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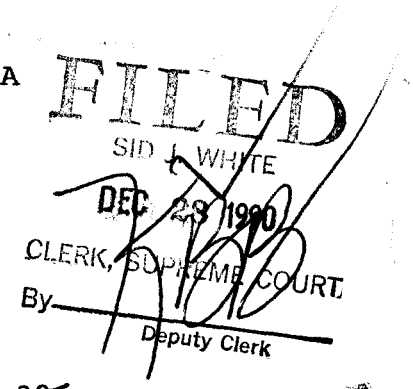
IN THE SUPREME COURT OF FLORIDA



MARSHALL SANDERS CROCKER,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

_____/

CASE NO. ~~76,396~~ 76,936

RESPONDENT'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

The Respondent agrees with the statement of the case and facts as set forth by the Petitioner in his brief on the merits, with the following exception:

Mr. Crocker was sentenced to *nine* years' incarceration to be followed by concurrent terms of probation, the longest of which is to last fifteen years. (R 30-48)

SUMMARY OF ARGUMENT

Point One: The trial courts should be permitted to depart from the sentencing guidelines on the basis of non-scoreable juvenile adjudications whenever a defendant's guidelines scoresheet does not accurately reflect the nature or severity of his previous record.

Point Two: The petitioner has shown no compelling reason for this court to recede from its decision in Weems v. State, 469 So.2d 128 (Fla. 1985). That portion of the Juvenile Justice Act which provides that court records of delinquency proceedings are not generally admissible in evidence does not establish that previous juvenile adjudications cannot be considered by the trial courts in sentencing proceedings.

Point Three: The petitioner argues, by analogy from cases construing Florida's habitual offender statute, that non-scoreable juvenile offenses should not be a permissible basis for departure unless those offenses were disposed of in successive proceedings. The reasons for the rule of construction adopted by this court in the habitual offender context are not present in the guidelines departure context. Persistent failure to abide by the law is the evil the habitual offender enhancement statutes were designed to offset; the option to depart from the guidelines on the basis of non-scoreable offenses exists to avoid sentences based on misleading guidelines scores.

Point Four: The record does not support the petitioner's assertion that the trial court departed from the guidelines based on a previously prepared set of written reasons for departure.

ARGUMENT

POINT ONE

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 petitioner, Marshall Sanders Crocker, seeks review of the decision of the District Court of Appeal, Fifth District, in Crocker v. State, 568 So.2d 116 (Fla. 5th DCA 1990). The district court, in its opinion in Crocker, certified the question quoted above as one of great public importance.[1] This court has jurisdiction pursuant to Art. V, §(3)(b)(4), Fla.Const.

This court held in Weems v. State, 469 So.2d 128 (Fla. 1985), that the trial courts may depart from the sentencing guidelines on the basis of a defendant's juvenile record, to the extent that that record is not already reflected on his guidelines scoresheet. Weems, 469 So.2d at 129. Juvenile dispositions are scored only if they occur within three years before the primary offense on the scoresheet and if they are the equivalent of adult convictions. Fla.R.Crim.P. 3.701(d)(5). As this court stated in Weems,

> [i]t is true that Florida Rule of Criminal Procedure 3.701(d)(5)(c) does exclude juvenile dispositions over three years old from the initial computation, but no part of the rule or the guidelines statute exclude such matters from being considered by the trial court as

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[1] This court has previously taken jurisdiction of another case in which the same question was certified. Puffinberger v. State, No. 75,917.

> reasons for departing from the guidelines.

Id. at 130.

As the district court pointed out in its opinion in this case, some of the District Courts of Appeal have added a gloss to this court's decision in Weems. See Morgan v. State, 550 So.2d 151 (Fla. 3rd DCA 1989) (three juvenile dispositions never sufficient to support departure); Blue v. State, 541 So.2d 736 (Fla. 1st DCA 1989) (entering without breaking, petit theft, and simple battery insufficient); Musgrove v. State, 524 So.2d 715 (Fla. 1st DCA 1988) (two misdemeanors and a felony insufficient); Walker v. State, 519 So.2d 1105 (Fla. 3rd DCA 1988) (one disposition insufficient; unscored record must be either significant or extensive); White v. State, 501 So.2d 189 (Fla. 5th DCA 1987) (juvenile record "of a quite minimal nature" insufficient). Compare Puffinberger v. State, 558 So.2d 189 (Fla. 4th DCA 1990) (three prior burglary convictions sufficient); Copeland v. State, 503 So.2d 1301 (Fla. 2d DCA 1987) (one arson, two batteries, and two assaults would have been sufficient for departure); Williams v. State, 484 So.2d 71 (Fla. 1st DCA 1986), aff'd 504 So.2d 392 (Fla. 1987) (two arsons, one burglary and one shoplifting clear and convincing reason for departure); Weems v. State, 451 So.2d 1027 (Fla. 2d DCA 1984), aff'd 469 So.2d 128 (Fla. 1985) (nine unscored burglaries adequate basis for departure).

The appellant cites Morgan, Blue, Musgrove, Walker, and White, supra, in support of a proposed rule that a defendant's

unscored juvenile record must be "extensive" before the trial courts may consider it as a basis for departure. The State submits that regardless of the number of a defendant's unscored juvenile adjudications, that unscored record should be a valid basis for departure *whenever* the scoresheet does not accurately reflect the nature or severity of his previous record. The State further submits that the trial courts should not be precluded from considering juvenile adjudications, regardless of their number, when they form part of an escalating pattern, or a continuing and persistent pattern, of criminal conduct.

The rule announced by the Third District Court of Appeal in Morgan v. State, supra, requiring a minimum of four unscored adjudications for departure in every case, is excessively arbitrary; the district courts for the Fourth and Fifth Districts have sensibly declined to follow it. See Puffinberger v. State, supra; Crocker v. State, 568 So.2d 116 (Fla. 5th DCA 1990), citing West v. State, 566 So.2d 374 (Fla. 5th DCA 1990). Imposing *any* such numerical quota would inevitably, in some cases, have the effect of mandating a guidelines sentence in spite of a scoresheet that substantially misrepresents the severity of the defendant's record. See, e.g., Smith v. State, 515 So.2d 182, 184 (Fla. 1987) (juvenile manslaughter adjudication, combined with other unscored offenses, was valid and substantial reason for departure). Defendants have no right to a misleading guidelines scoresheet. See Cheshire v. State, 568 So.2d 908, 913 (Fla. 1990). The guidelines were not intended to usurp the trial courts' discretion in sentencing. Fla.R.Crim.P. 3.701(b)(6).

The Florida appellate courts have approved departures from the guidelines based on defendants' non-scoreable prior convictions in other contexts. See Hansbrough v. State, 509 So.2d 1081, 1087 (Fla. 1987) (capital felony); Wichael v. State, 567 So.2d 549 (Fla. 5th DCA 1990) (offenses taking place after primary offense, sentenced on separate scoresheet); Flournoy v. State, 507 So.2d 668, 670-71 (Fla. 1st DCA 1987), rev'd on other grounds, 522 So.2d 340 (Fla. 1988) (remote felony convictions). The State has discovered no arbitrary rule in those decisions that would limit the trial courts to considering non-scoreable prior convictions only in some cases. Compare Russell v. State, 458 So.2d 422, 423-4 and n.1 (Fla. 2d DCA 1984), aff'd, 472 So.2d 466 (Fla. 1985) (only four prior adult felonies scoreable on pre-1985 scoresheets; departure based on other priors approved).

The petitioner argues that "[a]n important cornerstone of Weems may...have been undermined by the Legislature" when this court's decision in Albritton v. State, 476 So.2d 158 (Fla. 1985) was overridden in part by Chapter 86-273, s. 1, Laws of Florida. (PB 7)[2] That law, codified at Section 921.001(5), Florida Statutes, provides that the extent of departure from a guideline sentence shall not be subject to appellate review. However, as the petitioner concedes, this court decided Albritton after it decided Weems; moreover, in Williams v. State, 504 So.2d 392 (Fla. 1987), after the effective date of Chapter 86-273, this court expressly declined to recede from Weems. In any event,

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[2] "PB-[page number]" refers to the Petitioner's Brief on the Merits filed in this action.

nothing in Weems suggests that the appellate courts' ability to review the extent of departure sentences was "a cornerstone of," or even incidental to, this court's decision in that case.

The record of the present case shows no abuse of discretion. Two of Mr. Crocker's unscored prior juvenile adjudications were for burglaries, as were all six of the offenses to which he pleaded guilty at the time he was sentenced. (R 67, 58-9) The guidelines scoresheet for burglaries provides that any prior burglary convictions should be scored more heavily than other prior offenses. Fla.R.Crim.P. 3.988(e). See also Fla.R.Crim.P. 3.988(a) (similar multiplier for prior DUI convictions); 3.988(c) (same; robberies); 3.988(f) (same; theft crimes). The policy of discouraging a pattern of repeated offenses of the same nature would be arbitrarily undercut by precluding the trial courts from departing in a case, like Mr. Crocker's, in which the defendant is found guilty of committing eight burglaries within 39 months and two days. (R 67, 58-9, 10, 15, 24-7) If there is any overriding purpose behind the sentencing guidelines, it is that they be used to punish repeat offenders more severely than first-time offenders. Peters v. State, 531 So.2d 121 (Fla. 1988).

As a reason for departure, unscored juvenile adjudications are not prohibited by the guidelines, have not already been taken into account by the guidelines, and are not inherent components of the offenses for which sentence is imposed. See Hansbrough v. State, 509 So.2d 1081, 1087 (Fla. 1987). The State submits that the trial courts, therefore, should be permitted to exercise their discretion to depart from the guidelines *whenever* a

defendant's scoresheet does not accurately reflect the nature or severity of his previous criminal record. That a defendant committed some of his crimes before his eighteenth birthday should not preclude the courts from exercising that discretion. Appellate review of the trial court's expressed reasons for departure provides a check against abuse of discretion. Weems v. State, supra, 469 So.2d at 130.

The petitioner appears to concede that the trial courts should not be precluded from considering unscored juvenile adjudications when they form part of an escalating pattern, or a continuing and persistent pattern, of criminal conduct. (PB 7) This court has permitted such departures in the past. See Williams v. State, 504 So.2d 392 (Fla. 1987). See also Burke v. State, 456 So.2d 1245 (Fla. 5th DCA 1984), rev'd on other grounds, 483 So.2d 404 (Fla. 1985); §921.001(8), Fla.Stat. (escalating pattern established by "prior record including offenses for which adjudication was withheld"). Petitioner has shown no compelling reason why this court should recede from Williams in this regard. Matters excluded from the original guidelines computation are not precluded from consideration as reasons for departure. Weems, supra, 469 So.2d at 130.

POINT TWO

THE PETITIONER HAS SHOWN NO COMPELLING REASON FOR THIS COURT TO RECEDE FROM *WEEMS V. STATE.*

The petitioner asserts that this court must recede from Weems v. State, 469 So.2d 128 (Fla. 1985), because it is in conflict with various provisions of the Juvenile Justice Act. This court has rejected that argument, which formed the basis for Justice Boyd's sole dissenting opinion in Weems. 469 So.2d at 130-31. Nothing that has taken place since this court decided Weems suggests that this court should reverse its decision.

The petitioner relies on Section 39.12(7), Florida Statutes (1987), (renumbered as Section 39.045(7) in 1990). That provision states that

> [n]o court record of proceedings under this chapter is admissible in evidence in any other civil or criminal proceeding....

§39.045(7), Fla.Stat. (1990). Petitioner's contention is that since the statute has been re-enacted since the guidelines were enacted, then the statute "has superseded and unambiguously repealed" the guidelines to the extent of any conflict between them. (PB 11) The logical conclusion of this argument would be that the trial courts can *never* consider juvenile adjudications when imposing guidelines sentences; in short, that Florida Rule of Criminal Procedure 3.701(d)(5) (c) is a nullity. The State submits that the Legislature's re-enactment of Section 39.045 did not intend, and did not result in, any such sweeping change in the law.

Section 39.045 provides that court records of juvenile delinquency proceedings are not admissible in evidence at later proceedings. The information available to the trial courts at sentencing need not be admissible in evidence. See §39.052(3)(d), Fla.Stat. (1990) (predisposition report to include all prior adjudications); Fla.R.Juv.P. 8.200(a) (evidence received at disposition hearing need not comply with usual rules of admissibility); §921.231(1)(c), Fla.Stat. (1990) (all prior arrests and convictions to be included in presentence investigation); Fla.R.Crim.P. 3.720(b) (all relevant submissions and evidence to be considered at sentencing); Fla.R.Crim.P. 3.712 (listing entities having access to presentence report; trial courts included).

The salutary general policy of permitting citizens who have committed the odd youthful indiscretion to put that fact behind them is recognized in, e.g., Section 90.610(1)(b), Florida Statutes as well as in the statute the petitioner relies on. That general policy does not outweigh the reasonable concern for public safety which permits the trial courts to inform themselves of a defendant's previous criminal history when sentencing him. The Legislature's having re-enacted Section 39.045 does not affect the sentencing guidelines.

The petitioner also argues that "the irony of the Weems conclusion [is] that [it] allows a much longer sentence on account of factors which are specifically excluded from the sentencing guidelines scoresheet computation, than if they were included." (PB 11) That "irony" is not present to any great

extent in Mr. Crocker's case; he was sentenced in the trial court to nine years' incarceration. That sentence represents a three-cell departure from the sentence permitted by his guidelines score, but only a one-cell departure from the sentence Mr. Crocker would have received had his January, 1986 offenses been scoreable.[3] (R 28, 67) Fla.R.Crim.P. 3.988(e). Cf. Brown v. State, 15 FLW 607, 608 (Fla. November 15, 1990) (departure sentence based on defendant's pretrial release status six times as long as sentence scoring legal constraint would be).

The State submits that the petitioner has shown no compelling reason for this court to recede from its decision in Weems v. State. While juvenile adjudications entered more than three years before a defendant's primary offense are not included in the guidelines computation, neither are they specifically prohibited as reasons for departure. Weems, 469 So.2d at 130; see also Hansbrough v. State, 509 So.2d 1081, 1087 (Fla. 1987) (departure based on unscored capital offense not prohibited by guidelines). Cf. State v. Mischler, 488 So.2d 523, 525 (Fla. 1986) (departure based on defendant's social and economic status expressly prohibited by Rule 3.701(b)(1)).

The State submits that whenever a defendant's scoresheet does not reflect the nature or severity of his record, that fact reasonably justifies aggravation of his sentence. §921.001(5),

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[3] His scoresheet would have included 60 points for his prior record, since he had three third-degree and two second-degree prior felonies. The Category 5 scoresheet would have included ten additional "multiplier" points because two of those priors were burglaries. (R 67) The scoresheet total would then have been 115, placing him in the 3½-7 year permitted range. Fla.R.Crim.P. 3.988(e).

Fla.Stat. The extent of departure from a guidelines sentence is, of course, not subject to appellate review. Id. However, appellate review of the trial courts' expressed *reasons* for departure provides a check against abuse of discretion. Weems v. State, supra, 469 So.2d at 130. This court's decision in Weems is consistent with the guidelines, with this court's other decisions construing the guidelines, and with Section 921.001, Florida Statutes; the petitioner has shown no compelling reason for this court to recede from or modify that decision.

POINT THREE

THE TRIAL COURT PROPERLY DEPARTED FROM THE SENTENCING GUIDELINES; THE RULE OF *JOYNER V. STATE* SHOULD NOT BE APPLIED TO GUIDELINES DEPARTURES.

The petitioner, citing Wilken v. State, 531 So.2d 1011 (Fla. 4th DCA 1988), and Shead v. State, 367 So.2d 264 (Fla. 3rd DCA 1979), argues that the rule this court established in Joyner v. State, 30 So.2d 304 (Fla. 1947), should be applied in the context of departures from the guidelines. In Joyner, this court held that Florida's habitual offender statute applies only to those defendants whose prior felonies were successive. That decision was based on two rationales:

> (1) because the purpose of the statute is to protect society from habitual criminals who persist in the commission of crime after having been theretofore convicted and punished for crimes previously committed. It is contemplated that an opportunity for reformation is to be given after each conviction.
> (2) This construction is implicit in the statutes.

30 So.2d at 306. The State submits that neither reason for the rule of Joyner is present in the context of departing from the guidelines based on non-scoreable offenses.

A defendant's failure to reform despite repeated opportunities given him to do so has widely been held to be the evil that habitual offender sanctions are designed to correct. See Joyner, 30 So.2d at 306, citing cases; Shead v. State, supra, 367 So.2d at 267. The option of departing from the sentencing guidelines based on non-scoreable offenses, on the

other hand, is designed to correct the distinct problem of a scoresheet that does not accurately reflect the nature or extent of a defendant's record. Even one unscored juvenile offense can render a scoresheet inadequate to characterize the nature of a defendant's record. See Smith v. State, 515 So.2d 182, 184, supra at 5 (juvenile manslaughter adjudication, inter alia, valid and substantial reason for departure). Several unscoreable offenses, as in Mr. Crocker's case, may even more readily render scoresheet totals so misleading as to be properly disregarded.

The petitioner argues that the trial court's departure order in this case suggests that all four of his January, 1986 offenses "may...have resulted from a single criminal episode." However, the district court correctly noted that the record indicates that those offenses "arose out of two or three separate criminal episodes." Crocker v. State, 568 So.2d 116 (Fla. 5th DCA 1990). (R 67) The district court also noted that two of the adjudications "appear to have resulted from a single incident." 568 So.2d at 116. The State submits that the complex analyses that have evolved in various contexts to determine the legal effect of a single act, a single episode, and a single incident would be superfluous as threshold questions to the straightforward determination whether a guidelines scoresheet fairly reflects a defendant's criminal record. The State further submits that grafting the rule of Joyner onto that determination would have the same undesirable effect of muddying the conceptual waters and, ultimately, of precluding the trial courts from departing in cases in which the guidelines scoresheet is simply not descriptive.

Moreover, nothing in the guidelines suggests that successive adjudications, rather than a single adjudication, are necessary as a predicate for departure. In Joyner v. State, supra, this court held that its construction of Florida's then-existing habitual offender statutes was "implicit" in those statutes. 30 So.2d at 306. The statutes construed in Joyner, Sections 775.09 and 775.10, Florida Statutes (1941), were worded as follows:

> 775.09 **Punishment for second conviction of felony.** A person who, after having been convicted within this state of a felony..., commits any felony within this state is punishable upon conviction of such second offense as follows....
>
> 775.10 **Punishment for fourth conviction of felony.** A person who, after having been three times convicted within this state of felonies..., commits a felony within this state shall be sentenced upon conviction of such fourth or subsequent offense to imprisonment ...for...life.

Nothing in the guidelines is remotely analogous to the references, in the statutes construed in Joyner, to "having been convicted" or "having been three times convicted." The State submits that the petitioner's suggestion on this point is without foundation and should be rejected.

POINT FOUR

THE TRIAL JUDGE CORRECTLY ENTERED A WRITTEN ORDER, DETAILING HIS REASONS FOR DEPARTING FROM THE SENTENCING GUIDELINES, AT THE TIME HE IMPOSED THE SENTENCE.

The petitioner argues that the record clearly reflects that the trial court did not comply with this court's ruling in Ree v. State, 565 So.2d 1329 (Fla. 1989), which requires trial judges to issue written reasons at the time of sentencing whenever they depart from the sentencing guidelines. Specifically, the petitioner argues that the record shows that the trial judge brought his departure order to the sentencing hearing with him and therefore "imposed a departure sentence that had been decided before, and was evidently not subject to, argument of counsel." (PB 18). However, it is not clear from the record that Judge Eastmoore's departure order was brought to the sentencing hearing in final form; in any event, the State submits that Ree does not clearly hold that such a proceeding would be incorrect.

First, the petitioner relies on the following colloquy from the sentencing transcript to establish that the trial judge had finalized his departure order before the sentencing hearing:

> THE COURT: This is a departure sentence. The Court at this time sets forth its reasons for aggravating the defendant's sentence as being the unscored juvenile record as permitted by the Supreme Court finding in [T]il[l]man versus State, 525 So.2d [86]2.
>
> And the Court at this time enters a written order.

> Madam Clerk, you will need to prepare a copy of this and give it to counsel for both parties.
>
> * * *
>
> She will furnish you, Mr. DeThomasis, with a copy of that departure, if you want to wait around a few minutes, before you leave here today. (R61).

Petitioner now complains that this portion of the record indicates that Judge Eastmoore did not, as recommended by Ree, write out his findings at the time sentence was imposed, while he was still on the bench. 565 So.2d at 1332. However, this portion of the record lends itself equally well to the assumption that Judge Eastmoore did, in fact, write out the sentencing order at the bench and then turned it over to his clerk to be typed.

However, even if Judge Eastmoore had prepared the typed sentencing order which appears in the record (R 49-50) before the sentencing hearing, the State submits that nothing in Ree precludes a trial judge from bringing a typed draft of a departure order to a sentencing hearing. Ree holds that to be contemporaneous with sentencing, departure reasons must be issued at the time of the sentencing, 565 So.2d at 1332; it does not require that departure reasons be first committed to paper at that time. Particularly in a case such as the case at bar, where the presentence report recommends a departure sentence (R 57), and where the sole argument offered in mitigation consisted of defense counsel pointing out that the defendant was not yet twenty years of age and had never been incarcerated in a state

prison, it is unreasonable to presume that the defendant has not had a fair hearing simply because the trial judge provided himself with a typed draft of his proposed departure order. The petitioner has shown no error on this point.

CONCLUSION

Based on the arguments and authorities presented above, the respondent requests that this court affirm the decision of the district court in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Respondent's foregoing Brief on the Merits has been furnished by hand delivery to Paolo Annino and Brynn Newton, Attorneys for Appellant, 112-A Orange Avenue, Daytona Beach, Florida 32114-4310, at the Public Defenders' in-basket at the Fifth District Court of Appeal, this 26th day of December, 1990.

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