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IN THE SUPREME COURT OF THE STATE OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

Case No. 77,249

JAMES LEO DODD,

Respondent.

_____ /

ON CERTIFIED QUESTION FROM THE DISTRICT COURT OF APPEAL,
FIFTH DISTRICT, FROM APPEAL FROM THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

PETITIONER'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

James Leo Dodd was released from prison after serving eight years of a twenty year sentence for second degree murder in Dade County in September or October, 1988. (R 47) Upon his release from prison, he went to live with his sister and her boyfriend, the victim in this case. Dodd was charged by information filed January 6, 1989, with second degree murder by shooting Otis Fields on December 17, 1988. (R 71) On September 5, 1989, he entered a negotiated plea of guilty as charged, in exchange for the state abandoning its intention to seek reclassification of the crime to a life felony and withdrawing its motion to seek enhanced punishment under the habitual offender act. (R 2-11, 131) The state retained the option of seeking a departure sentence. Dodd stipulated to a factual basis for the plea. (R 8)

Sentencing proceedings were conducted on October 25, 1989. (R 14) The recommended sentencing guidelines sanction was 17 to 22 years' incarceration. (R 18, 134) The trial court imposed a departure sentence of 40 years' incarceration, followed by life on probation. (R 61, 139) Contemporaneous written reasons were provided at the bottom of the scoresheet and signed by the trial judge. "Defendant released form Department of Corrections 2-3 months before the commission of this crime. He had served a 20 year sentence for 2nd degree murder." (R 134)

Dodd filed a timely notice of appeal. Briefs were filed by the parties. On October 18, 1990, the District Court of Appeal,

Fifth District, entered its decision in this case, quashing the sentence and remanding for resentencing. The court held that the short interval of time between release from prison and commission of the new substantive offense is a valid consideration, but is part of a necessary finding that a defendant has engaged in a continuing and persistent or escalating pattern of criminal activity. The trial court did not find such a pattern, nor could the record support a finding of a pattern. The second reason for departure, that the defendant had committed another second degree murder before, was considered a circumstance which was "...unique, albeit unfortunate and inexcusable." Dodd v. State, 15 F.L.W. D 2604 (Fla. 5th DCA October 18, 1990).

Upon appellee's motion for clarification, the court revised its decision by order dated December 20, 1990, by certifying the following question to this court for resolution as one of great public importance. Fla.R.App.P. 9.030(2)(A)(v):

IN A CASE INVOLVING THE IMPOSITION OF AN UPWARD DEPARTURE SENTENCE IN A CRIMINAL PROSECUTION FOR A NEW SUBSTANTIVE OFFENSE, DOES THE SHORT TIME INTERVAL BETWEEN COMMISSION OF THE CRIME AND RELEASE FROM PRISON PROVIDE AN ADEQUATE BASIS FOR THE DEPARTURE, EVEN THOUGH THE TRIAL JUDGE FAILS TO MAKE AN EXPLICIT FINDING THAT THE DEFENDANT HAS ENGAGED IN A PERSISTENT PATTERN OF CRIMINAL ACTIVITY?

The state timely filed its notice to invoke the discretionary jurisdiction of this court. On January 21, 1991, this court ordered petitioner to file a brief on or before

February 18, 1991. On February 13, 1991, petitioner filed a motion to toll the time for service of this brief until resolution of the motion for consolidation, filed the same date. Petitioner sought consolidation with a pending case before this court where essentially the same question had been certified, Barfield v. State, Case No. 76,524. See also, Forney v. State, Case No. 76,900. The motion to consolidate was denied by order dated February 27, 1991. This order was received by petitioner this date, March 5, 1991.

SUMMARY OF ARGUMENT

Temporal proximity of crimes is alone a valid basis for departure from the recommended guidelines sanction. In some instances, this factor will be part of a consideration of whether the crimes committed by the defendant form a continuing and persistent pattern of criminal activity, but timing is a clear and convincing reason for departure whether or not a persistent pattern exists.

ARGUMENT

IT IS A VALID REASON FOR DEPARTURE FROM THE SENTENCING GUIDELINES IF A DEFENDANT COMMITS A NEW SUSTANTIVE OFFENSE WITHIN A SHORT PERIOD OF TIME FROM HIS RELEASE FROM INCARCERATION.

The issue to be resolved in this and other cases pending before this court¹ is whether the timing of offenses is a valid reason for departure, or whether it is part of a consideration of whether there is a continuing and persistent pattern of criminal activity. Dodd committed second degree murder within three months from his early release from prison for another second degree murder.

In Williams v. State, 504 So.2d 392, 393 (Fla. 1987), this court stated:

Neither the continuing and persistent pattern of criminal activity nor the timing of each offense in relation to prior offenses and release from incarceration or supervision are aspects of a defendant's prior criminal history which are factored in to arrive at a presumptive guidelines sentence. Therefore, there is no prohibition against basing a departure sentence on such factors. Id. (emphasis added).

Any doubt that these two reasons were separate was dispelled in this court's decision in Tillman v. State, 525 So.2d 862, 864 (Fla. 1988):

¹ See, Barfield v. State, Case No. 76,524; Forney v. State, Case No. 76,900; Libscomb v. State, Case No. 77,456.

Reason nine concerns the timing of offenses in relation to prior offenses and release from incarceration. [four months] This is a clear and convincing reason since it too is an aspect of prior criminal history not already factored in to arrive at a presumptive guidelines sentence. Williams v. State, 504 So.2d 392 (Fla. 1987). Id.

Tillman was decided after this court's decisions in Mathis v. State, 515 So.2d 214 (Fla. 1987), and Rousseau v. State, 509 So.2d 281 (Fla. 1987), which seemed to hold that timing of offenses was factored in to the presumptive sentence.

Subsequent to Williams and Tillman, this court issued two decisions which blurred the line between these two reasons for departure. State v. Jones, 530 So.2d 53 (Fla. 1988); State v. Simpson, 554 So.2d 506 (Fla. 1989). Nevertheless, just one month before Simpson, this court issued two decisions which hold that temporal proximity alone continues to exist as a valid ground for departure. Gibson v. State, 553 So.2d 701 (Fla. 1989); Jones v. State, 553 So.2d 702 (Fla. 1989).

In Gibson, supra, the trial court departed for "prior record within a short time." While the court held that fourteen months was too long, it noted that "timing may, under appropriate circumstances, be an appropriate reason to depart." Id. Likewise, in Jones, this court approved the use of timing and persistent pattern as separate grounds for departure, and indicated that eight days was short enough to establish temporal proximity. Jones v. State, 533 So.2d at 703. In both Gibson and

Jones, Justice Barkett specially concurred, noting her disapproval with timing alone as a departure ground. However, these two cases resolved the problem raised by Justice Barkett, namely, that there was no clear indication of how close in time was sufficient to render two events temporally proximate. Gibson holds that fourteen months is too long, but eight days is short enough under Jones. District courts have grappled with this problem, and the concensus appears to be one year. See, Roseman v. State, 519 So.2d 1129 (Fla. 5th DCA 1988); Jordan v. State, 562 So.2d 820 (Fla. 4th DCA 1990). In any event, the facts of this case establish that within three months of Dodd's release from prison, after serving eight years of a twenty year sentence, he committed another second degree murder. These two events are temporally proximate, and constitutes a valid reason for departure from the sentencing guidelines.

Even if timing alone is not a valid reason, two incidents nevertheless may constitute a continuing and persistent pattern of criminal activity. Lipscomb v. State, 16 F.L.W. D330 (Fla. 5th DCA January 31, 1991); but see, Frederick v. State, 556 So.2d 471 (Fla. 1st DCA 1990); McKinney v. State, 559 So.2d 621 (Fla. 3d DCA 1990). "Just as two points make a line and just as two felonies can establish a habit²," two second degree murders separated by a prison term shows a pattern of criminal behavior of unlawfully killing other people.

² See, §775.084, Fla. Stat. (1989).

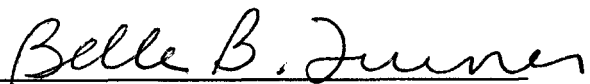
Pursuant to this court's decisions in Williams, Tillman, Gibson, and Jones, it is a valid reason for departure that the defendant committed a new substantive offense within three months from his release from prison. Continuing and persistent pattern of criminal activity is another, somewhat related, ground for departure, but is logically and legally distinct from temporal proximity.

CONCLUSION

Based upon the argument and authority presented, petitioner respectfully requests this honorable court to answer the certified question in the affirmative.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing brief on the merits has been furnished, by delivery to Assistant Public Defender Daniel Schafer counsel for respondent at 112-A Orange Avenue, Daytona Beach, FL, 32114, this 5th day of March, 1991.


BELLE B. TURNER
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