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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,)
)
 Petitioner,)
)
 vs.)
)
 JAMES LEO DODD,)
)
 Respondent.)
 _____)

CASE NO.: 77,249

ON REVIEW FROM A QUESTION CERTIFIED
TO BE OF GREAT PUBLIC IMPORTANCE
FROM THE FIFTH DISTRICT COURT OF APPEAL

RESPONDENT'S BRIEF ON THE MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,)
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 Petitioner,)
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vs.) CASE NO.: 77,249
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JAMES LEO DODD,)
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 Respondent.)
_____)

RESPONDENT'S BRIEF ON THE MERITS

STATEMENT OF THE CASE AND FACTS

Respondent accepts the Statement of the Case and Facts
as stated by Petitioner.

SUMMARY OF ARGUMENT

Temporal proximity of crimes does not, without more, justify departing from a recommended guidelines sentence. Such a departure would be arbitrary without a showing of escalating pattern of criminal conduct. Here, as the Fifth District Court of Appeal's opinion recites, the record shows no such pattern. Therefore, the District Court correctly reversed Mr. Dodd's departure sentence.

ARGUMENT

TEMPORAL PROXIMITY ALONE DOES NOT
PROVIDE A VALID REASON FOR DEPARTURE
FROM THE SENTENCING GUIDELINES WITHOUT
A FINDING OF PERSISTENT PATTERN OF
CRIMINAL ACTIVITY.

Respondent's recommended guidelines sentence was a substantial seventeen to twenty-two (17 - 22) years in prison. (R 18, 134) The trial court departed and imposed a forty (40) year prison term, followed by life probation. (R 61, 139) Cited as reason for the departure was the fact that Appellant had been released from the Department of Corrections shortly before the crime. The Fifth District Court of Appeal reversed but certified the question of whether temporal proximity between commission of a crime and release from prison could provide reason for departure "even though the trial judge fails to make an explicit finding that the defendant has engaged in a persistent pattern of criminal activity." As was noted in the State's brief, essentially the same question has been certified in Barfield v. State, Case Number 76,524; and Forney v. State, Case Number 76,900. The Fourth District Court of Appeal stated the question succinctly:

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 ACTIVITY?

This question, and the question certified by the Fifth District should be answered in the negative. The Fifth District Court of Appeal's position is consistent with caselaw announced by this Court and should be affirmed.

The purpose of the guidelines is to insure uniformity and to eliminate unwarranted variation in the sentencing process, and to prevent overcrowding in our prison system. Fla.R.Crim.P. 3.701; §921.001, Fla.Stat. (1983). Since the propose of the guidelines is to remedy subjective variations in the sentencing process, any exceptions should be narrowly construed. Cf. Farrey v. Bettendorf, 96 So.2d 889 (Fla. 1957). While the rule does not eliminate judicial discretion, it does seek to discourage departures from the guidelines. Hendrix v. State, 475 So.2d 1218 (Fla. 1985). The reasons themselves must be of such weight as to produce in the mind of the judge a firm belief or conviction, without hesitancy, that departure is warranted. Id.

As this Court has made clear in State v. Simpson, 554 So.2d 506 (Fla. 1989) temporal proximity of 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.

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 FLW D2017 (Fla. 3d DCA August 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 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 months from release from prison was held to be an invalid reason for departure. Whereas in Jordan v. State, 15 FLW D1535 (Fla. 4th DCA June 6, 1990) a timing of six 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.¹

¹ 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 months is a valid reason for departure.

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 made 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 departure² because the offense was committed 5½ months after release from prison as opposed to 6½ months?³ Without an explanation which can be analyzed objectively, timing is not a valid reason for departure.

² Appellate review of extent of departure is no longer permitted.

³ 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 would 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.

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.⁴ 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 not override other factors of the guidelines which have been deemed important enough to be scored.

Mr. Dodd's case illustrates well the fact that "temporal proximity" does not always equal a "continuing and persistent pattern". After noting that the trial judge had made no finding of a pattern, the Fifth District Court held:

Even if the judge had made such a finding, the record does not clearly support it. The sentencing hearing established that Dodd had previously served a twenty year sentence for second degree murder. After being released from prison, he moved into residence with his sister and her common-law husband, the victim.

Two to three months after Dodd's release from prison, he got into an argument and

⁴ 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.

fight with the victim. The victim was heavily intoxicated, and had a violent temper when under the influence of alcohol. He first fought with Dodd's sister and hit her in the face, causing her mouth to bleed. She left their apartment.

According to Dodd, whose statement was the only one given about the killing, the victim later picked an argument with him. The victim threatened Dodd with a handgun and shot into the apartment walls. Dodd struggled with the victim, got control of the gun, and shot him. The state agreed there was some evidence to support Dodd's self-defense theory; and the victim was clearly intoxicated. Because of those facts, the state was willing to accept a guilty plea to second degree murder rather than pursue a first degree charge.

This crime, coupled with the earlier homicide, does not appear to create a pattern of similar crimes. The circumstances are unique, albeit unfortunate and inexcusable. We thus conclude Dodd should have received a guidelines sentence.

In summary, temporal proximity of crimes alone does not provide a valid reason for departure without a finding of a continuing and persistent or escalating pattern of criminal conduct. The District Court correctly reached this conclusion by following this Court's previous decisions. Simpson, supra; Jones, supra. In Mr. Dodd's case the trial court found no pattern nor did such a pattern exist. Therefore, the District Court's decision reversing the departure sentence should be affirmed.

CONCLUSION

Based on the arguments and authorities cited herein, Respondent respectfully requests that this Honorable Court answer the certified question in the negative and affirm the decision of the Fifth District Court of Appeal.

Respectfully submitted,

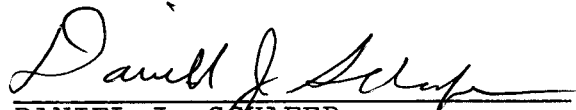
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been delivered to the Honorable Robert Butterworth, Attorney General, 210 N. Palmetto Avenue, Suite 447, Daytona Beach, FL 32114, in his basket at the Fifth District Court of Appeal and to; James Leo Dodd, #B-073184, P.O. Box 667, Bushnell, FL 33513, this 27th day of March, 1991.



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