

IN THE SUPREME COURT OF FLORIDA

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CLERK, SUPREME COURT

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CARL PUFFINBERGER,
Petitioner,
vs.
STATE OF FLORIDA,
Respondent.

CASE NO. 75,917

PETITIONER'S BRIEF ON THE MERITS

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE AND FACTS	2
SUMMARY OF ARGUMENT	4
ARGUMENT	
IN LIGHT OF <u>WEEMS</u> , TO WHAT EXTENT MAY A TRIAL	
COURT CONSIDER A NON-SCOREABLE JUVENILE RECORD	
IN AGGRAVATING A SENTENCE ABOVE THE GUIDELINES	
RANGE?	
	5
CONCLUSION	12
CERTIFICATE OF SERVICE	12

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<u>Blue v. State</u> , 541 So.2d 736 (Fla. 1st DCA 1989)	3, 5, 9
<u>Carter v. State</u> , 510 So.2d 930 (Fla. 5th DCA 1987)	3, 7
<u>Florida Rule of Criminal Procedure Re: Sentencing Guidelines</u> , 522 So.2d 374 (Fla. 1988)	11
<u>Jones v. State</u> , 501 So.2d 668 (Fla. 1st DCA 1987)	5, 8, 9
<u>McCaskell v. State</u> , 524 So.2d 461 (Fla. 5th DCA 1989)	11
<u>Morgan v. State</u> , 550 So.2d 151 (Fla. 3rd DCA 89)	5
<u>Musgrove v. State</u> , 524 So. 2d 715 (Fla. 1st DCA 1988)	5-7, 9
<u>Puffinberger v. State</u> , 558 So.2d 189 (Fla. 4th DCA 1990)	3
<u>State v. Jones</u> , 530 So.2d 53 (Fla. 1988)	8
<u>Walker v. State</u> , 519 So.2d 1105 (Fla. 1st DCA 1988)	5, 7, 10
<u>Weems v. State</u> , 469 So.2d 1228 (Fla. 1985)	3-9, 12
<u>White v. State</u> , 501 So.2d 189 (Fla 5th DCA 1987)	5, 8

OTHER AUTHORITIES

<u>Florida Rules of Criminal Procedure</u>	
3.701(11)	9
3.988	10

PRELIMINARY STATEMENT

Petitioner was the appellant in the District Court of Appeal, Fourth District and the defendant in the trial court. He will be referred to as petitioner in this brief.

The record on appeal is not consecutively numbered. References to the original record filed in the district court June 10, 1989, will be by the symbol "R" followed by the appropriate page number in parentheses. The supplemental record containing juvenile records filed August 3, 1989, will be referred to by "SR."

STATEMENT OF THE CASE AND FACTS

By information petitioner was charged with aggravated child abuse on Crystal Lynn McGrath which was alleged to have occurred between the dates of Oct. 1, 1987 and Nov. 19, 1988 (R-44-45). Count II of the same information charged Cheryl Puffinberger with aggravated child abuse on Crystal McGrath.

Petitioner entered a plea of no contest on March 3, 1989 (R-60-63).

On May 5, 1989, sentencing hearing commenced before the Honorable Robert R. Makemson, Circuit Judge presiding (R-1). A dispute arose over the accuracy of the sentencing guideline scoresheet because it reflected three prior second degree felony convictions for three burglaries against petitioner's father's house committed when petitioner was a juvenile. After extensive argument, the court ruled that the three juvenile offenses were unscorable because their disposition was more than three years from the inception of this aggravated child abuse offense of October 1, 1987 (R-15). The state then pointed out that the court could exceed the guidelines based on the unscorable prior juvenile record (R-23). After further argument, the court concluded that aggravation was appropriate for unscored juvenile convictions over defendant's objections that his prior juvenile record was not serious enough to warrant a departure (R-27).

Correctly scored, all counsel and the court agreed that petitioner showed 182 for a recommended range of five-and-a-half to seven years (R-5,22, SR-36-37). The court then imposed a sentence of ten years imprisonment and gave this sole written

reason for departure:

"Defendant's three juvenile dispositions for burglary that are the equivalent of convictions as defined in rule 3.701(d)(2), but are not scoreable since they occurred more than three years prior to the commission of the instant offense. Weems v. State, 469 So.2d 1228 (Fla. 1985)."

(R-75).

On appeal to the District Court of Appeal, Fourth District, petitioner contended that the trial court abused his discretion in exceeding the guidelines for petitioner's insignificant juvenile record. On March 21, 1990, the district court entered its decision and held:

Under Weems, wherein the defendant's thirteen juvenile dispositions were held to be valid considerations in sentencing above the guidelines, a defendant's unscored juvenile record, containing offenses disposed of by adjudications equivalent to conviction of an adult, can be a clear and convincing reason for departure. Id. Some district courts of appeal have taken the Weems opinion to imply that to be justification for departure, the juvenile record must be extensive. See Blue v. State, 541 So.2d 736 (Fla. 1st DCA 1989); Carter v. State, 510 So.2d 930 (Fla. 5th DCA 1987). We affirm the trial court's ruling; however, we certify the following question as being one of great public importance:

IN LIGHT OF WEEMS, TO WHAT EXTENT
MAY A TRIAL COURT CONSIDER A NON-
SCOREABLE JUVENILE RECORD IN AGGRA-
VATING A SENTENCE ABOVE THE GUIDE-
LINES RANGE?

Puffinberger v. State, 558 So.2d 189 (Fla. 4th DCA 1990) (Appendix
- 2).

Notice of discretionary review was timely filed. This brief follows according to this Court's established briefing schedule.

SUMMARY OF ARGUMENT

Weems v. State held that a defendant's extensive unscored juvenile record was a clear and convincing reason for departure. Petitioner contends that unscored juvenile offenses may not be considered as a reason for departure unless the juvenile record is extensive or significant. There is a growing body of case law from the district courts which applies Weems only when the juvenile record is extensive or significant. Petitioner's juvenile record which resulted from his burglaries of his father's home during a ten day period was minor in nature and not serious enough to warrant a departure.

ARGUMENT

IN LIGHT OF WEEMS, TO WHAT EXTENT MAY A TRIAL COURT CONSIDER A NON-SCOREABLE JUVENILE RECORD IN AGGRAVATING A SENTENCE ABOVE THE GUIDELINES RANGE?

The question before this Court is whether the decision in Weems v. State, 469 So 2d 128 (Fla. 1985), allows for departure in aggravation from the guidelines recommended range for unscored juvenile dispositions even when the prior juvenile record is insignificant. There is a growing body of case law from the district courts, though not from the Fourth District which certified this question, that unscored juvenile convictions which are insubstantial do not warrant departure. Musgrove v. State, 524 So. 2d 715 (Fla. 1st DCA 1988). Walker v. State, 519 So.2d 1105 (Fla. 1st DCA 1988), Jones v. State, 501 So.2d 668 (Fla. 1st DCA 1987), Blue v. State, So.2d (1 DCA 89), White v. State, 501 So.2d 189 (Fla 5th DCA 1987), Morgan v. State, 550 So.2d 151 (Fla. 3rd DCA 89).

On the other hand, in petitioner's case neither the district court nor the circuit court considered petitioner's arguments that his prior juvenile record was not serious enough to warrant departure. Petitioner's juvenile record consisted of three burglaries of his parents' home during a 10 day period, on February 29, March 6 and 10, 1984.(SR-10). Petitioner was again living with his parents at the same dwelling he had burglarized by the time he appeared in juvenile court, waived his right to counsel and entered a guilty plea to the offenses (SR-15,5-6). At best, this is a minimal juvenile history and one that is not serious enough to

warrant an aggravation or departure of a guideline sentence as imposed upon the petitioner. It simply does not support an upward departure.

In Weems, this Court held that a defendant's extensive unscored juvenile record was a clear and convincing reason for departure:

The fact that Weems had a multitude of juvenile dispositions for previous burglaries was certainly material to the sentencing process and may be considered by the trial court in deciding on an appropriate sentence under the circumstances. The district court correctly concluded that the trial court did not abuse its discretion in departing from the guidelines in this case.

Id. at 130.

True, petitioner had a juvenile record but it was not extensive as required by Weems. Other cases regarding departures based on unscored juvenile offenses read Weems to require an extensive juvenile record to justify a departure sentence. In Musgrove v. State, supra, the First District dealt with unscored juvenile offenses stating:

The fact that a defendant's record reflects the commission of offenses which cannot be scored because the offenses were committed when the defendant was a juvenile may, of course, be a valid reason for departure under our Supreme Court's rulings in Weems v. State, 469 So.2d 128 (Fla. 1985) and Williams v. State, 504 So.2d 392 (Fla. 1987). However, unscored juvenile record may be properly considered as a basis for departure only if the juvenile record is extensive, and only if the juvenile offenses were disposed of by adjudications equivalent to conviction of an adult. Weems v. State; Walker v. State, 519 So.2d 1105 (Fla. 3rd DCA 1988); Carter v. State, 510 So.2d 930 (Fla. 5th DCA 1987); Jones v. State, 501 So.2d 665 (Fla. 1st DCA

1987); White v. State, 501 So.2d 189 (Fla. 5th DCA 1987). In this case, seven entries appear on appellant's juvenile "rap sheet," only three of which clearly and unambiguously reflect adjudications equivalent to conviction of an adult. Of the three offenses which resulted in adjudications of guilt, only one, a burglary of a dwelling, was unquestionably a felony. Accordingly, we are unable find adequate support in the record for the trial judge's conclusion that appellant's juvenile record is so "substantial" as to warrant imposition of a departure sentence. Cf. Weems v. State, where the defendant had a record of thirteen juvenile dispositions which were the equivalent of convictions.

Musgrove v. State, 524 So.2d 715,716-717 (Fla. 1st DCA 1988).

In Walker v. State, supra, the First District held that an upward departure cannot be based on a single prior juvenile conviction some four and one-half years earlier. The court also noted, ironically, had the juvenile burglary conviction occurred within three years of the sentencing and been scored as a prior third-degree felony, the presumptive guideline sentence would have been 5 1/2 to 7 years but "because the single juvenile conviction was more remote in time, the trial court believed itself empowered to impose a still longer sentence." Id. at 1105, fn. 1.

The Fifth District upheld "significant unscored juvenile record" as a valid departure reason under Weems based on the defendant's many juvenile crimes in Carter v. State, 510 So.2d 930 (5th DCA 1987). This case is cited in other decisions, such as petitioner's and Musgrove v. State, to demonstrate that Weems is authority for departure only where the unscored juvenile record is significant.

In Jones v. State, supra, approved in State v. Jones, 530 So.2d 53 (FLa. 1988), the court cited Weems with approval and stated the trial judge may properly consider any juvenile convictions more than three years old as a reason to depart. There the trial judge had relied on the presentence investigation for the record of the defendant's juvenile offenses. Since the PSI was not clear how many of these entries had resulted in adjudications, the trial court was ordered to determine the correct disposition of the juvenile offenses in order for them to be used as a reason for departure.

In White v. State, supra, the Fifth District further showed in what circumstances an unscored juvenile record could be a valid reason for departure under Weems. The court there said that although unscored juvenile record had been found a valid reason for departure, that factor standing alone did not justify departure because White's juvenile record was quite minimal. Also the crime for which White was convicted was not committed under serious circumstances even though the crime itself (robbery) was serious.

These same considerations pertain in petitioner's case. The three burglaries of his father's home were not serious, though burglary is a serious crime. On February 29 petitioner took a 12 gauge shotgun from the home and gave it to an adult accomplice who sold it; on March 6, petitioner removed pressure gauges and once again gave it to an adult accomplice to sell; only an AM/FM stereo was stolen in the third burglary on March 10 (SR-8,10). Petitioner was once again living in his parents' home at the time he pled guilty to all three juvenile offenses and was placed on community

control. A condition of the community control was that petitioner pay restitution. The record notes that his juvenile sanctions were satisfied (SR-7). This is not the sort of extensive or serious record contemplated by Weems which would justify departure.

In Blue v. State, the First District said that three unscored juvenile offenses were not significant or extensive enough to justify departure. The three adjudications there were for entering without breaking, petit theft and simple battery. Relying on Blue, as well as Musgrove, and Jones v. State, the Third District invalidated a Weems departure reason when the record did not support a conclusion that Andre Morgan's juvenile record was extensive. The Third District also said that three prior juvenile convictions were insufficient to support departure. Id. at 153.

The holding of these cases correctly applies Weems. Departures are to be avoided unless there are circumstances or factors which "reasonably justify" aggravating or mitigating the sentence. Florida Rule of Criminal Procedure 3.701(11). A juvenile record does not reasonably justify departure when the adjudications it reflects are not substantial nor extensive. A trial judge should be required to examine the extent of a juvenile record and determine that the circumstances of those offenses are serious before a departure for unscored juvenile offenses is allowed.

In a special concurring decision in petitioner's case, Judge Anstead wrote to offer his explanation why other district courts have read Weems to require that unscored juvenile adjudications be extensive before departure is allowed:

Because of the Supreme Court's holding in Weems, I agree that we should affirm the appellant's departure sentence and certify the issue as to the extent a court may rely on an unscored juvenile record in departing from a guidelines sentence.

There is clearly a tension between the policies excluding a juvenile record from consideration in computing a guidelines sentence, but allowing such record to be used as a reason for departing from the guidelines. The latter policy would appear on its face to overrule the policy adopted by the guidelines drafters to exclude consideration of a juvenile record except as provided by Rule 3.701(d)(5)(c), Florida Rule of Criminal Procedure. This tension is apparently the reason why some courts have required an "extensive" juvenile record to support departure. Weems contains no such restriction.

Use of this reason for departure even where the juvenile record is not significant can result in a higher sentence being imposed than if the juvenile offense were scoreable. Walker v. State, supra. It may also be utilized to give a lengthier prison sentence even though petitioner may not have been advised of these potential collateral consequences when he decided to waive counsel as a juvenile and plead guilt.

Petitioner respectfully requests this Court to quash the decision of the district court in his case and to reverse and remand for resentencing within the guidelines recommended range of five-and-a-half to seven years and no more.

The 1988 amendment to Florida Rule of Criminal Procedure 3.988 giving permissible ranges is not applicable here. To give effect to that amendment would require a prohibited retroactive application. The trial court here determined that the inception of this offense was October 1, 1987, the first date charged in the informa-

tion (R-185). This Court has already recognized that the 1988 amendment to the guidelines which establishes a new range of permissive sentences is a substantive change in the law and must be prospective only in application so as to avoid violating constitutional prohibitions against ex post facto laws. Article I, Section 10, Florida Constitution. Florida Rule of Criminal Procedure Re: Sentencing Guidelines, 522 So.2d 374 (Fla. 1988). McCaskell v. State, 524 So.2d 461 (Fla. 5th DCA 1989).

CONCLUSION

Based on the foregoing, the decision of the district court should be quashed and remanded for instructions that only a substantial or extensive non-scoreable juvenile record may justify departure under Weems.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by courier, to DEBORAH GULLER, Assistant Attorney General, Elisha Newton Dimick Building, Room 204, 111 Georgia Avenue, West Palm Beach, Florida 33401, this 7th day of June, 1990.

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