FLORIDA SUPREME COURT

MICHAEL HARRIS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.
_____/

DCA Case No. 94-1516
Supreme Court Case No. 86,564

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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CASES:

STATEMENT OF THE CASE AND FACTS

Respondent agrees with Petitioner's Statement of the Case and Facts, but would add the following information about the underlying crime.[1]

The victim in the present case testified that she was vacationing in Cocoa, Florida with her seven year old son. (T. 202, 203, 228). As she was carrying her luggage from the car to her hotel room, she was confronted by the petitioner who had a gun, physically knocked her and demanded her purse. (T. 205-209). While she suffered only short term bruises, her son continues to have emotional trauma after witnessing the attack. (R. 6-9). The Petitioner was convicted of robbery with a weapon. (R. 102).

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[1]Michael Harris shall be referred to as "the Petitioner" or by his proper name. The State of Florida shall be referred to as "the Respondent" or as the State. References to the record on appeal shall be designated as (R.). References to the trial transcript shall be designated as (T.).

SUMMARY OF THE ARGUMENT

The appellate court asks this Court to decide whether there are any limits to a trial court's discretion to impose an upward departure sentence. However, this would amount to an appellate court reviewing the degree of a departure, something which the legislature has strictly prohibited in Section 921.001(5), Florida Statutes (1993). This Court already answered the question certified by the Fifth District Court of Appeal in Booker, infra., and held that this statute is substantive in nature. Thus, the ability to change it lies within the province of the legislature.

Review of the degree of a departure is limited to the constitutionality of the sentence. As long as the sentence is not grossly disproportionate to the crime, a defendant's right to be free from cruel and unusual punishment is not violated. Presently, Petitioner received a sentence within the statutory maximum which was proportionate to the crime; therefore, the sentence is valid.

ARGUMENT

POINT ON APPEAL

THIS COURT CANNOT IMPOSE A LIMIT ON A TRIAL COURT'S DISCRETION TO IMPOSE AN UPWARD DEPARTURE SENTENCE BECAUSE THE POWER TO SUBSTANTIVELY CHANGE THE STATUTE LIES SOLELY WITHIN THE PROVINCE OF THE LEGISLATURE.

The Petitioner was convicted of armed robbery and received a thirty year sentence with the Florida Department of Corrections. The trial court, using a subsequent, unscorable conviction for burglary, ordered a departure sentence. The district courts of appeal are uniform in holding that a subsequent, unscored conviction will support an upward departure sentence.[2] Hunt v State, 468 So. 2d 1100 (Fla. 1st DCA 1986); Prince v State, 461 So. 2d 1015 (Fla. 4th DCA 1984); Kigar v State, 495 So. 2d 273 (Fla. 5th DCA 1986); Safford v State, 488 So. 2d 141 (Fla. 5th

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[2]These cases are grounded in the language of Florida Rule of Criminal Procedure 3.701(d)(5) which prohibits consideration of past criminal conduct for which convictions were not obtained prior to the commission of the primary offense for purposes of scoring under the prior record category. Further, Rule 3.701(d)(11) prohibits as reasons for departure factors relating to prior arrests without conviction, or the instant offense for which convictions have not been obtained. Thus, the courts conclude, nothing in the rule precludes taking a subsequent, unscored conviction into consideration for purposes of departure. See also, Davis v State, 455 So. 2d 602 (Fla. 5th DCA 1984).

DCA 1986). The Fifth District Court of Appeal followed the foregoing case law and upheld the trial court's departure sentence, but it also expressed concern that a defendant could be sentenced to a greater prison term by virtue of a subsequent, unscored conviction than the defendant would have faced had the conviction been included on the scoresheet. The court certified the followed question:

> IS THERE ANY LIMIT UPON A TRIAL COURT'S RIGHT TO IMPOSE A DEPARTURE SENTENCE UNDER THE GUIDELINES BASED SOLELY ON AN UNSCORABLE CRIMINAL OFFENSE COMMITTED AFTER THE CRIME BEING SENTENCED FOR, SUCH AS NOT DEPARTING BEYOND THE PERMISSIBLE SENTENCING RANGE, HAD THE LATTER OFFENSE BEEN SCORED?

Harris v State, 20 Fla.L.Weekly D2061, 2062 (Fla. 5th DCA September 8, 1995). This Court should answer the question in the negative, as the issue was previously decided by this Court in Booker v State, 514 So. 2d 1079 (Fla. 1987).

A. THE FLORIDA LEGISLATURE AND THIS COURT HAVE CLEARLY STATED THAT THE EXTENT OF AN UPWARD DEPARTURE IS BEYOND APPELLATE REVIEW.

In Albritton v State, 476 So. 2d 158 (Fla. 1985), this Court

held that an appellate court could review the amount of a departure sentence to determine if, from the record, it was "reasonable". In 1986, the Florida Legislature expressly abrogated the Albritton ruling when it amended section 921.001(5), Florida Statute(1987):

> The failure of a trial court to impose a sentence within the sentencing guidelines is subject to appellate review pursuant to Chapter 924. However, the extent of the departure from a guidelines sentence is not subject to appellate review.

The Fiscal Notes Prepared on June 2, 1986 by the Florida House of Representative Committee on Appropriations commented,

> This bill would restrict appellate review of sentences imposed outside sentencing guidelines to the reasons for the court's departure from the guidelines. The extent of the departure would no longer be subject to appeal...This bill would abrogate the Supreme Court Albritton decision of September 1985 which allowed for appeal to the extent of departure guidelines.

When an amendment to a statute is enacted soon after controversies as to the interpretation of the original act arise, a court may consider that amendment as a legislative

interpretation of the original law and not as a substantive change thereof. Lowry v Parole and Probation Commission, 473 So. 2d 1248, 1250 (Fla. 1985). The speed with which the legislature enacts the amendment is indicative of legislative intent. Presently, the legislature immediately enacted the statute, and thus, it was clearly the legislative intent that the appellate courts not be permitted to review the degree of a departure sentence.

In Booker, 514 So. 2d at 1079, this Court directly addressed the effect that the Section 921.001(5), Florida Statutes (1987), has on the ability of appellate courts to review the degree of a departure sentence. Following state and federal law, this Court recognized that the power to set forth the range within a defendant may be sentenced was substantive, and within the legislative domain. It is also within the legislative domain to determine by what means appellate review may be obtained, and to modify the scope of review. Id. At 1081. Thus, there is no inherent judicial power of appellate review over sentencing:

> Indeed, it clearly appears that both this Court and the United States Supreme Court have embraced the notion that so long as the sentence imposed is within the maximum limit set by the legislature, the appellate court is

> without power to review the sentence. In effect, this rule recognizes that setting forth the range within which a defendant may be sentenced is a matter of substantive law, properly within the legislative domain.

Id. at 1082.

The petitioner raises the point that the allowing an upward departure based upon a subsequent, unscored offense, limited only by the statutory maximum sentence, appears to thwart the fundamental purpose of the guidelines-uniformity of sentence. Petitioner's Initial Brief of the Merits at 8-9. The Booker court also noted this, but commented,"This observation, however, goes to the wisdom of the amendment and not to its constitutionality." Booker, 514 So. 2d at 1082.

In Smith v State, 537 So. 2d 982 (Fla. 1989), this Court addressed the constitutional validity of the sentencing guidelines. This Court observed that it is authorized to promulgate rules of procedure; however, only the legislature may enact substantive law:

> As related to criminal law and procedure, substantive law is that which declares what acts are crimes and prescribes punishment therefore while procedural law is that which provides or regulates the steps by which one who violates the criminal

statute is punished.

Id. at 985, citing State v Garcia, 229 So. 2d 236, 238 (Fla. 1969). This Court held that as the 1987 amendment to section 921.001(5), Florida Statutes, constituted substantive law, so did the sentencing guidelines insofar as they limited the length of sentences to be imposed. Id. At 986. Thus, this Court cannot alter section 921.001(5), Florida Statutes, because it is substantive law, and the power to change it lies solely with the legislature.

The Fifth District Court of Appeal correctly acknowledged the authority of this statute when it affirmed the trial court's sentence. It stated,"Section 921.001(5), Florida Statutes, has taken the appellate courts out of the business of reviewing the extent of a departure sentence so long as the reason given for that departure is legally sufficient and supported by the record, and so long as the sentence is within the statutory maximum." Harris, 20 Fla.L.Weekly at 2062.

B. EVEN ASSUMING ITS CONTINUED VIABILITY, THE PUFFINBERGER ANALYSIS SHOULD NOT BE EXTENDED BEYOND PRIOR, UNSCOREABLE JUVENILE OFFENSES.

Despite the fact sentencing is substantive, the Petitioner

invites this Court to place a limit on upward departures by extending the holding in Puffinberger v State, 581 So. 2d 897 (Fla. 1991), to the present matter. In Puffinberger, the defendant's score sheet reflected three second-degree felony convictions for burglaries committed when he was a minor. They were unscoreable because they occurred more than three years prior to the instant offense. Id. at 898-899. The Florida Supreme Court held that "significant" unscored juvenile convictions could form the basis of an upward departure, but only the extent that the defendant would have been sentenced had the convictions been scored in the present case. Id.

This Court did not address Section 921.001(5), Florida Statutes in the Puffinberger opinion. This Court, by limiting an upward departure to the sentence a defendant would have received had the juvenile offenses been scored, has invaded the province of the legislature to set the permissible sentencing range. In effect, this Court has taken offenses which Florida Rule of Criminal Procedure 3.702(d)(8)(B) does not score, and adds them tO the score sheet.

This is one of the reasons for permitting upward departure based on factors not taken into account in the guidelines. The courts are not permitted to "add in" additional points to a

scoresheet. In Bunney v State, 603 So. 2d 1270 (Fla. 1992), this court approved upward departure based upon a contemporaneous unscored capital conviction.[3] This reason was not factored into the guidelines although it included points for victim injury. Id. Similarly, Bedford v State, 589 So. 2d 245 (Fla. 1991) cert. den., __U.S.__, 112 S.Ct. 1773, 118 L.Ed.2d 432 (1991), held that a first degree murder conviction was not scored and thus constituted a valid reason for departure. In Barfield v State, 594 So. 2d 259 (Fla. 1992), this Court approved upward departure where there was an escalating pattern of crimes with temporal proximity. In Booker, this Court upheld departure based upon prior probation violations because a probation violation which occurs between the substantive offense and the current revocation was not scored on the guideline scoresheet. Booker, 514 So. 2d at 1080.

Assuming the continued viability of Puffinberger, its holding should not be expanded beyond its present application. There are valid reasons to set a cap on the degree of a departure sentence when the court is using unscorable prior juvenile

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[3]This holding was incorporated in the Florida Rule of Criminal Procedure 3.701(d)(12) in Amendments to Florida Rules of Criminal Procedure Guidelines, 613 So. 2d 1307 (Fla. 1993).

convictions (as opposed to the subsequent, unscorable convictions of an adult). A minor is presumed to be lacking in judgment that an adult has, and this provides some insulation to an adult from the errors of his youth.

This philosophy is evident in Puffinberger's requirement that nonscorable records may be considered only where that record is 'significant'. Puffinberger, 581 So. 2d at 899, see also Weems v State, 469 So. 2d 128 (Fla. 1985). The trial court is to consider the number of juvenile offenses that are the equivalent of adult convictions, as well as the nature and seriousness of the underlying offenses. Id. In effect, this Court developed a mechanism that includes juvenile offenses in a score sheet when those offenses are deemed so serious that they should be treated as adult offenses. Thus, this Court's holding in Puffinberger recognized the unique problems of a juvenile record.

The Puffinberger exception should be eliminated, and at the very least, not extended any further, because the reasons for it in Puffinberger are not present when dealing with the subsequent, unscoreable conviction of an adult. There is not the same rational of protecting an adult from the errors he made as a juvenile. An adult who commits a series of crimes should not be insulated from the later crimes. Extending Puffinberber any

further would cause the judiciary to tread perilously close to the legislature's mandate not to review the degree of a departure sentence.

C. THE DEFENDANT'S SENTENCE CAN ONLY BE REVIEWED AS A VIOLATION OF THE STATE AND FEDERAL CONSTITUTIONS' BAN ON CRUEL AND UNUSUAL PUNISHMENT.

Under Florida law, an appellate court may only review the extent of a departure sentence where there are constitutional ramifications, such as a violation of the prohibition against cruel and unusual punishment. The United States Supreme Court held in Solem v Helm, 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983), that a criminal sentence must be proportionate to the crime for which the defendant has been convicted, and set forth a three prong test. However, in Harmelin v Michigan, 501 U.S.957, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991), a fragmented Supreme Court cast doubt on Solem. Two members of the majority said they would overrule Solem and eliminate the proportionality requirement in non-capital cases. 501 U.S. at 966, 111 S.Ct. at 2686. The three remaining majority members preserved the Solem analysis but would only apply it where there was gross disportionality between the sentence and the crime. 501 U.S. at

1005, 111 S.Ct. at 2707. The four dissenters would require a complete Solem analysis without an initial finding of gross disportionality. 501 U.S. at 1016, 111 S.Ct. at 2713,

The Florida Supreme Court, in Hale v State, 630 So. 2d 521 (Fla. 1993), cert. den., __U.S.__, 115 S.Ct. 278, 130 L.Ed.2d 195 (1994), considered the issue of cruel and unusual punishment as it relates to the habitual offender statute. It found that Harmelin could be harmonized with Solem and that there is a proportionality requirement of a sentence to a crime under U.S.C.A. Const. Amendment 8. Id. at 525. However, the Court went on to reaffirm its holding that the length of the sentence actually imposed is generally a matter of legislative prerogative. Id. at 526. The Florida courts have consistently held that a sentence which is within the limit fixed by statute is not cruel and unusual punishment.

> If the statute is not in violation of the constitution, then any punishment assessed by a court or jury within the limits fixed thereby cannot be adjudged excessive, for the reason that the power to declare what punishment may be assessed against those convicted of crime is not a judicial power, but a legislative power, controlled only by the provisions of the Constitution.

Brown v State, 152 Fla. 853, 13 So. 2d 458 (Fla. 1943), see also, Booker, supra.

The Appellant was convicted of a first degree felony pursuant to section 812.13, Florida Statutes (1991). Under section 775.082(3)(b), Florida Statutes (1993) he could be sentenced to a term of imprisonment not to exceed thirty years, and that is the sentence he received. Additionally, the facts of the crime were very serious. The Petitioner was found guilty of using a weapon to rob the victim of her purse. (R. 102). She testified that she was vacationing in Florida with her seven-year-old son. She was taking their bags from the car to the hotel room, when the Petitioner pointed a gun at her and demanded her purse. (T. 201-235). Fortunately, no one was seriously injured or killed, but the victim's son continues to suffer emotional trauma from the event.

This Court should not place any limits on a trial court's discretion to impose an upward sentence. The Florida legislature, through section 921.001(5), Florida Statutes, has clearly expressed its intent to prohibit appellate review of the degree of a departure sentence. This Court has held that the length of a sentence is substantive in nature. Thus, it lies solely within the province of the legislature to effect change on

the statute.

The review of a departure sentence is limited to a determination of its constitutionality. The present sentence is within the statutory maximum and is proportionate to the crime. Therefore, it does not violate either the state or the federal constitutional ban on cruel and unusual punishment.

CONCLUSION

Based on the arguments and the authorities presented herein, the Respondent respectfully prays this honorable court answer the certified question in the negative.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Answer Brief of Respondent has been hand delivered to the Public Defender's box at the Fifth District Court of Appeals on this 28th day of December, 1995.

Allison Leigh Morris
Of Counsel