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CLERK, SUPREME COURT

By [Signature]
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

HENRY TAYLOR,

Petitioner,

v.

CASE NO. 78,133

STATE OF FLORIDA,

Respondent.

_____ /

MERITS BRIEF OF RESPONDENT

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STATEMENT OF CASE AND FACTS

The state disagrees with the defense statement of the facts because it lacks sufficient detail regarding the history of the defendant's criminal activities. For purposes of clarity and ease of reference, the material facts are presented sequentially below.

November 7, 1987: Defendant arrested for possession of cocaine (R 81; 254).¹

January 29, 1988: While out on bond the defendant sold cocaine on two separate occasions, on January 29, 1988, and February 19, 1988 (R 83; 82; 255).

September 22, 1988: The defendant was sentenced to prison for one year and a day concurrently on all three charges (R 254).

December 14, 1988: The defendant was released from prison (R 255).

August 2, 1989: The defendant sold cocaine (R 90; 255).

August 4, 1989: The defendant was arrested (R 94-98) for committing the following crimes:

Count I: Possession of cocaine.

Count II: Possession of more than 20 grams of cannabis.

Count III: Possession of a short barrel shotgun.

Count IV: Possession of a firearm by a convicted felon.

Count VII: Maintaining a drug house.

Count IX: Sale of cocaine.

(R 88-91; the state agreed not to present any evidence on counts V and VI in exchange for the plea to the other counts (R 52; 215). The defendant was convicted of count II as well. It is not included in the list immediately above because the

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The parties are referred to as the defendant and the state. References to the record are indicated "(R and page)"; those to the initial brief, if any, are denoted "(B and page)".

information also charged the defendant with the crime that he had committed on August 2.

(R 88-91; 255).

August 25, 1989: The defendant was released on his own recognizance (R 110-112; 256).

September 28, 1989: An affidavit alleging violation of probation was filed and a warrant executed (R 114-117).

November 18, 1989: The defendant committed the following crimes:

Count I: Possession of cocaine.

Count II: Possession of a firearm by a convicted felon.

Count III: Possession of more than 20 grams of cannabis.

(R 92-983; 256).

The trial court sentenced the defendant for the violations of probation and on the new substantive offenses at the same hearing (R 1-41). The trial court imposed consecutive sentences for certain of the substantive offenses totalling 65 years, which constitutes a departure from the guidelines.² At the sentencing hearing the court pronounced its reasons for departure as follows:

The Court will make findings as follows in departing in the sentencing:

² The defendant received the following terms: In 89-11985-CFB, the defendant received 15 years consecutively on counts IV, VII and IX (R 247, 249-250); in 89-17789-CFA the defendant received consecutive sentences of 5 years on count I and 15 years on count II (R 237-238). The remaining sentences, both on the substantive and V.O.P. counts, are to run concurrently with these sentences (R 222-233, 244-246, 248 and 239).

That the link between weapons and the drug charges has been established by competent evidence and is an aggravating factor in the Court's mind in terms of sentence to be imposed.

The Court finds that there is competent evidence by conviction of Mr. Taylor's continuing and persistent pattern of criminal activity as evidenced by his record in part as follows:

That in January of 1988 the Defendant sold cocaine to a confidential informant; that again on February 19th of that same year he again sold cocaine to a confidential informant; that there continues over a period of roughly two years a constant and continuous pattern of convictions for the sale and possession of drugs as evidenced by the fact that he was again arrested for selling cocaine on August the 4th having been released from the Department of Corrections or having terminated his probation on similar charges on August 2nd, two days prior; that he was found in possession of cocaine thereafter and a short-barrel shotgun thereafter, charged with and convicted of maintaining a drug house after being arrested on these charges on August 4th and again released on recognizance August 25th, 1989, and thereafter on November 18th, 1989, having been arrested on an outstanding warrant and being found in possession of cocaine, more than 20 grams of cannabis and a firearm; that this record continues as a result of convictions which cover a period from November of '87 until the date of the arrest on these current charges.

(R 30-31).

The court also contemporaneously provided written reasons for departure (R 40). At the bottom of the scoresheet the court summarized its reasons in the following fashion:

Continuing & persistent forming a pattern of criminal activity established by convictions for drug related charges commencing in Nov '87 & continuing to his arrest in Nov '89 - Links to weapons[.]

(R 253).

The more detailed written departure order provides in its entirety:

It is hereby ORDERED AND ADJUDGED the Court will depart from the sentencing guidelines on Henry Taylor's

case set forth above. Relying on the Supreme Court of Florida's holding in *State v. Simpson* 14 FLW 601 (12/22/89), the basis for departure the Court finds to exist is the timing of the offenses coupled with Mr. Taylor's continuing and persistent pattern of criminal activity which is evidenced as follows:

1) The defendant was arrested for possession of cocaine on November 7, 1987. He was later found guilty and sentenced to a year and a day at the Department of Corrections followed by four years probation on September 22, 1988.

2) While out on bond for his November 7, 1987 charge, the defendant sold cocaine to a confidential informant on January 29, 1988, and again on February 19, 1988. Mr. Taylor was convicted for both these crimes and sentenced to a year and a day department of corrections followed by four years of probation. These sentences were served concurrently with the November 7, 1987 charge and with each other. Mr. Taylor was released from his prison term on December 14, 1988, and began serving his four years of probation.

3) On August 22, 1989, [a]pproximately seven and one-half months after his release from prison, the defendant sold cocaine to a confidential informant. On August 4, 1989 the defendant once again sold cocaine to a confidential informant. A resulting search of the defendant's residence found the defendant to be in possession of cocaine, more than twenty grams of cannabis and a short barreled shotgun. From this and other evidence derived from the search of Mr. Taylor's premises, the defendant pled guilty to maintaining a drug house. The defendant's guilt to these charges is evidenced by his plea to information numbered 89-11985-CF-B.

4) Mr. Taylor was released on the pending charges from his arrest of August 4, 1989 on August 25, 1989. On November 18, 1989 the defendant was arrested at his home on an outstanding warrant. During the course of a search incident to arrest and a protective sweep search, the defendant was found to be in possession of cocaine, more than twenty grams of cannabis, and a firearm as evidenced by his plea to information numbered 89-17789-CF-A on May 4, 1990.

DONE and ORDERED in Chambers at Melbourne Courthouse, Brevard County, Florida, this 12 day of July, 1990.

(R 254-256).

The defense did *not* argue in the district court that the reasons for departure were invalid (*see* attached copies of initial and reply briefs). Its claims related to the departure, which have been abandoned in the instant proceeding, were that departure order had not been rendered contemporaneously with the imposition of sentence and that the written reasons rendered contemporaneously with sentencing were vague (points I and II in initial brief; point I in reply brief).

SUMMARY OF ARGUMENT

Point One: Any error related to the multiplication of legal constraint points was harmless because the sentence imposed was a valid departure sentence to which the scoresheet was immaterial. Legal constraint was not a basis for the departure. As a result, the defendant would have received the same sentence even if the defendant had assessed only 14 points for legal constraint.

Point Two: The reasons for departure are valid. The timing of offenses in conjunction with a defendant's involvement in a continuing and persistent pattern of criminal activity and a pattern of criminal activity which reflects an escalation to more serious crimes are recognized bases for departure.

ARGUMENT

Point One

THE CERTIFIED QUESTION HAS ALREADY BEEN ANSWERED BY THIS COURT IN A PREVIOUS CASE. HOWEVER, ANY ERROR IN CALCULATING THE SCORESHEET WAS RENDERED HARMLESS WHEN A VALID DEPARTURE SENTENCE WAS IMPOSED.

Sentencing errors are subject to a harmless error analysis. See *Young v. State*, 579 So.2d 721,724 (Fla. 1991); *Holton v. State*, 573 So.2d 284, 293 (Fla. 1991); *Downs v. State*, 572 So.2d 895, 901 (Fla. 1991). Contrary to the subsequent holding of this court in *Flowers v. State*, 16 F.L.W. S637 (Fla. October 3, 1991), the scoresheet below included legal constraint points for each offense. Nonetheless, reversal in this case is unwarranted because the multiplication of the legal constraint points did not prejudice the defendant as it did not affect his sentence.

The defendant's legal constraint status was not a factor which the trial court considered in imposing the departure sentence. (See R 30-31; 40; 253; 254-256). The mere fact that the legal constraint points were multiplied does not warrant reversal because the defendant would have received the departure sentence even if the proper amount of points for legal constraint had been assessed. (See point two for discussion of departure bases.)

Point Two

THE DEFENSE CONTENTION IS
PROCEDURALLY BARRED. MOREOVER, THE
REASONS GIVEN FOR DEPARTURE ARE
VALID.

PROCEDURAL BAR

"In order to be preserved for further review by a higher court, an issue must be presented to the lower court and the specific legal argument or ground to be argued on appeal or review must be part of that presentation if it is to be considered preserved." *Tillman v. State*, 471 So.2d 32, 35 (Fla. 1985); cf. *Bertolotti v. State*, 514 So.2d 1095, 1096 (Fla. 1987); *D'Oleo-Valdez v. State*, 531 So.2d 1347 (Fla. 1988). The current defense claim that the departure was not based upon a valid reason is procedurally barred because it was never advanced below.

The defense did not challenge the departure reasons before the trial court (R 30-40). On direct appeal the defense argued that the departure order was not contemporaneously rendered with the imposition of sentence and that the written reasons provided at sentencing were vague. These claims have been abandoned before this court. No doubt this is due in large part to the fact that the defense before the district court expressly conceded in material part that "[a]t the sentencing hearing, the trial court did write a departure reason on the Sentencing Guidelines scoresheet." (Initial brief, p. 6, n. 1). The defense also admitted that "the trial court's written reason is valid in the 'abstract' . . ." *Id.*, p. 7. While the defense argued before the district court that the trial court erred in

the manner in which it had specified the reason for departure, at no point was it alleged that the facts of this case failed to support the finding of a continuing and persistent pattern of criminal activity.

MERITS

Assuming, *arguendo*, that the claim is not procedurally barred, the defendant cannot prevail. At the sentencing hearing the court pronounced its reasons for departure as follows:

The Court will make findings as follows in departing in the sentencing:

That the link between weapons and the drug charges has been established by competent evidence and is an aggravating factor in the Court's mind in terms of sentence to be imposed.

The Court finds that there is competent evidence by conviction of Mr. Taylor's continuing and persistent pattern of criminal activity as evidenced by his record in part as follows:

That in January of 1988 the Defendant sold cocaine to a confidential informant; that again on February 19th of that same year he again sold cocaine to a confidential informant; that there continues over a period of roughly two years a constant and continuous pattern of convictions for the sale and possession of drugs as evidenced by the fact that he was again arrested for selling cocaine on August the 4th having been released from the Department of Corrections or having terminated his probation on similar charges on August 2nd, two days prior; that he was found in possession of cocaine thereafter and a short-barrel shotgun thereafter, charged with and convicted of maintaining a drug house after being arrested on these charges on August 4th and again released on recognizance August 25th, 1989, and thereafter on November 18th, 1989, having been arrested on an outstanding warrant and being found in possession of cocaine, more than 20 grams of cannabis and a firearm; that this record continues as a result of convictions which cover a period from November of '87 until the date of the arrest on these current charges.

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(R 253).

The more detailed written departure order provides in its entirety:

It is hereby ORDERED AND ADJUDGED the Court will depart from the sentencing guidelines on Henry Taylor's case set forth above. Relying on the Supreme Court of Florida's holding in *State v. Simpson* 14 FLW 601 (12/22/89), the basis for departure the Court finds to exist is the timing of the offenses coupled with Mr. Taylor's continuing and persistent pattern of criminal activity which is evidenced as follows:

1) The defendant was arrested for possession of cocaine on November 7, 1987. He was later found guilty and sentenced to a year and a day at the Department of Corrections followed by four years probation on September 22, 1988.

2) While out on bond for his November 7, 1987 charge, the defendant sold cocaine to a confidential informant on January 29, 1988, and again on February 19, 1988. Mr. Taylor was convicted for both these crimes and sentenced to a year and a day department of corrections followed by four years of probation. These sentences were served concurrently with the November 7, 1987 charge and with each other. Mr. Taylor was released from his prison term on December 14, 1988, and began serving his four years of probation.

3) On August 22, 1989, [a]pproximately seven and one-half months after his release from prison, the defendant sold cocaine to a confidential informant. On August 4, 1989 the defendant once again sold cocaine to a confidential informant. A resulting search of the defendant's residence found the defendant to be in possession of cocaine, more than twenty grams of cannabis and a short barreled shotgun. From this and other evidence derived from the search of Mr. Taylor's premises, the defendant pled guilty to maintaining a drug house. The defendant's guilt to these charges is evidenced by his plea to information numbered 89-11985-CF-B.

4) Mr. Taylor was released on the pending charges from his arrest of August 4, 1989 on August 25, 1989. On November 18, 1989 the defendant was arrested at his home on an outstanding warrant. During the course of a search incident to arrest and a protective sweep search, the defendant was found to be in possession of cocaine, more than twenty grams of cannabis, and a firearm as evidenced by his plea to information numbered 89-17789-CF-A on May 4, 1990.

DONE and ORDERED in Chambers at Melbourne Courthouse, Brevard County, Florida, this 12 day of July, 1990.

(R 254-256).

The defense now contends that "[t]he important thing to note in this particular case is that every offense that Petitioner committed in his adult life was currently before the court for sentencing." (B 6). Such a contention implies that all of the crimes were committed at approximately the same time and that the defendant had never before been sentenced for a criminal offense. His history reveals otherwise:

November 7, 1987: Defendant arrested for possession of cocaine (R 81; 254).

January 29, 1988: While out on bond the defendant sold cocaine on two separate occasions, on January 29, 1988, and February 19, 1988 (R 83; 82; 255).

September 22, 1988: The defendant was sentenced to prison for one year and a day concurrently on all three charges (R 254).

December 14, 1988: The defendant was released from prison (R 255).

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Count VII: Maintaining a drug house.

Count IX: Sale of cocaine.

(R 88-91; the state agreed not to present any evidence on counts V and VI in exchange for the plea to the other counts (R 52; 215). The defendant was convicted of count II as well. It is not included immediately above because the information charged the defendant with the crime that he had committed on August 2.

(R 88-91; 255).

August 25, 1989: The defendant was released on his own recognizance (R 110-112; 256).

September 28, 1989: An affidavit alleging violation of probation was filed and a warrant executed (R 114-117).

November 18, 1989: The defendant committed the following crimes:

Count I: Possession of cocaine.

Count II: Possession of a firearm by a convicted felon.

Count III: Possession of more than 20 grams of cannabis.

(R 92-983; 256).

Less than eight months after his release from prison the defendant was involved in two separate criminal episodes on August 2 and 4, 1989. He was arrested after the second and later released on his own recognizance. Less than three months later he again committed more drug and weapons related crimes. This court has held:

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.

Williams v. State, 504 So.2d 392, 393 (Fla. 1987); see also *State v. Simpson*, 554 So.2d 506 (Fla. 1989); *State v. Jones*, 530 So.2d 53 (Fla. 1988); *Tillman v. State*, 525 So.2d 862 (Fla. 1988).

"The pattern of criminal activity which reflects an escalation to more serious crimes has been a recognized basis for departure." *Williams v. State*, 16 F.L.W. S397 (Fla. May 30, 1991). All of the defendant's criminal episodes involved violations of drug laws. However, the later crimes were more serious because, as the trial court noted (R 30-31; 253; 254-256), the defendant possessed weapons at those times. "While most cases have involved a progression from nonviolent to violent crimes, we do not believe that this is a requirement so long as the defendant has shown a pattern in increasingly serious criminal activity."
Id.

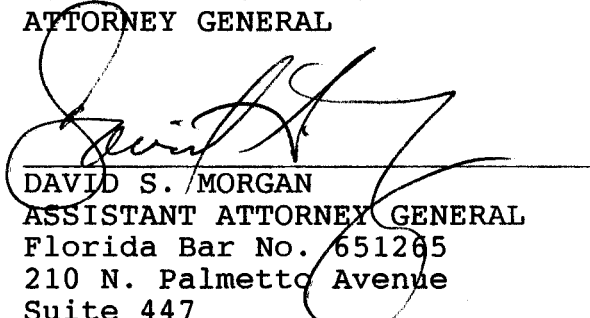
In sum, the departure sentence was valid. The defendant's criminal actions did constitute a continuing and persistent pattern that warranted departure from the guidelines.

CONCLUSION

The decision of the district court should be approved because the multiplication of legal constraint points was harmless error as a valid departure sentence was imposed. The second claim is procedurally barred because it was not advanced in the lower courts. In any event, the departure sentence was validly based upon a finding of a continuing and persistent pattern of criminal activity.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

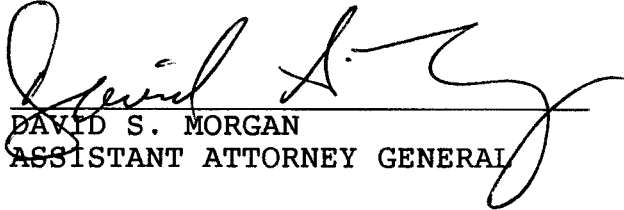


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CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Michael S. Becker, Assistant Public Defender, 112-A Orange Ave., Daytona Beach, FL 32114, by interoffice delivery on this 4th day of November, 1991.



DAVID S. MORGAN
ASSISTANT ATTORNEY GENERAL