IN THE SUPREME COURT OF FLORIDA

RICHARD C. SMITH,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 76,659

PETITIONER'S BRIEF ON THE MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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ATTORNEY FOR PETITIONER

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MERIT BRIEF OF PETITIONER

STATEMENT OF THE CASE

Richard Charles Smith, hereafter Petitioner, was charged in a seven count information filed June 6, 1988 with: count I - grand theft, in violation of Section 812.014, Fla. Stat. (1987); count II - fleeing or attempting to elude, in violation of Section 316.1935(1), Fla. Stat. (1987); count III - reckless driving, in violation of Section 316.192(1), Fla. Stat. (1987); count IV - resisting an officer without violence, in violation of Section 843.02, Fla. Stat. (1987); count V - uttering a false or forged instrument, in violation of Section 831.02, Fla. Stat. (1987); count VI - forgery, in violation of Section 831.01, Fla. Stat. (1987) and count VII - fraudulent use of a credit card, in violation of Section 817.61, Fla. Stat. (1987). (R 10-11) (lower case number 88-2746)

Pursuant to a negotiated plea agreement, Petitioner pled nolo contendere to grand theft, uttering a forged

instrument, and the fraudulent use of a credit card. In exchange the state nolle prosequi the remaining four counts. (R 19)

On October 18, 1988 Petitioner appeared for sentencing before the Honorable Judge John W. Watson, III, Circuit Court Judge, Seventh Judicial Circuit in and for Volusia County, Florida. (R 26) A category six (theft, forgery, fraud) sentencing guidelines scoresheet was prepared reflecting a total point score of 17 points for a recommended sentencing sanction of any non-state prison sanction. (R 26) The guideline scoresheet revealed that no points were assigned for Petitioner's prior record. (R 26) The Court sentenced the Petitioner in the following manner: for the grand theft conviction (count I), the court sentenced Petitioner to a period of five years probation; for the uttering of a false or forged instrument (count V), the court ordered a consecutive five year period of probation; and on the remaining conviction, fraudulent use of a credit card (count VII), the court ordered a concurrent one year period of probation. As a condition of probation, the court ordered that appellant serve 210 days in the Volusia County Jail. (R 13-14) Appellant received 180 days credit for time served. (R 14)

On November 30, 1988, an affidavit alleging violation of probation was filed by Petitioner's correctional probation officer alleging violation of four conditions of probation. One of which included the commission of substantive offenses. (R 21-23)

On December 13, 1988 a five count information was filed

alleging that Petitioner committed: count I - grand theft; count II - petit theft, in violation of Section 812.014, Fla. Stat. (1987); count III - reckless driving; count IV - fleeing or attempting to elude a law enforcement officer; and count V - resisting a law enforcement officer without violence. (R 58-59)

Pursuant to a negotiated plea agreement, Petitioner plead nolo contendere to the charges of grand theft, petit theft, and resisting arrest without violence. (R 62) In exchange the state nolle prosequi the remaining charges. (R 58-59,75)

On February 7, 1989, Petitioner appeared for sentencing on the violation of probation case (88-2746) as well as the case involving the new substantive offenses (88-9091). (R 1-8, 49-56) A category six sentencing guidelines scoresheet was prepared reflecting a total point score of 43 points for a recommended sentencing range of 12 - 30 months incarceration or community control. (R 62) Invoking the discretionary one cell bump up for the violation of probation, would place the recommended sentencing range at $2\frac{1}{2}$ to $3\frac{1}{2}$ years incarceration. The court departed from the recommended guidelines sentence and imposed a cumulative sentence of ten years incarceration followed by five years probation. Specifically, on the violation of probation case, (88-2746) the court sentenced on count I - a term of five years incarceration with 289 days credit for time served; count V - a consecutive period of five years probation to the sentence imposed. For the new substantive offenses, (88-9091) the court sentenced on count I - a term of five years incarceration to run consecutively to the sentence imposed in the violation of

probation case; count II - to a term of 60 days in the county jail to run concurrently with count I in the violation of probation case and finally as to count V - a term of one year incarceration in the county jail, again to run concurrently with count I in the violation of probation case. (R 63-70, 51-54, 71-72) The court recognized that it had imposed a departure sentence and gave reasons at the sentencing hearing which were memorialized in a written order of departure. (R 55-56, 71-77)

On February 14, 1989 both cases were appealed to the Fifth District Court of Appeal.

On August 30, 1990, the Fifth District Court of Appeal affirmed the departure sentence because at least one reason given for departing beyond the one cell bump up was valid and justified based on the record presented. Nevertheless, the court certified the question:

> MAY A TRIAL JUDGE IMPOSED A DEPARTURE SENTENCE BASED SOLELY ON A PERSISTENT PATTERN OF CRIMINAL ACTIVITY, CLOSELY RELATED IN TIME, ALTHOUGH THE PATTERN IS NOT ESCALATING TOWARDS MORE VIOLENT OR SERIOUS CRIMES?

On September 26, 1990 Petitioner filed a Notice to Invoke Discretionary jurisdiction. This appeal follows.

STATEMENT OF THE FACTS

On one day, April 20, 1988, it was alleged that Petitioner stole Douglas Downs automobile, presented a forged or an altered order for money, with the intent to injure Douglas Downs or Howard Leonard, and then presented Douglas Downs' Shell credit card in order to illegally obtain goods. (R 10-11) For these offenses Appellant was confined in the County Jail of Volusia for a period of 210 days to be followed by five years probation. Petitioner was released from county jail and placed on probation. Within thirty days thereafter he committed the new substantive offenses and an affidavit alleging violation of probation followed. (R 23-25, 58-59)

Petitioner's recommended sentencing sanction was 12 - 30 months incarceration or community control. Invoking the discretionary one cell bump up for the finding of the violation of probation recommended a sentence of 2½ to 3½ years incarceration.

The sentencing court imposed a departure sentence. In the violation of probation case, the court imposed a term of five years incarceration. In the new substantive offenses, the court ordered a consecutive term of five years incarceration. The cumulative sentence was ten years incarceration followed by five years probation. The sentencing court issued a written order of departure which assigned four reasons in order to justify the departure. (R 37-38)

The trial judge gave the following reasons for the departure sentence:

(1) the timing of the commission of the offenses in (88-9091) grand theft, petit theft and resisting an officer without violence. Specifically, said offenses were committed on November 17, 1988 within approximately 30 days from the date the defendant had been released on probation in (88-2746) for the offense of grand theft, ect. as above described.

(2) the nature of the defendant's prior record. Specifically, the defendant had previously committed the offense of grand theft in (88-2746) which as was previously stated, the defendant was placed on probarion for. In said grand theft, was motor vehicle grand theft. One of the offenses for which the defendant is currently before the court in (88-9091) is grand theft. Specifically, grand theft of a motor vehicle.

(3) The violations of probations are serious and substantial and egregraious [sic] in nature and not merely technical in nature.

(4) the defendant's criminal record as evidenced by the offenses in (88-2746 and 88-9091) show a continuing and persistent and escalating pattern of criminal activity. (R71-77)

SUMMARY OF ARGUMENT

Departures from the recommended guidelines sentence based upon "temporal proximity" of the new substantive offense with the defendant's prior convictions or release from incarceration and serving of probation, concern factors already included within the sentencing guidelines scoresheet. Specifically, the primary offense for which the defendant is being sentenced is scored, the prior record is assessed points, the legal status of the probationer is factored. Additionally, in the case of Category 6 (Theft) offenses, the pattern or persistence of the criminal conduct is factored on the scoresheet by inclusion of the multiplier for like offenses.

Even if temporal proximity of the offenses is a proper reason for departure in a particular case, the instant case is not one of those cases.

ARGUMENT

MAY A TRIAL JUDGE IMPOSE A DEPARTURE SENTENCE BASED SOLELY ON A PERSISTENT PATTERN OF CRIMINAL ACTIVITY, CLOSELY RELATED IN TIME, ALTHOUGH THE PATTERN IS NOT ESCALATING TOWARDS MORE VIOLENT OR SERIOUS CRIMES?

It is the Petitioner's position that the answer to the certified question must be No. The Fifth District Court of Appeal affirmance of the departure sentence ordered in this case must be reversed, because it relies upon factors already taken into consideration and weighted in the sentencing guidelines scoresheet, and considers matters that the Legislature failed to include on the sentencing guidelines scoresheet. Specifically, the timing or "temporal proximity" of the offenses and the pattern of offenses.

Petitioner appeared for sentencing on both the original offenses (grand theft auto, forgery, and fraudulent use of a credit cart) and for sentencing on the new substantive offenses (grand theft auto, resisting arrest without violence, and petit theft). Given the nature of the newly committed offenses, a Category 6 sentencing guidelines scoresheet was selected. The court assessed points for the new substantive offenses, under Section I - primary offense at conviction, and Section II - additional offenses at conviction. Secondly, Petitioner was assessed points under Section III.a. - prior record. Thirdly, the multiplier for apparent "persistent" Category 6 offenses was utilized by the court in Section III.b. Forthly, under Section

IV - legal status at time of offense, Petitioner was assessed additional points for legal constraint. Factors already included within the sentencing guidelines scoresheet can not be the basis for departure. Hendrix v. State, 475 So.2d 1218 (Fla. 1985). Finally, by virtue of Florida Rule of Criminal Procedure 3.701(d)14, the sentencing court was authorized to increase the sentencing by one cell (one guideline range) as to the sentences imposed after revocation of probation or community control. Upon finding of a violation of probation, the sentencing court is limited to a one cell increase. Ree v. State, 15 FLW 395 (Fla. July 19, 1990); Lambert v. State, 545 So.2d 838 (Fla. 1989); State v. Mischler, 488 So.2d 523 (Fla. 1986). Thus, as it can be seen, the reasons given for departing are grounded in matters already weighed in the scoresheet in arriving at the recommended guidelines sentence or specifically disapproved by this Court, and therefore, can not reasonably justify departure from the recommended sentence.

In approving the departure reasons, the District Court of Appeal recognized that Appellant's commission of similar type offenses committed within thirty days after his release from County Jail to probation, did not evince an "escalating" pattern as described in Section 921.001(a), Florida Statutes (1987). That provision provides that, "[t]he escalating pattern of criminal conduct may be evidenced by a progression from non-violent to violent crimes or a progression of increasingly violent crimes." It is clear that Petitioner's two encounters

with the law regarding non-violent activities does not comport with an escalating pattern of criminality for the departure sentence. See Keys v. State, 500 So.2d 134 (Fla. 1986); Williams v. State, 504 So.2d 392 (Fla. 1987).

In Williams v. State, 504 So.2d 392 (Fla. 1987), this Court flirted with the concept of timing as being a valid reason for departure. It affirmed that a departure sentence could be based on a defendant's criminal conduct and the time sequence of the commission of each offense in relation to prior offenses and the release from incarceration or supervision. But in Williams, supra, the trial court detailed the defendant's criminal history. The defendant's extensive and frequent contact with the criminal system warranted the departure. The abstract reason coupled with the factual basis, persuaded the reviewing court that such evidence presented more than a defendant's prior record and combined the timing and pattern factors as one reason for departure. In Williams, supra:

> the defendant, as a juvenile, was committed to the Department of HRS for the offense of arson, dated January 11, 1977. He was committed also in Case No. 76-466 for arson and burglary of an occupied dwelling, and again committed for shop lifting dated August 18, 1978. At age eighteen (18) years, the defendant was sentenced to the Department of Corrections for three (3) years for burglary of a structure dated February 19, 1979 and paroled September 16, 1980. He was charged with violating his parol on March 3, 1981, having only been out of prison for some six months. On July 10, 1981 the defendant was again sentence to the Department of Corrections on the offense of attempted burglary for five (5) years. On December 10, 1983 he was discharged as to that sentence, and after

> only approximately ten (10) months committed the instant offense on October 6, 1984 (aggravated battery and burglary of a dwelling with an assault).

Id. at 392-93 (explanation supplied).

Even if this Court were to find that an escalating pattern was not required to establish a valid basis to depart, but merely a persistent pattern, however vague that term is, the paucity of convictions, and Petitioner's minimal contact with the law, does not rise to the level present in Williams. Williams exiting and entering institutions resembled that of a revolving door. In contrast, Petitioner's first convictions resulted in him being placed on probation with a condition that he serve County Jail time. Admittedly, he violated that probation and as such, the guidelines permitted incarceration up to 3 1/2 years. Petitioner's situation does not establish a pattern of - escalating or persistent-criminal activity. The Courts in Frederick v. State, 556 So.2d 471 (Fla. 1st DCA 1990) and McKinney v. State, 559 So.2d 621 (Fla. 3d DCA 1990), hold that two offenses does not a pattern make. But see Lipscomb v. State, 15 FLW 2227 (Fla. September 6, 1990)(two points can establish a line just as two felonies can establish a habit, two similar violations of theft laws separated by short prison terms show a pattern of criminal behavior).

Finally, it is obvious that the District Court misinterpreted this Court's holding that in the context of a revocation of probation, that the sentencing court is limited to a one

cell increase from the recommended sentence. Ree v. State, 15 FLW 395 (Fla. July 19, 1990). Because the District Court affirmed a five year incarceration term ordered in the violation of probation case wherein the maximum sentence (utilizing the one cell bump-up) was 3 1/2 years incarceration.

Neither the "timing" or the "temporal proximity", nor the "persistent pattern of criminal conduct" adopted by the majority opinion in this case to uphold the departure sentence should be approved as valid reasons for imposing a sentence departing from the recommended guidelines sentence. If those concepts or factors are necessary in formulating a fair and reasonably sentence under the uniform guidelines system of sentencing, then the guidelines scoresheet should be amended to reflect so. Authorizing departures on the basis of "timing" or "temporal proximity" or persistence of a pattern in the context of temporal proximity, is so imprecise and so indefinite that it will not take much to justify a desired result. But by answering the certified question in the negative, this Court will reduce the disparities and promote uniformity which was the motivating factor for adopting the guidelines system of sentencing.

Accordingly, the Petitioner respectfully requests that the certified question be answered in the negative, rejecting the departure reasons, and remanding for resentencing within the appropriate guidelines. Shull v. Duggar, 515 So.2d 748 (Fla. 1987).

CONCLUSION

Based on the forgoing reasons and authority, Petitioner respectfully requests that this Honorable Court certfify the question in the negative, rejecting the departure reasons, and remanded for resentencing within the appropriate guidelines.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been delivered to the Honorable Robert Butterworth, Attorney General, 210 N. Palmetto, Suite 447, Daytona Beach, Florida 32114, in his basket, at the Fifth District Court of Appeal; and to: Richard C. Smith, No. 115334, P.O. Box 999, Bristol, FL 32321, this 26th day of October, 1990.

Barbara L. Condon

BARBARA L. CONDON
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF FLORIDA

RICHARD C. SMITH, Petitioner,	)	
vs.	)	CASE NO.: 76,659
STATE OF FLORIDA, Respondent.	)	

A P P E N D I X

Smith v. State,
15 FLW D 2179 (August 30, 1990)

The almost identical problem was presented to the court in *Hardwick v. State,* 521 So.2d 1071 (Fla. 1988). However, in *Hardwick* the court refused to permit the public defender to withdraw. In the case before us, the public defender was permitted to withdraw to a "standby" position—to assist at the request of defendant. In *Hardwick* the defendant was not permitted to choose his court appointed attorney; neither was the defendant in the case at bar. He does not now claim that the court erred in permitting the public defender to assume a standby role, but in requiring him to accept the public defender's representation. The record does not support his position. The trial court's handling of this matter is consistent with *Hardwick* and we find no error.

We note, however, that the judgment reflects that Griffin was convicted of a third degree felony. This appears to be a clerical error. The offense of possession of a weapon in a correctional institution is a second degree felony. §§ 944.47(2) and 944.47(1)(a)5, Fla. Stat. (1989). Since the scoresheet correctly assesses points for a second degree felony, we remand only for correction of the judgment.

AFFIRM, but REMAND for correction of judgment. (PETERSON and GRIFFIN, JJ., concur.)

* * *

Criminal law—Probation order to be corrected to reflect that defendant was convicted after jury trial rather than indicating that defendant entered guilty plea

EARNEST L. ROGERS, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 89-2161. Opinion filed August 30, 1990. Appeal from the Circuit Court for St. Johns County, Richard G. Weinberg, Judge. James B. Gibson, Public Defender, and Lyle Hitchens, Assistant Public Defender, Daytona Beach, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Bonnie Jean Parrish, Assistant Attorney General, Daytona Beach, for Appellee.

(DANIEL, C.J.) Earnest Rogers was convicted of aggravated battery and given a split sentence of 30 months incarceration followed by 5 years probation. He raises two points on appeal. We consider only the second point in which Rogers claims a scrivener's error occurred in the probation order. The probation order states that Rogers entered a plea of guilty to aggravated battery when, in fact, the record reveals that Rogers pled not guilty and received a jury trial. Rogers asked that the record be set straight. We agree, but find it unnecessary to remand this matter for such a simple correction.

Accordingly, the probation order entered herein is corrected to the extent that such order will reflect that Rogers pled not guilty and, following a jury trial, was found guilty of aggravated battery. In all other respects the judgment and sentence are affirmed.

Judgment and sentence AFFIRMED as corrected. (SHARP, W., and COWART, JJ., concur.)

* * *

Criminal law—Costs—Absence of adequate notice and opportunity to be heard

RONNIE CHERK, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 89-2302. Opinion filed August 30, 1990. Appeal from the Circuit Court for Brevard County, John Dean Moxley, Jr., Judge. James B. Gibson, Public Defender, and Daniel J. Schafer, Assistant Public Defender, Daytona Beach, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Judy Taylor Rush, Assistant Attorney General, Daytona Beach, for Appellee.

(PER CURIAM.) This is an appeal from an order imposing costs without adequate notice and an opportunity to be heard afforded to appellant. We quash the order. *Harrell v. State,* 520 So.2d 271 (Fla. 1988).

ORDER QUASHED. (DANIEL, C.J., DAUKSCH and GRIFFIN, JJ., concur.)

* * *

Criminal law—Simple battery is lesser included offense of battery on law enforcement officer—Refusal to give requested jury instruction on battery reversible error

DWAYNE CRAPPS, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 89-2241. Opinion filed August 30, 1990. Appeal from the Circuit Court for Volusia County, Robert P. Miller, Judge. James B. Gibson, Public Defender and Michele A. Lucas, Assistant Public Defender, Daytona Beach, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Rebecca R. Wall, Assistant Attorney General, Daytona Beach, for Appellee.

(HARRIS, J.) Dwayne Crapps appeals his conviction of two counts of battery on a law enforcement officer. He contends the court erred in denying his request to give the simple battery instruction as a lesser included offense. We agree and reverse.

Although not listed as a lesser included offense to the offense of battery on a law enforcement officer in the Standard Jury Instructions, nonetheless, case law makes it clear that simple battery is a lesser included offense to such a charge. *Jelks v. State,* 509 So.2d 404 (Fla. 5th DCA 1987); *Crumley v. State,* 489 So.2d 112 (Fla. 1st DCA 1986), *approved,* 512 So.2d 183 (Fla. 1987). A trial judge has no discretion on whether to instruct on a necessary lesser included offense. *State v. Wimberly,* 498 So.2d 929 (Fla. 1986). Such error is not harmless. *Hayes v. State,* 15 F.L.W. 1678 (Fla. 2d DCA, June 20, 1990).

REVERSED for a new trial. (PETERSON and GRIFFIN, JJ., concur.)

* * *

Torts—Contracts—Fraudulent misrepresentation—Evidence legally insufficient to support judgment awarding compensatory and punitive damages

HOLD & HOOKER, INC., Appellant/Cross-Appellee, v. BARCELONA WEST INVESTORS, LTD., et al., Appellees/Cross-Appellants. 5th District. Case No. 88-2296. Opinion filed August 30, 1990. Appeal from the Circuit Court for Orange County, Lawrence R. Kirkwood, Judge. David H. Simmons and Michael A. Romano of Drage, deBeaubien, Knight & Simmons, Orlando, for Appellant/Cross-Appellee. Lawrence G. Matthews and Mary M. Wills of Smith, Mackinnon, Mathews, Harris & Christiansen, P.A., Orlando, for Appellee/Cross-Appellant Southwest Realty, Ltd.

(PER CURIAM.) This is an appeal from an order granting the appellee a new trial and a cross-appeal from a judgment awarding the appellant compensatory and punitive damages for breach of contract and fraudulent misrepresentation. Because the evidence at trial was legally insufficient to prove either of those claims, the damages award is reversed. The appeal concerning the order awarding the new trial is moot.

The order granting a new trial is quashed and the judgment is reversed.

REVERSED. (DAUKSCH, COWART and GRIFFIN, JJ., concur.)

* * *

Criminal law—Sentencing—Guidelines—Departure—Persistent pattern of criminal offenses as evidenced by defendant's having committed three subsequent criminal offenses thirty days after having been released from prison on probation is valid reason for departure—Question certified whether trial judge may impose departure sentence based solely on persistent pattern of criminal activity, closely related in time, although pattern is not escalating towards more violent or serious crimes

RICHARD SMITH, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 89-324. Opinion filed August 30, 1990. Appeal from the Circuit Court for Volusia County, John W. Watson, III, Judge. James B. Gibson, Public Defender, and Barbara L. Condon, Assistant Public Defender, Daytona Beach, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee,

and Colin Campbell, Assistant Attorney General, Daytona Beach, for Appellee.

(SHARP, W., J.) We affirm Smith's convictions for grand theft,[1] petit theft,[2] and resisting arrest,[3] and other crimes he committed earlier and for which he was placed on probation. He was given a sentence which departed beyond the one-cell bump-up for the old and new crimes combined. We affirm the sentence imposed of ten years followed by five years on probation because at least one reason given for departing beyond the bracket permitted by the one cell bump-up[4] is valid and justified based on this record.

The trial judge gave the following reasons for the departure sentence:

> 1. The *timing* of the commission of the offenses in 88-9091 of Grand Theft, Petit Theft, and Resisting an Officer without violence. Specifically, said offenses were committed on November 17, 1988, within approximately 30 days from the date the defendant had been placed on probation in 88-2746 for the offense of Grand Theft, etc. as above described.
>
> 2. The nature of the defendant's prior record. Specifically, the defendant had previously committed the offense of Grand Theft in 88-2746 (which as was previously stated the defendant was placed on probation for) and said Grand Theft was motor vehicle grand theft. One of the offenses for which the defendant is currently before the court in 88-9091 is Grand Theft specifically Grand Theft of a Motor Vehicle.
>
> 3. The violations of probation are serious and substantial and egregraious [sic] in nature and not merely technical in nature.
>
> 4. The defendant's criminal record as evidenced by the offenses in 88-2746 and 88-9091 show a continuing and persistent and escalating pattern of criminal activity.

The first reason, timing of the second group of offenses, has been held insufficient in the context of revocation of probation. *Maddox v. State*, 553 So.2d 1380 (Fla. 5th DCA 1989); *Ree v. State*, 15 FLW 395 (Fla. July 19, 1990). However, those cases deal with sentences imposed after revocation of probation for the original offense. Here, Smith was being sentenced for new substantive offenses committed thirty days after he was placed on probation. *Compare Ree.*

We agree that Smith's prior record would be an insufficient reason to depart because prior record is already weighed in the scoresheet under which Smith was sentenced. Further consideration would amount to "double-dipping." *Lambert v. State*, 545 So.2d 838, 841 (Fla. 1989); *Hamilton v. State*, 548 So.2d 234 (Fla. 1989). However, a consideration of all of Smith's offenses for which he has been convicted, and a consideration of the "temporal proximity" to his commission of other crimes or his release from prison may be utilized by the trial judge to determine a continuing, persistent or escalating pattern of criminality to support a departure sentence. § 921.001(8), Fla. Stat. (1987); *State v. Jones*, 530 So.2d 53 (Fla. 1988); *Keys v. State*, 500 So.2d 134 (Fla. 1986).

In 1989 the legislature incorporated the holding of *Keys* in section 921.001(8), Florida Statutes (1987).

> (8) A trial court may impose a sentence outside the guidelines when credible facts proven by a preponderance of the evidence demonstrate that the defendant's prior record, including offenses for which adjudication was withheld, and the current criminal offense for which the defendant is being sentenced indicate an escalating pattern of criminal conduct. The escalating pattern of criminal conduct may be evidenced by a progression from nonviolent to violent crimes or a progression of increasingly violent crimes.

The question posed by the facts in this case is whether a departure for this reason is limited to a persistent pattern which is also an escalating pattern (as when a defendant moves from property crimes to violent crimes against persons).

Although the legislature has not specifically addressed this question we think that a persistent pattern of criminal behavior in term's of timing alone is a valid basis to impose a departure sentence. *See Jones; Tillman v. State*, 525 So.2d 862 (Fla. 1988). In *Jones*, the court said that burglary and grand theft offenses and trafficking in stolen property might qualify as a "specific pattern of criminal conduct" if the offenses had been committed closer in time to one another (10 months and 15 months). In *Tillman*, the court held that the timing (alone) of the defendant's commission of offenses (4 months and 6 months after release from prison) was a clear and convincing reason to depart upwards from the guidelines sentence.

In the instant case, the three subsequent criminal offenses (grand theft, petit theft and resisting arrest) were committed 30 days after Smith had been released from prison on probation. He had just finished serving time in prison for grand theft, forgery, and fraudulent use of a credit card. The pattern of criminal offenses here is persistent, and close in time, although not "escalating" as described in section 921.001(8). We hold that the trial judge's reason for departure for Smith's persistent pattern of criminal activity was established by the record and is a valid basis for departure. However, in view of the importance of this question in interpreting the sentencing guidelines we certify the following question as one of major importance. Fla. R. App. P. 9.030(a)(2)(A)(v).

> MAY A TRIAL JUDGE IMPOSE A DEPARTURE SENTENCE BASED SOLELY ON A PERSISTENT PATTERN OF CRIMINAL ACTIVITY, CLOSELY RELATED IN TIME, ALTHOUGH THE PATTERN IS NOT ESCALATING TOWARDS MORE VIOLENT OR SERIOUS CRIMES?

AFFIRM. (DANIEL, C.J., concurs. COWART, J., dissents with opinion.)

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[1] §812.014, Fla. Stat. (1987).
[2] §812.015, Fla. Stat. (1987).
[3] §843.02, Fla. Stat. (1987).
[4] Fla.R.Crim.P. 3.701d.14.

(COWART, J., dissenting.) The defendant pleaded no contest to three offenses (Counts I, V, and VII in case 88-2746), a guidelines scoresheet was prepared, adjudication was withheld and he was placed on probation on October 18, 1988. Apparently he was arrested on November 17, 1988 and charged with three new offenses (Counts I, II and III in case 88-9091). No new scoresheet scoring all five offenses for which defendant was sentenced[1] is contained in the record on appeal but the order giving reasons for departure recites that "the scoresheet ... called for a sentence of 12-30 months' incarceration... ." A departure sentence was imposed as to the five offenses.

The first reason given for the departure sentence is timing based on the fact that the defendant committed the new offenses which violated his probation about 30 days after he had been placed on probation. The time relationship between being placed on probation and the violation of that probation, whether the violation results from the commission of new substantive offenses or otherwise, is but one facet of the probation violation which is itself factored into the determination of the guideline recommended sentencing range by virtue of Florida Rule of Criminal Procedure 3.701d.14. which authorizes a one cell (one guideline range) increase as to sentences imposed after revocation of probation or community control. Any reason which, in substance, is but a facet or aspect or natural part of a larger matter already weighed in the scoresheet in arriving at the recommended guideline sentence cannot reasonably justify a departure from the rec-

ommended sentence. This is the essence of the holdings in *Ree v. State*, 15 F.L.W. 395 (Fla. July 19, 1990); *Lambert v. State*, 545 So.2d 838 (Fla. 1989); *State v. Mischler*, 488 So.2d 523 (Fla. 1986); *Maddox v. State*, 553 So.2d 1380 (Fla. 5th DCA 1989) and numerous other cases.

The defendant was apparently again placed on probation as to 88-2746—Count V—uttering a forgery, a third degree felony, and was sentenced as to the other five offenses as follows: (88-2746—Count I) grand theft, a third degree felony; (88-2746—Count VII) credit card fraud, a first degree misdemeanor; (88-9091—Count I) grand theft, a third degree felony; (88-9091—Count II) petit theft, a first degree misdemeanor; (88-9091—Count III) resisting arrest without violence, a first degree misdemeanor.

In *Keys v, State*, 500 So.2d 134 (Fla. 1986), the defendant's prior criminal history showed an escalation from crimes against property to violent crimes against persons and was held to justify departure. Section 921.001(8), Florida Statutes, authorizes imposition of a departure sentence when the defendant's prior record, including offenses for which adjudication was withheld, and that current criminal offenses for which the defendant is being sentenced, indicate an escalating pattern of criminal conduct. The statute defines "escalating pattern of criminal conduct" to be one evidenced by a progression from non-violent to violent crimes or a progression of increasingly violent crimes. The defendant's criminal history in this case does not meet the criteria in *Keys v. State* or the statute[2] and therefore, the departure sentence should be reversed.

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[1]The defendant was sentenced to probation as to Count V of Case 88-2746.

[2]*Compare* State v. Van Horn, 561 So.2d 584 (Fla. 1990) (escalating pattern found where defendant had committed disturbing the peace, then burglary, then burglary of a dwelling with threats and then burglary of a dwelling, assault, aggravated battery and attempted sexual battery) *with* State v. Simpson, 554 So.2d 506 (Fla. 1989) (Shaw concurring) (no escalating pattern where offenses de-escalated after initial crime, then escalated with present offenses); Jackson v. State, 556 So.2d 813 (Fla. 5th DCA 1990) (no escalating pattern where defendant had been convicted of a non-violent third degree felony and was subsequently convicted of non-violent third degree misdemeanor); and Ramsey v. State, 562 So.2d 394 (Fla. 5th DCA 1990) (no escalating pattern where defendant was sentenced for non-violent third degree felony and prior offenses were non-violent misdemeanor and non-violent second degree misdemeanor and subsequent offense was non-violent third degree felony).

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Criminal law—Sentencing—Probation revocation—Credit for time served—After defendant has been released from incarcerative portion of split sentence and probation is subsequently revoked, he is entitled to receive credit for entire incarcerative period regardless of whether he actually served the entire time or was released early due to gain time

VERDELL HILL, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 89-2108. Opinion filed August 30, 1990. Appeal from the Circuit Court for Putnam County, E. L. Eastmoore, Judge. James B. Gibson, Public Defender, and Daniel J. Schafer, Assistant Public Defender, Daytona Beach, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Bonnie Jean Parrish, Assistant Attorney General, Daytona Beach, for Appellee.

(DANIEL, C.J.) Verdell Hill appeals, claiming he did not receive proper jail time credit following revocation of his probation. We agree and reverse.

Defendant was convicted in 1988 of unlawful sale and delivery of cocaine. For this conviction, he received a true split sentence of 8-1/2 years incarceration where, after 3-1/2 years of incarceration, the balance would be suspended and he would be released on probation. Following his release, defendant was subsequently charged with violating his probation. He pleaded guilty and his probation was revoked. With the one cell bump-up authorized for violations of probation, the recommended sentencing range was 4-1/2 to 5-1/2 years incarceration. The defendant was reincarcerated for a term of 5-1/2 years with credit for 441 days, presumably the prison time actually served by him on the incarcerative portion of his split sentence.

Our supreme court has held that after a defendant has been released from the incarcerative portion of the split sentence and his probation is subsequently revoked, he should receive credit for the entire incarcerative portion of the split sentence regardless of whether he actually served the entire time or was released early due to gain time. *See State v. Green*, 547 So.2d 925 (Fla. 1989). Pursuant to *Green*, the defendant should have received credit for 3-1/2 years instead of 441 days.

Accordingly, we reverse and remand for entry of proper jail time credit.

REVERSED and REMANDED. (GOSHORN and HARRIS, JJ., concur.)

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Criminal law—Search and seizure—Officers approaching parked car in parking lot—Use of flashlight to illuminate interior of vehicle does not violate Fourth Amendment rights even though officer may specifically be looking at an area of suspicious activity—While in parked automobile in parking lot to which public had access, defendant had no legitimate expectation of privacy with respect to illegal activities which would have been as visible to a private security guard or police officer as to a private citizen—Officers' conduct prior to viewing cocaine in plain view in vehicle did not rise to level of investigatory detention

SCOTT THOMAS ROBERTS, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 89-1985. Opinion filed August 30, 1990. Appeal from the Circuit Court for Marion County, Victor J. Musleh, Judge. Mark D. Shelnutt, Ocala, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Judy Taylor Rush, Assistant Attorney General, Daytona Beach, for Appellee.

(HARRIS, J.) Scott Thomas Roberts appeals from an order denying his motion to suppress certain physical evidence after his plea of no contest to possession of cocaine and possession of drug paraphernalia. Although in his notice of appeal the defendant seeks to appeal from a nonappealable prejudgment order denying a motion to suppress, it is clear from the record that appellant is seeking review of the final judgment and sentence resulting from his no contest plea.[1] Upon examination of the record on appeal and the supplemental transcript, however, we find the record insufficient to warrant a reversal of the trial court.

On April 19, 1989, two plainclothes police officers were patrolling motel parking lots in an unmarked car to check for vehicle burglaries. The officers observed appellant's automobile parked with the windows down and the T-tops removed. Two people were in the front seat bent over, and two people were in the back seat. One of the officers approached the driver to obtain identification. The second officer approached the passenger side of the car and shined his flashlight inside. He observed a mirror with white powder on the floorboard of the passenger side beneath appellant's feet. The officer requested that the appellant hand him the mirror. The residue of the powder tested positive for cocaine.

Police officers can initiate brief encounters with a citizen without creating a stop. *Lightbourne v. State*, 438 So.2d 380 (Fla. 1983), *cert. denied*, 465 U.S. 1051, 104 S.Ct. 1330, 79 L.Ed.2d 725 (1984); *State v. Smith*, 477 So.2d 658 (Fla. 5th DCA 1985). Here the officers approached a parked car in a parking lot available to the public. We do not find that the actions of the police officers in this case rose to the level of an investigatory detention *prior* to the viewing of the cocaine. The officer observed the cocaine in plain view before any arrest or seizure oc-