IN THE SUPREME COURT OF FLORIDA

CASE NO. 75,917

CARL PUFFINBERGER,

Petitioner.

vs.

STATE OF FLORIDA,

Respondent.

****

ON APPEAL FROM THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA, FOURTH DISTRICT

****

RESPONDENT'S BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

JOSEPH A. TRINGALI
Assistant Attorney General
Florida Bar No. 134924
111 Georgia Avenue, Suite 204
West Palm Beach, Florida 33401
Telephone: (407) 837-5062

Counsel for Respondent.

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PRELIMINARY STATEMENT

Respondent was the prosecution in the trial court and the appellee in the District Court of Appeal, Fourth District.

In the brief, the parties will be referred to as they appear before this Honorable Court except that the Respondent may also be referred to as the State.

The following symbols will be used:

"R" Record on Appeal

"AB" Appellant's Initial Brief

STATEMENT OF THE CASE AND FACTS

Respondent accepts the Statement of the Case and Facts as presented in the Initial Brief of Petitioner to the extent that they are not argumentative.

SUMMARY OF THE ARGUMENT

Weems v. State held that a defendant's unscored juvenile record could be used as a reason for departure from the sentencing guidelines. Weems did not require that the juvenile record be extensive in order to be examined, but rather, than an extensive unscored juvenile record could be used to depart from sentencing guidelines.

Appellant's juvenile adjudications were felonies and were properly utilized for sentence departure.

ISSUE I

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

ARGUMENT

The question before this Court is not, as stated by the Appellant, "...whether the decision in Weems v. State, 469 So.2d 128 (Fla. 1985), allows for departure in aggravation from a guidelines recommended range for unscored juvenile dispositions even when the prior juvenile record is insignificant." Rather, the question before this Court focuses on the extent to which a trial court may consider a non-scoreable juvenile record.

Appellant's assertion that "a growing body" of case law in the district courts which holds that an "...unscored juvenile record may be properly considered as a basis for departure only if the juvenile record is extensive..." is a misinformed attempt to blend the holdings of those cases with the holding of the Weems case, when, in fact, the holdings address completely different issues.

Issac Weems plead guilty in the Circuit Court, Pinellas County, to burglary of a structure, battery of a police officer, and resisting arrest without violence. It happened that Weems had a juvenile record which included thirteen juvenile dispositions that were the equivalent of convictions had he been an adult when they were committed. However, most of the dispositions were more than three years old and could not be included in the score under the sentencing guidelines.

Florida Rule of Criminal Procedure 3.701 (d) (5) (c) reads:

> "Juvenile Record: All prior juvenile dispositions which are the equivalent of convictions as defined in section (d) (2), occurring within three (3) years of the commission of the primary offense and which would have been criminal if committed by an adult shall be included in the prior record." (emphasis added)

While it was clear from the Rule that dispositions less than three years old were included in the prior record and became part of the "score", the Rule was silent as to the significance of older dispositions and whether such "unscored" dispositions could be used as a reason to depart from the sentencing guidelines:

> "Departures From The Guideline Sentence: Departures from the recommended or permitted guideline sentence should be avoided unless there are circumstances or factors which reasonably justify aggravating or mitigating the sentence. Any sentence outside of the permitted guideline range must be accompanied by a written statement delineating the reasons for the departure. Reasons for deviating from the guidelines shall not include factors relating to prior arrests without conviction. Reasons for deviating from the guidelines shall not include factors relating to the instant offenses for which convictions have not been obtained." Fla.R.Crim.P., 3.701(d)(11).

In sentencing Issac Weems, the trial judge properly stated that he could not "score" most of the defendant's juvenile record. However, he then proceeded to use the unscored portion of the record as a basis for departing from the sentencing guidelines. Weems appealed, and this Court, in its opinion, specifically delineated the issue:

> "The issue before us is whether Weems' extensive juvenile record, which could not be considered in calculating the applicable sentencing range because the juvenile dispositions were over three years old, could be considered by the trial court as a reason for departing from the sentencing guidelines." Weems v. State, 469 So.2d 128 (1985) (emphasis added).

Clearly, the question before this Court in Weems was whether "old" dispositions which could not be considered under Rule 3.701(d)(5)(b), could be considered for the purposes of departure from the guidelines under Rule 3.701 (d) (11). This Court answered that question in the affirmative.

Thereafter, a number of district courts have cited the Weems case when confronted with appeals from excessive sentences. (see cases cited by Appellant: 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), White v. State, 501 So.2d 189 (Fla. 5th DCA 1987), Morgan v. State, 550 So.2d 151 (Fla. 3rd DCA 1989). However, in each of these cases, the courts have properly cited Weems only in support of the proposition that a non-scoreable juvenile record may be used for the purpose of departing from the sentencing guidelines. Having established that principle, the courts have then examined the severity of the sentence in light of the juvenile record, which is, of course, a completely separate question.

The Appellee urges this Court to answer the certified question from the Fourth District so as to permit a non-scoring

juvenile record to be used for departure purposes in the same manner as any other "non-scoring" record, that is, to permit a trial court to consider the number of the adjudications, the nature of the adjudications and the escalating pattern of criminal activity in order to arrive at a proper sentence.

ISSUE II

THE TRIAL COURT IN THE INSTANT CASE PROPERLY SENTENCED THE DEFENDANT

With regard to the question of severity in the case sub judice, the trial court properly sentenced the defendant. Appellant maintains that his three prior juvenile adjudications are "insignificant" and not sufficient to validate the trial court's departure from the sentencing guidelines. (Appellant's Brief at page 5).

The supplemental record (S.R. at 8, 10) indicates the nature of Appellant's three prior juvenile adjudications. In addition to the stealth entry in his parent's home, not his legal residence at the time, Appellant entered with other adults and juveniles and, without permission, removed items from the home for resale. On February 29, 1984 Appellant "removed a 12 gauge shotgun and give it to adult accomplice who sold it...On March 6, 1984 [Appellant] removed pressure gauge and again gave it to adult accomplice who sold it...On [March 10, 1984, Appellant] removed Am/Fm Stereo and gave to (3) adult accomplices..." (S.R. 8, 10). Appellant failed to make a court appearance (S.R. 24). Furthermore the three burglaries were felonies of the second degree. (R 25).

Contrary to Walker v. State, 519 So.2d 1105 (Fla. 3rd DCA 1988), where that defendant had a single prior juvenile adjudication, and Musgrove v. State, 524 So.2d 715 (Fla. 1st DCA 1988), where "only one [juvenile crime], a burglary of a

dwelling, was unquestionably a felony...[1] Appellant, sub judice, has three prior juvenile adjudications all of which are felonies. In White v. State, 501 So.2d 189 (Fla. 5th DCA 1987), the Court found that the defendant's juvenile record was minimal, without detail, and additionally noted the crime for which defendant was being sentenced did not occur under serious circumstances. Id. at 190. At bar, three juvenile offenses, and aggravated child abuse as the primary offense, distinguish this case from Appellant's references.

On the other side of the coin, Appellee presents for this Court's consideration cases where prior juvenile adjudications, not scorable on the scoresheet, were valid reasons for enhancement. In Copeland v. State, 503 So.2d 1301 (Fla. 2nd DCA 1987), the defendant had "five juvenile adjudications of guilt..." Id. at 1303. A "prior history of delinquency and [being] on parole at the time of commission of the instant offenses is also a factor that may properly influence a departure from the guidelines." Carney v. State, 458 So.2d 13, 16 (Fla. 1st DCA 1984); see also; Price v. State, 519 So.2d 76, 78 (Fla. 2nd DCA 1988); Neal v. State, 531 So.2d 410 (Fla. 1st DCA 1988).

The 1988 amendment to Rule 3.988 Fla.R.Crim.P., became effective July 1, 1988.[2] The information, sub judice, alleges a crime occurring on October 1, 1987 and November 19, 1988. (R

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[1] Id. at 716.

[2] State v. Williams, 14 F.L.W. 1835 (Fla. 4th DCA August 2, 1989).

34). Application of the permissible range is, therefore, not a retroactive application. Therefore, should this Court find error, the permissible sentencing range is 4½ to 9 years.

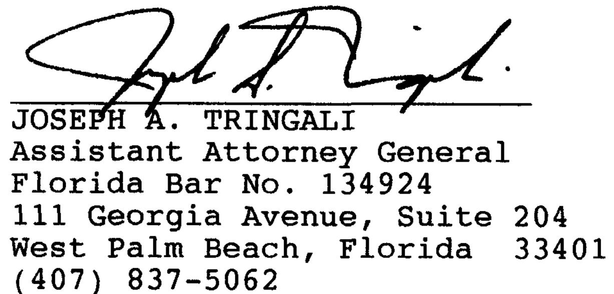
Appellee respectfully requests this Court's affirmation of Appellant's (10) ten year sentence.

CONCLUSION

WHEREFORE, based upon the foregoing reasons and citations of authority cited herein, Appellee respectfully requests that the judgment and sentence of the trial court be AFFIRMED.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

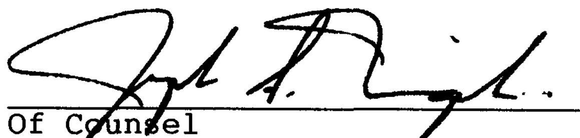


JOSEPH A. TRINGALI
Assistant Attorney General
Florida Bar No. 134924
111 Georgia Avenue, Suite 204
West Palm Beach, Florida 33401
(407) 837-5062

Counsel for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing "Answer Brief of Appellee" has been furnished by courier to: MARGARET GOOD, ESQUIRE, Assistant Public Defender, The Governmental Center, 301 N. Olive Avenue, Ninth Floor, West Palm Beach, Florida 33401, this 22nd day of June, 1990.



Of Counsel

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