MICHAEL HARRIS)
)
Petitioner,)
)
vs.) DCA CASE NO. 94-1516
)
STATE OF FLORIDA,) Supreme Court Case No. 86,564
)
Respondent.)
)

PETITIONER'S INITIAL BRIEF ON THE MERITS

JAMES B. GIBSON
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SEVENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE AND FACTS

In this case the defendant was convicted of armed robbery. As there were no prior convictions, the guidelines scoresheet yielded a maximum-permitted sentence of 4 1/2 years. (R 141) The defendant had, however, committed an additional burglary a few days after the robbery. Because of the timing involved, this burglary could not be scored on the guidelines either as an additional offense or as prior record. (R 113)

As the new burglary was not scoreable under either heading, the judge used the unscorable nature of this offense as his sole reason for departure. (R 113) It should be noted here that, under the existing law, the trial judge was clearly authorized to depart on this basis, and cited cases to establish his right to do so: Kigar v. State, 495 So.2d 237 (5th DCA 1986); Hunt v. State, 468 So.2d 1100 (1st DCA 1985); Prince v. State, 461 So.2d 1015 (4th DCA 1984)

The sentence imposed was 30 years DOC, the statutory maximum for the offense.[1] (R 108) This was a nine-cell departure. It multiplied the greatest-permissible guidelines sentence by six

[1]Section 812.13(2)(b), Florida Statutes; Section 775.082(3)(b), Florida Statutes.

times. (R 141) [2]

Had the burglary which was used as a reason for this departure been scoreable under "prior record", it would have increased the defendant's maximum-permitted sentence to 9 years. (FN 3) If the burglary had been scoreable as an "additional offense at conviction", the maximum would have been 5 1/2 years. (FN 3)

The defense moved to modify and correct the sentence as illegal, arguing that, as the defendant had no prior record, and there was nothing unusual or aggravated about the robbery itself, such an extreme sentence was not justified. The defense also argued that there was no reason why a person who robs first then steals should be punished more severely than a person who steals first and then robs, and that the principle of equal protection requires that similarly-situated persons should be treated similarly by the courts. (R 142-155)

On appeal, the Fifth District Court of Appeal affirmed the departure, noting that it was legal to depart for unscorable offenses under existing law, and that appellate review of the heroic extent of the departure was precluded by Section 921.001(5), Florida Statutes.

The appeals court specifically noted, however, that the type of situation typified by this case points up an apparent anomaly in the sentencing law.[3]

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[2]Rule 3.988(c), Florida Rules of Criminal Procedure.

[3]See page 4, Harris v. State, 20 Fla. L. Weekly D2061 (5th DCA 1995) at appendix A.

The anomaly noted is that, while the guidelines expressly prohibit scoring of points against a defendant for convictions occurring after the instant offense, these same convictions may be used anyway under the heading of "reasons for departure", and that is perfectly permissible. Further, when the later convictions are so used, there is no limit to the extent of departure which can be based on them, except the statutory maximum. Then, under Section 921.001(5), Florida Statutes, the extent of departure, no matter how disproportionate, is not subject to appellate review.[4]

As a means of confronting this problem, the court of appeal certified the following question as being of public importance:

> IS THERE ANY LIMIT UPON A TRIAL JUDGE'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 LATER OFFENSE BEEN SCORED?

The defendant filed a notice to invoke discretionary jurisdiction, and this Court issued its order postponing decision on jurisdiction and directing that briefs on the merits shall be filed. These proceedings follow.

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[4] See pages 3 and 4, Harris v. State, 20 Fla. L. Weekly D2061 (5th DCA 1995) at appendix A.

SUMMARY OF ARGUMENT

Section 921.001(5), Florida Statutes is unconstitutional in its operation because under certain circumstances it allows a judge to sentence in a way which defeats the requirement for sentencing proportionality inherent in the state and federal constitutional guaranties against cruel and unusual punishment.

The unconstitutional result of this situation should be ameliorated by placing a ceiling on such sentences commensurate with the maximum which would be permitted under the guidelines had the unscorable offense been scored.

ARGUMENT

THE LEGISLATIVE PROVISION WHICH PRECLUDES APPELLATE REVIEW OF THE EXTENT OF DEPARTURES FROM THE SENTENCING GUIDELINES CONTRAVENES BOTH THE STATE AND FEDERAL CONSTITUTIONS, AND THWARTS THE STATED PURPOSE OF THE GUIDELINES THEMSELVES.

The question certified by the 5th DCA in the instant case could have been answered rather unequivocally prior to the passage of Section 921.001(5), Florida Statutes.

Prior to that time, the law, as set forth by Albritton v. State, 476 So.2d 158 (Fla.1985) was quite clear. This court held:

> In our view, and we so hold, the proper standard of review is whether the judge abused his judicial discretion. An appellate court reviewing a departure sentence should look to the guidelines sentence, the extent of the departure, the reasons given for the departure, and the record to determine if the departure is reasonable. We disagree with and disapprove the holding below that the only lawful limitation on a departure sentence is the maximum statutory sentence for the offense.
>
> Albritton v. State, 476 So.2d 158 (Fla.1985) at page 476.

When Section 921.001(5), Florida Statutes was passed, it radically changed the effect of Albritton, because the statutes now specify that the extent of a departure sentence is no longer subject to appellate review. This leaves the law in the posture that, while the extent of a departure is morally governed by the constraints set out by the Supreme Court in Albritton, there is no mechanism in place by which a judge who errs in this regard can be set right.

In situations such as the instant case, where there is an unscorable crime committed after the instant offense, the judge may depart to an unreasonable extent if he wishes, and be shielded from review by the statute. The practical effect of this is to create a small Camelot of unbridled discretion in which a trial judge may sentence without regard to whether his sentence is proportionate to the punishment meted out to other defendants in similar cases, and do so with impunity.

CONSTITUTIONAL CONSIDERATIONS

While the ruling handed down by the State Legislature in Section 921.001(5), Florida Statutes may take apparent precedence over the will of the courts in this instance, constitutional considerations take precedence over the Legislature.

The Constitution of the United States is the supreme law of the land, and should brook no interference in the implementation of its mandates, either by legislation, or otherwise.

The U.S. Constitution prohibits cruel and unusual punishment under the 8th Amendment. Cruel or unusual punishment (arguably a broader guarantee) is also prohibited under article I, section 17, of the Florida Constitution.

In Solem v. Helm, 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983), the U.S. Supreme Court held that the Eighth Amendment's proscription of cruel and unusual punishments prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed. Accordingly, the

Court determined that a criminal sentence must be proportionate to the crime for which the defendant has been convicted. Further, the U.S. Supreme Court held that the federal "cruel and unusual" clause prohibits disproportionate prison sentences for noncapital as well as capital crimes.

Turning to the state level, in the case of Hale v. State, 630 So.2d 521 (Fla. 1993), the Florida Supreme Court held that the doctrine of Solem is still binding and serves as a minimum standard for interpreting the cruel and unusual punishment clause in the federal constitution. The court further held that the guarantee against cruel and unusual punishment provided by the 8th Amendment to the United States Constitution provides a guarantee of proportionality, and that such a guarantee acts as a minimum standard which is not restricted to death penalty cases, but can in proper circumstances be brought to bear in any appropriate case.

Based on the above, it seems clear that proportionality of sentences is required by the constitutions of both the United States and the state of Florida, and that it applies to noncapital as well as capital cases.

Such proportionality would appear to be required of any criminal sentence, whether imposed as a departure, or otherwise.

Section 921.001(5), Florida Statutes, reposing unbridled discretion in the trial judge as it does, defeats this proportionality requirement by enabling the type of disproportionate sentence seen in the instant case.

Clearly, if constitutionality is to be maintained, a way must be found to assure proportionality of departure sentences in unscorable-offense departure cases.

The guidelines themselves are intended to insure proportionality of sentences throughout the state. This intent is expressed in the statement of purpose set out in the guidelines law at Section 921.001(4), Florida Statutes, where it is stated:

> The purpose of the sentencing guidelines is to establish a uniform set of standards to guide the sentencing judge in the sentence decisionmaking process. The guidelines represent a synthesis of current sentencing theory, historical sentencing practices, and a rational approach to managing correctional resources. the sentencing guidelines are intended to eliminate unwarranted variation in the sentencing process by reducing the subjectivity in interpreting specific offense-related and offender-related criteria and in defining the relative importance of those criteria in the sentencing decision.
>
> (a) The sentencing guidelines embody the principles that:
>
> ...(3) The penalty imposed is commensurate with the severity of the primary offense and the circumstances surrounding the primary offense.

Having stated this as their purpose, can the Legislature, in passing Section 921.001(5), Florida Statutes, have intended to create a little oasis of unbridled discretion so that trial judges may in a certain number of cases defeat the stated purposes of the guidelines without restraint?

The failure of a trial court to conform to the requirements of sentence proportionality set forth in the U.S constitution, the State constitution, and the guidelines themselves is a matter of the utmost gravity. A legislative proviso which functions to

allow such a thing should be recognized not only as unconstitutional, but also as dysfunctional, in that it acts as a de-facto bar to enforcement of the stated purposes of the sentencing guidelines themselves.

A RATIONAL SOLUTION

The Fifth District Court of Appeal has proposed in its certified question a rational solution to the dilemma posed by the legislative enactment under examination. This suggestion is contained in the wording:

> "SUCH AS NOT DEPARTING BEYOND THE PERMISSIBLE SENTENCING RANGE HAD THE LATER OFFENSE BEEN SCORED."

This a solution analogous to the one already used by The Florida Supreme Court with regard to juvenile cases in Puffinberger v. State, 581 So.2d 897 (Fla.1991), where it was held that a prior juvenile record should serve as a basis for departure only where the resulting departure sentence is no greater than that which the defendant would have received had the juvenile offenses been scored.

Use of this solution would set a rational ceiling to the departure possible in an unscorable-offense case, while still avoiding the appellate review which the Legislature seems to find objectionable. In so doing it would secure to defendants in such cases the same proportionality of sentencing which the guidelines provide to similarly-situated persons in cases where all offenses can be scored.

CONCLUSION

Section 921.001(5), Florida Statutes allows trial courts unbridled discretion in imposing departure sentences where unscorable criminal offenses are involved. For this reason it functions to allow sentences that are disproportionate to the crime committed, and defeats the sentencing proportionality required by both the State and Federal constitutions. The unconstitutional result of this situation should be ameliorated by placing a ceiling on the sentence possible in such situations which is commensurate with the sentence which would be required under the guidelines had the unscorable offense been scored.

In the instant case, the defendant's sentence should be vacated, and the matter remanded for resentencing of the defendant to a sentence no greater than he could have received if the unscorable offense had been scored under the guidelines.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon the Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Blvd., Fifth Floor, Daytona Beach, Fla. 32118, in his basket at the Fifth District Court of Appeal; and mailed to Michael Harris, DOC # 706913, Central Florida Reception Center-East, P.O. Box 628229, Orlando, Florida, on this 7th day of November, 1995.

S.C. Van Voorhees
ASSISTANT PUBLIC DEFENDER

APPENDIX A

94-69
SV

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT JULY TERM 1995

NOT FINAL UNTIL THE TIME EXPIRES TO FILE REHEARING MOTION, AND, IF FILED, DISPOSED OF.

MICHAEL HARRIS,

Appellant,

v.

CASE NO. 94-1516

STATE OF FLORIDA,

Appellee.

/

Opinion filed September 8, 1995

Appeal from the Circuit Court
for Brevard County,
John Dean Moxley, Jr., Judge.

James B. Gibson, Public Defender,
and S.C. Van Voorhees, Assistant
Public Defender, Daytona Beach,
for Appellant.

Robert A. Butterworth, Attorney General,
and Allison Leigh Morris, Assistant
Attorney General, Daytona Beach,
for Appellee.

SHARP, W., J.

Harris appeals from his thirty-year sentence he received after being convicted of robbery with a weapon.[1] The trial court imposed a "departure sentence" for the sole reason that, after committing the offense involved in this case, Harris committed burglary of a conveyance. That later crime could

[1] § 812.13, Fla. Stat. (1991), a first degree felony and a Category 3 scoresheet offense.

not be scored as "prior record," nor as an "additional offense" at time of conviction.[2] We affirm, but certify a question of public importance to the Florida Supreme Court.[3]

Harris committed a burglary on May 18, 1991, which is the crime involved in this case. He committed a second burglary on May 20, 1991. He was arrested and convicted for that crime on September 13, 1991. On December 12, 1991, Harris violated his probation and the court issued a warrant for his arrest. On May 25, 1994, Harris was tried for the first burglary and was convicted of robbery with a weapon. He was sentenced by the same judge who handled the May 20, 1991 burglary case.

The trial judge noted that because Harris had no convictions prior to May 18, 1991, he would score only seventy points for this crime. That placed Harris in the third sentencing bracket for which the recommended sentence was two and one-half to three and one-half years incarceration. The permitted sentence range was community control or one to four and one-half years in prison.

If the guidelines had permitted scoring of the May 20, 1991 robbery offense as an "additional offense" at conviction, Harris' score would have been 84 points, and his recommended sentence would have been three and one-half to four and one-half years incarceration with a permitted sentencing range of two and one-half to five and one-half years. Similarly, had the judge been able to score the May 20, 1991 robbery conviction as "prior record," Harris' score would have increased to 130 points, and he would have been sentenced under the sixth sentencing bracket. In that bracket the recommended sentencing range was five and one-half years to seven years, while the permitted range was four and one-half to nine years incarceration.

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[2] Fla. R. Crim. P. 3.701.d.4. and 5.

[3] Fla. R. App. P. 9.030(2)(A)(vi).

But, since the May 20 burglary occurred after the crime for which Harris was being sentenced, it could not be scored as "prior record," and since Harris had already been sentenced for the May 20 burglary, it could not be scored as an "additional offense" at conviction. Because the May 20th burglary was unscoreable under the guidelines, the trial judge relied solely upon it in imposing a departure sentence of thirty years. This is a jump of six sentencing brackets and more than triple the sentence which could have been imposed under the sentencing guidelines had the May 20th burglary been scoreable as "prior record."

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 the departure is legally sufficient and supported by the record, and so long as the sentence is within the statutory maximum.[3] In *Have v. State*, 615 So. 2d 762 (Fla. 5th DCA 1993), this court held that the trial court properly imposed a departure sentence in that case because the defendant had committed two armed robberies one week after the crime for which he was being sentenced. The defendant argued in that case that the departure sentence imposed should be no longer than that which the defendant could have received had the later crimes been scoreable. This court rejected that argument.

In *Puffinberger v. State*, 581 So. 2d 897 (Fla. 1991), the supreme court imposed the sort of limitation on a departure sentence argued for by Harris in this case. In *Puffinberger*, the defendant received a departure sentence, based on his juvenile record for offenses which occurred before and not after the crime for which the defendant was being sentenced.

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[3] *Compare Smith v. State*, 480 So. 2d 663 (Fla. 5th DCA 1985), *rev. denied*, 488 So. 2d 69 (Fla. 1986); *Mullen v. State*, 483 So. 2d 754 (Fla. 5th DCA 1986).

In *Have*, we distinguished *Puffinberger* on the ground that it involved unscorable juvenile criminal offenses, and the offenses occurred prior to the crime for which the defendant was being sentenced. We said that the calculation of a guidelines sentence should focus on a defendant's conduct "up to the time of sentencing." The defendant's juvenile record was not usable to score points for prior crimes, due to the express provisions of the guidelines. But the court ruled that this break, expressly given to defendants under the guidelines, should not be turned around and used against a defendant to depart beyond what would have been allowed, had the prior offenses been scoreable.

That same rationale could be used in this case as well. We recognize (once more) that it is anomalous to exclude later criminal convictions from scoring, but to allow a court to rely upon them to depart without any limitation other than the maximum statutory sentence. *See Wichael v. State*, 567 So. 2d 549 (Fla. 5th DCA 1990). If the sentencing guidelines are intended to focus on a defendant's behavior up to the time of commission of the criminal act in question, consideration of later criminal behavior is not logically relevant. We are bound by our prior decisions on this issue, but we certify to the Florida Supreme Court as a question of public importance:

> IS THERE ANY LIMIT UPON A TRIAL JUDGE'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 LATER OFFENSE BEEN SCORED?

AFFIRMED.

PETERSON, CJ., concurs.

HARRIS, J., concurs specially with opinion.

HARRIS, J., concurring specially: **Case No. 94-1516**

I concur in so much of the majority opinion that holds that the reason for departure is proper. Clearly, under existing law, it is proper for the trial court to depart on the basis of criminal convictions which cannot be scored as "prior record." *Manning v. State*, 452 So. 2d 136 (Fla. 1st DCA 1984). This includes convictions for offenses committed after the subject offenses but before the sentence. *Prince v. State*, 461 So. 2d 1015 (Fla. 4th DCA 1984); *Safford v. State*, 488 So. 2d 141 (Fla. 5th DCA 1986), and *Wichael v. State*, 567 So. 2d 549 (Fla. 5th DCA 1990).

Having determined that the ground for departure is appropriate, we have exhausted our jurisdiction. The legislature has removed from our responsibility and authority the consideration of the extent of the departure. Section 921.001(5), Florida Statutes (1993).

I would simply affirm.