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CLERK, SUPREME COURT

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Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

CHARLES HOWARD GIPSON,

Petitioner,

vs.

:

Case No. 80,367

STATE OF FLORIDA,

Respondent.

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

INITIAL BRIEF OF PETITIONER ON THE MERITS

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

CECILIA A. TRAINA
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NUMBER 865729

Public Defender's Office
Polk County Courthouse
P. O. Box 9000 -- Drawer PD
Bartow, FL 33830
(813) 534-4200

ATTORNEYS FOR PETITIONER

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PRELIMINARY STATEMENT

Petitioner **was** the Appellant in the **second** District Court of Appeal and the defendant **in** the trial **court**. Respondent, the State of Florida was the Appellee in the **second** District Court of Appeal. The record on appeal, which was utilized on the District **Court** level, will referred to by the symbol "R" followed **by** the **appropri-**
ate page number.

STATEMENT OF THE CASE AND FACTS

Trial court case numbers 88-16584, 89-7962, 90-16715, and 90-17327 were appealed together in the instant case.

88-16584

On December 17, 1988, the State Attorney for the Thirteenth Judicial Circuit in and for Hillsborough County, Florida, filed an information charging the Petitioner, CHARLES HOWARD GIPSON, with one count of robbery, contrary to section 812.13, Florida Statutes (1987). (R 9-10) This offense allegedly occurred on October 15, 1988. (R 9)

On December 14, 1988, Mr. Gipson pled guilty to robbery. (R 11-12) The trial court placed Mr. Gipson on five years probation. (R 16-17) The sentencing guidelines recommended a sentence of any nonstate prison sanction. (R 13-14)

On July 31, 1989, the trial court revoked Mr. Gipson's probation (R 27) and sentenced him to 2 1/2 years Florida state prison to be followed by five years probation. (R 24-25)

On March 29, 1991, the trial court revoked Mr. Gipson's probation (R 124-125) and sentenced him to nine years Florida state prison, to run consecutively with the sentence in case number 90-17327. (R 38-39, 290-291) The guideline scoresheet permitted a sentence of 4 1/2 to 9 years imprisonment. (R 117, 288)

89-7962

On June 7, 1989, the State Attorney for the Thirteenth Judicial Circuit in and for Hillsborough County, Florida, filed an information charging Mr. Gipson with one count of delivery of

cocaine, contrary to section 893.13 (1)(a), Florida Statutes (1987). (R 47-48) This alleged offense occurred on May 5, 1989. (R 47)

On June 30, 1989, Mr. Gipson pled guilty as charged. (R 49-50) On July 31, 1989, the trial court **placed** Mr. Gipson on five years probation, to run concurrently with case number 88-16584. (R 51-52)

On March 29, 1991, the trial court revoked Mr. Gipson's probation (124-125), and sentenced him to nine **years** Florida state prison, to run concurrently with case number 88-16584. (R 63-64, 290-291) The guideline scoresheet permitted a sentence of 4 1/2 to 9 years imprisonment. (R 117, 288)

90-16715

On November 19, 1990, the State Attorney **for** the Thirteenth Judicial **Circuit** in and for Hillsborough **County**, Florida, filed an information charging Mr. Gipson with one count of delivery of cocaine, contrary to section 893.13(1)(a), Florida Statutes (1989), and one count of possession of cocaine, contrary to section 893.13(1)(f), Florida Statutes (1989). (R 73-74) These alleged offenses occurred on August 3, 1990. (R 73) On November 27, 1990, the trial court signed a notice of intent to treat Mr. Gipson as an habitual felony offender. (R 110) On December 4, 1990, the trial court notified Mr. Gipson that it intended to treat him as an habitual felony offender. (R 111)

On February 26 and 27, 1991, Mr. Gipson was tried before a jury. (R 127-200) On February 27, 1991, the jury convicted Mr. Gipson of both charges, (R 113, 114, 197) On March 29, 1991, the trial court adjudicated Mr. Gipson guilty and sentenced him to

thirty years Florida state prison **as** an habitual felony offender **for** delivery of cocaine, and ten years Florida state prison as an habitual felony offender for possession of cocaine, to run consecutively. (R84-88, 290) The sentencing guidelines scoresheet permitted a sentence of 4 1/2 to 9 years imprisonment. (R 117, 288)

90-17327

On November 29, 1990, the State Attorney **for** the Thirteenth Judicial Circuit in and **for** Hillsborough County, Florida, filed an information charging Mr. Gipson with one count of delivery of cocaine, contrary to section 893.13 (1)(a) , Florida Statutes (1989). (R 94-95) This alleged offense occurred on October 30, 1990. (R 94) On December 4, 1990, the trial court signed and filed a notice of intent to treat Mr. Gipson as an habitual felony offender. (R 111)

On February 26, 1991, Mr. Gipson was tried by a jury. (R 201-285) The jury convicted Mr. Gipson as charged. (R 112, 282) On March 29, 1991, the trial court adjudicated Mr. Gipson guilty (R 106-107, 290), and sentenced him to thirty years Florida state prison **as** an habitual felony offender, to run consecutively to his case number 90-16715. (R 108-109, 290) The sentencing guideline scoresheet permitted a sentence of 4 1/2 to 9 **years** imprisonment. (R 117, 288)

On April 4, 1991, Mr. Gipson filed a timely notice of appeal for all four cases. (R 118)

On appeal, Mr. Gipson raised three issues: (1)the sentencing of Mr. Gipson where the trial judge signed and filed notice of

intent to treat Mr. Gipson as an habitual felony offender, (2) imposition of consecutive habitualized sentences upon Mr. Gipson, and (3) running Mr. Gipson's guideline sentences consecutive to Mr. Gipson's habitual felony offender sentences scored on the same guideline scoresheet. **The Second District Court of Appeal rejected all three arguments in its June 19, 1992, decision. Upon rehearing, the court affirmed the lower court decision on the basis of Boomer v. State, 596 So. 2d 730 (Fla. 2d DCA 1992), pending, 79,638; however noted that its decision was contrary to a decision by the Fifth District Court of Appeal in Wood v. State, 593 So. 2d 557 (Fla. 5th DCA 1982), held that imposing a guidelines sentence consecutively to a non-guidelines sentence was not a guidelines departure. Boomer.**

SUMMARY OF THE ARGUMENT

A guidelines departure occurs when the trial court imposes a guidelines sentence to run consecutively to other habitualized sentences scored on the same guidelines scoresheet.

ARGUMENT

ISSUE

WHETHER THE TRIAL COURT ERRED IN RUNNING APPELLANT'S GUIDELINES SENTENCES CONSECUTIVE TO APPELLANT'S HABITUAL FELONY OFFENDER SENTENCES SCORED ON THE SAME GUIDELINES SCORESHEET?

The issue of whether a guidelines departure sentence occurs when a defendant is sentenced for both a guidelines and a non-guidelines offense and the sentences are run consecutively has become an issue of conflict among at least two Florida Courts.

The Second District Court of Appeals determined in the present case, a trial judge, on a probation revocation sentence, could run a guidelines sentence consecutively to other habitualized sentences scored on the same guidelines scoresheet and that such a sentence was not a departure. The Court did not discuss its reasons for this holding, but on rehearing only noted that the decision was in accord with Boomer v. State, 596 So. 2d 730 (Fla. 2d DCA 1992), pending and that it was contrary to the recent opinion of the Fifth District Court of Appeal in Wood v. State, 593 So. 2d 557 (Fla. 5th DCA 1992).

In Wood, the defendant was sentenced to a total of eighty years of imprisonment on two felony counts pursuant to the habitual offender statute. He then received a guidelines life sentence which was imposed to run consecutively to the two other offenses. The Fifth District Court of Appeals held that running the guidelines life sentences consecutive to the habitual offender enhanced

offense constituted a guidelines departure. The Court determined that in running the life sentence consecutive to the eighty year sentence the life sentence would not commence to run until the defendant had served the eighty year sentence thus, the defendant would ultimately serve more than **life** on the guidelines sentence.

The logic employed in Wood is correct. The repeatedly stated purpose and goal of the sentencing guidelines is uniformity in sentencing. Branam v. State, 554 So. 2d 512 (Fla. 1990). Departures from the recommended guidelines range, absent valid written reasons, are not allowed. Williams v. State, 492 So. 2d 1308 (Fla. 1986). In this vain, when the recommended guidelines sentence is life imprisonment, a trial court may not impose consecutive sentences without providing written reasons for departure. Rease v. State, 493 So. 2d 454 (Fla. 1986). The desire to maintain consistency in sentencing is also reflected in the requirement that concurrent or consecutive sentences, whichever is closer to the recommended guidelines range, must be imposed where statutory maximums or minimums preclude sentencing within the applicable guidelines range. Branam.

Clearly there is a distinction between cases where all of the counts before the court for sentencing are scoreable under the guidelines and those cases where some of the counts are non-scoreable such as capital felonies, or are removed from the guidelines limitations through the application of the habitual offender statute. In cases where **all** of the counts are encompassed by the guidelines a departure sentence is easy to discern, Any

overall period of incarceration which is less than or exceeds the guidelines range is a departure. In cases where both guidelines and non-guidelines counts are present a departure sentence should be no less discernible. If trial courts are required to run multiple counts concurrently or consecutively to best approximate the guideline range, so too should they be required to run guidelines and non-guidelines counts concurrently or consecutively, if applicable, to reflect the guidelines range.

In instances where a person is sentenced for both capital or habitualized felonies and non-capital felonies a departure sentence occurs when the guidelines sentence is run consecutively to the sentences imposed for the non-guidelines counts. In such cases, the guidelines sentence does not commence to run until the non-guidelines sentence has been serve. Thus, as in the present case, a person given a habitualized sentence may not begin the service of his guidelines sentence until a minimum number of years has passed which **exceeds** the maximum number of years in the guidelines range. In this case the maximum under the guidelines is 9 years. This sentencing scheme is in complete opposition with the stated desire of having a defendant sentenced as close to the recommended guidelines range **as** possible. The sentences in such cases should be structured to run concurrently. The decision of the Second District Court of Appeals should be rejected and the analysis in Wood, supra, which is consistent with the purpose of the sentencing guidelines and should be adopted by this court.

CONCLUSION

In light of the foregoing reasons, arguments and authorities, the Second District Court of Appeals decision on the Petitioner's case should be reversed and the case remanded for sentencing within the guidelines.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

CHARLES HOWARD GIPSON,
Appellant,

v.

CASE NO. 90-01177

STATE OF FLORIDA,
Appellee.

Opinion filed July 24, 1992.

Appeal from the Circuit Court
for Hillsborough County;
Harry Lee Coe, 111, Judge.

James Marion Moorman, Public
Defender, and Timothy A.
Hickey, Assistant Public
Defender, Bartow, for
Appellant.

Robert A. Butterworth, Attorney
General, Tallahassee, and
Katherine V. Blanco, Assistant
Attorney General, Tampa, for
Appellee.

PER CURIAM.

Affirmed. See Boomer v. State, 596 So. 2d 730 (Fla. 2d
DCA 1992); contra Wood v. State, 593 So. 2d 557 (Fla. 5th DCA
1992).

SCHOONOVER, A.C.J., and HALL and THREADGILL, JJ., Concur.

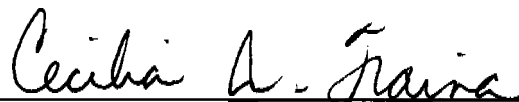
Received By
JUL 24 1992
James Marion Moorman
Public Defenders Office

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CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Sue Henderson, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 10th day of December, 1992.

Respectfully submitted,



JAMES MARION MOORMAN
Public Defender
Tenth Judicial Circuit
(813) 534-4200

CECILIA A. TRAINA
Assistant Public Defender
Florida Bar Number 865729
P. O. Box 9000 - Drawer PD
Bartow, FL 33830

CAT/mlm