont v. State, 514 So.2d 1159 (Fla. 2d DCA 1987)). Thus, the district court found that the trial court had inadvertently imposed what amounted to a departure sentence without providing written reasons therefor. Following its decision in Roberts v.



State, 534 So.2d 1225 (Fla. 1st DCA 1988) approved, 14 F.L.W. 187 (Fla. July 28, 1989) and Chaplin v. State, 473 So.2d 842, 844 (Fla. 1985) as approved by this Court in State v. Chaplin, 490 So.2d 52, 53 n. 1 (Fla. 1986), the court concluded that Shull v. Dugger, 515 So.2d 748 (Fla. 1987) did not prohibit the imposition of a departure sentence upon remand. Brown, 535 So.2d at 333-334.

The State submits that the first district court's reasoning in a series of case beginning with Davis v. State, 493 So.2d 82 (Fla. 1st DCA 1986) and culminating in Brown is sound, correct, and applicable in the instant case. The decision of other district courts support the position that the State takes herein.

In Dyer v. State, 534 So.2d 843 (Fla. 5th DCA 1988), the Fifth District Court of Appeal adopted the position of the first district court on this issue. There, the trial court imposed what it believed was a departure sentence; therefore, it provided no reasons for the sentence imposed. However, due to a misapplication of the youthful offender statute, the sentence imposed exceeded the maximum sentence allowed by the statute. The district court vacated the sentence but held that on remand the trial court could impose a departure sentence and provide written reasons therefor. Dyer, 534 So.2d at 844.

Similarly, in Jones v. State, 540 So.2d 245 (Fla. 4th DCA 1989), the trial court imposed what it believed was a guidelines sentence, but the sentence in fact exceeded the guidelines range due to an incorrect application of the habitual offender statute. The original sentence was vacated accordingly. On remand, the trial court imposed a departure sentence setting forth reasons for its departure. The fourth district court affirmed the departure sentence, holding that the initial sentencing did not constitute a bar to subsequent enhancement of the defendant's sentence based upon written reasons supporting the departure. Jones, 540 So.2d at 246.

Likewise, in Waldron v. State, 529 So.2d 772 (Fla. 2d DCA 1988) (en banc), the trial court erroneously sentenced the defendant to a combination of imprisonment and community control, deemed a departure sentence, without providing written reasons. The second district court reversed the sentence but held on remand the trial court could depart from the guidelines upon providing valid written reasons for such departure. Waldron, 529 So.2d at 774.

In Harrison v. State, 523 So.2d 726, 727 (Fla. 3d DCA 1988), the third district court rejected the well-reasoned decisions of this Court and its sister courts and held that where the trial court mistakenly imposed a departure sentence, on remand the court was bound to sentence the defendant within

the guidelines. The district court reasoned that to allow the sentencing court to depart on remand would violate the "thrust, if not the precise holding, of Shull. This Court's decision in Shull does not prohibit the trial court from imposing a departure sentence under the instant circumstances.

In Shull, the original sentence was a departure sentence for which the trial court assigned a reason. The holding of Shull was when a sole reason for departure was determined by a reviewing court to be invalid, upon remand the trial court was not allowed to go back into the record and find new reasons. Shull, 515 So.2d at 750. In the instant case, the State requested, at the original sentencing hearing, that the Defendant be sentenced under amended Rule 3.701 d 3 or that the trial court depart from the 5 1/2 to 7 years' range. The court specifically declined to depart and imposed sentence under the amendment. Thus, the court did not originally intend to depart from the guidelines sentence. Since no departure took place, no reason was assigned because all parties believed a guidelines sentence was being imposed.

The reasoning of Shull, was based on policy. It requires trial courts to put all their reasons for departure in their first departure order. Shull was decided to prevent deliberate manipulation of the sentencing system by a trial judge. Without a Shull-type decision a sentencing judge, who

had several reasons for departure, could theoretically issue a departure sentence, use on reason, and reserve the remaining reasons to be used one at a time if the original reason was later held to be invalid. To avoid this possibility of abuse of discretion, this Court in Shull required all reasons to be placed in the initial departure order. The instant record reflects that there was no abuse under Shull by the trial court.

Interestingly, the third district court has applied its own rule and interpreted Shull in an inconsistent manner. In State v. Wayda, 533 So.2d 939 (Fla. 1988), the trial court departed downward from the guidelines without providing reasons for departure. The district court reversed the departure sentence but held that on remand the trial court would be afforded the opportunity to enter a written order supporting the departure. Wayda, 533 So.2d at 939.

In order for the goal of the sentencing guidelines to be fulfilled, the trial court must make a fully informed decision as to the appropriate sentence to be imposed. In order for the court to make a proper decision, the court must have before it an accurate guidelines scoresheet. When there is an error, based on either a misapplication of the law or a mere mathematical miscalculation, all parties should be returned to their original position and the court must be allowed to exercise its full sentencing authority upon resentencing. Each

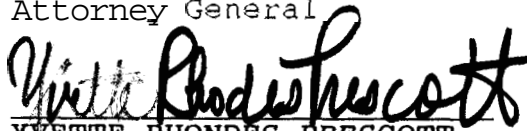
criminal defendant and all citizens of the State of Florida deserve no less. To do otherwise propagates the inconsistent sentencing which the guidelines were enacted to prevent.

CONCLUSION

Based on the foregoing reasons and citations of authority, the State urges this Court to quash the decision of the district court.

Respectfully submitted,

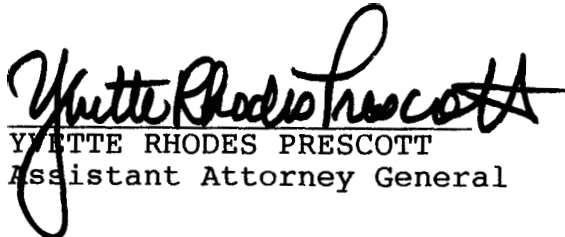
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF PETITIONER was furnished by mail to TIMOTHY VAN HORN, Respondent Pro-se, Prisoner No. 094673, Martin Correctional Institution, P. O. Box 1218, 1150 S. W. Allapattah Road, Indiantown, Florida 34956, on this 28th day of August, 1989.



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