IN THE SUPREME COURT OF THE STATE OF FLORIDA

TOBIAS BARFIELD,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 76,524

PETITIONER'S BRIEF ON THE MERITS

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AUTHORITIES CITED

OTHER AUTHORITY

FLORIDA STATUTES (1987)

PRELIMINARY STATEMENT

The Petitioner was the appellant in the Fourth District Court of Appeal and the defendant in the trial court. The Respondent was the appellee and the prosecution, respectively, in the lower courts. In the 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
"A"	Appendix

STATEMENT OF THE CASE AND FACTS

On April 21, 1988, Petitioner, Tobias Barfield, was charged in Count I with trafficking in cocaine (R452-453) and in Count II with conspiracy to traffic in cocaine (R448). On September 26, 1988, Petitioner was convicted of both offenses (R441,442,458). On November 3, 1988, a sentencing hearing was held (SR189-197). The recommended guideline range was seven (7) to nine (9) years in prison (R476). On November 3, 1988, the trial court departed from the sentencing guidelines and sentenced Petitioner to twenty (20) years in prison for Count II, conspiracy to traffic in cocaine (R475). On November 29, 1988, the trial court entered the following reasons for departure:

> 1. The Court finds that departure from the sentence recommended for the Defendant in the Florida Rules of Criminal Procedure is appropriate in this case for the following clear and convincing reasons.
>
> 2. Certified documents provided to this Court reflect that the Defendant was sentenced to Florida State Prison for Trafficking in Cocaine, in an amount of 28 grams or more, in Case No. 86-7845 CF10(A). Certified documents further reflect that the Defendant was sentenced on January 27, 1987, to two years Florida State Prison as a youthful offender and that on January 5, 1988, the Defendant was released to the community and continued on Department of Corrections Supervision.
>
> 3. The substantive offenses for which the Defendant now stands convicted occurred on April 5, 1988. Since the Defendant was recently released from prison at the time he committed the substantive offense, the Court finds cause to aggravate his sentence. Furthermore, the Defendant is found to be a continuing threat to the community and appears to show absolutely no sigh of rehabilitation since he has committed another Trafficking in Cocaine offense within a very short time of his release from prison.

(R478-480). These reasons were filed on December 1, 1988 (R479).

On December 5, 1988, Petitioner timely filed his notice of appeal (R481).

On August 1, 1990, the Fourth District Court of Appeal affirmed Petitioner's sentence (A1-2). On appeal Petitioner had argued that temporal proximity was an invalid reason for departure. The district court affirmed the departure and certified the following question to be one of great public importance:

> DOES THE TEMPORAL PROXIMITY OF CRIMES ALONE PROVIDE A VALID REASON FOR DEPARTURE FROM THE SENTENCING GUIDELINES WITHOUT A FINDING OF A PERSISTENT PATTERN OF CRIMINAL CONDUCT?

(A2).

On August 20, 1990, Petitioner timely filed his notice to invoke this Court's discretionary review. On August 27, 1990, this Court set forth a briefing schedule for this review.

SUMMARY OF THE ARGUMENT

Temporal proximity of crimes alone does not justify departing from the recommended guideline sentence. Such a departure would be arbitrary without a showing of an escalating pattern of criminal conduct. Here, there was no such pattern. Also, the lack of rehabilitation is not a valid reason for departure. Petitioner should be resentenced within the guidelines. In addition, a separate ground for resentencing within the guidelines is due to the failure to enter and file the reasons for departure contemporaneously with the imposition of the departure sentence.

ARGUMENT

THE TRIAL COURT ERRED IN DEPARTING FROM THE RECOMMENDED GUIDELINE SENTENCE.

Petitioner's recommended guideline sentence was seven (7) to nine (9) years in prison (R476). At sentencing on November 3, 1988, the trial court departed from the guidelines by sentencing Petitioner to twenty (20) years in prison for Count II, conspiracy to traffic in cocaine (R475).[1] On November 29, 1988, the trial court entered the following reasons for departing from the guidelines:

> 1. The Court finds that departure from the sentence recommended for the Defendant in the Florida Rules of Criminal Procedure is appropriate in this case for the following clear and convincing reasons.
>
> 2. Certified documents provided to this Court reflect that the Defendant was sentenced to Florida State Prison for Trafficking in Cocaine, in an amount of 28 grams or more, in Case No. 86-7845 CF10(A). Certified documents further reflect that the Defendant was sentenced on January 27, 1987, to two years Florida State Prison as a youthful offender and that on January 5, 1988, the Defendant was released to the community and continued on Department of Corrections Supervision.
>
> 3. The substantive offenses for which the Defendant now stands convicted occurred on April 5, 1988. Since the Defendant was recently released from prison at the time he committed the substantive offense, the Court finds cause to aggravate his sentence. Furthermore, the Defendant is found to be a continuing threat to the community and appears to show absolutely no sign of rehabilitation since he has committed another Trafficking in Cocaine offense within a very short time of his release from prison.

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[1] Because the statute requires a mandatory minimum term of fifteen (15) years imprisonment, the actual extent of departure was five (5) years in prison.

(R479-480).[2] In summary, the trial court gave two reasons for departure -- (1) the timing of the offense for which Petitioner is being sentenced (90 days after his release from prison) and (2) the fact that Petitioner had not been successfully rehabilitated as shown by his most recent offense. On appeal the district court upheld the departure and certified the following question of great public importance:

> DOES THE TEMPORAL PROXIMITY OF CRIMES ALONE PROVIDE A VALID REASON FOR DEPARTURE FROM THE SENTENCING GUIDELINES WITHOUT A FINDING OF A PERSISTENT PATTERN OF CRIMINAL CONDUCT?

(A2). As will be explained, the trial court's reasons for departure are invalid and the certified question should be answered in the negative.

A. Temporal proximity of crimes alone does not justify departure.

As this Court has unequivocally made clear in State v. Simpson, 554 So.2d 506 (Fla. 1989) temporal proximity of the crimes by itself will not be a valid reason for departure:

> In State v. Jones, 530 So.2d 53, 55 (Fla. 1988), we again held that timing of offenses could be a valid reason for departure under certain conditions. However, we cautioned the trial courts:
>
> > Before temporal proximity of the crimes can be considered as a valid reason for departure, it must be shown that the crimes committed demonstrate a defendant's involvement in a continuing and persistent pattern of criminal activity as evidenced by the timing of each offense in relation to prior offenses and the release from incarceration or other supervision.

[2] These reasons were filed on December 1, 1988 (R479).

> Id. at 56. Applying this standard in Jones, we held that the defendant did not evince such a continuing and persistent pattern. In Jones, the defendant had committed a burglary and grand theft about one year after release from prison on earlier charges, and then he trafficked in stolen goods five months later.

554 So.2d at 509-510 (emphasis added) (footnotes omitted); see also Frederick v. State, 556 So.2d 471 (Fla. 1st DCA 1990); State v. Jones, 530 So.2d 53 (Fla. 1988); Chanquet v. State, 15 F.L.W. D2017 (Fla. 3d DCA Aug. 7, 1990); Mott v. State, 549 So.2d 1128 (Fla. 3d DCA 1989) (2½ month timing does not justify departure). However, timing combined with facts showing an escalating pattern of crime will be a valid reason for departure. See State v. Simpson, 554 So.2d 506 (Fla. 1989) (ftnt. 3 -- holding that timing alone invalid was "entirely in harmony with Williams v. State, 504 So.2d 392 (Fla. 1987), in which sufficient additional facts were introduced to establish an escalating pattern of criminality").

The use of temporal proximity alone would result in arbitrary and disparate sentences -- as opposed to the goal of the sentencing guidelines -- uniform sentencing. For example, in McKinney v. State, 559 So.2d 621 (Fla. 3d DCA 1990) the timing of six (6) months from release from prison was held to be an invalid reason for departure. Whereas in Jordan v. State, 15 F.L.W. D1535 (Fla. 4th DCA June 6, 1990) a timing of six (6) months was held to be a valid reason for departure. More disturbing is the reasoning behind the holding in Jordan. The district court noted that this Court "spoke of a defendant's release from prison 'only months before'" and from that concluded that temporal proximity of "any

period of less than a year" would justify departure.[3] Of course, placing a random number for timing results in arbitrary type of sentencing arrangements.

Without the requirement of an escalating pattern, the use of mere temporal proximity will result in unwarranted disparity in sentencing. Any decision there is as to the specific timing required for departure will be arbitrary. By only considering temporal proximity, there must be some bright-line test which in itself would be arbitrary and contribute to disparity in sentencing. For instance, if the test were 6 months, would it be logical to permit unlimited departure[4] because the offense was committed 5½ months after release from prison as opposed to 6½

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[3] While apparently overlooking this Court's limitation of Williams v. State, 504 So.2d 392 (Fla. 1987) by the necessity of providing facts to establish an escalating pattern of criminal activity (see ftnt. 3 in Simpson, supra), the district court cited Williams for the proposition that a timing of ten (10) months is a valid reason for departure.

[4] Appellate review of extent of departure is no longer permitted.

months?[5] Without an explanation which can be analyzed objectively, timing is not a valid reason for departure.

In addition to the arbitrary and subjective sentencing which results from considering temporal proximity, it must be noted that temporal proximity is a related aspect of prior offenses which have already been scored. Prior offenses are scored in computing the guidelines. Each offense has to occur at some point in time. Thus, each offense will have some temporal proximity to another event or offense. Of course, the point in time involved is not as significant as the fact that the offense occurred.[6] Mere temporal proximity should not be exalted over other aspects of offenses such as nature of the offense, degree and quantity of offenses, legal constraint, victim injury, etc. Mere temporal proximity should

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[5] Again, an example of this is where one court has held that a temporal proximity of 6 months justifies departure, Jordan, supra, while another has ruled a temporal proximity of 6 months does not justify departure. McKinney, supra. The temporal proximity sufficient for departure rests with the subjective beliefs of the sentencer. In Gibson v. State, 553 So.2d 701 (Fla. 1989) this Court reversed a sentence which demonstrated the arbitrariness of using solely temporal proximity to justify departure. In Gibson v. State, 519 So.2d 756 (Fla. 1st DCA 1988) the district court held that the timing of the offense 14 months after release from prison was a clear and convincing reason for departure. The 14 month timing was held to be valid not because of any explanation as to why this particular timing was relevant, but because the court had previously held a timing of 10 months to be a valid reason. Without any bright-line test or further explanation, logic would dictate that an 18 month timing would be valid because the 14 month timing was valid. Future cases would then hold that a 22 month timing is valid because the 18 month timing was valid. Using this logic, eventually any timing wold become a valid reason to depart. In other words, it is not logical to base departure merely on timing. There must also be some explanation of its significance.

[6] While timing of an offense can be an indication of the recidivism of an offender, the recidivism is more precisely defined by prior convictions which are already factored into the guideline recommendation.

not override other factors of the guidelines which have been deemed important enough to be scored.

In summary, temporal proximity of crimes alone does not provide a valid reason for departure without a finding of an escalating pattern of criminal conduct. Simpson, supra; Jones, supra; Frederick, supra.

B. The evidence did not show an escalating pattern of criminal conduct.

An escalating pattern may be "evidenced by a progression from nonviolent to violent crimes or a progression of increasingly violent crimes." Section 921.001(8), Florida Statutes (1987). This Court's examples of escalating patterns are consistent with the legislature's view in that an escalating pattern is intended to be valid where there is a series of increasingly severe crimes which indicates a dangerous propensity not accounted for by the guidelines. See Keys v. State, 500 So.2d 134 (Fla. 1986) (commission of four crimes escalating from property to persons); Williams v. State, 504 So.2d 302 (Fla. 1987) (nine escalating offenses in ten years); Newland v. State, 508 So.2d 486 (Fla. 3d DCA 1987) (six escalating offenses over three years). Here there was only the commission of similar offenses which are not sufficient to depart from the guidelines. See Aleman v. State, 498 So.2d 967 (Fla. 2d DCA 1986).

In the present case the trial court noted that Petitioner was sentenced as a youthful offender on January 27, 1987, and that on April 5, 1988, he was convicted of the offenses for which he is now being sentenced (R497). Clearly, this is not escalating and not

a pattern. At best, this is a mere repetition of criminal activity which is factored into the guidelines, rather than an escalating pattern. See Davis v. State, 534 So.2d 821 (Fla. 4th DCA 1988) (fact that defendant convicted of armed robbery had committed armed robbery in past ("as one swallow does not a summer make") does not show escalating criminal activity); State v. Simpson, 554 So.2d 506, 510 (Fla. 1989) ("Two criminal episodes occurring two days apart are insufficient to establish a continuing and persistent or escalating pattern of criminality); Smith v. State, 507 So.2d 788 (Fla. 1987); Mitchell v. State, 507 So.2d 686 (Fla. 1st DCA 1987). The trial court's order fails to demonstrate the escalating pattern as defined by the legislature or as demonstrated in Williams, supra. Consequently, departure is not warranted.

C. Lack of rehabilitation since he committed the instant offense.

The trial court's order also indicated that the departure was due to lack of rehabilitation since he committed the instant offense (R479). Clearly, prior criminal record followed by the commission of a criminal offense is always evidence of a lack of rehabilitation. Anyone with a prior record would qualify for a departure sentence under this reasoning. Since prior record is factored in the guidelines, this reason is invalid. Bradley v. State, 509 So.2d 1137 (Fla. 2d DCA 1987) (irretrievable criminal incapable of being rehabilitated not valid reason); Baker v. State, 493 So.2d 515 (Fla. 1st DCA 1986) (presence of four prior convictions for similar crimes is not valid because those convictions are factored in scoresheet).

Since the reasons for departure are invalid, Petitioner's sentence must be reversed and this cause remanded for resentencing within the guidelines. Shull v. Dugger, 515 So.2d 748 (Fla. 1987).

D. The failure to provide contemporaneous written reason for departure.

As noted earlier, the trial court sentenced Petitioner outside the guidelines on November 3, 1988, but did not enter the written reasons for departure until November 29, 1988, and the reasons were not filed until December 3, 1988. The failure to contemporaneously enter and file the reasons at the time of imposition of the sentences requires that Petitioner's sentences be vacated and that Petitioner be resentenced within the recommended guideline range. Ree v. State, 15 F.L.W. S395 (Fla. July 19, 1990).

CONCLUSION

Based on the foregoing argument and authorities cited therein, Petitioner would request this Honorable Court to reverse the decision of the district court with directions that Petitioner be sentenced within the recommended guideline range.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to CAROL ASBURY, Assistant Attorney General, Elisha Newton Dimick Building, Suite 204, 111 Georgia Avenue, West Palm Beach, Florida 33401, by courier this 5th day of October, 1990.

Jeffrey L. Anderson
of Counsel

A P P E N D I X

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT JULY TERM 1990

TOBIAS BARFIELD,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 88-3269.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DISPOSED OF.

Opinion filed August 1, 1990

Appeal from the Circuit Court for Broward County; Arthur J. Franza, Judge.

Richard L. Jorandby, Public Defender, and Joseph S. Shook, Assistant Public Defender, West Palm Beach, for appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Carol Cobourn Asbury, Assistant Attorney General, West Palm Beach, for appellee.

GARRETT, J.

Appellant seeks review of his cocaine conspiracy to traffic and attempted trafficking convictions and sentences.

We affirm the convictions and sentences, but write to address the trial judge's upward departure from the sentencing guidelines.

As the result of a previous crime, on February 27, 1987, appellant pled guilty to trafficking in cocaine and received a two year prison sentence as a youthful offender. On January 5, 1988, he was released into a supervisory program.

The trial judge wrote the following as his basis for the upward sentence departure:

> 3. The substantive offenses for which the Defendant now stands convicted occurred on April 5, 1990. Since the Defendant was recently released from prison at the time he committed the substantive offense, the Court finds cause to aggravate his sentence. Furthermore, the Defendant is found to be a continuing threat to the community and appears to show absolutely no sign of rehabilitation since he has committed another Trafficking in Cocaine offense within a very short time of his release from prison.

This court in Mauney v. State, 553 So.2d 707 (Fla. 4th DCA 1989), upheld an upward departure "where only 'a short period of time' ha[d] transpired between the crime at issue and release from incarceration for some other transgression." Id. at 707 (emphasis added); citing, Lee v. State, 537 So.2d 704 (Fla. 1st DCA 1989)(other citations omitted). We note that only ninety days separated appellant's prison release and his new crime for the same transgression. Our supreme court in State v. Jones, 530 So.2d 53, 55 (Fla. 1988), held that the temporal proximity of crimes can be a valid reason for departure when the timing of an offense relates to prior offenses and the release from incarceration or other supervision. Here appellant committed the same crime before and shortly after his period of incarceration and supervision.

We affirm appellant's convictions and sentences, however, we certify the following question to be of great public importance:

> DOES THE TEMPORAL PROXIMITY OF CRIMES ALONE PROVIDE A VALID REASON FOR DEPARTURE FROM THE SENTENCING GUIDELINES WITHOUT A FINDING OF A PERSISTENT PATTERN OF CRIMINAL CONDUCT?

AFFIRMED.

WARNER, J., concurs.
DELL, J., specially concurs with opinion.

DELL, concurring with opinion.

I concur with the result reached by the majority and the question certified concerning the adequacy of temporal proximity of crimes as the sole basis for a guidelines departure. In State v. Jones, 530 So.2d 53 (Fla. 1988), the supreme court held:

> Before the temporal proximity of the crimes can be considered as a valid reason for departure, it must be shown that the crimes committed demonstrate a defendant's involvement in a continuing and persistent pattern of criminal activity as evidenced by the timing of each offense in relation to prior offenses and the release from incarceration or other supervision.

State v. Jones at 56. State v. Jones seems clear in its holding that the temporal proximity of crimes may not be the basis for departure unless accompanied by a showing of a persistent pattern of criminal conduct. The First District Court of Appeals in Frederick v. State, 556 So.2d 471 (Fla. 1st DCA 1989), so held in a case involving essentially identical facts as those sub judice. In Frederick, the defendant had been convicted of possession of cocaine just seventy-eight days after being discharged from his only prior conviction. The First District quoted State v.

Simpson, 554 So.2d 506 (Fla. 1986), which relied upon State v. Jones, reversed the trial court's enhanced sentence and stated:

> Under this rule, in the state-conceded absence of Frederick's involvement in a "continuing and persistent pattern of criminal activity" - one which could not in any event arise when, as here, only two offenses are involved,... - the allegedly short period between his release and the present crime cannot alone support a guidelines deviation. In other words, proximity alone is no longer (if it ever were) enough; a sufficient pattern of criminal activity must also be demonstrated.

Frederick, 556 So.2d at 472-473 (footnotes omitted); citing, Davis v. State, 534 So.2d 821 (Fla. 4th DCA 1988)(one prior "not included" strong arm robbery does not establish pattern of criminal conduct).

Gibson v. State, 553 So.2d 701 (Fla. 1989) and Jones v. State, 553 So.2d 702 (Fla. 1989), decided after State v. Jones, apparently approve temporal proximity of crimes as a sole basis for departure. While the majority opinions do not reveal whether a "persistent pattern of criminal conduct" existed, Justice Barkett's concurring opinion in Gibson questions the necessity of such a finding:

> Upon further consideration, I would recede from Williams v. State, 504 So.2d 392 (Fla. 1987), and not permit timing alone to be an appropriate reason to depart. I am at a loss as to what standard might be adopted to guide trial judges in applying such a factor. In Jones [553 So.2d 702], we approved eight days. Here, we disapprove fourteen months. It appears to me that this factor is not susceptible to articulable

> standards, and therefore should not be permitted.

Gibson at 702 (emphasis added). In my view, it may be inferred from Jones v. State and Gibson that the temporal proximity of crimes, standing alone, constitutes a sufficient basis for departure.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to CAROL ASBURY, Assistant Attorney General, Elisha Newton Dimick Building, Suite 204, 111 Georgia Avenue, West Palm Beach, Florida 33401, by courier this 5th day of October, 1990.

Jeffrey L. Anderson

Of Counsel